SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.:	**STL-14-05/PT/CJ**
Before:	**Judge Nicola Lettieri, Contempt Judge**
Registrar:	**Mr Daryl Mundis, Registrar**
Date:	**24 July 2014**
Original language:	**English**
Classification:	**Public**

IN THE CASE AGAINST

***NEW TV* S.A.L.**
KARMA MOHAMED TAHSIN AL KHAYAT

DECISION ON MOTION CHALLENGING JURISDICTION AND ON REQUEST FOR LEAVE TO AMEND ORDER IN LIEU OF AN INDICTMENT

***Amicus Curiae* Prosecutor:**
Mr Kenneth Scott

Counsel for *New TV* S.A.L. & Ms Karma Khayat:
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Maya Habli
Ms Shyamala Alagendra

Headnote[*]

The Defence for New TV S.A.L. and Ms Karma Khayat—the Accused in this case—has challenged the Tribunal's jurisdiction to hear cases of contempt regarding legal persons. The Defence has not questioned the basis for the Tribunal's jurisdiction over contempt in any other respect. However, given that the Contempt Judge has received numerous submissions from amici curiae *contending that the Tribunal has no jurisdiction over contempt and obstruction of justice in general, he finds it appropriate to address this fundamental issue* proprio motu.

The Contempt Judge, consistent with the case-law of the Tribunal's Appeals Chamber and other international courts, holds that the Tribunal, in addition to the jurisdiction given to it by its Statute, may or—in some cases—even must exercise jurisdiction that is ancillary or incidental to its primary jurisdiction and is necessary so as to ensure a good and fair administration of justice. This doctrine of inherent jurisdiction originates in the common law. However, a principle of international law has crystallized that allows the Tribunal (and other international criminal courts) to deal with allegations of obstruction of justice. This means that the Tribunal must have the authority to ensure that the exercise of its main jurisdiction—to prosecute those found responsible for the attack which killed Rafik Hariri and others as well as connected cases—is safeguarded and not frustrated by any interference with its procedures. Rule 60 bis *is an expression of this authority. Even assuming that such incidental jurisdiction must be prescribed in written law, this has been the case here, given that the applicable Rule on contempt and obstruction of justice has existed since 2009. No unfairness to the Accused therefore arises.*

The Contempt Judge considers that the procedure under Rule 60 bis *is similar to how an incidental question would be addressed in Lebanon. If the incidental question is connected to the main trial and there is no other jurisdiction competent to resolve it, then it is up to the court vested with jurisdiction in the main case to deal with the connected, incidental proceedings.*

The argument that when contempt implicates the freedom of the press to publish freely, press freedoms must prevail is too simplistic. Under international human rights standards, the freedom of expression, which carries with it special duties and responsibilities, is not without restrictions. These restrictions have to be proportional. The Contempt Judge notes that also under Lebanese law, the freedom of the press to publish has limits. Lebanese courts, including a specially constituted Court of Publications, routinely try cases of publication of confidential court filings or the content of on-going investigations to protect their secrecy, safety and efficiency. In any case, in the case before the Contempt Judge, the proper balance of the competing interests between the Tribunal's need to safeguard the integrity of its proceedings (which includes protecting its witnesses) and the freedom of the press is not a jurisdictional matter but rather concerns the substance of the case. It can only be fully assessed at the end of the trial, only once all the evidence in the case has been presented. The Contempt Judge does not take a position, at this stage, as to whether there is sufficient evidence to show that obstruction of justice actually occurred in this case.

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[*] This Headnote does not constitute part of the decision. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

The Contempt Judge also cannot dismiss the charges on the basis of the claim that other instances of alleged obstruction of justice have gone unpunished in the past. There is no right not to be charged with a crime just because other such alleged cases have not been pursued.

With respect to the possibility of Lebanese courts to prosecute cases of contempt, the Contempt Judge stresses again that charges in this case are incidental (or ancillary) to the main proceedings over which the Tribunal has jurisdiction. They do not relate to obstruction of justice in Lebanon. Indeed, the Lebanese authorities have taken no action in respect of the publications alleged to have been made by the Accused.

In sum, the Contempt Judge concludes that the Tribunal has inherent jurisdiction over contempt and obstruction of justice. When allegations of interference with the Tribunal's administration of justice are made, especially in circumstances where no steps have been taken in Lebanon to safeguard the Tribunal's proceedings, it is unquestionably within the Tribunal's purview to act. Failing this, interference with the main proceedings before the Tribunal would not be prosecutable, thus impairing the effectiveness of the Tribunal's primary jurisdiction.

However, the Contempt Judge holds that Rule 60 bis *applies to natural persons only. The Contempt Judge considers that the wording of the Statute makes clear that the Statute does not apply to legal persons.*

While the inherent jurisdiction of the Tribunal can be somewhat broader than its primary jurisdiction set out in the Statute, the Contempt Judge holds that a clear distinction must be made between the Tribunal's temporal and territorial jurisdiction, on the one hand, and its personal jurisdiction, on the other. The Tribunal's power to protect the integrity of its proceedings would be frustrated if its inherent powers were limited only to cases contemporary to the Tribunal's primary jurisdiction (2004-2005) in Lebanon. The same however cannot be said with respect to the Tribunal's jurisdiction over legal persons.

While exercising such jurisdiction might be preferable as a matter of policy, the Contempt Judge considers that Rule 60 bis *does not allow prosecution of corporate entities. Taking into account applicable principles of legal interpretation, including that any ambiguities in the interpretation of the Rules should be resolved in favour of the Accused, the Contempt Judge concludes that the preferable way to interpret Rule 60* bis *is to limit the Tribunal's jurisdiction to natural persons. This is supported by the notion of the term "person" under international criminal law (one of the sources of statutory interpretation) which hitherto has always been construed as referring to natural persons only.*

INTRODUCTION

1. The Defence challenges the jurisdiction of the Special Tribunal for Lebanon ("Tribunal") over *New TV* S.A.L., the corporate Accused in this contempt case. While the Defence limits its arguments to jurisdiction over legal persons, many third-party *Amici Curiae* have submitted briefs, pursuant to my invitation, disputing the Tribunal's jurisdiction over contempt generally. The *Amicus Curiae* Prosecutor contends that the Tribunal can try allegations of contempt, including those against legal persons. Having considered the arguments, I conclude that, though the Tribunal has inherent jurisdiction over contempt necessary to protect its administration of justice, the Tribunal has no jurisdiction over legal persons. I therefore dismiss all charges against New TV *S.A.L.* and order the *Amicus Curiae* Prosecutor to file a proposed amended order in lieu of an indictment reflecting such dismissal.

PROCEDURAL HISTORY

2. Judge Baragwanath, acting as the original Contempt Judge, found that there were sufficient grounds to proceed for contempt with respect to the broadcast by *New TV* S.A.L., the company operating *Al Jadeed* TV, in programmes on *Al Jadeed* TV on 6, 7, 9 and 10 August 2012, on its website and on its YouTube channel, of information regarding the identities of individuals alleged to be witnesses before the Tribunal. In his order in lieu of an indictment charging Ms Karma Khayat and *New TV* S.A.L. (Al Jadeed TV) (together, the "Accused"), Judge Baragwanath explicitly found that there was *prima facie* evidence that the publication of information relating to the identity of alleged confidential witnesses entailed knowing and wilful interference with the administration of justice in breach of Rule 60 *bis* (A) of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] He specifically added that "public interest in protecting [the main] proceedings against undue outside influence is of the highest importance. *Amicus* charges that alleged criminal conduct in this matter had a detrimental effect on the

[1] STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014 ("Indictment Decision"), para. 4.

Tribunal's administration of justice",[2] thus linking the current prosecution to the Tribunal's main jurisdiction.

3. In the Indictment Decision, Judge Baragwanath recused himself from these proceedings. He then, acting in his role as President of the Tribunal, designated me as Contempt Judge.[3] Subsequently, the Registrar appointed Mr Kenneth Scott as *Amicus Curiae* Prosecutor.[4]

4. On 13 May 2014, pursuant to summonses, the Accused made their respective initial appearances, at which each entered a plea of not guilty.[5] At the hearing, I ordered the Parties to file any preliminary motions under Rule 90 by 16 June 2014. I further invited third-party *Amicus Curiae* submissions on the Tribunal's jurisdiction, to be filed by the same date. Responses to both were due by 30 June 2014.[6]

5. On 12 June 2014, the *Amicus Curiae* Prosecutor sought leave to amend the order in lieu of an indictment in this case with respect to the identification of the corporate Accused. He submitted that the "weight of our continuing enquiries indicates that the correct corporate entity/name is Al Jadeed [Co. or co.] S.A.L./ NEW T.V. S.A.L. (N.T.V.) (additional name NTV, NTV S.A.L. and/or New TV), sometimes written 'Al Jadeed S.A.L. (NTV)' or 'Al Jadeed S.A.L. New TV'".[7] The Defence did not oppose the request for leave.[8]

6. On 16 June 2014, the Defence filed its motion challenging the jurisdiction of the Tribunal to hear cases of contempt against legal persons.[9] By the same day, and pursuant to my call for *Amicus Curiae* briefs on the Tribunal's jurisdiction, I had also received 18 submissions from a

