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

THE APPEALS PANEL

Case No.:	**STL-14-05/PT/AP/AR126.1**
Before:	**Judge Janet Nosworthy, Presiding** **Judge Walid Akoum** **Judge Ivana Hrdličková, Judge Rapporteur**
Registrar:	**Mr Daryl Mundis**
Date:	**2 October 2014**
Original language:	**English**
Classification:	**Public**

IN THE CASE AGAINST

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

DECISION ON INTERLOCUTORY APPEAL CONCERNING PERSONAL JURISDICTION IN CONTEMPT PROCEEDINGS

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

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

I. HEADNOTE[1]

In this interlocutory appeal the Appeals Panel is tasked with determining whether or not the Contempt Judge erred in his ruling preventing legal persons from being prosecuted for contempt and whether such error, if any, led to the invalidation of his decision. The Appeals Panel examines: (1) whether the Contempt Judge erred in excluding legal persons when interpreting Rule 60 bis *pursuant to Rule 3; and (2) whether the Contempt Judge erred in distinguishing between the Tribunal's material, temporal and territorial jurisdiction on the one hand, and its personal jurisdiction on the other. Upon consideration of the matter, the Appeals Panel, by majority, Judge Akoum dissenting, finds that the term "person" as set out within Rule 60* bis *includes legal persons and therefore grants the appeal. As a result, the original Order in Lieu of an Indictment dated 31 January 2014 is reinstated.*

The facts giving rise to this appeal originate from Judge Baragwanath, in his capacity as the initial Contempt Judge, issuing an order in lieu of an indictment containing charges against both New TV *S.A.L., operating as* Al Jadeed *TV, and Ms Karma Al Khayat, Deputy Head of News and Political Programmes Manager at* Al Jadeed *TV. Judge Lettieri, as Contempt Judge, dismissed the charges against* New TV *S.A.L. having found that the Tribunal has no personal jurisdiction to hold contempt proceedings against legal persons and certified this issue for appeal. The* Amicus *Prosecutor filed an appeal challenging the decision of the Contempt Judge concerning the Tribunal's legal authority to proceed against legal persons for the crime of contempt. The Defence asserts that the decision of the Contempt Judge should be upheld as the* Amicus *Prosecutor has not established any errors in his decision.*

The Appeals Panel considers that the appeal concerns the proper interpretation of the term "person" as contained in Rule 60 bis and the Tribunal's exercise of personal jurisdiction with respect to contempt proceedings. The Appeals Panel has been guided by the need for the Tribunal to protect the integrity of its proceedings.

Having found that there exists ambiguity with respect to the term "person" in Rule 60 bis, *the Appeals Panel was guided by Rule 3 (A) which calls for an interpretation that is consonant "with the spirit of the Statute" together with the principles of interpretation laid down in customary international law, international standards on human rights, general principles of international criminal law and procedure and, as appropriate, the Lebanese Code of Criminal Procedure. The Appeals Panel finds that the Contempt Judge erred in resorting to Rule 3 (B) (that one should adopt the interpretation most favourable to the accused) as the ambiguity in Rule 60* bis *should have been resolved by the application of Rule 3 (A). As a result, the Contempt Judge erred in determining that the term "person" in Rule 60* bis *excludes legal entities.*

In support of its conclusion, the Appeals Panel finds that the ordinary meaning of the word "person" in a legal context can include both natural human beings and legal entities.

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[1] This headnote does not constitute a 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.

With respect to the object and purpose of Rule 60 bis *to hold accountable those who interfere with the administration of justice and to ensure that the exercise of the Tribunal's primary jurisdiction is not frustrated, the Appeals Panel finds that this object would be impeded should legal entities be excluded from prosecution as a rule.*

Additionally, the Appeals Panel has examined evolving international standards on human rights and corporate accountability as well as trends in national laws. Current international standards on human rights support an interpretation that is consonant with imposing criminal liability on legal persons. Furthermore, since such an outcome has not created any new crime, the Appeals Panel does not consider this contrary to the rights of the accused pursuant to Rule 69.

With respect to the Lebanese Code of Criminal Procedure, the Appeals Panel considers it relevant that legal persons can be criminally liable under Lebanese criminal law. Accordingly, it considers that it is foreseeable under Lebanese law that legal entities could be subject to criminal proceedings.

Moreover, the Appeals Panel holds that the expression of the Tribunal's inherent contempt power under Rule 60 bis *is not exhaustive and that the Contempt Judge erred in his reasoning in respect of the principle of effectiveness, resulting in the drawing of a distinction as regards the Tribunal's personal jurisdiction and its material, territorial and temporal jurisdictions in contempt proceedings.*

In light of the Tribunal's inherent power to protect the integrity of its proceedings, the need to uphold the rule of law, execute and maintain the administration of justice; and domestic developments and evolving international law standards, the Appeals Panel considers that it is in the interests of justice to interpret the Tribunal's personal jurisdiction under Rule 60 bis *as encompassing legal persons. Indeed, the existence of criminal responsibility for legal persons best enables the Tribunal to achieve its goals to administer justice in a fair and efficient manner by ensuring that no one is beyond the reach of the law.*

The Appeals Panel concludes that the Contempt Judge committed the following errors: an interpretation of the word "person" in Rule 60 bis *that was consonant with the* letter *of the Statute rather than its* spirit*; that the interpretation of the word "person" to include legal persons was only possible if the Tribunal's contempt jurisdiction was rendered "meaningless" without doing so; giving insufficient weight to the relevance of state practice on the criminalization of the conduct of legal persons in the interpretation of the word "person"; resorting to Rule 3 (B) when the principles of interpretation contained in Rule 3 (A) were sufficient. These errors of law are of such a nature that they invalidate the Contempt Judge's decision.*

Accordingly, the Appeals Panel by majority, Judge Akoum dissenting, upholds the appeal and reinstates the Order in Lieu of an Indictment of 31 January 2014 which includes New TV *S.A.L. as an accused in this case.*

II. INTRODUCTION

1. The Appeals Panel is seized of an interlocutory appeal ("Appeal")[2] filed by the *Amicus Curiae* Prosecutor ("*Amicus* Prosecutor") pursuant to Rule 126 (E) of the Rules of Procedure and Evidence ("Rules") seeking to challenge the Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment ("Impugned Decision") rendered by Judge Lettieri ("Contempt Judge").[3] The Defence for *New TV* S.A.L. and Ms Karma Al Khayat ("Defence") responded that the Appeal should be rejected.[4]

2. In the Impugned Decision, the Contempt Judge dismissed the charges against *New TV* S.A.L., a corporate entity, having found that the Tribunal has no personal jurisdiction (*ratione personae*) to hold contempt proceedings against legal persons. Additionally, the Contempt Judge certified the issue for appeal *proprio motu* 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"[5] and declared moot the *Amicus* Prosecutor's request for leave to amend the Order in Lieu of an Indictment with Annexes.[6]

3. We find the Appeal admissible as stated below. We hold by majority, Judge Akoum dissenting, that the Appeal is founded for the reasons set out below. Consequently, the Impugned Decision is reversed and the Order in Lieu of an Indictment of 31 January 2014 is reinstated.

III. BACKGROUND

4. On 31 January 2014, Judge Baragwanath, acting as the initial contempt judge found that there were sufficient grounds to justify the issuance of an order in lieu of an indictment for contempt against *New TV* S.A.L., the legal person doing business as *Al Jadeed* TV, and Ms Karma Al Khayat, *Al Jadeed* TV's Deputy Head of News and Political Programmes Manager. They were both charged with knowing and wilful interference with the

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[2] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0001, Interlocutory Appeal against the Decision on Motion Challenging Jurisdiction, 31 July 2014.
[3] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/CJ, F0054, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014.
[4] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0005, Defence Response to *Amicus* Prosecutor's 'Interlocutory Appeal Against the Decision on Motion Challenging Jurisdiction', 11 August 2014 ("Response").
[5] Impugned Decision, p. 34.
[6] *Id.* at para. 80.

administration of justice in breach of Rule 60 *bis* (A) of the Rules.[7] As he had charged the accused, Judge Baragwanath proceeded to recuse himself from the contempt proceedings and designated Judge Lettieri as the Contempt Judge on the basis of the Judges' roster.[8]

5. On 16 June 2014, the Defence filed a motion challenging the jurisdiction of the Tribunal to hear cases of contempt against legal persons.[9] On 30 June 2014, the *Amicus* Prosecutor opposed the Defence Preliminary Motion asserting that the Tribunal does indeed have inherent jurisdiction to indict legal persons for contempt under Rule 60 *bis*.[10] On 24 July 2014, the Contempt Judge dismissed the charges against *New TV* S.A.L., having found that the Tribunal has no jurisdiction *ratione personae* to hold contempt proceedings against legal persons.[11] Consequently, he ordered the *Amicus* Prosecutor to file a proposed amended order in lieu of an indictment removing all references to *New TV* S.A.L.[12] and declared moot the *Amicus* Prosecutor's request for leave to amend the order in lieu of an indictment.[13] In the same decision, the Contempt Judge also granted certification *proprio motu* pursuant to Rule 60 *bis* (H) and 126 (C) to the *Amicus* Prosecutor to 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" ("Certified Issue").[14]

6. On 31 July 2014, the *Amicus* Prosecutor filed the Appeal. The President of the Tribunal issued an order pursuant to Rules 60 *bis* (M) and 30 (B) of the Rules designating the

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[7] STL, *In the case against New TV* S.A.L. *and Al 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. On 12 June 2014, the *Amicus* Prosecutor sought leave to amend the order in lieu of an indictment in this case with respect to the identification of the corporate accused, submitting 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'". *See* STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/CJ, F0032, Request for Leave to Amend Order in Lieu of an Indictment with Annexes, 12 June 2014, para. 5.

[8] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014.

[9] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/CJ, F0037, Defence Preliminary Motion Challengeing [sic] Jurisdiction, 16 June 2014 ("Defence Preliminary Motion"). In addition to this, the Contempt Judge also received 18 submissions from a range of individuals and organisations in Lebanon and elsewhere pertaining to this issue. *See* Impugned Decision, para. 6.

[10] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/CJ, F0047, Response to "Defence Preliminary Motion Challenging Jurisdiction", 30 June 2014 ("Response to Defence Preliminary Motion"). *See also* STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/CJ, F0048, Consolidated Response to *Amicus Curiae* Briefs, 30 June 2014.

[11] Impugned Decision, p. 34.

[12] *Ibid.*

[13] *Id.* at para. 80.

[14] *Ibid.*

Appeals Panel on 1 August 2014 pursuant to the existing Judges' roster.[15] The Defence responded to the Appeal on 11 August 2014 requesting that it be dismissed.[16] Along with the Appeal, the *Amicus* Prosecutor filed an urgent request seeking the suspensive effect of the Appeal[17] to which the Defence responded on 11 August 2014.[18] The *Amicus* Prosecutor also requested an oral hearing in the Appeal[19], to which the Defence responded on 19 August 2014.[20] On 22 August 2014, the Appeals Panel dismissed the request for suspensive effect as the *Amicus* Prosecutor had not shown good cause and denied the request for an appeal hearing.[21]

IV. SUBMISSIONS OF THE PARTIES

A. The *Amicus* Prosecutor

7. The *Amicus* Prosecutor contends that the Tribunal has the power to charge legal persons with contempt and claims that the Contempt Judge erred in ruling to the contrary.[22] In support of this position, the *Amicus* Prosecutor alleges that international tribunals have

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[15] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/PRES/AR126.1, F0003, Order Designating Appeals Panel, p. 2.
[16] Response, p. 17.
[17] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0002, Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction, 31 July 2014, para. 12.
[18] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0004, Defence Response to *Amicus* Prosecutor's 'Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction', 11 August 2014. On 13 August 2014, the *Amicus* Prosecutor filed a request for leave to reply to the Response on the issue of relevant standards required for grant of suspensive effect. *See* STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0006, Request for Leave to Reply to "Defence Response to *Amicus* Prosecutor's 'Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction'", 13 August 2014. The Defence submitted that this request for leave to reply should be rejected. *See* STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0007, Defence Response to "Request for Leave to Reply to 'Defence Response to *Amicus* Prosecutor's 'Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction'", 15 August 2014, paras 5-12. The *Amicus* Prosecutor then filed a motion to clarify and amend the request for leave to reply. *See* STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0010, Motion to Clarify and Amend the "Request for Leave to Reply to 'Defence Response to *Amicus* Prosecutor's 'Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction'" of 13 August 2014, 20 August 2014. The request for leave to reply was denied by the Appeals Panel.
[19] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0008, Request for Appeals Hearing, 15 August 2014.
[20] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0009, Defence Response to *Amicus* Prosecutor's "Request For Appeals Hearing", 19 August 2014.
[21] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0011, Decision on Urgent Request for Suspensive Effect of the Appeal, Request for Leave to Reply and Request for Appeal Hearing, 22 August 2014, p. 10.
[22] Appeal, paras 10-40.