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[2] Indictment Decision, para. 64.
[3] STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/I/CJ, F0002, Order Designating Contempt Judge, 31 January 2014.
[4] STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/I/CJ, F0004, Registrar's Decision Under Rule 60*bis*(E)(ii) to Appoint a Replacement *Amicus Curiae* to Investigate and Prosecute Contempt Allegations, 4 March 2014.
[5] STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05, Transcript of 13 May 2014 (T1) ("Transcript of 13 May 2014 (T1)")), p. 20 (EN); STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05, Transcript of 13 May 2014 (T2) ("Transcript of 13 May 2014 (T2)")), p. 7 (EN).
[6] Transcript of 13 May 2014 (T2), p. 21; STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0013, Order Varying Time-Limit for Filing of *Amicus Curiae* Submissions on Jurisdiction, 16 May 2014, p. 1. All further references to filings and decisions refer to this case number unless otherwise stated.
[7] F0032, Request for Leave to Amend Order in Lieu of an Indictment with Annexes, 12 June 2014, para. 5.
[8] F0046, Defence Response to Amicus Prosecutor's Request for Leave to Amend Order in Lieu of an Indictment, 26 June 2014 ("Leave to Amend Response").
[9] F0037, Defence Preliminary Motion Challengeing [sic] Jurisdiction, 16 June 2014 ("Defence Motion").

range of individuals and organizations in Lebanon and elsewhere, all of which are publicly available and accessible on the Tribunal's website.[10]

7. On 30 June 2014, the *Amicus Curiae* Prosecutor filed his response to the Defence Motion, asserting that the Tribunal has inherent jurisdiction to indict legal persons for contempt under Rule 60 *bis* and requesting that the motion be denied.[11] He also filed a consolidated response to the *Amicus Curiae* briefs.[12] The Defence has sought leave to reply to the *Amicus Curiae* Prosecutor's Response.[13]

[10] F0019, Position of the Lebanese University Faculty of Law and Political and Administrative Sciences in Respect of the Accusations of Contempt and Obstruction of Justice Brought Against Two Media Outlets by the Special Tribunal for Lebanon, 27 May 2014 ("Lebanese University Brief"); F0021, Letter from the President of the Beirut Bar Association and of the Committee for the Defence of Public Freedoms and Human Rights of the Beirut Bar Association, 29 May 2014 ("Beirut Bar Association Committee for the Defence of Public Freedoms Brief"); F0023, Legal Opinion Submitted by Lebanese Lawyer Antoine Joseph Sabeh, 26 May 2014 ("Sabeh Brief"); F0024, Memorandum Containing Written Observations Submitted by Maharat Foundation, 29 May 2014 ("Maharat Foundation Brief"); F0025, Position of Certain [Unnamed] Members of the Lebanese Parliament, no date ("Position of Certain Lebanese MPs"); F0027, Brief signed by Mr Elias Aoun, President of the Order of Lebanese Press Editors [though containing on its cover page the reference to "Certain Members of the Lebanese Parliament"], 5 June 2014 ("President of Order of Lebanese Press Editors Brief"); F0028, Arab Lawyers Union General Secretariat, 23 May 2014 ("Arab Lawyers Union Brief"); F0029, Federation of Arab Journalists General Secretariat Brief, 24 May 2014 ("Federation of Arab Journalists Brief"); F0030, Arab Reporters for Investigative Journalism Brief, 10 June 2014 ("Arab Investigative Reporters Brief"); F0033, Letter from Former Prime Minister Najib Mikati, no date ("Prime Minister Mikati Brief"); F0034, Letter from President Hussein El-Husseini to the Lebanese Prime Minister, 13 June 2014 ("President El-Husseini Brief"); F0035, Compétence du TSL en matière d'outrage à la Cour, 12 June 2014 ("Ibrahim Najjar Brief"); F0036, Summary Notes in the Law on the Tribunal's Jurisdiction to Consider Prosecution in the Above Case, no date ("Ziad Baroud Brief"); F0039, Request for Amicus Curiae Submission, 16 June 2014 ("Paul Morcos Brief"); F0040, Opinion and Position of the Lebanese Republic National Council for Audiovisual Media, 16 June 2014 ("National Council for Audiovisual Media Brief"); F0041, Letter from the Head of the Lebanese Press Association, Mohammed Al Baalbaki, 12 June 2014 ("President of Lebanese Press Association Brief"); F0042, Brief by Christophe Deloire, General Secretary of Reporters Without Borders, 16 June 2014 ("Reporters Without Borders Brief"); F0043, Brief by Elie Marouni, Member of Parliament in Lebanon, 10 May 2014 ("MP Elie Marouni Brief"); F0044, Brief by Talal Salman, Editor in chief of As-Safir Newspaper, 16 June 2014 ("Talal Salman Brief"). Although not all of the briefs received complied fully with the required formalities, I exceptionally ordered the Registry to file them all on the record. One submission, however, from Ms Ahlam Beydoun, an international law professor, was filed well after the deadline and consequently was not considered.

[11] F0047, Response to "Defence Preliminary Motion Challenging Jurisdiction", 30 June 2014 ("Response").

[12] F0048, Consolidated Response to *Amicus Curiae* Briefs, 30 June 2014 ("Consolidated Response").

[13] F0050, Defence Request for Leave to Reply to "Response to 'Defence Preliminary Motion Challenging Jurisdiction'", 2 July 2014 ("Reply Request"); F0051, Response to Defence Request for Leave to Reply to "Response to 'Defence Preliminary Motion Challenging Jurisdiction'", 4 July 2014 ("Response to Reply Request").

DISCUSSION

I. Preliminary issues

A. Defence request for leave to reply

8. The Defence asserts several issues which, it claims, newly arise from the *Amicus Curiae* Prosecutor's Response, and thus justify the filing of a reply.[14] The *Amicus Curiae* Prosecutor argues that his Response raised no new issues and that the standard for requesting leave to reply is not met.[15] Having considered the Defence Motion, the 18 *Amicus Curiae* briefs and the *Amicus Curiae* Prosecutor's responses to both the Defence Motion and the *Amicus Curiae* briefs, I am sufficiently briefed on the material legal questions, and thus reject the Defence request for leave to reply. Indeed, I note that the issues raised by the Defence go to its contention that the Tribunal does not have jurisdiction over legal persons. As I have concluded that the Tribunal indeed has no such jurisdiction, there can be no prejudice to the Defence in rejecting its reply request.

B. Admissibility of Amicus Curiae brief submitted by Legal Representative of Victims in the Ayyash et al. case

9. The Legal Representative of Victims ("LRV") submitted a request for leave to make *Amicus Curiae* submissions along with an *Amicus Curiae* brief.[16] The Defence opposes the LRV's request on the basis that, under the terms of my invitation for *Amicus Curiae* briefs, the LRV does not qualify as an *Amicus Curiae*.[17] I recall that I allowed "any interested party, such as media organizations, non-governmental organization[s], or academic institution[s] to file an Amicus Curiae brief on the issue of the Tribunal's jurisdiction".[18] This was done pursuant to Rule 131. Given the circumstances of the case, I did not intend to invite an *Amicus Curiae* submission from the LRV. Furthermore, especially in light of the seeming collaboration between the LRV and the *Amicus Curiae* Prosecutor,[19] I find that the position of the LRV could be

[14] Reply Request, para. 2.
[15] Response to Reply Request.
[16] F0038, Request for Leave to Make *Amicus Curiae* Submissions, 16 June 2014; F0038/A01, Amicus Curiae Brief, 16 June 2014.
[17] F0049, Consolidated Defence Response to Legal Representative of Victims in the Ayyash et al. Case Request for Leave to Make Amicus Curiae Submissions and Amicus Curiae Brief, 30 June 2014 ("Consolidated Response to LRV *Amicus Curiae* Brief"), paras 4-6.
[18] Transcript of 13 May 2014 (T2), p. 21.
[19] Consolidated Response to LRV *Amicus Curiae* Brief, para. 8.

considered as partial. I therefore reject the LRV's request for leave to make submissions as a third party. I will not consider further the LRV's *Amicus Curiae* brief.

II. Admissibility of the Defence Motion

10. I note that, while the Rules do not explicitly provide for a jurisdictional challenge with respect to contempt proceedings, Rule 60 *bis* (H) makes applicable, *mutatis mutandis*, parts Four to Eight of the Rules. These include Rule 90, which specifies that a party may bring a preliminary motion challenging the jurisdiction of this Tribunal if the motion "challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal".[20]

11. However, as pointed out by the *Amicus Curiae* Prosecutor, the particular challenge brought by the Defence against the indictment of a legal person as such—a challenge *ratione personae*—is not one that falls within Rule 90 (E).[21] In this context, I recall the Appeals Chamber's strict interpretation of this Rule.[22] Indeed, the Appeals Chamber held that "the language of Rule 90 was drafted in a specific and narrow way".[23] In light of Rule 90 (E)'s clear wording, the personal jurisdiction of the Tribunal cannot be the subject of a preliminary motion challenging jurisdiction.

12. Nevertheless, the Tribunal's Appeals Chamber has clarified that the first-instance Judge retains discretion to treat such a motion as "other motions" pursuant to Rule 126.[24] Here, I find it is in the interests of justice to do so, given the importance of the Defence challenge for these proceedings. I will therefore address the Defence Motion on the merits, but under Rule 126 instead of Rule 90.

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[20] *See* Rule 90 (E) STL RPE. I consider that the relevant case-law of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), where the Appeals Chamber held that jurisdictional challenges could not be brought against indictments issued for contempt, is distinguishable here. These decisions were based on the wording of Rule 72 (D) ICTY RPE, which is different from the equivalent Rule 90 (E) STL RPE (*see* ICTY, *Prosecutor v. Milošević*, IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 35; ICTY, *Prosecutor v. Križić*, IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 2 March 2006, paras 4-5). Indeed, unlike Rule 90 (E) STL RPE, Rule 72 (D) ICTY RPE only permits jurisdictional challenges with respect to the specific crimes mentioned in the ICTY Statute (which do not include contempt).

[21] Response, para. 2.

[22] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 ("Jurisdiction Appeal Decision"), paras 11-17.

[23] Jurisdiction Appeal Decision, para. 17 (with respect to a challenge to the legality of the Tribunal).

[24] *See id.* at paras 19 (with references to the case-law of the ICTY) and 22.

III. The jurisdiction of the Tribunal over contempt and obstruction of justice in general

A. The position of the Accused

13. I first note that, importantly, the Defence does not challenge the jurisdiction of the Tribunal over contempt *per se*, but argues only that Rule 60 *bis* proceedings must be limited to natural—as opposed to legal—persons. The Defence rather explicitly acknowledges that "[t]he purpose of Rule 60*bis*, to preserve the integrity of the proceedings before the STL, can therefore be more than adequately served through the prosecution of those natural persons who are alleged to have actually perpetrated an alleged contempt".[25] Thus, the Defence is not challenging the authority of the Tribunal, on the basis of its incidental or inherent jurisdiction, to prosecute natural persons who have allegedly interfered with the judicial process under Rule 60 *bis*.

B. The scope of my review

14. However, I have also received many *Amicus Curiae* briefs which do assert that the Tribunal has no such power. Therefore, though I am not required to consider the Tribunal's general contempt jurisdiction, I find it appropriate, given its fundamental importance, to address the matter *proprio motu*.

15. Below I summarize the relevant submissions and examine the applicable legal principles and provisions. I conclude, consistent with other international criminal courts and tribunals, that the Tribunal has inherent jurisdiction over contempt, which is necessary to protect its administration of justice.

C. The position of Amici Curiae

16. It is apparent from the content of many *Amicus Curiae* briefs that there exists some confusion as to what this case is really about. Contrary to certain *Amici Curiae* assertions, the order in lieu of an indictment issued by Judge Baragwanath *does not* relate to the publication of actual confidential information. Instead, Judge Baragwanath found that there was *prima facie* evidence to support the charge that the Accused published information on purported confidential witnesses in the *Ayyash et al.* case, which interfered with the administration of justice by undermining public confidence in the Tribunal's ability to protect the confidentiality of

[25] Defence Motion, para. 14.

information about, or provided by, witnesses or potential witnesses.[26] He further found *prima facie* evidence that the Accused failed to remove such information in violation of a court order.[27] In other words, the Accused are *not* charged with publishing information made confidential by judicial order (a charge which would have been brought under Rule 60 *bis* (A) (iii) or another enumerated offence), as certain *Amici Curiae* represent. The discussion below should be read in this context and bearing this clarification in mind.

17. Generally speaking, the *Amici Curiae* raise five categories of arguments in relation to the Tribunal's power to hold persons in contempt. I note that not all of the arguments in fact go to the question of jurisdiction.

18. First, some briefs call my attention to a possible conflict between the Tribunal's provisions on contempt (especially as applied to journalists), on the one side, and the requirements of freedom of opinion and expression, both as a matter of principle and Lebanese law, on the other.[28] A number of *Amici Curiae* contend, as a fundamental point, that in the exercise of its role of uncovering facts, the media must remain free from pressure.[29] Certain of them also allege that the media must benefit from provisions of the Lebanese Constitution, Lebanese law and fundamental international covenants which guarantee freedom of the press, and supersede any other sources.[30] They further submit that specific Lebanese legislation immunizes Lebanese media from or otherwise protects them against a contempt prosecution.[31] In a nuanced submission, the NGO Reporters Without Borders considers that any prosecution for disclosure of confidential investigative material must take into account context, including, *inter alia*, the content of the media report, the journalists' intent, the consequences of disclosure and whether any potential restrictions on the press are necessary and proportionate.[32]

19. Second, several *Amici Curiae* submit that the Statute of the Tribunal ("Statute"), which makes no mention of contempt, does not provide a sufficient legal basis for the plenary of the

[26] Indictment Decision, paras 36-38.
[27] *Id.* at para. 44.
[28] Lebanese University Brief, pp. 1-2 and 6-8; Arab Investigative Reporters Brief, p. 2; Arab Lawyers Union Brief, pp. 1-2; Talal Salman Brief, pp. 2-3.
[29] Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 2; Talal Salman Brief, pp. 1-2.
[30] Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; MP Elie Marouni Brief, p. 3; Prime Minister Mikati Brief, p. 1.
[31] MP Elie Marouni Brief, p. 3.
[32] Reporters Without Borders Brief, pp. 1, 6.

Judges to expand the Tribunal's jurisdiction and create new *crimes* in the Rules,[33] and that the conduct charged in this case falls outside, and has no relation to, the jurisdiction of the Tribunal under Article 1 of the Statute.[34] As an exceptional criminal statute, one argues, the founding instrument of the Tribunal cannot be interpreted broadly so as to allow, by implication, the prosecution of additional crimes through the Rules.[35] A somewhat related argument is advanced that, even if the Tribunal can deal with contempt, Rule 60 *bis* can extend to persons in media only when they are "linked professionally" or "involved" with the Tribunal.[36]

20. Third, it is argued that Rule 60 *bis* conflicts with the domestic jurisdiction of Lebanon and certain legal provisions under Lebanese criminal law. Since the Tribunal's main jurisdiction is limited to crimes under Lebanese law, and Lebanon enjoys territorial jurisdiction in criminal matters, *Amici Curiae* contend that Lebanese law must apply, both in relation to the forum (*i.e.*, according to some submissions, the Lebanese Court of Publications)[37] and to the substantive law.[38] It is also advanced that Lebanese law on the punishment of media outlets is more lenient than Rule 60 *bis*, and that it should therefore take precedence.[39]

21. Fourth, certain *Amici Curiae* suggest that the prosecution in this specific case is selective, and that blaming the Lebanese media for failures of the Tribunal's witness protection programme is unjustified.[40] *Amici Curiae* specifically assert that it is Tribunal staff members who should be

[33] Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; Ziad Baroud Brief, para. 7; *see also* Lebanese University Brief, p. 4; Prime Minister Mikati Brief, p. 2; Maharat Foundation Brief, paras 9-11; Talal Salman Brief, p. 2.
[34] National Council for Audiovisual Media Brief, pp. 3-4; Arab Lawyers Union Brief, p. 1; Sabeh Brief, pp. 4-5; Maharat Foundation Brief, para. 8; Paul Morcos Brief, p. 4.
[35] National Council for Audiovisual Media Brief, pp. 3-4.
[36] Paul Morcos Brief, p. 2; Reporters Without Borders Brief, p. 3; MP Elie Marouni Brief, p. 3; Federation of Arab Journalists Brief, p. 2.
[37] President of Lebanese Press Association Brief, p. 1; Arab Lawyers Union Brief, p. 2; Sabeh Brief, pp. 2-3; MP Elie Marouni Brief, p. 3; Ziad Baroud Brief, p. 5. A more general argument in this respect is that the Tribunal, and the mechanism of its funding in particular, is illegitimate under Lebanese constitutional law. *S*ee Lebanese University Brief, pp. 1-2. The answer to this specific argument can be found in the Jurisdiction Appeal Decision, in particular paras 24-31, to which I defer.
[38] National Council for Audiovisual Media Brief, pp. 4-5; President of Lebanese Press Association Brief, p. 1; Position of Certain Lebanese MPs, pp. 1-2 (where the contention is also raised that the statute of limitations under Lebanese law has in any event expired in this matter; for this point, *see also* Ziad Baroud Brief, para. 9); Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; Sabeh Brief, pp. 2-3, 7-8; Maharat Foundation Brief, paras 14-15; Ziad Baroud Brief, paras 4, 6-7; President El-Husseini Brief.
[39] Position of Certain Lebanese MPs, p. 2; Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; Ziad Baroud Brief, para. 9; Arab Lawyers Union Brief, p. 3.
[40] Maharat Foundation Brief, paras 12-13, 18-20; *see also* Reporters Without Borders Brief, p. 3.

prosecuted for the "leak[s]" of confidential information,[41] and that in any event other media outlets have published details of the main case without consequence.[42]

22. Fifth, some *Amici Curiae* contend that the assumption of jurisdiction by the Tribunal over contempt, even if warranted, could only take place after the necessary consultations with the Lebanese Republic,[43] and in particular after a request for deferral under Article 4 of the Statute and Rule 17.[44] Primacy of the Tribunal only exists, under this reading of the relevant texts, within the ambit of Article 1 of the Statute and after deferral under Article 4 (2).[45] It is further suggested that, instead of opening the case, the Tribunal should have requested the Lebanese authorities to cooperate and pursue the matters at issue here.[46]

D. Position of Amicus Curiae *Prosecutor*

23. In a consolidated response to the *Amicus Curiae* briefs, the *Amicus Curiae* Prosecutor first asserts that the Tribunal does have inherent power to try persons for contempt.[47] He argues that therefore, rather than creating a new offence, Rule 60 *bis*, pursuant to Article 28, simply articulates this inherent power and the Tribunal's procedures for exercising it.[48] Consequently, in his view, reference to provisions of the Statute or the Annex to Security Council Resolution 1757 relating to relative competences of Lebanon and the Tribunal, as well as expansion of the Tribunal's statutory jurisdiction, are irrelevant.[49] He also contends that, by its terms and in context, Rule 60 *bis* cannot be read as limited to persons affiliated or involved with the Tribunal.[50]