favoured broader interpretations because their *raison d'être* is the fight against impunity.[23] In addition, he contends that the Tribunal's contempt power is derived from its inherent powers and not from the Statute or Rule 60 *bis*.[24] Therefore, in his view, the Contempt Judge erred in finding that the Tribunal's contempt power is limited by the Statute and its jurisdiction as neither international law nor the Statute and Rule 60 *bis* imposes such a limitation to natural persons.[25]

8. With respect to the definitions of words in the Statute and the Rules, the *Amicus* Prosecutor argues that the Contempt Judge erred in concluding that the word "person" in the Statute and Rules is limited to natural persons. In support of this position, the *Amicus* Prosecutor relies on ordinary definitions in national and international legal contexts,[26] on the Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon ("Report on the Establishment of STL"), on Article 1 of the Statute[27] and on the definitions in the Rules of the terms "Accused", "Suspect" and "Victim", the latter referring specifically to natural persons.[28]

9. With respect to Article 3 of the Statute, the *Amicus* Prosecutor contends that the limited use of the pronouns "he" and "she" is not a compelling basis for limiting the Tribunal's inherent contempt powers, as legal systems that do recognise corporate criminal liability do not use the pronoun "it" when setting out the rights of the accused.[29]

10. The *Amicus* Prosecutor also contends that the Contempt Judge erred in holding that the language of Rule 60 *bis*, which provides for custodial sentences and fines, must mean that the drafters did not envisage legal persons as falling under its purview. On the contrary, the alternative between custodial sentences and/or a fine plainly allows for the punishment of both natural and legal persons as do domestic criminal codes providing for corporate criminal liability, including Article 210 of the Lebanese Criminal Code.[30]

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[23] *Id.* at para. 10.
[24] *Id.* at para. 11.
[25] *Id.* at paras 12-14.
[26] *Id.* at paras 18-24.
[27] *Id.* at para. 20.
[28] *Id.* at para. 21.
[29] *Id.* at para. 22.
[30] *Id.* at para. 23.

11. The *Amicus* Prosecutor also disputes that the arguments in support for the Contempt Judge's narrow interpretation of the term "person" can be found in the debates concerning the Statute of the International Criminal Court ("ICC").[31]

12. Further, the *Amicus* Prosecutor contends that the Contempt Judge erred in limiting the jurisdiction of the Tribunal's contempt power with respect to personal jurisdiction since no other jurisdictional aspect of its contempt power is limited by the Statute or Rule 60 *bis* especially since it substantially limits its effectiveness and may result in impunity.[32]

13. The *Amicus* Prosecutor contends that the Contempt Judge erred in stating that to depart from the *societas delinquere non potest* principle requires explicit language to that effect as this maxim is not a rule of international law but only a maxim found in a decreasing number of legal systems.[33]

14. In addition, the *Amicus* Prosecutor contends that the Contempt Judge erred in disregarding relevant national laws and major international trends recognising the criminal liability of legal persons,[34] citing laws from various common law and civil law countries [35] as well as the draft Statute of the African Court of Justice and Human Rights ("ACJHR").[36] The *Amicus* Prosecutor highlights that Lebanese law clearly includes corporate criminal liability.[37] The *Amicus* Prosecutor states that the Contempt Judge wrongly found it "preferable" not to exercise jurisdiction over legal persons when domestic corporate criminal responsibility is being "widely adopted as essential to closing an impunity gap".[38] He adds that a narrow interpretation by the court creates "a zone of impunity" for legal and (indirectly) natural persons whereby the court's power to administer justice is rendered ineffective, even though it is not rendered "meaningless".[39]

15. Finally, the *Amicus* Prosecutor alleges that the Contempt judge erred in stating that Rule 60 *bis* needs to be interpreted in a way most favourable to the accused pursuant to Rule 3 (B) as the ambiguity has been resolved by "abundant law, standards and principles, including the Lebanese Criminal Code and Code of Criminal Procedure" pertaining to the

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[31] Appeal, para. 24.
[32] *Id.* at para. 25.
[33] *Id.* at para. 26.
[34] *Id.* at paras 27-33.
[35] *See* Appeal, paras 28-30, fn. 29.
[36] *Id.* at para. 29.
[37] *Id.* at para. 30.
[38] *Id.* at para. 33.
[39] *Id.* at para. 37.

Tribunal's "inherent contempt power".[40] The *Amicus* Prosecutor argues that Rule 3(B) does not apply in the present case and, even if the Contempt Judge was correct in resorting to its consideration and application, the principle stated in Rule 3 (B) is subject to the principle of effectiveness, which requires that the Tribunal adopt an interpretation that best enables it to achieve its goal to administer justice in a fair and efficient manner.[41]

B. The Defence

16. The Defence responds that the Contempt Judge made no error in ruling that the Tribunal's inherent power is limited to natural persons. It relies on a decision on appeal in the matter of *El Sayed* to show that the Tribunal's inherent jurisdiction is subject to limitations and that it must be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction or matters incidental to it.[42]

17. The Defence relies on the Contempt Judge's interpretation of the principles of treaty interpretation to show that nothing in the contents of Article 3 and 16 of the Statute may extend the personal jurisdiction of the Tribunal to legal entities.[43] If the intention of the STL drafters had indeed been for the term "person" to include "legal persons", then the basic principles of legal drafting would have required Rule 2 (B) of the Rules to explicitly refer to "it".[44] The Defence supports the Contempt Judge's determination that exercising jurisdiction over legal persons requires explicit language to that effect.[45] The Defence submits that the Contempt Judge was right in not according any weight to the trends in national laws in this regard because reference to such sources of law is only permissible when primary and higher sources of law are unclear on the matter in question.[46] In addition, the Defence reiterated the Contempt Judge's findings that Lebanese law was inapplicable.[47] With respect to the Statute of the proposed ACJHR, the Defence noted that the latter is in its draft stages and might recognise this "future exception".[48]

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[40] Appeal, para. 38.
[41] *Ibid.*
[42] Response, paras 18-19.
[43] *Id.* at paras 23-26.
[44] *Id.* at para. 29.
[45] *Id.* at para. 31.
[46] *Id.* at para. 36.
[47] *Id.* at para. 41.
[48] *Id.* at para. 40.

18. With respect to the punishment of the crime of contempt, the Defence contends that the *Amicus* Prosecutor ignores the Contempt Judge's finding that Rule 60 *bis* provides for these two punishments "without distinguishing between natural and legal persons".[49]

19. The Defence adds that no other international tribunal has found it legally permissible to declare unilaterally that it may exercise contempt jurisdiction over legal entities.[50] Furthermore, the principle of effective remedy does not allow the Tribunal to find that it has inherent jurisdiction over legal entities.[51]

20. Finally, the Defence considers that there is no ambiguity in the fact that the term "person" does not include legal entities.[52] If the Appeals Panel finds that such an ambiguity could exist, the Defence submits that, as per Rule 3 (B), an interpretation that is most favourable to the accused should be adopted.[53]

V. DISCUSSION

A. Preliminary matters

1. Admissibility of the Appeal

21. We note that the Certified Issue was formulated by the Contempt Judge *proprio motu* after he was satisfied that Rule 126 (C) did not make a certification of an issue for appeal dependent on the request by the parties.[54] The Contempt Judge found that it was in the interest of a fair and expeditious conduct of proceedings to ensure that appellate resolution of the matter concerning jurisdiction over "corporate Accused indicted in this case" be sought without delay.[55]

22. The Proceedings before the Appeals Panel are governed by the Rules and further regulated by the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Special Tribunal for Lebanon.[56] We consider that the briefs of the Parties meet these requirements and the Appeal is admissible.

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[49] *Id.* at para. 30.
[50] *Id.* at paras 42-43.
[51] *Id.* at para. 47.
[52] *Id.* at para. 48.
[53] *Ibid.*
[54] Impugned Decision, para. 83.
[55] *Id.* at paras 82-83.
[56] STL/PD/2013/07/Rev.1, 13 June 2013 ("Practice Direction").

2. Standard of Review on Appeal

23. Under Article 26 of the Statute and Rule 176 of the Rules, an appeal may be lodged on the grounds of "an error on a question of law invalidating the decision" or "an error of fact that has occasioned a miscarriage of justice". The *Amicus* Prosecutor asserts that the Contempt Judge committed several errors in law that invalidate the Impugned Decision.[57]

24. The Appeals Chamber has adopted the standard of appellate review applicable to alleged errors of law as set out by other international tribunals:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[58]

25. We consider that the jurisdiction on appeal is limited to those issues that are in fact certified.[59] All the arguments relating to issues not covered by the certification decision are liable to be dismissed.[60]

3. Principles of Interpretation of the Rules

26. We recall that Rule 3 contains principles of interpretation which must be applied when considering the meaning of provisions of the Rules and when resolving any ambiguity or *lacuna* in the Rules. Pursuant to Rule 3 (A), the Rules must be interpreted "in a manner consonant with the *spirit*[61] of the Statute and, in order of precedence, with (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) ("Vienna Convention"), (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

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[57] Appeal, paras 7-9.
[58] STL, *The 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, para. 10 (with reference to case-law of the ICTY, ICTR, SCSL and ICC).
[59] *See* STL, *The Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer", 12 May 2014, para. 11.
[60] *See* STL, *The Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber's "Decision on Trial Management and Reasons for Decision on Joinder", 21 May 2014, para. 17.
[61] Emphasis added.

Procedure". Rule 3(B) states that "[a]ny 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".

27. According to Article 31 (1) of the 1969 Vienna Convention, "[a] treaty shall be interpreted 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". Article 31 (2) of the Vienna Convention provides further means for interpretation, such as subsequent relevant agreements or practice as well as "[a]ny relevant rules of international law applicable in the relations between parties". In the context of its interlocutory decision on the Tribunal's applicable law[62] and with respect to the rules of the Vienna Convention, the Appeals Chamber determined that it would also take into account, when interpreting the Statute, "such statements made by members of the Security Council in relation to the adoption of the relevant resolutions, the [Report on the Establishment of STL] [...], and the object and purpose of those resolutions [...], as well as the practice of the Security Council".[63] We note that this reflects a cardinal principle of interpretation that texts should be applied in a manner consistent with the *spirit* of the law.[64] The principle underlying Rule 3 has its basis in this general tenet. A clear distinction is therefore drawn between the *letter* of the law, which requires strict adherence to the words used and employed in the provisions under consideration and the more literal approach, as against the *spirit* of the law which is more liberal and necessitates ascertaining the aim and scope of the Statute as a whole.

28. According to this principle of teleological interpretation, the Appeals Chamber emphasised the need "to construe the provisions of a treaty in such manner as to render them effective and operational with a view to attaining the purpose for which they were agreed

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[62] STL, *The Prosecutor* v. *Ayyash et al.*, STL-11-01/I, F0010, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 25 ("Interlocutory Decision").

[63] Interlocutory Decision, para. 27.

[64] John Salmond, *Jurisprudence*, 4th ed. (Stevens and Haynes, 1931), pp. 138-139: "Interpretation is of two kinds, which Continental lawyers distinguish as grammatical and logical. The former is that which regards exclusively the verbal expression of the law. It does not look beyond the *litera legis*. Logical interpretation, on the other hand, is that which departs from the letter of the law, and seeks elsewhere for some other and more satisfactory evidence of the true intention of the legislature." One of the logical defects noted by Salmond is "ambiguity" in which case he suggests that "it is the right and duty of the courts to go behind the letter of the law, and to ascertain from other sources, as best they can, the true intention which has thus failed to attain perfect expression".

upon".[65] The principle of effectiveness "with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle in *dubio mitius* (in case of doubt, the more favourable construction should be chosen)" is therefore emphasised.[66]

29. As per the hierarchical structure of Rule 3, only if these principles are not helpful or capable of resolving the ambiguity should one then turn to Rule 3 (B) – the interpretation which is more favourable to the accused taking into account the general principle of the non-retroactive application of criminal law (*nullum crimen sine lege*), a specific aspect of the principle of legality and when in case of doubt, one should rule in favour the accused (*in dubio pro reo* or *favor rei*).

30. Finally, in case of conflicting languages of a document authenticated in two or more languages, Article 33 (4) of the Vienna Convention requires that, if after the application of the Articles 31 and 32 of the Vienna Convention, a difference of meaning persists, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

B. The Merits of the Appeal

31. We recall that the Certified Issue is "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".[67] To answer that question, and in light of the arguments of the Parties, we will address the following two issues: (1) whether the Contempt Judge erred in excluding legal persons when interpreting Rule 60 *bis*; and (2) whether the Contempt Judge erred in distinguishing between the Tribunal's material, temporal and territorial jurisdiction on the one hand, and its personal jurisdiction on the other with respect to contempt proceedings.