24. The *Amicus Curiae* Prosecutor next specifically addresses the arguments that the Lebanese Court of Publications is the competent authority for the crimes alleged in this case, and that Lebanese law should apply. To this, he asserts that contempt and obstruction of justice are

[41] Maharat Foundation Brief, para. 19.
[42] Reporters Without Borders Brief, p. 3.
[43] Arab Lawyers Union Brief, p. 2; Ziad Baroud Brief, para. 8
[44] Sabeh Brief, pp. 4-8; Paul Morcos Brief, p. 4.
[45] Ziad Baroud Brief, paras 1-3.
[46] Ziad Baroud Brief, para. 8; President of Lebanese Press Association Brief, p. 3; *see also* Maharat Foundation Brief, para. 15; Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; Prime Minister Mikati Brief, p. 2.
[47] Consolidated Response, paras 8-13.
[48] *Id.* at paras 8-13.
[49] *Id.* at para. 13.
[50] *Id.* at paras 14-16.

ancillary or incidental issues arising from the Tribunal's primary proceedings, and not separate judicial matters implicating the Statute's provisions on concurrent jurisdiction. As such, the Tribunal is not simply empowered to deal with them, but is also the most appropriate body to do so.[51] Further, given that the purpose of the contempt power is protection of the Tribunal's own proceedings, it follows that in exercising this power the Tribunal need not apply Lebanese law.[52]

25. Lastly, with respect to the argument that the contempt charges here violate fundamental freedoms of expression and the press, the *Amicus Curiae* Prosecutor maintains that these freedoms are not absolute and cannot justify interference with the administration of justice, including defiance of a court order or disclosing confidential information.[53]

E. Discussion

1. The Tribunal's inherent jurisdiction

26. As mentioned above, several *Amici Curiae* contest the Tribunal's jurisdiction over contempt as not properly based on its Statute. By its own terms, Rule 60 *bis*, adopted under Article 28 of the Statute and under which the Accused are charged, invokes the Tribunal's inherent jurisdiction to safeguard the proper administration of justice. It states, in relevant part, "The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice". This assumes an altogether different source of jurisdiction than the Tribunal's Statute, which does not mention contempt or obstruction of justice and on which many of the *Amicus Curiae* briefs focus. Thus, whether the Tribunal can hold a person in contempt depends on whether the Tribunal has inherent jurisdiction and, if so, the scope of that jurisdiction. The following analysis discusses this power and its source.

27. The Appeals Chamber has unequivocally held that the Tribunal possesses inherent jurisdiction, and characterised it as follows:

> [Inherent jurisdiction is] the power of a Chamber [. . .] to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises

[51] *Id.* at paras 17-22.
[52] *Id.* at paras 23-25.
[53] *Id.* at paras 26-28.

> as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. It can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. *The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice*, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.
>
> [. . .]
>
> The practice of international bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings. More specifically, it serves one or more of the following purposes: (i) to ensure the fair administration of justice; (ii) to control the process and the proper conduct of the proceedings; (iii) to safeguard and ensure the discharge by the court of its judicial functions (for instance, by dealing with contempt of court). It follows that *inherent jurisdiction can be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction* (as is the case with the *compétence de la competence*), or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.[54]

28. The Appeals Chamber's holding is consistent with the case-law of other international courts and tribunals, both non-criminal and criminal. For example, the International Court of Justice ("ICJ"), the principal judicial organ of the United Nations ("UN"), has held that it possesses

> inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that *the exercise of its jurisdiction* [...] *shall not be frustrated*, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function" [...], and to "maintain its judicial character'.[55]

Other courts and tribunals have similarly rightly claimed inherent powers to ensure their proper functioning, as courts of law.[56]

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[54] STL, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 ("*El Sayed* Jurisdiction Decision"), paras 45, 48 (emphasis added).
[55] ICJ, *Nuclear Tests* (*New Zealand v. France*), Judgment, I.C.J. Reports 457 (1974), para. 23 (emphasis added).
[56] *See*, for instance, the cases cited in the *El Sayed* Jurisdiction Decision, paras 44-46,including: ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), paras 18-20; ICTY, *Prosecutor v. Blaškić*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras 25-26, 28; ICTR, *Prosecutor v. Rwamakuba,* ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 45-47, 62; ICTR, *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 26; SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave

29. While the doctrine of inherent judicial powers originated in common law jurisdictions, it makes eminent sense for international criminal tribunals to adopt it. Just like common law courts, international criminal tribunals—or tribunals of an international character, as the Tribunal has been defined—enjoy scant statutory provisions on procedural matters, as opposed to criminal procedural codes in civil law countries. Their statutes do not (and could not be expected to) elaborate exhaustively on all of the powers and competences these tribunals may require to effectively carry out their mandates.[57]

30. Moreover, due to the lack of the development so far of an integrated and coherent international judiciary (which exists in contemporary domestic systems), each of these international criminal courts and tribunals is a separate and self-contained institution in its own right, and in the case of the Tribunal an international entity distinct even from the UN and Lebanon.[58] These courts therefore do not benefit from an independent external means of ensuring the integrity of their own proceedings, and must therefore be internally empowered with such means.[59] They of course should exercise this power cautiously, so as not to encroach on other subjects with legal authority and competences and so as not to appropriate for themselves powers not strictly necessary for their smooth and efficient functioning. But exercise this inherent jurisdiction, in exceptional circumstances, they must.

31. With respect to contempt and obstruction of justice specifically, the other international criminal courts and tribunals have consistently affirmed their inherent jurisdiction over this matter,[60] and have time and again tried such cases pursuant to their respective procedural rules.

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to File an Interlocutory Appeal, 17 January 2005, para. 32; ILOAT, *In re Vollering (No. 15)*, Judgment No. 1884, 8 July 1999, para. 8.

[57] Though in relation to offences against the administration of justice, this is changing. *See* Art. 70 ICC St. ("Offences against the administration of justice"); Art. 1 MICT St. ("Competence of the Mechanism"); SC Res. 1966, UN Doc. S/RES/1966 (22 December 2010), Annex 2 (Transitional Arrangements), Art. 4 ("Contempt of Court and False Testimony").

[58] *Cf.* Jurisdiction Appeal Decision, para. 39.

[59] *Cf. Tadić* Jurisdiction Decision, para. 11.

[60] ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Contempt Judgement"), paras 13-29. Although no specific customary international law seemed directly applicable to the issue, the ICTY Appeals Chamber recalled that the contempt power was effectively provided for in the Charter of the International Military Tribunal and exercised by the United States Military Tribunals sitting in Nurnberg. *Vujin* Contempt Judgment, para. 14. Furthermore, by looking to the general principles of law common to the major legal systems of the world, the Tribunal observed that the power to deal with contempt historically originated as a "creature of the common law", but at the same time "many civil law systems have legislated to provide offences which produce a similar result." *Vujin* Contempt Judgement, para. 15. Finally, the Tribunal declared the contempt power a "necessity [. . .] to ensure that its exercise of [its statutory] jurisdiction is not frustrated" and stated that "[t]he inherent power of the Tribunal to deal with contempt has necessarily existed

In doing so, they identified the authority of a court to deal with contempt as a general principle of law common to the major legal systems of the world. Indeed, I agree with the well-accepted holding of the Appeals Chamber of the ICTY that an international criminal tribunal possesses

> an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it [. . .] is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which further interferes with its administration of justice. The content of that inherent power may be discerned by reference to the usual sources of international law.[61]

32. Those *Amicus Curiae* submissions that stress the lack of provisions of the Statute endowing the Tribunal with jurisdiction to hold persons liable for obstruction of justice thus misapprehend the issue in question.[62] The Tribunal, duly established by the Security Council and charged with fairly and expeditiously fulfilling its mandate to try those responsible for the attack of 14 February 2005, has the same inherent authority as all other international criminal courts and tribunals to protect its proceedings. Indeed, Article 28 of the Statute explicitly calls on the Judges, in making the Rules, to be guided by the Lebanese Code of Criminal Procedure and by "reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial". Such materials must be deemed to include the relevant rules on contempt in place at other international criminal tribunals and the case-law in which those tribunals have identified and exercised their inherent jurisdiction in this respect.

33. Moreover, I note that the contempt procedure envisioned in Rule 60 *bis* is similar to how an incidental question would be dealt with in Lebanon. In Lebanon, as in most domestic jurisdictions, the judge of the main case must be deemed competent to adjudicate on any incidental question that arises in that case—this is the crux of the inherent jurisdiction discussed above by the Tribunal's Appeals Chamber. This is enshrined, in Lebanon, in Article 30 of the new Code of Civil Procedure, and is a principle also applicable to criminal proceedings

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ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence" *Vujin* Contempt Judgement, paras 18, 28. From this moment on, the power to deal with contempt has consistently been recognized as an inherent power of an international tribunal in the following judgments, *inter alia*: ICTY, *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 9; ICTY, *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 23; ICTY, *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgment, 15 March 2007, para. 34.

[61] *Vujin* Contempt Judgement, para. 13.

[62] *See, e.g.*, Lebanese University Brief, p. 4; Ziad Baroud Brief, para. 6; Beirut Bar Association Committee for the Defence of Public Freedoms Brief, p. 3; Maharat Foundation Brief, para. 8; Talal Salman Brief, p. 2; Paul Morcos Brief, pp. 4-5.

according to Article 6.[63] According to this concept, if the incidental question is connected to the main trial (*i.e.*, resolution of the former impacts on the latter) and there is no other jurisdiction competent to resolve it, then it is up to the court vested with jurisdiction in the main case to deal with the connected, incidental proceedings. As one *Amicus Curiae* brief remarks, this is the principle of *accessorium sequitur principale* necessary to ensure the good functioning of the proceedings and to avoid their fragmentation.[64] The crime of contempt or obstruction of justice is a connected and incidental question of the main case.[65] The issue of whether Lebanese courts could also have jurisdiction (concurrent jurisdiction) over this matter is discussed further below.[66]

34. Furthermore, even if one were to accept the suggestion made by some *Amici Curiae* with specific regard to the *nullum crimen, nulla poena sine lege* principle that contempt must be spelled out in writing before any charges are brought,[67] this *was* the case here. Rule 60 *bis* was issued, in its first form, in 2009 (as Rule 134).[68] From then through the present, written law has explicitly set out that this type of conduct is criminally punishable, thus providing the necessary notice to any person. No unfairness to the Accused arises.

35. In sum, I conclude that a principle of international criminal law enshrining inherent jurisdiction for contempt and obstruction of justice has crystallized and is directly applicable to the Tribunal. The Tribunal possesses inherent jurisdiction and that jurisdiction includes the power to deal with allegations of contempt and obstruction of justice.

2. Interference with the administration of justice vs. freedom of expression?

36. Several *Amicus Curiae* briefs suggest that, when there is a conflict between the freedom of the press to publish information and other important rights and interests, the freedom of the

[63] Ibrahim Najjar Brief, pp. 3-4. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, F0396, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("Applicable Law Decision"), fn. 397, where the Appeals Chamber has found that "Article 6 of the Code of civil procedure [...] provides that the provisions contained in the Code may be applied whenever other Codes of Procedure lack such provisions".
[64] Ibrahim Najjar Brief, p. 3.
[65] *Id.* at p. 3.
[66] *See* below, paras 45-55.
[67] Maharat Foundation Brief, para. 11; Ziad Barouf Brief, para. 6.
[68] *See* Rule 134 STL RPE (STL/BD/2009/01/Rev.1).

press should always prevail.[69] While I recognize that this contempt case implicates the limits of the freedom of the press, this is too simplistic an argument. In particular, I agree with Judge Baragwanath's reasoning that what is required here is a balancing exercise between the rights of a free press and the need to protect the integrity of judicial proceedings, as well as, relatedly, victims and witnesses.[70] Since such arguments do not strictly pertain to the Tribunal's jurisdiction over contempt as such, but rather touch on the merits of the case, I will limit myself to address certain aspects only.

37. At the international level, Article 19 of the International Covenant on Civil and Political Rights ("International Covenant")[71] clarifies that the exercise of freedom of expression

> *carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary*: (a) [f]or respect of the rights or reputations of others; (b) *[f]or the protection of national security or of public order (ordre public)*, or of public health or morals.[72]

The Human Rights Committee—set up under the International Covenant—has observed that the "requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect".[73] I note that this is also the law as applied in Lebanon, as well as elsewhere. For instance, Lebanese courts—and actually a specially constituted Court of Publications—routinely try cases of publication of confidential court filings or of the content of on-going investigations to protect their secrecy, safety and efficiency.[74] As recently as 14 July 2014, that Court, for instance, found that a general plea of freedom of expression does not justify slander.[75] Thus, in Lebanon, just like in any other jurisdiction, freedom of expression finds its limits in the legitimate protection of other societal interests.

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[69] *See, e.g.*, Beirut Bar Association Committee for the Defence of Public Freedoms Brief, pp. 2-3; Talal Salman Brief, pp. 1-3.
[70] Indictment Decision, paras 14-17.
[71] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.
[72] Emphasis added.
[73] UNHRC, *Morais v. Angola*, Communication No. 1128/2002, 29 March 2005, UN Doc. CCPR/C/83/D/1128/2002, para, 6.8.
[74] *See, e.g.*, Lebanon, Court of Criminal Cassation, 7th Chamber, Decision No. 18/2001 publications (23 October 2001); Lebanon, Court of Publications, Decision No. 81 (12 July 1999).
[75] Lebanon, Court of Publications, *Omar Nashabe vs. Future TV et al.*, Decision No. 212 (14 July 2014) (unofficial STL translation).

38. With respect to the specific circumstances of this case, as the *Amicus Curiae* brief for Reporters Without Borders argues, the following factors may be relevant when balancing these two important and competing interests. First, Reporters Without Borders suggest that an analysis should be carried out as to whether the identity of witnesses was actually revealed. Second, it must be determined whether witnesses have indeed been put at risk by the publications and if the media coverage indeed interfered with the investigation (and prosecution). Third, they call for an inquiry into whether the journalists in question deliberately and consciously interfered with the administration of justice. Fourth, the judge should consider if these alleged interferences justify a restriction of the right to information. Finally, they urge deliberations on whether the measures adopted and the sentences imposed are necessary and proportionate to the objective sought to be achieved by the prosecution.[76] Reporters Without Borders do not state that freedom of the press *always* trumps the interests in protecting the integrity of the proceedings; rather they advance important factors that should be taken into account when considering the responsibility of journalists—and the press in general—in the context of investigative or judicial proceedings.

39. But, even assuming that these are valid criteria, the proper balance of the competing interests is clearly not a jurisdictional issue. These or other factors relate to the *substance* of the case, and the obligation of the *Amicus Curiae* Prosecutor to prove his case—and all elements thereof—beyond reasonable doubt. This is because a fair assessment of some of these factors (such as the impact on witnesses of the publications in question, the *mens rea* of the Accused, whether the sentence to be imposed is necessary and proportionate to the alleged interference with justice) cannot take place without a full analysis of the parties' arguments and the evidence at trial, something that goes well beyond the issue of jurisdiction. Whether to seek dismissal of this case on this ground, or to raise the issue of disproportionate punishment, is therefore a matter to be addressed at the *end* of the trial proceedings, not at its start.

40. In other words, the proper balance between the freedom of the press and a prosecution for offences against the administration of justice can be fully assessed only once the evidence in the case has been presented. It therefore does not concern the question of whether the Tribunal has jurisdiction over this case and these specific Accused. I do not and cannot pronounce on these matters at this stage. Indeed, I reserve my findings in this respect until I have heard the evidence

[76] Reporters Without Borders Brief, p. 6.

presented in full in the courtroom. The arguments raised by *Amici Curiae* in this respect are not persuasive as a jurisdictional challenge. They might of course be raised in relation to the substance of the case.

3. Exercising contempt jurisdiction in the specific circumstances of this case

41. Several *Amicus Curiae* briefs criticize the Tribunal for prosecuting the allegations of contempt made in this case, and not the person or persons who may have provided information to the Accused (sources) or other instances where potentially unlawful disclosure of information occurred. These challenges also do not properly go to the Tribunal's jurisdiction *per se*, but rather to the appropriateness of the prosecution of this case. Nonetheless, I find it helpful to address them below.

a) Selectivity of charges

42. A summary of the relevant procedural history to date may assist. On 12 April 2013, the Head of Defence Office informed the Pre-Trial Judge of an incident relating to disclosure of purported confidential witness information that potentially constituted contempt of the Tribunal.[77] Subsequently, the LRV and the Prosecutor brought to the attention of the Pre-Trial Judge two similar incidents potentially constituting contempt.[78] The Pre-Trial Judge referred each incident to the President for referral to a Contempt Judge.[79] The LRV, the Registrar, certain of the Defence counsel and the Prosecutor all concurred that the publication of such information could amount to contempt.[80] According to Judge Baragwanath, acting as Contempt Judge, this

[77] STL, *Prosecutor v. Ayyash et al.*, STL-11-01-PT/CJ/R60*bis*.1, F0021, Public Redacted Version of Decision on Allegations of Contempt, 29 April 2013 ("Decision on Allegations of Contempt"), para. 7.
[78] *Id.* at para. 8.
[79] *Id.* at paras 7-8.
[80] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0853, Public Redacted Version of the Request on Behalf of the Legal Representative of Victims to the Pre-Trial Judge to Refer Certain Facts to the President under Rule 60 *bis* (D), 15 April 2013, paras 26-31; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60*bis*.1, F0009, Public Redacted Version of "Registry Submission Pursuant to Rule 48(C) in Relation to the Contempt Judge's Orders of 15 and 18 April 2013" Dated 19 April 2013, 29 May 2013, paras 26-27; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60*bis*.1, F0007, Public Redacted Version of "Submissions on Behalf of Mr Badreddine Regarding Contempt of the Tribunal" dated 19 April 2013, 31 May 2013, para. 3; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60*bis*.1, F0015, Defence for Salim Jamil Ayyash's Joinder in the Defence Office Submissions of 19 April 2013 and 23 April 2013, 24 April 2014, para. 3; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/60*bis*.1, F0008, Redacted Version of the Prosecution Submissions on Whether Contempt Proceedings Should Be Initiated Pursuant to Rule 60 *bis*(E), dated 19 April 2013, 31 May 2013, paras 7-8, 36-45; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60*bis*.1, F0016, Public Redacted Version of the Further Submissions of the Legal Representative of Victims Pursuant to the 18 April 2013 Order of the Contempt Judge, 30 May 2013, paras 4-10.