1. Contempt and Inherent Power

32. We recall that the power of the Tribunal to prosecute for contempt is inherent from its status, character and function as a judicial institution. Its substance and legitimacy is not derived from Rule 60 *bis per se* but rather Rule 60 *bis* is a manifestation of this power and

[65] Interlocutory Decision, para. 28.
[66] Interlocutory Decision, para. 29.
[67] *See* para. 5 above.

not its source.[68] Therefore, inherent jurisdiction over the crime of contempt, as opposed to crimes that fall within our primary jurisdiction, is outlined but not confined by Rule 60 *bis*. By definition inherent jurisdiction is not strictly constrained by the letter of relevant statutory provisions. Indeed, "[i]nternational courts have exercised this inherent jurisdiction in many instances where [...] statutory provisions did not expressly or by necessary implication contemplate their power to pronounce on the [relevant] matter".[69]

2. Whether the Contempt Judge erred in excluding legal persons when interpreting Rule 60 *bis*

33. Rule 60 *bis* of the Rules addresses both the substantive and procedural law regarding contempt proceedings before the Tribunal. In relevant parts, it reads:

> The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal's jurisdiction according to the Statute. This includes, but is not limited to the power to hold in contempt any person who: [...]

34. As a preliminary matter, we consider that the principle raised by the Contempt Judge of *ubi lex voluit dixit, ubi noluit tacuit* (one who wants something says it; one who does not want anything is silent) does not apply in the instant case as the issue is not one where the Rule is silent, but rather is one that concerns the correct interpretation of "person" to include (or not) legal persons under Rule 60 *bis*.

35. It follows that the interpretation of *who* can be prosecuted for contempt revolves around the interpretation of the term "person" (and to a lesser degree of the term "those") pursuant to Rule 3 (A) of the Rules. As stated above, Rule 3 (A) (i) – the first rung in the hierarchy on the means of interpretation – refers to the principles set out in the Vienna Convention on the Law of Treaties according to which one must take into account the ordinary meaning of the terms interpreted in the context of the provisions of the Statute and the Rules, their object and purpose.

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[68] We note that "[t]he extensive practice of international courts and tribunals to make use of their inherent powers and the lack of any objection by States, non-state actors or other interested parties evince the existence of a general rule of international law granting such inherent jurisdiction". STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 ("*El Sayed* Appeal Decision on Jurisdiction"), para. 47.
[69] *Id.* at para. 46.

a. Interpretation According to the Vienna Convention Principles (Rule 3 (A) (i))

36. We will first look at the ordinary meaning of the term "person". We note that this ordinary meaning is not varied, although it may depend on the specific legal cultures that define it.[70] It is the context in which the term is used that is often considered more important than its strict definition. Nothing in the text of the Rules in all three official languages suggest that the use of the term "person" in Rule 60 *bis* would, on its face, exclude legal persons and be limited to natural persons only. On the contrary, the ordinary definition of the term "person" in a legal context can include a natural human being or a legal entity (such as a corporation) that is recognized by law as the subject of rights and duties.

37. As stated above, we recall that the Rules - and the Statute - are drafted in three official languages, Arabic, English and French as per Article 14 of the Statute. In the heading of Rule 60 *bis* reproduced above, the relevant terms used in Arabic are "كل من", in English they are "those" and "a person" while the French terms are "*quiconque*" and "*toute personne*". In the procedural part of the rule, the drafters refer to "شخص" in Arabic, "a person" in English and "*une personne*" in French. Accordingly, a plain reading of Rule 60 *bis* in all three languages does not demonstrate any difference in meaning between any of the versions of the Rules as concerns the use of this terminology. It does not suggest that what was meant by the drafters was not "person" but rather "individual" for instance. On the contrary, we note that when the drafters of the Rules specifically intended to be restrictive in their definition of a

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[70] *Al-Munjid fi al-lugha al-'arabiya al-mu'asira* (Dictionary of Contemporary Arabic), Dar-El-Machreq, Third Edition, 2008, defines شخص as "فرد من الناس، كائن بشري، إنسان" which means an individual, a human being then adds the definition of a legal person as " شخص معنوي: هيئة أو جماعة يعتبرها القانون كأنها شخص حقيقي فيقرر لها الحقوق ويفرض عليها الواجبات ويجيز لها التعامل مع الآخرين واكتساب الحقوق" which means "an entity or group considered by law as a real person and which is consequently given rights and obligations, is permitted to deal with others and may acquire and exercise rights".
The Merriam-Webster dictionary (http://www.merriam-webster.com/dictionary/person) defines person as follows:

1. Human, Individual – sometimes used in combination especially by those who prefer to avoid man in compounds applicable to both sexes
2. A character or part in or as if in a play

[...]

5. The personality of a human being
6. One (as a human being, a partnership, or a corporation) that is recognized by law as the subjects of rights and duties.

Le Nouveau Petit Robert, Nouvelle édition millésime 2009, defines person as "*individu en général*" which means an individual and adds the definition of a person in a legal sense as "*individu ou groupe auquel est reconnue la capacité d'être sujet de droit*" which means individual or group that is recognized by law as a legal subject.

natural person, they chose to be explicit in that respect as exemplified by the definition of a victim under Rule 2 of the Rules.[71]

38. With respect to the interpretation of the term "person" in Rule 60 *bis* "in a manner consonant with the spirit of the Statute", we note that both Judge Baragwanath[72] and Judge Lettieri,[73] in their capacities as contempt judges, referred to the gendered language contained in the Statute in Article 3 (2)-(3) (the use of the words "his or her/him or her") and Article 16 in their respective decisions concerning the Tribunal's jurisdiction *ratione personae*. In this, we find that Judge Lettieri's interpretation of the word "person" in Rule 60 *bis* appeared to have been in a manner consonant with the letter of the Statute rather than its spirit. This led to the Contempt Judge erroneously concluding that the term "person" in Rule 60 *bis* should exclude legal persons.

39. We also note that in both instances exclusive reference was made to the Statute's English version. However, unlike the English version, the Arabic and French versions of the Statute do not contain gendered language. In this respect, as aforementioned, we have been guided in reading the texts in their authentic languages by Article 33 (4) of the Vienna Convention.[74] Whilst the Statute is not a formal treaty between States to which the Convention would normally apply,[75] the Appeals Chamber has previously endorsed its application, at least insofar as it codifies customary international law, in interpreting the Statute.[76] We endorse and apply this approach to the present matter.

40. In addition, we recall that, as noted by the *Amicus* Prosecutor, both the Report on the Establishment of STL and Security Council Resolution 1664 (2006) did not prescribe the personal jurisdiction of the Tribunal, while Article 1 of the Statute simply provided that the Tribunal shall have jurisdiction "over persons" responsible for the crimes.[77]

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[71] Victim: a natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction.
[72] Indictment Decision, para. 22.
[73] Impugned Decision, para. 63.
[74] Article 33 (4) of the Vienna Convention dictates that in instances of language inconsistencies which are not removed by the application of Articles 31 and 32, then "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". In the view of the Appeals Panel, this approach corresponds with the directive in Rule 3 (A) to interpret the STL Rules "in a manner consonant with the spirit of the Statute".
[75] *See* Article 1, Vienna Convention.
[76] Interlocutory Decision, para. 26. As the International Court of Justice has held, Article 33 (4) of the Vienna Convention indeed reflects customary international law: ICJ, *LaGrand* (*Germany v. United States America*), Judgment, ICJ. Reports 466 (2001), para. 101, p. 502.
[77] Report on the Establishment of STL, paras 19-20.

41. With respect to the role of the case law of the *ad hoc* international criminal tribunals, it may be informative insofar as these tribunals were also established by Security Council resolutions and share commonalities in their respective applicable law. However, the fact that none of these courts has prosecuted legal persons in contempt proceedings in analogous circumstances[78] only means that this issue has not been previously adjudicated and determined by an international tribunal. There has simply been no legal pronouncement on this specific issue as the different Prosecutors of the various international criminal tribunals have not previously sought to undertake such an endeavour.

42. As to the object and purpose of the term "person" used in Rule 60 *bis*, we recall that contempt proceedings are designed to hold accountable those who interfere with the administration of justice to ensure that the exercise of the Tribunal's primary jurisdiction "is not frustrated and that its basic judicial functions are safeguarded"[79] as well as to deter future acts of contempt by punishing the offender(s). In this respect, we find that the Contempt Judge erred by inferring that only if the Tribunal's jurisdiction was rendered "meaningless" would it be proper to extend the Tribunal's personal jurisdiction so as to include legal persons.[80] We do not accept that charging legal persons with contempt under Rule 60 *bis*, in the exercise of the Tribunal's inherent power, necessarily extends the Tribunal's jurisdiction over contempt.[81] When operating within the realm of our inherent power, our jurisdiction remains undefined, only to be determined upon the crystallization of circumstances that call for a judicial pronouncement.

43. The Contempt Judge also erred in his reasoning as to the relevance of state practice towards criminalizing the acts and conducts of legal persons in domestic jurisdictions. In the Impugned Decision, the Contempt Judge held that he could not determine a consensus in the domestic criminal systems of the world with respect to corporate liability and neither could he find the ordinary meaning of the term "person" in the international criminal law context to

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[78] *See* for example: ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-R77.2, Public Edited Version of "Judgement on Allegations of Contempt" Issued on 24 July 2009, 24 July 2009 (where the accused was convicted of contempt for publishing in a book confidential information relating to his case); ICTY, *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 (where the accused was convicted of contempt for publishing confidential information relating to an ICTY case).

[79] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 18.

[80] Impugned Decision, para. 67.

[81] *Id.* at para. 68: "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."

include legal persons. He added that the maxim *societas delinquere non potest* (a legal entity cannot be blameworthy) requires that there must either be an explicit inclusion of legal persons in the term "person" or other similar positive expression of such an intent in the definition – either in the Tribunal's Statute or the Annex to Security Council Resolution 1757.[82]

44. On the contrary, as exemplified in the following section of this decision, we consider that the Contempt Judge's approach does not accord adequate consideration and currency to the growing number of states criminalizing the acts and conducts of legal persons.[83] Instead, this is one factor, among others, that overwhelmingly supports a broader interpretation of Rule 60 *bis* as it concerns personal jurisdiction.

b. Interpretation According to International Standards on Human Rights and General Principles of International Criminal Law and Procedure (Rule 3 (A) (ii) and (iii))

i. International Standards on Human Rights

45. In examining international standards on human rights, we consider that they include not only the rights of the accused[84] – legal persons in the present case – but also the standards that are applicable to remedying the results of their conduct. As such, we look to trends that address corporate acts that violate human rights in our interpretation of Rule 60 *bis*, while ensuring consistency with the accused's rights in a criminal context.

46. As a preliminary matter, we note that there is an emerging shared international understanding on the need to address corporate responsibility. We consider that international human rights standards and the positive obligations arising therein are equally applicable to legal entities.[85] The United Nations Human Rights Council ("HRC") has recognised that

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[82] *Id.* at para. 63.

[83] In particular we recognize the comments of an eminent Italian criminal law scholar who, over 40 years ago, concluded that "the principle *societas delinque non potest* has no ontological value but is an expression of the force of the laws of economic power: when the latter is not at stake, the principle falls apart[.]" Franco Bricola, "*Il costo del princio «societas delinquere non potest» nell'attuale dimensione del fenomeno societario*", *Rivista italiana di diritto e procedura penale* 951 (1970), 1031.

[84] *See* Rule 69: "An accused shall enjoy the rights enshrined in Article 16 of the Statute, as well as, *mutatis mutandis*, the rights conferred on suspects by Rules 65 and 66." By virtue of Rule 60 *bis* (H), this rule applies to contempt proceedings before the Tribunal.

[85] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8: "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State,

private companies need to conform to international law as well as the Guiding Principles on Business and Human Rights.[86] The HRC issued a final report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises[87] and presented the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" ("UN Guiding Principles").[88] This represents a concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability.[89] Although we are wary that such instruments are non-binding, in light of the fact that corporations have been considered subjects of international law,[90] the possibility of proceeding against a corporation through criminal prosecution cannot discarded but rather criminal regimes are regarded as an available remedy. The Appeals Panel considers these factors to be evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights.

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not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities". See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Principle 25: "[a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights".

[86] *See* for example, HRC, Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRC/22/63, 7 February 2013, para. 117.

[87] HRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31, 21 March 2011.

[88] Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04, 2011.

[89] The UN Guiding Principles note the following which are relevant to the discussion of corporate liability: States should "ensur[e] that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses" (UN Guiding Principle 7 (d)); "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy" (UN Guiding Principle 26); business enterprises should "[c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate" (UN Guiding Principle 23 (a)). It is worth mentioning that prior to this, the UN General Assembly ("UNGA") resolved that "[i]n cases where a person, a *legal person*, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim[.]": Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005 ("Basic Principles"), para. 15 (emphasis added).