was because either names of potential witnesses might have been disclosed in violation of an order issued by the Tribunal or the mere assertion that names of witnesses were disclosed—whether or not these were names of potential witnesses actually to be called by the parties—could be construed as attempted interference with actual witnesses. In the former case, contempt would stem from the disclosure of names (that ought to remain confidential under an order by the Pre-Trial Judge) and their wilful further dissemination. In the latter case, contempt might result from attempts to interfere with, or even threaten, potential witnesses by leading them to believe that protective measures taken by the Tribunal are insufficient and by giving rise to apprehension on their part.[81]

43. With respect to the three incidents, Judge Baragwanath ordered an investigation both into the source of the material and its publication by actors outside the Tribunal.[82] An independent *amicus curiae* investigator examined, *inter alia,* whether information as to the identity of alleged confidential witnesses could have been disclosed by Tribunal personnel with access to confidential documents and concluded that it was "unlikely" that any such information would have been made available by the Tribunal.[83] Of course, if alleged confidential material was indeed made public, it could have come from other sources. But the fact remains that the *amicus curiae* investigator—chosen not from among the Tribunal's staff, but as an independent outsider (which further guarantees his effective autonomy)—did not find evidence supporting further steps in this regard. I finally note that if anyone has knowledge of the details of disclosure of confidential information, they are of course at liberty to make submissions in this respect.[84]

44. In these circumstances, I cannot speculate as to why the organs of the Tribunal or other entities have not called upon the relevant Judge or Chamber, as appropriate, to investigate other instances of alleged contempt and obstruction of justice. I am not an investigator or prosecutor. I am seized as Judge of this case, and have to pronounce on its merits. It is not within my authority, after an indictment has been confirmed, to divest myself of the case because of the allegation it might have been selectively identified among other possible cases. As Judge Baragwanath wrote in another context:

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[81] Decision on Allegations of Contempt, para. 20 (and cited authorities).
[82] *Id.* at Disposition.
[83] Indictment Decision, para. 61.
[84] *See* Rule 60 *bis* (D) ("[A] Party or any other interested person may inform the Judge or Chamber of an allegation of contempt or obstruction of justice.").

> While it is greatly preferred that all who commit criminal conduct are brought to justice, failure to meet that standard does not as a rule afford a defence to any who are brought to trial. Their right is to fairness of their trial, not to a discharge on the ground that others have not, or not yet, been charged. [85]

b) Concurrent jurisdiction

45. Some of the *Amicus Curiae* briefs received, as mentioned above, argue that the Tribunal could only exercise jurisdiction over this contempt case—if at all—after having requested and obtained from Lebanon deferral of the case.[86] They base their arguments on Article 4 of the Statute, which states, in relevant part:

> Concurrent jurisdiction
>
> 1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.
>
> 2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

46. This provision, however, only applies to the primary—as opposed to inherent and ancillary—jurisdiction of the Tribunal to try persons suspected of "the attack against Prime Minister Rafiq Hariri and others". There are two essential misunderstandings at the base of the *Amici Curiae* argument.

47. First, the argument wrongly assumes that proceedings for contempt and obstruction of justice are of the same type as the proceedings identified in the Statute and are subject to the ordinary provisions related to our main jurisdiction. Here, the contempt proceedings relate to the *Ayyash et al.* case, which was deferred as a result of an order by the Tribunal.[87] This order

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[85] Jurisdiction Appeal Decision, Separate and Partially Dissenting Opinion of Judge Baragwanath, para. 95.
[86] Sabeh Brief, pp. 4-8; Paul Morcos Brief, p. 4.
[87] STL, CH/PTJ/2009/01, Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, 27 March 2009. This order was issued by the Pre-Trial Judge on the basis of Article 4 of the Statute—which indeed provides for concurrent jurisdiction of the Tribunal and the domestic courts of Lebanon over the crimes referred to in Article 1 of the Statute—and the mechanism envisaged by Rule 17 (A).

specifically requested Lebanon to "defer to the Tribunal's competence in this case".[88] From the moment when Lebanon deferred the jurisdiction of the main case to the Tribunal—and the Tribunal started enjoying primacy over those cases pursuant to a UN Security Council resolution binding on Lebanon—[89] the Tribunal had jurisdiction over any ancillary and incidental matters as well.[90]

48. Second, the argument misunderstands the nature of contempt proceedings, and thus the reason why interference with a court's administration of justice is best addressed by that court as opposed to other mechanisms. In this context, it is useful to focus on the relevant law of Lebanon as referenced by some of the *Amici Curiae*. According to several written submissions I received, the Lebanese Criminal Code criminalizes, in Article 420, the publication of any document related to an investigation prior to it being revealed in a public hearing. Article 53 of the Lebanese Code of Criminal Procedure adds:

> The investigation shall remain confidential until such time as the case is referred for trial, except for the committal order. Anyone who breaches the confidentiality of the investigation shall be liable to prosecution before the Single Judge in whose area of jurisdiction the act occurred; he shall be punishable by imprisonment of between one month and one year and/or a fine of between one hundred thousand and one million Lebanese pounds.

49. The Lebanese Parliament has further adopted a specific regime for media outlets. The Lebanese Law on Publications[91] penalises the publication of false or deceitful information (Art. 3) and the publication of, *inter alia*: the facts of felony and misdemeanour investigations prior to their being revealed in a public hearing; the facts of investigations by the Central Investigation and Judicial Investigation Department; letters, documents, files or any parts of files of any departments that are affixed with a stamp containing the word "Confidential"; the proceedings of any legal case the publication of which the court has prohibited; and reports, letters, communications, articles, photographs and news items that violate public morality and decency (Art. 12). The Lebanese Law on Publications also criminalizes acts such as intimidation (Art. 16), as well as libel, slander and defamation (Art. 17).

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[88] *Id.* at Disposition.
[89] Jurisdiction Appeal Decision, paras 24-31.
[90] *See* above, paras 26-35.
[91] Law on Publications, 14 September 1963 (Lebanon) (some articles have been amended by the Legislative Decree No. 104/77 of 30 June 1977).

50. A special criminal court, the Court of Publications, is now competent in Lebanon to deal with crimes committed by means of publications (including on radio or television) that are listed in the Law on Publications or the Radio and Television Broadcasting Law.[92]

51. The crimes listed in the Law on Publications are therefore quite broad, and the law can be interpreted as also covering the intimidation of witnesses, or interference with the Lebanese administration of justice, if done by means of publications. Certain *Amici Curiae* have relied on the language of these provisions—including the statute of limitations thereof—to argue that jurisdiction over the allegations brought by the *Amicus Curiae* Prosecutor in the present proceedings lies with the Lebanese Court of Publications,[93] and that the statute of limitations in Lebanon for these alleged offences has expired.[94]

52. However, the crux of the matter is, again, as the Defence recognized by not challenging the Tribunal's jurisdiction on contempt, that the case before me is incidental (or ancillary) to the main proceedings over which the Tribunal has jurisdiction. It does not relate to obstruction of justice in Lebanon, or the publication of confidential information related to matters before a Lebanese court. Rather, these proceedings relate to interference with the administration of *this* Tribunal's justice.

53. There is no provision, to my knowledge, of the Lebanese codes or legislation for prosecuting interference with justice *in another jurisdiction*, such as courts of other countries, or this Tribunal. It would indeed be unusual if Lebanese prosecutors had the authority to prosecute interference with the administration of justice—even when originating in Lebanon—which had effects—i.e., it is alleged to have effectively interfered with justice—*not in Lebanon, not before Lebanese courts, but before another jurisdiction*. It is generally left to the courts in each jurisdiction to regulate *their* proceedings.[95]

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[92] *See*, among others, Prime Minister Mikati Brief, p. 1; President of Lebanese Press Association Brief, p. 2; Sabeh Brief, pp. 2-3.
[93] *See, e.g.*, President of Lebanese Press Association Brief, p. 2; National Council for Audiovisual Media Brief, p. 2; Paul Morcos Brief, p. 4; Ziad Baroud Brief, para. 7; Prime Minister Mikati Brief, p. 1; Arab Investigative Reporters Brief, p. 1.
[94] Ziad Baroud Brief, para. 9 (citing "Article 17 of the Lebanese Publications Law").
[95] Exceptions exist (*see* Art. 70 (4) ICC St., requiring State Parties to extend their criminal laws penalizing offences against the integrity of the investigative or judicial process to cover offences against the ICC administration of justice), but they remain of very limited import.

54. I further note that the Government of Lebanon did not file any brief suggesting that the Tribunal does not have, or should not exercise, jurisdiction over offences against the administration of its justice. The National Council for Audiovisual Media, which filed an *Amicus Curiae* brief, never suggests that Lebanon had the authority to launch a case related to the conduct alleged in this case, nor that it could take any sort of action in respect of these publications. I am therefore puzzled by the contention that this matter should have been dealt with by the Lebanese authorities. They have not done so, and now (if the statute of limitations actually already expired in Lebanon) cannot do so.

55. These circumstances further support the conclusion that the only authority that can effectively deal with this matter is *this* Tribunal.

4. Conclusions

56. In sum, the Tribunal has inherent jurisdiction over contempt and obstruction of justice. When allegations of interference with the Tribunal's administration of justice are made, especially in circumstances where in my understanding no steps have been taken in Lebanon so far to safeguard the Tribunal's proceedings, it is unquestionably within the Tribunal's purview to act. Failing this, acts of extreme seriousness related to the conduct of the main proceedings would not be prosecutable, thus impairing the effectiveness of the Tribunal's primary jurisdiction.

57. A completely different matter is, of course, whether the charges as detailed in the order in lieu of an indictment—comprising *actus reus* and *mens rea*—can be proved beyond reasonable doubt. As a matter of fact, this is not a jurisdictional question, but rather an issue for trial and, ultimately, for the final judgment.

IV. The jurisdiction of the Tribunal over *legal* persons

58. With respect to personal jurisdiction, Rule 60 *bis* provides that the Tribunal's contempt power reaches "any *person*" who knowingly and wilfully interferes with its administration of justice. The Defence seeks a ruling that "person" under this Rule does not encompass legal persons and that, consequently, all charges against the corporate Accused in this case—*New TV* S.A.L.—should be dismissed

59. Judge Baragwanath, in indicting *New TV* S.A.L., concluded that "Rule 60 *bis* extends to acts of contempt allegedly undertaken by legal persons".[96] His analysis turned on the scope of "person" under the Rule which, he noted, did not explicitly exclude legal persons. He first interpreted "person" in the context of Articles 2 and 3 of the Statute. He determined that, due to the thus far exclusive application in international law of the *societas delinquere non potest* principle ("only natural persons can be charged with crimes") and the explicitly gendered language used with regards to possible accused in Articles 3 and 16 of the Statute, Articles 2 and 3 did not apply to legal persons.[97] However, he reasoned that "[w]hether a legal person can be an accused under Articles 2 and 3 [. . .] is a very different question from whether a legal person can be held in contempt".[98] Noting that no provision of the Statute or Rules expressly limits contempt proceedings to natural persons, he found that, in light of Article 28 and Rule 3, developments in the case-law of both common law and civil law jurisdictions (including Lebanon) and the fundamental purpose of the contempt power, "person" under Rule 60 *bis* must be read as encompassing legal persons.[99]

A. Submissions on the Tribunal's power to hold legal persons in contempt

1. Position of the Defence

60. The Defence submits that the "Statute and Rules do not provide for legal persons to be charged by the STL for *any* crimes within the Tribunal's jurisdiction, irrespective of whether the offences are charged under Articles 1-3 of the Statute or for contempt pursuant to Rule 60*bis*".[100] An interpretation consistent with Rule 3 must limit jurisdiction under Rule 60 *bis* to natural persons. They contend, *inter alia*, that (1) if legal persons cannot be charged under Articles 1 to 3, it is impermissible to charge legal persons under Rule 60 *bis*; (2) "person" must have the same meaning in both the Statute and the Rules; (3) the absence of an explicit exclusion of legal persons in Rule 60 *bis* cannot be the basis for finding jurisdiction over such persons; (4) if upholding the object and purpose of Rule 60 *bis* indeed requires jurisdiction over legal persons (which the Defence reject), the same must also be true for the Statutory crimes; and (5) there is

[96] Indictment Decision, para. 28.
[97] *Id.* at paras 22-23.
[98] *Id.* at para. 24.
[99] *Id.* at paras 24-28.
[100] Defence Motion, para. 11.

no evidence of an intention to expand the Tribunal's jurisdiction beyond that of all other international courts. Furthermore, the law of Lebanon with respect to corporate liability and those of other countries are irrelevant.[101]

2. Position of *Amicus Curiae* Prosecutor

61. The *Amicus Curiae* Prosecutor responds that "[s]ubstantive crimes under the Statute (Articles 2-3) and the inherent contempt powers (as reflected in Rule 60*bis*) are two entirely distinct types of crimes and to apply the same analysis to both of them is erroneous".[102] In his view, "the scope of their application depends on the specific objective they were created to address".[103] Because the purpose of the contempt power is to ensure the integrity of the Tribunal's proceedings, such power has a broader jurisdiction. This, he argues, is reflected in the open-ended language of Rule 60 *bis* and has been affirmed by the application of the contempt power in other international criminal courts and tribunals outside the subject matter, temporal and territorial jurisdiction of their statutory crimes.[104] The *Amicus Curiae* Prosecutor further argues that applying Rule 60 *bis* to legal persons, on a plain reading, is consistent with Rule 3; there has been no relevant rejection in the international criminal courts and tribunals of jurisdiction covering legal persons; it is not sufficient to only hold natural persons in contempt; and it is entirely appropriate to look to domestic jurisprudence, including Lebanon's, in interpreting and applying the Tribunal's contempt jurisdiction.[105]

3. Position of *Amici Curiae*

62. I note that several *Amici Curiae* have contended that the Special Tribunal may not hold corporations in contempt.[106]

B. Discussion

63. The starting point is the finding by Judge Baragwanath that "Rule 60 *bis* extends to acts of contempt allegedly undertaken by legal persons".[107] As Judge Baragwanath noted, Articles 2

[101] *Id.* at paras 11-66.
[102] Response, para. 8.
[103] *Id.* at para. 11.
[104] *Id.* at paras 21-25.
[105] *Id.* at paras 26-48.
[106] Maharat Foundation Brief, para. 17; Arab Lawyers Union Brief, pp. 2-3; Position of Certain Lebanese MPs, pp. 2-3; MP Elie Marouni Brief, p. 3; Paul Morcos Brief, p. 5.

and 3 of the Statute do not apply to legal persons. In light of the *societas delinquere non potest* principle, to read "person" in the Statute as including legal persons would require explicit language to that effect, or some other positive expression of such intent, in the Statute or the Annex to Security Council Resolution 1757. There is no such language or expression of intent in the Statute or the Annex. To the contrary, Article 3 (2)-(3) of the Statute, related to superior responsibility, expressly spells out the masculine and the feminine pronouns ("his or her"), but does not include the neutral ("its"). It further provides that the "fact that [a subordinate] acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility". Article 16 also clearly refers to *natural* persons in spelling out the rights of an accused. In fact, there is no reference to an "it" in the context of an accused anywhere in the Statute.[108]

64. Despite the fact that the Statute does not include reference to legal persons, the *Amicus Curiae* Prosecutor posits that the Tribunal's inherent power to hold persons in contempt, which is ancillary to and complementary of its primary purpose, does embrace the notion that a legal person can be held in contempt for knowingly and wilfully interfering with the administration of justice. On such a construction, personal jurisdiction with respect to the inherent contempt power—flowing from the inherent authority discussed above and, through Article 28 of the Statute, articulated in Rule 60 *bis*—would be broader than what is envisaged for the Tribunal's primary jurisdiction.[109]

65. In this respect, I believe that a clear and determinative distinction must be made between jurisdiction *ratione materiae/temporis/loci* and jurisdiction *ratione personarum*. Inherent jurisdiction does certainly broaden the scope of the Tribunal's authority *ratione materiae* (and *ratione temporis/loci*) by allowing it to punish conduct after 2005 not criminalized under the terms of the Statute.[110] But, in my view, it does not follow that the contempt power must also include a broader jurisdiction *ratione personarum* than the Statute provides.

66. With respect to the subject matter, temporal and territorial jurisdiction of the Tribunal, it would make no sense to assume that the Plenary intended to acknowledge the Tribunal's inherent contempt power, yet simultaneously leave it toothless by limiting such power to the jurisdiction

[107] Indictment Decision, para. 28.
[108] *Id.* at para. 23.
[109] This was the basis for Judge Baragwanath's decision to charge *New TV* S.A.L., in addition to Ms Karma Khayat, as a corporate accused (*see* Indictment Decision, paras 18-28).
[110] *See, mutatis mutandis*, *El Sayed* Jurisdiction Decision, paras 44-48.

of the Statute. The principle of effectiveness simply does not allow for such a strict interpretation. Indeed, Rule 60 *bis* would serve no purpose given that no contempt or obstruction of the Tribunal's justice could have taken place between October 2004 and December 2005 (the temporal jurisdiction prescribed by the Statute)—for the simple reason that the Tribunal did not exist at the time. It would also be irrational to limit the Tribunal's jurisdiction over contempt to conduct originating from the territory of Lebanon, since—as explained above—the obstruction of justice referred to in Rule 60 *bis* actually relates to the Tribunal's proceedings, regardless of where it takes place. In sum, if the Tribunal's subject matter, temporal and territorial jurisdiction for contempt here were confined by the Statute, no interference with the administration of the Tribunal's justice could be prosecuted; the inherent power of contempt, and Rule 60 *bis*, would effectively be rendered meaningless.

67. The same cannot however be said with regard to *personal* jurisdiction. Irrespective of one's position as to the better policy (and I could even agree with Judge Baragwanath *de lege ferenda*), the fact that the Tribunal is not allowed to prosecute legal persons does not as such render its contempt power meaningless. The natural persons who comprise a corporation, no matter how high their position, can still be held responsible for interfering with the administration of justice and this makes the Tribunal's authority to deal with contempt and obstruction of justice effective.

68. However preferable *de lege ferenda* it might be to have corporations answer to charges of contempt, this preference does not suffice to solidly ground the Tribunal's jurisdiction *de lege lata*. The extension of the authority to prosecute legal persons must have at least *some* basis—at least implicit—in Rule 60 *bis*, which is the provision specifically addressing contempt and obstruction of justice.

69. In this respect, it is notable that Rule 60 *bis* does not explicitly contemplate the possibility of holding legal persons liable. The fact that it provides for custodial sentences and fines (without distinguishing between natural and legal persons)[111] further suggests that its drafters did not envisage legal persons as under its purview.