[90] ICJ, *Case Concerning the Barcelona Traction, Light & Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, 5 February 1970, ICJ Reports 1970, p. 3 ("*Barcelona Traction*"), p. 38, para. 52.

47. We have considered various UN resolutions where corporate accountability has been emphasised.[91] The HRC has unanimously endorsed the UN Guiding Principles in 2011[92] and key elements of the UN Guiding Principles have been incorporated in the OECD Guidelines for Multinational Enterprises.[93] We note however that the UN Guiding Principles do not outline the liability for corporations by themselves but urge States and corporations to adhere to certain principles in the area of business and human rights and do not delve into situations of contempt as such. Nevertheless, we consider that the substance of these efforts is an indicator of the evolving practice in relation to corporations at the global level, in particular with respect to remedies for their transgressions.

48. We consider that the interpretation of Rule 60 *bis*, taking into account international standards of human rights, leads to the conclusion that – in principle – judicial remedies are not barred against a legal person on account that some national laws limit the applicability of criminal law to legal persons.

49. More recently, a study commissioned by the Office of the High Commissioner for Human Rights concerning the effectiveness of domestic judicial mechanisms in relation to corporations concluded that:

> most jurisdictions appear to recognise the possibility of corporate criminal responsibility (if not as a general concept then at least in relation to specific offences or types of offences). However some jurisdictions, for constitutional or doctrinal reasons, do not. This does not mean that corporate entities in these jurisdictions (which include Germany, Italy and Ukraine) enjoy complete impunity. Instead, corporate wrongdoing is dealt with through a system of administrative offences and penalties.[94]

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[91] *See* HRC Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, UN Doc. A/HRC/RES/21/5, 16 October 2012; HRC, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4, 6 July 2011; HRC, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/RES/8/7, 18 June 2008; Commissioner for Human Rights ("CHR"), Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. E/CN.4/RES/2005/69, 20 April 2005; ECOSOC, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

[92] HRC, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4, 6 July 2011, para. 1.

[93] *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, 2011).

[94] Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, 2014, p. 32.

50. We consider that the absence of unanimous international acceptance of criminal liability for corporations does not necessarily entail that they are entirely exempted from the application of criminal law. Further, we concur with the opinion that:

> corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.[95]

51. While making an inquiry into the international standards on human rights, we also look to various national laws concerning corporate criminal liability and examine the direction of comparative trends. We shall explore whether a trend in domestic practice may influence the interpretation of "person". At the outset, we note that too much importance need not be attached to a few uncertainties or contradictions, real or apparent, in State practice when making an evaluation; it is enough that the practice is sufficiently similar.[96]

52. We consider it relevant that many European States have laws that provide for genuine corporate criminal liability. These include for example, Austria,[97] Belgium,[98] Croatia,[99] Cyprus,[100] Czech Republic,[101] Denmark,[102] Finland,[103] France,[104] Hungary,[105] Iceland,[106]

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[95] HRC, Report of the Special Representative of the Secretary-General on the Issue of Human rights and Transnational Corporations and other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, 19 February 2007, para. 22.

[96] See for example, in an analogous context addressing State practice for the purposes of identifying a rule of customary international law: ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 98, para. 186: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules [...]".

[97] The Law on the Responsibility of Associations (*Verbandsverantwortlichkeitsgesetz*) of 2005 makes applicable criminal offenses contained in the Austrian Penal Code (*Strafgesetzbuch*, "StGB") and in other laws to legal persons.

[98] Article 5 of the Belgian Criminal Code provides: « *Toute personne morale est pénalement responsable des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte. Lorsque la responsabilité de la personne morale est engagée exclusivement en raison de l'intervention d'une personne physique identifiée, seule la personne qui a commis la faute la plus grave peut être condamnée. Si la personne physique identifiée a commis la faute sciemment et volontairement, elle peut être condamnée en même temps que la personne morale responsable* ». Further, the penalties that can be imposed on corporate entities are stipulated in Article 7 *bis* of the Belgian Criminal Code.

[99] According to Article 3 of the Act on the Responsibility of Legal Persons for Criminal Offences (No. 151/03) "The legal person shall be punished for a criminal offense of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person."

[100] Section 4 of the Criminal Code of Cyprus defines a "person" to include legal persons, thus criminalizing their conduct under the Code unless otherwise provided. Further, procedural aspects of criminal law relating to legal

Lithuania,[107] The Netherlands,[108] Norway,[109] Portugal,[110] Romania,[111] Spain,[112] Switzerland[113] and the United Kingdom.[114] We address separately and in more detail Germany and Italy as these two States were invoked by the Contempt Judge as examples of the "many important legal systems where corporate liability is not accepted".[115]

53. In Germany, while direct criminal responsibility cannot be imposed on companies,[116] it is possible to impose sanctions of forfeiture and confiscation against them.[117] In addition, in 1953 the *Bundesgerichtshof* (Federal Court of Justice) stated that while corporations could be found criminally liable under provisions in place at that time, criminal penalties against corporations were contrary to the history of German criminal law.[118] We note, however, that

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persons is regulated by specific provisions of the Criminal Procedure Law, including sections 46 (1) (b) (service of process), 72 (appearance and pleas), 95 (committal).

[101] Act No. 418/2011 Coll., on Corporate Criminal Liability, §§ 2-3 provide that a corporate entity registered or conducting its business in the Czech Republic or otherwise has assets in the Czech Republic can criminally liable. Czech corporate entities can also be punished under the Act for criminal offences committed abroad.

[102] According to Section 25 of the Danish Criminal Code, a company is subject to criminal punishments provided for by Danish law (or regulations issued pursuant to Danish law).

[103] Under Chapter 9, Sections 1-10 of Finland's Criminal Code, a corporation, foundation or other legal entity can be sentenced to a corporate fine if such a sanction has been provided for in the Finnish Criminal Code.

[104] Under Article 121-2 of the French Criminal Code, legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives.

[105] Section 70 (1) (8), (3) of the Hungarian Criminal Code and Act CIV of 2001 on Criminal Measures Applicable to Legal Persons.

[106] Pursuant to Article 19 a-c of the General Criminal Code of Iceland, legal persons can be held criminally liable for the acts and conduct committed by their employees or persons acting on their behalf.

[107] Article 20 of the Lithuanian Criminal Code provides from the criminal liability of legal persons.

[108] Article 51 of the Dutch Criminal Code establishes criminal liability for legal persons.

[109] Chapter 3 a, Article 48 a-b of the Norwegian Civil Penal Code provides for the criminal liability of companies, societies and other associations.

[110] Article 11 (2) of the Portuguese Criminal Code provides criminal liability for legal persons for a number of specific offences.

[111] Article 45 (1) of the Romanian Criminal Code provides for the criminal liability of legal entities with the exclusion of the State.

[112] Article 31 *bis* of the Spanish Criminal Code provides for the criminal liability of legal persons for offences committed in their name, on their behalf and for their benefit by their legal representatives or their administrators.

[113] Article 102 of the Swiss Criminal Code provides for corporate criminal liability for specific offences and imputes other crimes relating to commercial activities to a corporation where the acts in question cannot be attributed to natural persons.

[114] In the UK, the common law has recognised corporate criminal liability since at least the nineteenth century. In more recent times, statutes have included corporate criminal liability in two specific instances: Corporate Manslaughter and Corporate Homicide Act 2007 and the Bribery Act 2010.

[115] Impugned Decision, para. 74.

[116] Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing, 2009), p. 23.

[117] Pursuant to Sections 73 and 74 read with Sections 14 and 75 of the German Criminal Code, confiscation and deprivation orders serve to remove advantages gained from criminal offences and to deprive control over objects when they were used or intended to be used for the commission or preparation of an offence.

[118] *Bundesgerichtshof* [Federal Court of Justice], 27 October 1953. No. 5 StR 723/52, at 32 (Ger.) discussing the issue of *Strafbarkeit juristischer Personen* (criminal liability of legal persons).

this appears to be undergoing change. For example, in November 2013, the state of North Rhine-Westphalia introduced a draft law on corporate criminal liability.[119]

54. In Italy, administrative vicarious liability has been recognised for crimes committed by employees of corporate entities. This was first introduced by *Decreto Legistativo* no. 231 of 2001 ("Law 231"), under which sanctions of a punitive nature can be imposed on companies for acts that are criminal in nature.[120] These include: extortion, corruption, corporate crimes, counterfeiting of money, terrorism, crimes directed towards the subversion of the democratic system, money laundering, crimes against persons, and cross-border crimes.[121] Further, certain sanctions during the investigative phase of the proceedings can be imposed on the company through provisional orders and measures (*misure cautelari*) where serious *indicia* exist indicating the responsibility of entity and there is risk of the criminal conduct being repeated.[122] In addition, Italy also recognises that administrative sanctions against companies can be imposed jointly and severally with the natural offenders.[123] Other legal provisions impose sanctions directly on the company.[124] It is telling that proceedings under Law 231 explicitly incorporate provisions of the Italian Criminal Code[125] and stipulate the application of the Criminal Procedure Code.[126] These factors suggest that proceedings against companies in Italy, whilst not technically criminal in nature, may have similar practical effects.

55. In addition to Europe, States from varied legal cultures have embraced criminal liability for corporations. These includes Australia,[127] Bahrain,[128] Bangladesh,[129] Brazil,[130]

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[119] *Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden* 13, *Bundesrat Drucksachen* [BR].
[120] Articles 5-6, Law 231.
[121] Articles 24-26, Law 231.
[122] Article 45, Law 231.
[123] *See* for example Article 195 (9) of the Legislative Decree No. 58/1998.
[124] *See* for example Article 75 of Legislative Decree No. 58/1998 (providing for the revocation of market authorization if certain irregularities are exceptionally serious); Article 6 (5) of Legislative Decree No. 374/1999 (imposing pecuniary sanctions in instances of money laundering and financial activities liable to be used for money laundering purposes).
[125] Articles 24-26, Law 231.
[126] Article 34, Law 231.
[127] Criminal Code 1995 (Cth), Part 2.5, Sections 12.1-12.6 provides for corporate criminal responsibility.
[128] Article 3.3 of the Bahraini Decree Law 4/2001 establishes corporate criminal liability for money laundering.
[129] Sections 2 and 11 of the Bangladeshi Penal Code provide that any company, association or body of persons shall be criminally liable for offences contained within the Code.
[130] Article 3 of Brazilian Federal Law 9.605/98 provides for, *inter alia*, criminal liability for both natural persons and legal entities.

Canada,[131] Chile,[132] China,[133] Egypt,[134] Guatemala,[135] India,[136] Indonesia,[137] Jamaica,[138] Japan,[139] Kenya,[140] Lebanon,[141] Malaysia,[142] Morocco,[143] New Zealand,[144] Senegal,[145] South Africa,[146] South Korea,[147] Syria,[148] United Arab Emirates[149] and the United States.[150]

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[131] Section 2 of the Canadian Criminal Code, R.S.C., 1985, c. C-46, defines "person" as including an organization which in turn refer to, *inter alia*, a body corporate and companies. Sections 21-22 elaborate that such entities may be parties to criminal offences.

[132] Law 20.393 (2009) provides for criminal responsibility of legal persons.

[133] Article 30 of the Chinese Criminal Code provides for criminal liability for, *inter alia*, companies and enterprises in specific circumstances.

[134] Article 16 of Egyptian Law No. 80 of 2002 (promulgating the anti-money laundering law) provides for corporate criminal liability for money laundering.

[135] Article 38 of the Guatemalan Criminal Code provides for the criminal responsibility of legal persons.

[136] Sections 2 and 11 of the Indian Penal Code provide that any company, association or body of persons shall be criminally liable for offences contained within the Code.

[137] Various Indonesian laws impose criminal liability on legal persons for various specific offences: Articles 1 (24) and 41-48, Law No. 23 of 1997 (Law Concerning Environmental Management) provide for criminal liability of legal persons for environmental related offences; Article 1 (3), Law 31 of 1999 (Eradication of the Criminal Act of Corruption) provides for that law's application to corporations.

[138] Sections 14 (4) and 15 (1) of the Jamaican Corruption (Prevention) Act provides that corporations are capable of committing criminal acts of corruption.

[139] The Act Preventing Escape of Capital to Foreign Countries (1932) introduced the "Ryobatsu-Kitei" concept into the law of Japan. This provided that a legal person is liable to punishment where its agent, employee or other representative (natural persons) commit an offence. This has been subsequently introduced into various Japanese laws: Article 207, Securities and Exchange Act of 2002; Article 163 (1), Corporation Tax Act of 2013, and Article 22 (1) of the Unfair Competition Prevention Act 2005.

[140] Section 23 of the Kenyan Penal provides that, *inter alia*, companies and body corporates can commit criminal offences.