[111] Rule 60 *bis* (J) STL RPE.

70. On the basis of the foregoing, it however remains to be considered whether Rule 60 *bis* can be said to *implicitly* allow prosecution of legal persons for contempt and obstruction of justice. Rule 3 specifically dictates how Judges are to interpret the Tribunal's Rules. It states:

> (A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.
>
> (B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.

The Appeals Chamber has helpfully clarified that rules must be interpreted pursuant to the principles set out in the 1969 Vienna Convention on the Law of Treaties, and more specifically "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[112]

71. The spirit of the Statute, given its terms, supports an interpretation limiting personal jurisdiction in contempt cases to natural persons only.[113] In cases where the legislator (in this case, Lebanon and the United Nations, which discussed the terms of the Statute) did not explicitly foresee criminal jurisdiction for legal persons, it is impermissible to proceed by analogy. On the basis of the principle *ubi lex voluit dixit, ubi noluit tacuit*, which requires judges to infer precise consequences from the legislator's silence, it would therefore be inappropriate to expand the interpretation of the term "person" to cover legal persons.

72. In my view, the basic canons of treaty interpretation, invoked in Rule 3 and also adopted by other international criminal tribunals, compel a finding that legal persons cannot be held liable for contempt by this Tribunal. It makes eminent sense to read "person" in the Rules,

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[112] Applicable Law Decision, paras 26-28. The Appeals Chamber added that, as regards UN Security Council resolutions, one should also take into account the remarks made by the International Court of Justice in its Advisory Opinion on *Kosovo* (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 94, *available at* http://www.icj-cij.org/docket/files/141/15987.pdf).
[113] *See* above para. 63.

adopted by the Plenary of Judges, in consonance with the Statute's understanding of the same term, which, as discussed above, only encompasses natural persons.

73. In reading a legal text, as noted above, one should also look at its context, which requires the use of all legitimate aids to interpretation.[114] The European Court of Human Rights, for instance, follows a settled technique to interpret legal provisions, seeking inspiration in (i) whether a consensus has emerged on a certain principle in domestic jurisdictions (often expressed in national Supreme Courts' judgments); (ii) international courts' and tribunals' case-law; and finally (iii) whether the main international conventions offer support for a specific interpretation of the provisions in question.

74. In the instant matter, I cannot discern a consensus in *domestic* criminal systems with respect to corporate liability, and therefore a meaning of the term "person" that goes beyond natural persons. Even Judge Baragwanath found that there is but a "*trend* in *most* countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers".[115] While unanimity is certainly not required in order to establish the existence of consensus on a specific principle, I do not believe it would be appropriate to discount the many important legal systems where corporate liability is not accepted.[116]

75. Moreover, the ordinary meaning of "person" in the *international* criminal law context cannot be said to include legal persons. No international criminal court or tribunal has ever been granted explicit authority to or found that it had authority to try legal persons.[117] Further, there is no general principle of international criminal law, international treaty or customary law

[114] *See* Applicable Law Decision, para. 20 ("Context must embrace all legitimate aids to interpretation").
[115] Indictment Decision, paras 26-27 (emphasis added).
[116] *See*, for instance, the approaches in Germany (where criminal responsibility exists only for natural persons) and Italy (where only a sort of administrative/criminal liability exists, and only for a very narrow set of conduct).
[117] *See* International Military Tribunal (Nuremberg) Charter, Art. 6 ("power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes"); International Military Tribunal for the Far East Charter ("power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences"); Art. 6 ICTY St. ("jurisdiction over natural persons"); Art. 5 ICTR St ("jurisdiction over natural persons"); Art. 25 ICC St. ("jurisdiction over natural persons"); ECCC, Law on the Establishment of the Extraordinary Chambers, Art. 1 ("senior leaders of Democratic Kampuchea and those who were most responsible", always interpreted as limited to natural persons thus far); Art. 1 SCSL St. ("persons who bear the greatest responsibility for serious violations of international humanitarian law", always interpreted as limited to natural persons). A future exception to this approach might be constituted by the (still Draft) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (draft of 15 May 2012, available at http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf) which would provide for corporate criminal liability in Article 46C.

supporting corporate liability, or an interpretation of "person" that encompasses corporations. At most, one could say that international law does not *prohibit* the imposition of criminal liability for corporations; but this cannot translate into an expansion of the meaning of the term "person" to include entities beyond natural persons.

76. Furthermore, if there is in fact any ambiguity in Rule 60 *bis*, the interpretation most favourable to the Accused, which is required by Rule 3 (B) and international standards of human rights, is one that limits jurisdiction to natural persons.

77. It may be asserted that because legal persons can be liable under Lebanese criminal law, and as Article 2 of the Statute applies provisions of the Lebanese Criminal Code, the ordinary meaning of Article 3 of the Statute, in the absence of an express limitation of jurisdiction to natural persons, does not exclude legal persons from the Tribunal's jurisdiction.

78. However, I recall that the provisions of the Lebanese Criminal Code made applicable by Article 2 are "subject to the provisions of [the Tribunal's] Statute".[118] The express language of Articles 3 and 16, and the lack of reference to an "it" with respect to an accused, in light of the lack of consensus in the international system and among domestic systems on corporate criminal liability, compel a finding that corporate liability under Lebanese law is inapplicable here.[119]

79. Simply put, and although I agree with several aspects of Judge Baragwanath's reasoning, I nonetheless consider that the preferable way to interpret Rule 60 *bis* and, more generally, the Tribunal's inherent power to hold persons responsible for contempt and obstruction of justice, is to limit the Tribunal's jurisdiction to *natural* persons only. Consequently, I grant the Defence Motion and hold that the Tribunal lacks jurisdiction to hear the charges brought against *New TV* S.A.L. The *Amicus Curiae* Prosecutor is therefore ordered to submit a proposed amended order in lieu of an indictment that excises all references to *New TV* S.A.L. as an Accused in this case.

[118] Art. 2 STL St.

[119] The Defence contends, *inter alia*, that in the absence of a positive extension of the Tribunal's jurisdiction to include legal persons, the principle of *societas delinquere non potest* applies, and that, in any event, the Statute expressly limits jurisdiction to natural persons (*see* Consolidated Response to LRV *Amicus Curiae* Brief, paras 13-15).

V. *Amicus Curiae* Prosecutor request for leave to amend the order in lieu of an indictment

80. As mentioned above, the *Amicus Curiae* Prosecutor seeks leave to amend the order in lieu of an indictment. He presents what he deems *prima facie* evidence that the operative order in lieu of an indictment incorrectly identifies the charged corporate Accused.[120] However, as I am dismissing all charges against *New TV* S.A.L. in this case for lack of personal jurisdiction, the issue of properly identifying the corporate Accused, for the purposes of this case, is moot.

VI. Certification

81. As I held above, the Defence Motion is not a preliminary motion under Rule 90 but rather a motion under Rule 126. This means that there is no automatic right to an interlocutory appeal against this Decision. Rather, if the *Amicus Curiae* Prosecutor were intent on appealing this Decision, he would have to request certification from me pursuant to Rules 60 *bis* (H) and 126 (C).[121] Such certification can only be given if the Decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings".[122]

82. Here, the Decision meets the "stringent requirements of Rule 126 (C)".[123] Whether the Tribunal has jurisdiction to hear contempt charges against the corporate Accused indicted in this case is plainly an issue that affects the "fair and expeditious conduct" of the proceedings. It also requires "immediate resolution" by the Appeals Panel. While *Amicus Curiae* Prosecutor could—if he were so inclined—appeal my Decision at the end of the trial, it would not be efficient to do so. Indeed, if the Appeals Panel were to disagree with me, a new trial would have to be conducted against *New TV* S.A.L. A timely decision by the Appeals Panel would therefore materially advance the proceedings.

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[120] The Defence does not oppose his request (*see* Leave to Amend Response, para. 5).
[121] I note that all appeals in contempt proceedings are brought before a specially designated Appeals Panel. *See* Rule 60 *bis* (M) STL RPE; STL, Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, STL-PD-2013-06-Rev.2, 2 July 2014; STL, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Special Tribunal for Lebanon, STL-PD-2013-Rev.1, 13 June 2013.
[122] Rule 126 (C) STL RPE.
[123] *See* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/PT/AC/AR126.1, F0012/COR, *Corrected Version of* Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 8.

83. Finally, I am satisfied that I have the power to certify an issue in my Decision *proprio motu.* Indeed, Rule 126 (C) does not make certification dependent on a request by the parties. The *Amicus Curiae* Prosecutor is of course not bound by such certification and there is no obligation on him to file an appeal. Nevertheless, I find it is in the interests of justice to ensure that appellate resolution of this matter may be sought without delay. I therefore certify the following issue: whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge legal persons with contempt.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rules 60 *bis* and 126;

I

REJECT the Reply Request;

GRANT the Defence Motion;

ORDER that the charges against *New TV* S.A.L. be dismissed;

ORDER the *Amicus Curiae* Prosecutor to file a proposed amended order in lieu of an indictment that excises all references *to New TV* S.A.L. as an Accused in this case;

CERTIFY for appeal the issue of whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge legal persons with contempt; and

DECLARE MOOT the *Amicus Curiae* Prosecutor's Request for Leave to Amend Order in Lieu of an Indictment with Annexes.

Done in Arabic, English and French, the English version being authoritative.
Dated 24 July 2014
Leidschendam, the Netherlands

Judge Nicola Lettieri
Contempt Judge