[141] Article 210 of the Lebanese Criminal Code provides that legal persons shall be criminally responsible for the actions of their directors, management staff, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal persons.

[142] Section 11 of the Malaysian Penal Code defines a "person" as including companies, associations or body of persons.

[143] Articles 127 of the Moroccan Criminal Code stipulates that legal persons can commit criminal offences and be punished accordingly.

[144] Section 2 of the Crimes Act of 1961 and Section 29 of the Interpretation Act of 1999 define "person" as including, *inter alia*, companies and corporations.

[145] Article 163 *bis* of the Senegalese Penal Code provides that legal persons can be prosecuted for illicit enrichment.

[146] Section 332 of the South African Criminal Procedure Act 51 of 1977, Section 332 provides for corporate criminal liability.

[147] Article 4 of the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions of 1998 provides for the criminal responsibility of legal persons.

[148] Article 209 (2) of the Syrian Criminal Code provides that legal persons shall be criminally responsible for the actions of their directors, management staff, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal persons.

[149] Article 65 of the United Arab Emirates Penal Code provides for the responsibility of legal persons for criminal acts.

[150] *See* US Model Penal Code, section 2.07. In particular, the US Supreme Court has upheld the imposition of criminal liability on corporations: *NY Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 23 February 1909. It is worth noting that the issue of corporate liability for violations of the law of nations in the context of the Alien Tort Statute cases has been a source of ongoing debate in the United States with an unresolved split appearing at the federal Circuit Court level. *See* US Court of Appeals (Second Circuit), *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 17 September 2010; US Court of Appeals (D.C. Circuit), *Doe VIII v. Exxon Mobil Corporation*, 654 F.3d 11, 8 July 2011; US Court of Appeals (Seventh Circuit), *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 11 July 2011; *Sarei v. Rio Tinto, PLC*, 671 F.3d 736,

56. In particular, we note that in the United States, in the early days of corporate criminal liability, some courts faced much the same question as we do in this case: whether in the absence of an express statutory provision a court can have jurisdiction over a crime committed by a corporation. The following holding is of interest:

> Of course, there are certain crimes of which a corporation cannot be guilty; as for instance, bigamy, perjury, rape, murder, and other offences which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by the natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not express corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation, – as, for instance, a fine. [...] Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of the statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law should receive the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to congress, unless its language will admit of no other interpretation.[151]

57. We find these words compelling and insightful to the case in consideration. Of course, since those days much has changed. But then, as now in international law, corporate criminal liability was still in development in its domestic setting. Then, as in our situation with Rule 60 *bis*, the relevant legal provision did not expressly exclude legal persons and provided for fines in addition to imprisonment. It is in our view relevant and informative that in such a setting a conclusion was reached on the basis of an interpretation of legal provisions in a manner consistent with the need to ensure that legal persons would not be immune from criminal accountability.

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25 October 2011. We note however that these cases are in a civil law, rather than in a criminal law, context. *See* further James G. Stewart, "The turn to corporate criminal Liability for International Crimes: Transcending the Alien Tort Statute", 47 *New York University Journal of International Law and Politics* (2014) (forthcoming).

[151] US District Court – Northern District of California, *United States v. John Kelso Co.* 86 F. 304, 11 April 1898, pp. 306-307. *See* also Supreme Court of Illinois, *People v. Duncan* 2 N.E.2d 705, 12 May 1936, p. 706: "While it is the generally recognized rule that a corporation may be proceeded against criminally for the violation of a penal statute [...], yet exceptions must be made to this general rule. There are certain crimes which a corporation, on account of its very nature, cannot commit. Where a penalty prescribed for the violation of a criminal statute calls for imprisonment or death only, a corporation cannot be indicted. Where the statutory penalty is both fine and imprisonment, the corporate offender can be punished by imposing a fine, inasmuch as the two penalties are independent. [...] The theory is that a court shall apply the appropriate penalty in such instances as far as possible, in order that the corporate defendant shall not escape all punishment."

58. We acknowledge that the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems. However, it is apparent that in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal – and not a natural – person.

59. While international law has not evolved to the stage where the subjection of a corporate person to criminal liability has become imperative on States, in exercising our inherent power over contemptuous conduct the Appeals Panel need not be constrained by this fact. Rather, our inherent jurisdiction "over any issue that is incidental to [our] primary jurisdiction and the determination of which serves the interests of fair justice" is limited by "the principles of [the] fair administration of justice and [the] full respect for human rights[.] [...] [I]nherent jurisdiction may not be exercised in a manner inconsistent with the fundamental rights of the accused or of any other person involved in the criminal proceedings". [152] In our view, this allows the Appeals Panel to interpret the term "person" to include legal entities in the exercise of the Tribunal's inherent power over contempt proceedings.

60. Therefore, we find that the Contempt Judge erred in not giving sufficient weight to domestic practice under Rule 3 (A) in interpreting the trend criminalizing the acts of legal entities. We find that the current international standards on human rights allow for interpreting the term "person" to include legal entities for the purposes of Rule 60 *bis*.

ii. General Principles of International Criminal Law and Procedure

61. At the outset, we note that corporate personality and liability in domestic legal systems around the world demonstrates – independently of treaties or customary international law – that legal responsibility accompanies legal personality.[153] International law has long since recognised the exposure of non-human entities to liability under international

[152] *El Sayed* Appeal Decision on Jurisdiction, paras 48-49.

[153] In *Barcelona Traction*, the ICJ explicitly recognized corporate personhood: "international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. [...] [I]nternational law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction." *See Barcelona Traction*, at p. 33, para. 38. *See also* ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007, ICJ Reports 2007, p. 582, at p. 605, para. 61.

standards.[154] For instance, one historical way to enforce international prohibition on the slave trade has been to condemn the vessel involved.[155]

62. For the purpose of the inquiry whether general principles of international criminal law and procedure support the interpretation of legal entities in the definition of "person" under Rule 60 *bis*, we consider instances in international law where legal entities and criminal law have intersected.

63. In the immediate post-World War II period, various representatives and employees of corporate entities were put on trial for their involvement, and that of their companies, in international crimes.[156] In particular, *obiter dicta* comments were made that juridical entities were bound by (and could even breach) international standards, including those codified in the 1907 Hague Regulations on the Laws and Customs of War.[157] In addition, the Charter of the International Military Tribunal ("IMT") at Nuremberg specifically authorised that court to

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[154] The most prominent of these are of course, States. Indeed, the ICJ has held that a state may even possess genocidal intent in specific circumstances: ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, p. 43, at p. 143, para. 242. In response to this outcome, the late President Cassese commented that if an abstract entity such as a State could possess *dolus specialis* and be held responsible for genocide, then "the same should apply to corporations" and added that he "would therefore support criminal liability of corporations for genocide – corporations acting through their agents, of course". *See* Antonio Cassese, "Discussion – Boundary of Corporate Liability and the Nature of International Crimes: Between Individual Responsibility and State Criminality", 6(5) *Journal of International Criminal Justice* 947 (200), 969.

[155] Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012), pp. 67-98.

[156] See in particular, *United States v. Krauch et al.*, in *Trials of War Criminals before the Nuernberg Military Tribunals – Volume VIII: The I.G. Farben Case* (Nuernberg Military Tribunals, Washington D.C., 1952), pp. 1081-1325 (relating to the criminal responsibility of 23 employees and others of I.G. Farben, a major German chemical and pharmaceutical manufacturer); *United States v. Flick et al.*, in *Trials of War Criminals before the Nuernberg Military Tribunals – Volume VI: The Flick Case* (Nuernberg Military Tribunals, Washington D.C., 1952), pp. 1187-1223 (relating to the criminal responsibility of Flick and five leading officials of his Flick Concern (group of companies)); *United States v. Krupp et al.*, in *Trials of War Criminals before the Nuernberg Military Tribunals – Volume IX: The Krupp Case* (Nuernberg Military Tribunals, Washington D.C., 1950), pp. 1327-1474 (relating to the criminal responsibility of twelve former directors of the Krupp Group); *Trial of Toda Mitsugu and eight others (Kinkaseki Mine Trial)*, Case No. WO235/1028, Military Court for the Trial of War Criminals No. 5, 1947 (relating to the criminal responsibility of nine civilian staff of the Nippon Mining Company).

[157] *United States v. Krauch et al.*, in *Trials of War Criminals before the Nuernberg Military Tribunals – Volume VIII: The I.G. Farben Case* (Nuernberg Military Tribunals, Washington D.C., 1952), pp. 1132-1133: "[W]here a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations."; p. 1140: "[W]e find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 *were committed by [IG] Farben*, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries as above described. [...] The action of [IG] Farben and its representatives, under these circumstances, cannot be differentiated from the acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich" (emphasis added). But see p. 1153: "the corporate defendant, [IG] Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings".

designate any group or organisation as criminal.[158] Consequently, a number of Nazi organisations were indicted and so declared.[159] While ultimately only natural persons were ever punished, there is evidence that legal persons did not escape accountability: private industrial assets were confiscated and dismantled, creating a system of reparations for those injured during the Nazi period.[160]

64. We note however that the IMT's judgement dismissed the notion of imposing liability on abstract entities instead of individual perpetrators.[161] Nevertheless, this finding was *obiter dictum* – as no abstract entity could be found guilty of crimes before the IMT – and was made specifically to repudiate arguments submitted by the accused's defence that would have seen them hide behind Germany's international legal personality in order to avoid punishment.[162]

65. Further, we are cognisant of historical evidence demonstrating that the underlying reasons as to why corporate criminal liability was not developed in Control Council Law No. 10 proceedings was not because of any legal determination that it was impermissible under international law at that time.[163] Rather, history suggests that logistical and policy

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[158] Article 9, Charter of the International Military Tribunal, 8 August 1945: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization".

[159] These included the Leadership Corps of the Nazi Party, the *Geheime Staatspolizei* (Gestapo) and the *Sicherheitsdienst* (SD), and the *Schutzstaffel* (SS). See *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (International Military Tribunal, Nuremberg, 1947), pp. 255-279.

[160] Articles I, III, Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, 30 November 1945 (specifically directing the confiscation and dispersal of IG Farben's assets). A subsequent directive provided further details about how this would be achieved. *See* Allied High Commission Law No. 35, *Dispersion of Assets of I.G. Farbenindustrie*, 17 August 1950. The Control Council would go on to confiscate, dissolve and liquidate a number of other German companies and their assets for their involvement in the German war effort: Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies connected with the German Labor Front*, 6 September 1947; Control Council Directive No. 39, *Liquidation of German War and Industrial Potential*, 2 October 1946; Control Council Directive No. 47, *Liquidation of German War Research Establishments*, 27 March 1947.

[161] *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (International Military Tribunal, Nuremberg, 1947), p. 223: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international be enforced".

[162] *Id.* at pp. 222-223: "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected".

[163] See, for example, Memorandum from A. L. Pomerantz to General Telford Taylor, *Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate Entities*, 27 August 1946, in Jonathan Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", 109(5) *Columbia Law Review* 1094 (2009), 1248. We add that, in addition to the analysis conducted therein, Control Council Law No. 10, like our Rule 60 *bis*, contained both penalties of imprisonment *and* fines. See

concerns resulted in the fact that no legal persons were tried as separate legal entities as such.[164]

66. Since then, there have been a varied number of international treaties recognising criminal liability for legal entities which does not suggest that they enjoy impunity for their actions.[165] With respect to the omission of corporate criminal liability in the Rome Statute of the ICC as raised by the Parties,[166] we note that that treaty did not purport to codify existing principles emanating from customary international law or to be applicable outside the confines of the ICC.[167] The omission of legal persons from the Rome Statute should not be interpreted as a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law.[168] We thus hold that no definitive legal conclusion can be drawn from the exclusion of legal persons from the

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Article II (3) (a)-(f), Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945.

[164] Jonathan Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", 109(5) *Columbia Law Review* 1094 (2009), 1239.

[165] International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted 30 November 1973, 1015 U.N.T.S. 243, Article I (2): "The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid."; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Adopted 22 March 1989, 1673 U.N.T.S. 57, Article 2 (14): "For the purposes of this Convention: [...] 'Person' means any natural or legal person", Article 4: "The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal"; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted 21 November 1997, S. Treaty Doc. No. 105-43, Article 2: "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official", Article 3 (3): "Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable"; Second Protocol to European Convention on the Protection of the European Communities' Financial Interests, Adopted 19 June 1997, No. C 221/11, Article 3, Liability of legal persons: "Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person [...]", Article 4, Sanctions for legal persons: "Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines"; Convention against Transnational Organized Crime, Adopted 15 November 2000, 2225 U.N.T.S. 209, Article 10 (2): "Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative"; Council of Europe Convention on the Prevention of Terrorism, Adopted 16 May 2005, C.E.T.S. No. 196 (2005), Article 10 (2): "Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative".

[166] Appeal, para. 24; Response, para. 31.

[167] See Article 10 of the Rome Statute: "[n]othing in this Part [addressing jurisdiction, admissibility and applicable law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

[168] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records. Vol. II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.1, 16 June 1998, pp. 133-136 (with the Chairman noting that "the debate confirmed the substantive difficulties involved in addressing the criminal responsibility of criminal organizations [...]", para. 66).

jurisdiction *ratione personae* of the ICC. Instead, it is a reflection of the lack of a *political* (rather than legal) consensus to provide such jurisdiction in the Rome Statute.[169]

67. While it remains true that no post-World War II international criminal court or tribunal has previously found that it had the authority to try legal persons,[170] this singular fact does not convince the Appeals Panel that the term "person" under Rule 60 *bis* excludes legal persons[171] when seen through the prism and nature of the Tribunal's inherent power to protect the integrity of its proceedings. Indeed, corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law. Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that, given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.

c. Interpretation According to the Lebanese Code of Criminal Procedure (Rule 3 (A) (iv))

68. The Lebanese Code of Criminal Procedure is the last source of interpretation under Rule 3 (A) which specifically derives from the hybrid nature of the Tribunal. Though Rule 3 (A) (iv) refers to the Lebanese Code of Criminal Procedure only and not the Lebanese Criminal Code, we consider that in this particular context, where a rule is declarative of the Tribunal's inherent power over the crime of contempt, it is relevant to draw upon the Lebanese Criminal Code which lists substantive criminal offences as opposed to the Lebanese Code of Criminal Procedure which, by nature, merely addresses procedural aspects. Indeed, Article 2 of the Statute, which stipulates that the Lebanese Criminal Code is the

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[169] *See also* Per Saland, "International Criminal Law Principles", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results* 199 (Kluwer Law International, 1999): "One [further issue] which followed us to the very end of the Conference was whether to include criminal responsibility of legal entities alongside that of individuals or natural persons. This matter deeply divided the delegations. [...] [France and Solomon Islands] came up with a series of proposals that, more and more, linked the criminal responsibility of legal entities to that of an individual. The inclusion gradually became acceptable to a wider group of countries, probably a relatively broad majority. [...] Time was running out, and the inclusion of the criminal responsibility of legal entities would have had repercussions in the part on penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome".

[170] We note, however, that prior to this, historical international courts existed that, *inter alia*, prosecuted ships – not natural persons – for their involvement in the slave trade. See Jenny S. Martinez, "Antislavery Courts and the Dawn of International Human Rights Law", 117(4) *The Yale Law Journal* 550 (2008).

[171] Whilst not forming part of our substantive reasons in the present case, we recall that the Contempt Judge held that international law does not prohibit the imposition of criminal liability for corporations: Impugned Decision, para. 75.

applicable law to the prosecution and punishment of the core crimes under the jurisdiction of the Tribunal, does not address the crime of contempt.

69. In the present context, we deem it relevant to consider the fact that legal persons can be criminally liable under Lebanese Criminal Law as an interpretative consideration. Article 210, second paragraph of the Lebanese Criminal Code sets out who can be the perpetrator of an offence as follows: "[l]egal persons shall be criminally responsible for the actions of their directors, management staff, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal persons". Furthermore, Article 26 of the Legislative Decree No. 104/77 (30 June 1977) which amended the Law on Publications (14 September 1962), stipulates that:

> [l]iability for penalties imposed as a result of crimes committed by means of journalistic publications shall be incumbent upon the responsible executive and the writer of the article as the principal perpetrators. In this regard, the provisions of the [Lebanese] Criminal Code relating to co-perpetration or criminal complicity shall also apply.

70. The article further specifies that "[t]he owner of the journalistic publication shall be held jointly liable in respect of civil claims and legal costs. He shall not incur criminal liability unless his actual complicity in the crime committed is proven". The Lebanese Criminal Code and the Law on Publications also applies to crimes committed by television corporations in Lebanon.[172]

71. Accordingly, it is foreseeable under Lebanese law that the owner of a journalistic publication or a television station could be either a natural or a legal person and could be criminally liable provided that actual complicity in the crime committed is proven.[173]

d. Principle of Effectiveness

72. With respect to the principle of effectiveness of the Statute and Rules, we consider that, in light of the object and purpose of the Tribunal, we must elect the interpretation which

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[172] Article 35, paragraph 2, of the Lebanese Law related to Television and Radio Broadcasting (Law n° 382, issued on 4 November 1994) states that crimes committed by television and radio organisations shall face the penalties set forth in the general Criminal Code, the Law on Publications, the present Law and all other laws in force, subject to more severe penalties which may be imposed under Article 257 of the Criminal Code. *See also* Lebanese Court of Cassation, Criminal Chamber 9, Decision n ° 10, 24 March 2011 (published in Al-Moustashar Al-Mousannaf).

[173] *See* for instance: Lebanese Court of Cassation, Criminal Chamber 9, Decision of 9 March 2010 (published in Al-Moustashar Al-Mousannaf); Lebanese Court of Cassation, Criminal Chamber 9, Decision No. 2008/9, 20 May 2008 (published in Almarjaa-Cassandre).

enables the relevant provisions to have appropriate effects.[174] We consider that the Tribunal must have the authority to address any contemptuous acts described under Rule 60 *bis* so that the exercise of its primary jurisdiction over persons responsible for the attack resulting in the death of former Prime Minister Hariri and the death and injury of other individuals as well as the connected cases, is safeguarded and not frustrated. As stated by the Contempt Judge, the only authority which can and should deal with contempt matters is this Tribunal, not the Lebanese authorities or any other court,[175] "[f]ailing 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".[176]

73. In the present circumstances, this case concerns the integrity of our judicial proceedings and the proper administration of justice – cornerstones of the rule of law. Therefore, we find that the principle of effectiveness requires that the Tribunal guard its primary jurisdiction from contemptuous attacks by adopting an effective approach to its inherent jurisdiction.

e. Conclusion

74. In conclusion, we consider that the Contempt Judge erred in stating that the Tribunal's contempt jurisdiction is limited to natural persons pursuant to the principle contained in Rule 3 (B), according to which in case of any ambiguity one must resort to the interpretation most favourable to the accused.[177] We are of the view that the ambiguity with respect to the term "person" in Rule 60 *bis* is resolved by the principles of interpretation provided under Rule 3 (A) without resort to Rule 3 (B). Furthermore, we find that the Contempt Judge erred in holding that interpreting the word "person" so as to include legal persons as well as natural persons represents an "extension" of the Tribunal's jurisdiction over contempt cases.[178]

[174] See Interlocutory Decision, para. 30.
[175] Impugned Decision, para. 55.
[176] *Id.* at para. 56.
[177] *Id.* at para. 76.
[178] *Id.* at para. 68.

3. Whether the Contempt Judge erred in distinguishing between the Tribunal's material, temporal and territorial jurisdiction and the Tribunal's personal jurisdiction with respect to contempt proceedings

75. We recall that the Contempt Judge found that the inherent jurisdiction of the Tribunal can be broader than its statutory jurisdiction (with respect to its material, temporal and territorial jurisdiction) so as to protect the integrity of its proceedings and punish conduct not criminalized under the terms of the Statute.[179] We concur with this finding. By their nature, Rule 60 *bis* cases lie beyond the express terms of the Statute.

76. However, the Contempt Judge found that the same did not apply to its personal jurisdiction.[180] We do not agree with this finding. In principle, the notion that the Tribunal's inherent jurisdiction over contempt is unconstrained by the Statute should apply with equal force with respect to its material, temporal, territorial *and* personal jurisdiction. If such a limitation were imposed, the Tribunal would potentially be unable, in effect, to hold in contempt those who, including legal entities, knowingly and wilfully interfere with the administration of justice.

77. In this respect, we find that the Contempt Judge erred in his reasoning on account of the principle of effectiveness, resulting in the drawing of a distinction as regards the Tribunal's personal jurisdiction in contempt proceedings.[181] We note that in so holding, the Contempt Judge draws on limited support from the Statute, Rules or international contempt jurisprudence to justify that the application of the principle of effectiveness must entail a different, restrictive and exclusive approach towards personal jurisdiction.

78. The Appeals Chamber has explicitly stated that the Tribunal possesses inherent jurisdiction and that there exists a general rule of international law granting all international tribunals such jurisdiction.[182] Specifically, the existence of an inherent contempt power has been affirmed time and again by international criminal tribunals.[183] According to the ICTY,

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[179] *Id.* at para. 65.
[180] *Ibid.*
[181] In particular, the Contempt Judge held that "the fact that the Tribunal is not allowed to prosecute legal persons does not as such render its contempt power meaningless": Impugned Decision, para. 67.
[182] *El Sayed* Appeal Decision on Jurisdiction, para. 47.
[183] *See* for example, ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Tadić* Vujin Contempt Decision"), paras 13-28; ICTY, *Prosecutor v Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005, paras 9-13; SCSL, *Independent Counsel v. Samura*, Judgment in Contempt Proceedings, Case No.

contempt proceedings are not based on customary international law but it looked to the "general principles of law common to the major legal systems of the world".[184] This is important in light of the fact that Rule 60 *bis* is worded similarly to Rule 77 of the ICTY Rules of Procedure and Evidence whose procedures have influenced those in force at the Tribunal.

79. What is at issue here is the content of that power and how this relates to the interpretation of Rule 60 *bis*. With respect to the contempt proceedings, this inherent power has, in part, been stipulated in Rule 60 *bis* of the Rules. While this is a statement of that inherent power, it is not intended to be an expression that exhausts that inherent power. This is explicitly recognised by Rule 60 *bis* which provides that contempt "includes, *but is not limited to*, the power to hold in contempt *any* person [...]".[185] Thus, Rule 60 *bis* itself stipulates that the Tribunal's inherent power reaches beyond the confines of the wording of the Rule. This is consistent with the ICTY Appeals Chamber's similar holding that the content of the inherent power of that tribunal may be construed with reference to the usual sources of international law, and not by reference to the wording of its Rule 77 on contempt when interpreted in the light of its own inherent power.[186] We concur with this reading of the content of the inherent power of the Tribunal as it relates to contempt.

80. We draw on this inherent power when interpreting the scope and application of Rule 60 *bis*, in particular to include legal persons as coming within its purview so as not to impede the prosecution of contemptuous acts. We find therefore, that the Contempt Judge erred in limiting the inherent power of the Tribunal to only include natural persons who may be responsible for contempt and obstruction of justice.

81. We consider that the Contempt Judge erred in finding that the authority of the Tribunal to deal with contempt and obstruction of justice is made effective, without qualification, by way of its ability to hold natural persons within a corporation responsible. We underline that the power to address contemptuous acts is essential for any court that adheres to the rule of law in order to protect the integrity of its proceedings. But this ability must be exercised in a manner that makes effective the authority of the Tribunal. We consider

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SCSL-2005-01, 26 October 2005, paras 14-16; ICTR, *Prosecutor v. Nshogoza*, Judgement, Case No. ICTR-07-91-T, 7 July 2009, para. 2.

[184] *Tadić* Vujin Contempt Decision, paras 14-15.

[185] Rule 60 *bis* (A), emphasis added.

[186] *Tadić* Vujin Contempt Decision, paras 24, 26 (b).

that, in the circumstances of this case, this authority is made most effective by way of the ability to hold legal (and natural) persons responsible where allegations of contempt arise.

82. In this discussion, we simply cannot ignore the reality that many corporations today wield far more power, influence and reach than any one person. Whilst that was not always the case in the past, it is certainly true of the world we presently inhabit. Such characteristics can be, and often are, a force for the positive development of the societies in which they reside. However, wielding such great power and influence entails great responsibility. Regrettably, modern history is replete with examples where great harm has been caused by corporations with the advantages that result from the recognition of their status as legal persons.

83. In such a scenario, there can exist circumstances where the Tribunal may be unable, due to the complexity of corporate structures, internal operating processes, and the aggregate effect of the actions of many individuals, to identify and apprehend the most responsible natural persons within a corporation. Similarly, the prosecution of natural persons, rather than the legal persons that they serve, would fail to underline and punish corporate cultures that condone and in some cases encourage illegal behaviour. Punishing only natural persons in such circumstances would be a poor response where the need for accountability lies beyond any one person. In other words, the prosecution and punishment of legal persons pursues different aims and interests than the punishment of natural persons alone. Without the ability to address such considerations, the authority of the Tribunal to deal with contempt and obstruction of justice could be impeded. It would potentially lead to unacceptable impunity for criminal actions and effectively yield control over the Tribunal's proceedings to unaccountable legal entities.

84. Therefore, it would be contrary to the interests of justice, in our view, to shield legal persons when Rule 60 *bis* does not restrict our inherent power to punish contemptuous acts. No person, natural or legal, should be placed above the law or be allowed to operate outside of the rule of law.

85. We emphasise that our interpretation of Rule 60 *bis* does not create a new offence where before there was none – therefore, it is not in violation of the principle of *nullum crimen sine lege*. Rule 60 *bis* exists and defines those who can be held in contempt as "any person". And even if it did not exist, our inherent jurisdiction grants the Tribunal the power to adequately address such conduct. We do acknowledge that there is ambiguity as to the

meaning of "person" in Rule 60 *bis* in the present case. However, in such circumstances, our task is simply an exercise in the universal judicial function: to interpret the meaning and scope of words in legal texts. There is nothing novel or new in this endeavour. That the word "person" is ambiguous is where our analysis begins, not where it ends.

86. In short, this case concerns a narrow issue: the lawful exercise of personal jurisdiction over matters that fall within the inherent power of the Tribunal. The criminal conduct in question is sufficiently defined under international law so as to give rise to criminal liability. Not only it is included in the provisions of all of the modern international criminal tribunals (either in their respective Rules or Statutes), but it is also a criminal offence – in some form or another – in *every* State that adheres to the rule of law.

87. Further, the interpretation applied here is consistent with prior Appeals Chamber jurisprudence. The construction of our inherent contempt power lies within the limits to inherent jurisdiction as set out by the Appeals Chamber in the *El Sayed* Appeal Decision on Jurisdiction.[187] It accords with the general goal and serves the specific purposes behind "the rule endowing international tribunals with inherent jurisdiction"[188] and within its limits, namely, that it may not be exercised in a manner inconsistent with the fundamental rights of the accused or of any other person involved in the criminal proceedings. [189]

88. It is true moreover that the Interlocutory Decision favoured an outcome whereby the interpretation of the Statute (and not the Rules) would be influenced by the general criminal principle of *favor rei* as pointed out by Judge Akoum in his dissent. However, this methodology was only resorted to when a teleological approach "does not prove helpful [...]".[190] We find that this is not the case here. Rather, a teleological approach "that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner"[191] is conducive to the outcome we reach in the present case. We are also mindful that in coming to this construction on the inherent power of the Tribunal, we do so specifically within the confines of the crime of contempt.

89. In conclusion, we find that the Contempt Judge erred in drawing a distinction between the Tribunal's personal jurisdiction and its subject matter, temporal and territorial

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[187] *El Sayed* Appeal Decision on Jurisdiction, para. 48.
[188] *Ibid.*
[189] *Id.* at para. 49. *See* above, para. 59.
[190] Interlocutory Decision, para. 32.
[191] *Ibid.*

jurisdictions. It was not dispositive of this case to rely on the fact that the Tribunal can proceed against natural persons. That this did not render our contempt powers "meaningless" was but one factor to be considered among others and not the end of the matter.

VI. CONCLUSION

90. We find that the Contempt Judge, when faced with ambiguity, erred by not applying the step-by-step considerations contained in Rule 3 (A). After having considered the requirements of Rule 3 (A), we hold that the Contempt Judge was mistaken in excluding legal persons from the ambit of the term "person" in Rule 60 *bis*.

91. In light of the Tribunal's inherent power to protect the integrity of the proceedings, to execute and maintain the administration of justice, the need to uphold the rule of law, in light of domestic developments and evolving international law standards, we consider that it is in the interests of justice to interpret the Tribunal's personal jurisdiction under Rule 60 *bis* as encompassing legal persons. We stress that this outcome does not create any new and/or unforeseeable crime and is therefore consistent with the rights of the accused as contained in Rule 69 which is applicable in contempt proceedings by virtue of Rule 60 *bis* (H)-(I).

92. The Appeals Panel finds that errors of law on the part of the Contempt Judge are established and are of such a nature that they invalidate the Impugned Decision. These include: an interpretation of the word "person" in Rule 60 *bis* that was consonant with the letter of the Statute rather than its spirit; that the interpretation of the word "person" to include legal persons was only possible if the Tribunal's contempt jurisdiction was rendered "meaningless" without it; giving insufficient weight to the relevance of state practice on the criminalization of the acts and conduct of legal persons in the interpretation of the word "person"; resorting to Rule 3 (B) when the principles of interpretation contained in Rule 3 (A) were sufficient.

93. Accordingly, we, Judge Akoum dissenting, grant the Appeal, reverse the Impugned Decision and reinstate the Order in Lieu of an Indictment of 31 January 2014 which includes *New TV* S.A.L. as an accused in this case. As an ancillary matter, since the appeal is granted, the matter concerning the *Amicus* Prosecutor's amendment of the indictment is no longer

moot.[192] It is anticipated that it shall be determined before the Contempt Judge, as appropriate.

[192] Impugned Decision, para. 80.

VII. DISPOSITION

FOR THESE REASONS,

PURSUANT to Rules 60 *bis* and 126;

THE APPEALS PANEL

GRANTS the Appeal;

REVERSES the Impugned Decision;

REINSTATES the Order in Lieu of an Indictment of 31 January 2014;

Judge Akoum appends a dissenting opinion.

Done in Arabic, English and French, the English version being authoritative.

Leidschendam, 2 October 2014

Janet Nosworthy, Presiding Judge

Walid Akoum, Judge
Dissenting

Ivana Hrdličková, Judge
Rapporteur

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

DISSENTING OPINION OF JUDGE WALID AKOUM

Headnote[1]

Judge Akoum considers that the decision of the majority of the Appeals Panel is contrary to fundamental principles of criminal law: crimes must be based on written provisions, the strict interpretation of criminal law and when in doubt, one must side with the accused. In his view, the majority's decision leads to an unreasonable result. Whereas a legal person can be held criminally responsible for contempt, it would be criminally immune for participation in the attack of 14 February 2005. Such a strange result should have been provided for explicitly and not arrived at through judicial interpretation.

With respect to the interpretation of the word "person", Judge Akoum asserts that the evidence cited by the majority with respect to corporate criminal liability – either in domestic or international law – have all included express and clear provisions on the matter. None have relied on the mere existence of the word "person". As such, without a clear written provision on the matter – which is not the case with Rule 60 bis – corporate criminal liability cannot be imposed.

In any event, Judge Akoum holds that where there is doubt as to the interpretation of legal provisions, one should favour the interpretation that favours the accused. In the present case, that interpretation is the one that excludes legal persons from the personal jurisdiction of the Tribunal.

[1] This headnote does not constitute a part of the dissenting opinion. It has been prepared for the convenience of the reader, who may find it useful to have an overview of Judge Akoum's dissenting opinion.

1. I have carefully read and considered the opinion of my colleagues in this case. While I respect their views and the underpinning reasoning, I am unfortunately unable to agree with them. Therefore, I have voted against the operative part of the decision whereby the Appeals Panel reverses the Impugned Decision.[2] Nevertheless, I do not dissent as far as the majority's discussions in the sections entitled "Admissibility" and "Standard of Review" are concerned. For the reasons contained herein, it is my opinion that the Tribunal has no jurisdiction *ratione personae* to charge or prosecute legal persons – in the present instance a corporation – for contempt of court.

2. I wish to emphasize that in coming to this conclusion I offer no view on whether or not customary international law or general principles of law presently recognise corporate criminal liability. Should they not, I neither purport to impede nor prevent their future crystallisation and recognition through State action and/or subsequent judicial opinions. This is an area of law that is undergoing development in many jurisdictions around the world and it would be unwise to read my opinion as to stifle a clear trend towards the recognition of corporate criminal liability. Rather, my approach is a narrower one which focuses on fundamental and holy principles of criminal law: *nullum crimen sine lege scripta* (crimes must be based on written provisions), *nullum crimen sine lege stricta* (strict construction of criminal provisions) and *in dubio pro reo* (when in doubt, side for the accused).

A. Inherent power

3. The jurisdiction of the Tribunal is generally limited by the terms contained in the Statute. Nevertheless, as the Impugned Decision rightly held, the Tribunal also has the additional inherent power to, *inter alia*, hold in contempt those who knowingly and wilfully interfere with its administration of justice.[3] This has been clearly set out in Rule 60 *bis* of the Tribunal's Rules adopted by the Judges in Plenary.

4. However, I am unable to follow the reasoning that has led the majority of the Appeals Panel to conclude that the inherent contempt power of the Tribunal can be broader than the jurisdiction *ratione personae* as contained in the Tribunal's Statute. This is because in my view, in addition to the grounds I discuss below, it leads to a most unreasonable result:

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[2] STL, *In the case against New TV* S.A.L. *and Al Khayat*, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 ("Majority Decision").
[3] Impugned Decision, paras 26-35.

according to the majority, while a legal entity *can* be criminally prosecuted for contempt, it *cannot* be prosecuted for participation in the killing of former Prime Minister Hariri and others – the very reason why this Tribunal was created in the first place. This is an odd reality. If this strange result was indeed the intention of the drafters, then in my view this outcome should have been provided for explicitly, and not arrived at through (expansive) judicial interpretation. It was for our creators to envision, consider and approve such a radical split in the Tribunal's jurisdiction *ratione personae* and not for this Appeals Panel to do it for them.

B. Interpretation of the Rules

5. Rule 3 (A) provides:

> 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 codified in Articles 31, 32, 33 of the Vienna Convention of 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.

(a) Spirit of the Statute

6. As is clear from Rule 3 (A), the interpretation of the Rules requires consideration of the Statute. Equally clear is that the Statute only refers to *natural* persons as was found by both Judge Baragwanath[4] and Judge Lettieri[5] when they referred to the gendered language contained in Articles 3 (2)-(3) and 16, although Judge Baragwanath then considered that the Tribunal's inherent power to prosecute cases of contempt extends to legal persons.[6] Similarly, the modes of liability contained in Article 3 of the Statute are poorly crafted to apply to legal persons. Setting aside the gendered language expressed in Article 3 (2)-(3) (superior responsibility), the substance of the provision appears a difficult fit in the context of the liability of legal persons, unless of course legal persons are excluded from the Tribunal's jurisdiction *ratione personae*. Article 3 as a whole clearly does not envisage modalities to attribute criminal responsibility to legal persons; had the drafters intended corporations to be included in the definition of "persons" under the Statute, they would have certainly provided for ways to impute criminal acts to them. In short, I agree with the Impugned Decision in so

[4] Indictment Decision, para. 22.
[5] Impugned Decision, para. 63.
[6] Indictment Decision, para. 28.

far as the text of the Statute is consistent with criminal responsibility for natural persons only.[7]

7. Nevertheless, it is true that the overarching purpose of the Statute is to find, prosecute, and punish those who perpetrated the attack of 14 February 2005 which killed Prime Minister Hariri and others (as well as potential connected cases) and to end impunity for such criminal actions. My colleagues have taken into account such considerations in their discussion of the principle of effectiveness. However, it cannot be admitted that considerations against impunity be read as *carte blanche,* allowing anything and everything to be done merely because they secure the Tribunal's noble aims. Indeed, the creators of this Tribunal envisioned that the Tribunal would fulfill its objectives whilst at the same time *upholding the highest standards of international criminal justice.*[8] In my view, it is axiomatic that these high standards must first and foremost be understood as aimed at protecting the rights of the accused, so as to render trials before this Tribunal fair and just. This means that in considering the spirit of the Statute we must not only act so as not to frustrate the Tribunal's primary jurisdiction and the fight against impunity, but we must do so in the spirit and under the guiding light of international standards of human rights.

8. Furthermore, I wish to address the matter of the so-called "impunity gap" that is alleged would be created should, as I contend, legal persons fall beyond the jurisdiction *ratione personae* of the Tribunal. In this respect, I agree with the Impugned Decision that corporations act through its employees and directors who are natural persons, and as such "can still be held responsible for interfering with the administration of justice".[9] The present case is a good illustration of this in practice. Thus, although the Impugned Decision dismissed the proceedings relating to *New TV* S.A.L., this did not mark the end of the case as a whole. The parallel proceedings against Ms Al Khayat, Deputy Head of News and Political Programs Manager at *Al Jadeed* TV, continue unabated. In light of the fact that legal entities operate through natural persons, I fail to see a concrete and realistic example – in a criminal context – that would leave the Tribunal unable to enforce its contempt provisions, particularly in light of its recognition of trials *in absentia* (including in contempt proceedings).[10] Even if

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[7] Impugned Decision, para. 63.
[8] UN Secretary-General Report, UN Doc. S/2006/893, 15 November 2006, paras 2, 7, 31, 36.
[9] Impugned Decision, para. 67.
[10] Rule 60 *bis* (H) (providing that Parts Four to Eight of the Rules apply *mutatis mutandis* in a Rule 60 *bis* context). Part Five, Section 6 of the Rules (Rules 105 *bis* to Rule 109) contains the Rules applicable to trial *in absentia* proceedings).

the corporation was not to be prosecuted for any reason, such as the lack of a clear criminal provision for instance, there will not be an impunity gap, because the natural person who represents the corporation can still be prosecuted if his or her involvement or actual complicity in the crime committed is proven.

(b) International standards on human rights

9. The rights of the accused have featured in all major international and regional instruments on human rights, as well as in Lebanese law,[11] whereas the development of bringing corporations into the fold of these rights under international law are, at best, sporadic. Chief among these rights is the broad *nullum crimen sine lege* notion which includes the *nullum crimen sine lege scripta* and *stricta* elements. These act as important restraints in the prosecution of criminal cases so as to align such proceedings with fundamental principles of justice and fairness. I wish to highlight that Article 8 of the Lebanese Constitution, like that of many States around the world, includes the following provision: "[n]o offence may be established or penalty imposed except by law".

10. In saying this, I recognize the youthful character of international criminal law. In earlier days, there was much that required judicial development and explanation, particularly when looking at the content of customary international law, which by definition is unwritten. Indeed, I agree with the ICTY Appeals Chamber that the *nullum crimen sine lege* principle "does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime".[12] But we are not tasked here with the identification and application of customary international law. Instead, we are dealing with an offence – Rule 60 *bis* – that stipulates in some detail the relevant crime and procedures thereto. While this provision is a mere expression of what otherwise falls within the Tribunal's inherent (and unwritten) jurisdiction, in stipulating this crime in Rule 60 *bis* the drafters made conscious choices as to its scope and wording to which we must be strictly bound.

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[11] *See for example* Articles 7-9, Declaration of Human and Civic Rights, 26 August 1789; Articles 5-7, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5; Articles 9, 14, 15, International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171; American Convention on Human Rights, 22 January 1969, 1144 U.N.T.S. 123, Articles 7-9; Articles 6-7, African Charter on Human and Peoples Rights, 27 June 1981, 1520 U.N.T.S. 217; Articles 13-16, 19, Arab Charter on Human Rights, 22 May 2004, 12 Int'l Hum. Rts. Rep. 893 (2005). *See also* Articles 1-10, Lebanon, Criminal Code.

[12] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 127.

11. This, in some respects, reflects the way in which international crimes have, over the years, been moving away from the murky seas of customary international law and creative lawyering into an era where positivism, codification and strict legality are now more prominent.[13] This is a symptom, I suspect, of international criminal law slowly leaving behind the characteristics and attitudes of youth as it grows and matures over time. In my view, as in domestic criminal law, international criminal law is to be interpreted narrowly. As a corollary, where a criminal provision is unclear or vague then the correct approach is to side with the interpretation which best favours the accused (*in dubio pro reo* or *favor rei*).

12. This approach is neither unknown nor alien to this Tribunal. The Appeals Chamber has previously adopted this approach when harmonizing Articles 2 and 3 of the Statute. In its Interlocutory Decision it stated that:

> [T]he principles of teleological interpretation [...] require an interpretation that best enables the Tribunal to achieve its goals to administer justice in a fair and efficient manner. If however this yardstick does not prove helpful, one should choose that interpretation which is most favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as "in favour of the accused"). [...] These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.[14]

13. Similarly, as the Appeals Chamber unanimously held in the case of a conflict between the rights of accused and the rights of victims, it is the former that must prevail when other interests, even if important, "might conceivably lead to prejudice to the accused".[15] In this case, the majority's position clearly leads to prejudice for the corporate accused. I fail to see how these holdings – which I believe we ought to follow unless good reasons are shown to the contrary – can be reconciled with the view of the majority in this case.

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[13] This is most evident with the creation of the permanent International Criminal Court whose Statute was carefully negotiated and drafted by many States. In particular, Article 22 (2) of the Rome Statute (1998) recognizes that its criminal definitions are to be strictly construed and that should ambiguities arise they shall be interpreted in favour of the accused or suspect.

[14] Interlocutory Decision, para. 32, footnotes omitted. I note that there is a difference of opinion as to whether this principle applies only to findings of fact or whether they also apply to findings of law: ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, 27 September 2007 (Separate Opinions of Judge Shahabuddeen and Schomburg). However, I believe – as the Appeals Chamber has held – that it should apply to both findings of fact *and* law.

[15] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, paras 29-31.

14. In addition, the European Court of Human Rights has clearly held that:

> Article 7 [of the European Convention on Human Rights] embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability [...].[16]

15. In short, I see no reason why a similar approach as that advocated previously by the Appeals Chamber and by the European Court for Human Right should not be adopted in the present instance. Since Rule 3 (A) commands us to consider the spirit of the Statute as a whole, a teleological approach in this instance must also take into full account applicable international human rights standards – the rights of the accused. Other considerations cannot force us to interpret ambiguous criminal provisions in a manner that goes against an accused (in this case a corporate legal person).

C. The proper meaning of the term "person"

16. At the heart of the present case is the interpretation of the word "person" in Rule 60 *bis*. My colleagues appear to concede that there is ambiguity as to whether it encompasses natural as well as legal persons.[17] There is simply no clear stipulation that legal persons were intended to be covered by the Rule; the drafters did not express in writing that corporations could be liable for contempt. Both of these factors lead me to the conclusion that I have reached.

17. It is telling – and definitive – that the examples cited by the majority of the Appeals Panel of corporate criminal liability, whether it be in treaty law or domestic criminal law, have included *express* and *clear* provisions relating to the liability of legal persons for criminal offences. *Practically every single one* of the examples cited by my colleagues, including civil-law and common-law countries, supports this view;[18] they do not suggest that merely including the word "person" in the relevant law and/or treaty is enough to extend its

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[16] ECtHR, *Fortum Oil and Gas Oy v. Finland*, 32559/96, Admissibility, 12 November 2002, p. 13.
[17] Majority Decision, paras 74, 85.
[18] *Id.* at paras 52, 55, 66.

application to legal persons. Hence, even if "a person" in English, "*une personne*" in French and "شخص" in Arabic could mean a natural as well as a legal person in a legal context, various and diverse legislators considered it necessary, in the context of criminal law and to eliminate any doubt, to include specific text addressing corporate criminal liability. Thus, for example, the draft protocol on amendments to the protocol of the Statute of the African Court of Justice and Human Rights has an *express* and *detailed* provision relating to corporate criminal liability in Article 46 C.[19] The same is found in Article 210 of the Lebanese Criminal Code and in Article 121-2 of the French Criminal Code.

18. The only concrete example that the majority prominently cites is a case from the United States dating to 1898.[20] In my view, a case that predates all contemporary human rights instruments from one domestic jurisdiction is of limited value to our inquiry. Many legal principles can be found in the past – some have been discarded long ago while others have been maintained and presently remain alive and well. But their mere historical existence, without proper consideration for modern legal conditions, cannot form the basis for their invocation today. In any event, in this discussion, the present state of international law and the silence of Rule 60 *bis* with respect to corporate criminal liability is no justification for departing from bedrock principles of criminal law that protect accused persons in modern criminal trials.

19. Of more relevance is the IMT at Nuremberg – the closest that international criminal law has come to providing for the criminal liability of legal persons. There, a *specific*

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[19] Article 46 C reads:

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the relevant knowledge was possessed within the corporation and that the culture of the corporation caused or encouraged the commission of the offence.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.
7. For the purpose of this section:
"Corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.

[20] Majority Decision, para. 56.

provision was included in its Charter to allow the declaring of organization to be criminal.[21] And even then, such a declaration only permitted *natural persons* that were members of such organizations to be criminally prosecuted.[22]

20. In this context, I note that Article 3 (1) (b) of the Statute merely provides for the criminal liability of "a group of *persons* acting with a common purpose"[23] and does not impute criminal liability on the group itself as a separate legal entity – further evidence that the Statute only recognizes natural persons as the perpetrators of criminal offences.

21. Notably absent, therefore, are modern examples where corporate criminal liability has been held to exist when only the word "person" has been used in the relevant treaty or domestic law to include legal entities – as we hold in the matter before us. The very fact that international treaties and domestic law choose to make it clear that they envisage corporate criminal liability goes *against* – rather than supports – the notion that the term "person" includes legal persons. After all, if the inclusion of the word "person" is enough – as my colleagues appear to suggest – then the consistent practice of the drafters of international treaties and domestic law to go a step further and add express provisions to provide for the criminal liability of legal persons is perplexing. In my view, such practices do not correlate with the majority's interpretation of the law.

22. In other words, there must be *some* degree of positivism in the applicable law that indicates that responsibility can be extended to legal persons. Failing this, any charging and prosecution of legal persons is simply not permitted. For the reasons just expressed, the simple use of the word "person" does not satisfy *nullum crimen sine lege scripta*.

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[21] Article 9, Charter of the International Military Tribunal ("IMT Charter") provides: At the trial of any individual members of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. [...] However, I note with some scepticism language contained in the ICTY's recently repudiated judgment in *Perišić* (at least with respect to 'specific direction' in the *actus reus* of aiding and abetting) that implies that it could declare organizations to be criminal, even though nothing in the ICTY Statute or its jurisprudence provides for such a power: ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Appeal Judgment, 28 February 2013, para. 53: "[T]he Trial Chamber did not characterise the VRS [Bosnian Serb Army] as a criminal organization[.] [...] Having reviewed the evidence on the record, the Appeals Chamber agrees with the Trial Chamber that the VRS was not an organisation whose actions were criminal *per se*"; para. 57: "The Appeals Chamber underscores that the VRS [...] was not a purely criminal organisation"; para. 69: "The Appeals Chamber recalls once again that the VRS [...] was not a purely criminal organisation".

[22] Article 10, IMT Charter reads: In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

[23] Emphasis added.

23. In any event, one can consider that by its very nature, the word "person" is vague as to its scope and substantive content.[24] Indeed, it is the very reason why the matter has been litigated and reached the present Appeals Panel. My colleagues agree on this point. Here, there are two competing interpretations at play – as both Parties have submitted – that can be applied in this case. On the one hand, one interpretation sees the word "person" as encompassing legal as well as natural persons. On the other, one could also interpret "person" as only including natural persons.

24. The teleological approach consistent with the highest standard of international criminal justice – in which, I repeat, the rights of the accused must be paramount – maintains that when faced with such a situation, in line with the jurisprudence of the Appeals Chamber, the correct approach is the following: when in doubt judges should side with the accused (*in dubio pro reo* or *favor rei*). This means that the more narrow interpretation should be adopted. In the present instance, this interpretation is the one that excludes the criminal liability of legal persons.

25. I add that this is also a matter of foreseeability: when one considers the content of the Statute and Rules, it is doubtful that a corporate entity in Lebanon could have foreseen that it could sit in the dock as an accused before the Tribunal. Even if one were to accept a diluted version of the *nullum crimen* principle, foreseeability of criminal responsibility for acts and conduct by the accused must still exist. As aptly shown by the majority, every time where corporate criminal liability has been implemented, there has been included an *express* provision to that effect. In its absence, as in the present case, I do not see how a corporate entity could have foreseen criminal liability for its actions before this Tribunal.

26. For these reasons, I hold that the word "person" as contained in Rule 60 *bis* cannot be interpreted to include legal persons. In my view, contempt proceedings before the Tribunal can only be brought with respect to the acts and conduct of natural persons.

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[24] In addition to the gendered language in the Statute, it is also true that Rule 2 (A) describes a "victim" as a "natural person", while "accused" is simply defined as a "person". Nonetheless, the latter is only followed by the pronoun "whom" (and not "which") and Rule 2 (B) clearly stipulates that masculine language in the Rules *only* includes feminine language as well. In any event, I read the qualification that victims before the Tribunal must be natural persons as simply clarifying that the Lebanese practice of having associations representing victims cannot take place before the Tribunal, and nothing more.

D. Conclusion

27. The present proceedings are already delicate. To this we now add a decision that potentially permits contempt charges to be brought against political parties, Lebanese institutions, associations or any other actors that are recognized as legal persons. In my view, there is no reason to do so.

28. Of course, I would not hesitate to join my learned colleagues if the applicable law was clear and unambiguous. But that is not the case here. Unfortunately, the Contempt Judge is now left with a sweeping decision that offers him little guidance on core issues that should have been addressed in Rule 60 *bis* or other provision(s) if they had indeed foreseen corporate criminal liability. For example, the Contempt Judge will soon have to consider how to attribute the acts and conduct of natural persons to a corporate legal entity: a difficult task when these do not exist under our Statute or Rules. I fear that a trial under these conditions could infringe the rights of the corporate accused and that the trial process might be fatally compromised.

29. To conclude, in the face of ambiguity, the majority of this Appeals Panel has, in my view, extended our jurisdiction *ratione personae* in contempt proceedings by the adoption and application of an interpretative methodology that does not accord with the highest standards of international criminal justice. There is a fine line, but a line nevertheless, between a creative interpretation of the law and a violation of the rights of the accused. In the circumstances of the present case, I believe that line has been impermissibly crossed. I must therefore dissent.

Walid Akoum, Judge