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

**THE APPEALS PANEL**

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| **Case No.:** | **STL-14-06/PT/AP/AR126.1** |
| **Before:** | **Judge Afif Chamseddine, Presiding**<br>**Judge Janet Nosworthy**<br>**Judge Ivana Hrdličková** |
| **Registrar:** | **Mr Daryl Mundis** |
| **Date:** | **23 January 2015** |
| **Original language:** | **English** |
| **Classification:** | **Public** |

**IN THE CASE AGAINST**

***AKHBAR BEIRUT* S.A.L.**
**IBRAHIM MOHAMED ALI AL AMIN**

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# DECISION ON INTERLOCUTORY APPEAL CONCERNING PERSONAL JURISDICTION IN CONTEMPT PROCEEDINGS

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

**Counsel for *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin:**
Mr Antonio Abou Kasm

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## I. HEADNOTE[1]

1. *In this interlocutory appeal, the Appeals Panel is tasked with determining whether or not the Contempt Judge erred in his deciding that the Tribunal does not have jurisdiction to charge legal persons with 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 considering that there is no ambiguity in the term "person" under Rule 60 bis; (2) whether the Contempt Judge erred in his application of the principle of legality; and (3) the similarities between the current Appeal's Panel Decision and a previous appeals panel decision in the contempt proceedings against* New TV *S.A.L. (a legal person) and Al Khayat ("*New TV *Jurisdiction Appeal Decision").*

2. *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* Akhbar Beirut *S.A.L., a legal person operating as* Al Akhbar, *and Mr Ibrahim Mohamed Ali Al Amin, Editor-in-Chief of* Akhbar Beirut *S.A.L. Judge Lettieri, as the subsequent Contempt Judge, dismissed the charges against* Akhbar Beirut *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. In so doing, Judge Lettieri expressly departed from the reasoning adopted in the* New TV *Jurisdiction Appeal Decision. The* Amicus *Prosecutor filed an appeal challenging the Contempt Judge's determination on whether the* New TV *Jurisdiction Appeal Decision was binding upon him and his decision not to proceed against legal persons for the crime of contempt. The Defence responds that the decision of the Contempt Judge should be upheld as the* Amicus *Prosecutor has not established any errors in his decision.*

3. *The Appeals Panel considers that the current Appeal attracts the same reasoning as the* New TV *Jurisdiction Appeal Decision, since the legal issue at stake is the same in both cases. Having found that the Contempt Judge erred in considering that there is no ambiguity in the term "person" under Rule 60 bis, the Appeals Panel finds that the Contempt Judge further erred in his consideration of the* nullum crimen sine lege *principle as the* New TV *Jurisdiction Appeal Decision's interpretation of Rule 60* bis *did not create a new offence as*

[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.



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*the status of the perpetrator, legal or natural person, is not an element of the crime of contempt. As such, the* New TV *Jurisdiction Appeal Decision did not rely on analogical reasoning to come to its conclusion. Additionally, the Appeals Panel reiterates that the criminal responsibility of legal persons for the crime of contempt is permissible under Lebanese law and that the Tribunal, unlike other international criminal tribunals, is substantially guided by Lebanese law in the performance of its judicial duties. As such, it was foreseeable that* Akhbar Beirut *S.A.L. could be prosecuted for contempt before the Tribunal. These errors of law are of such a nature that they invalidate the Contempt Judge's decision.*

4. *With respect to the Contempt Judge's findings related to the binding effect of the* New TV *Jurisdiction Appeal Decision, the Appeals Panel, Judge Nosworthy dissenting, considers that it would have been preferable and important for judicial certainty as well as to avoid the fragmentation of the law, for the Contempt Judge to have followed the conclusions of the* New TV *Jurisdiction Appeal Decision.*

5. *Accordingly, the Appeals Panel upholds the appeal and reinstates the Order in Lieu of an Indictment of 31 January 2014 which includes* Akhbar Beirut *S.A.L. as an accused in this case.*

6. *Judge Chamseddine appends a separate opinion. Judge Nosworthy appends a separate and partially dissenting opinion.*



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## II. INTRODUCTION

7. The Appeals Panel is seized of an interlocutory 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 rendered by Judge Lettieri ("Contempt Judge").[3] The assigned Defence Counsel for *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin ("Defence") responded that the Appeal should be rejected.[4]

8. In the Impugned Decision, the Contempt Judge dismissed the charges against *Akhbar Beirut* S.A.L., a corporate entity, having found that the Tribunal has no personal jurisdiction (jurisdiction *ratione personae*) to hold contempt proceedings against legal persons.[5]

9. We grant the Appeal 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. PROCEDURAL BACKGROUND

10. 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 *Akhbar Beirut* S.A.L., the legal person operating the newspaper *Al Akhbar* and its Arabic and English websites, and Mr Ibrahim Al Amin, *Akhbar Beirut* S.A.L.'s Editor-in-Chief and the Chairman of its Board of Directors (the "Accused").[6] They were both charged with knowing and wilful interference with the 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] It is noted that two other accused,

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[2] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/AP/AR126.1, F0001, Interlocutory Appeal against the Decision on Motion Challenging Jurisdiction, 13 November 2014 ("Appeal").
[3] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0069, Decision on Motion Challenging Jurisdiction, 6 November 2014 ("Impugned Decision").
[4] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/AP/AR126.1, F0003, Response from Assigned Counsel to the "Interlocutory Appeal against the Decision on Motion Challenging Jurisdiction' dated 13 November 2014, 24 November 2014 ("Response").
[5] Impugned Decision, disposition.
[6] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014 ("Indictment Decision"), paras 4, 50.
[7] *Ibid.*
[8] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014.



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*New TV* S.A.L., a legal person and Ms. Al Khayat, were also charged for contempt by Judge Baragwanath on the same day in a separate order in lieu of an indictment.[9]

11. On 18 August 2014, the Defence filed a motion challenging the jurisdiction of the Tribunal to hear cases of contempt in general under Rule 90 (A) (i) and against legal persons in particular.[10] On 29 August 2014, the *Amicus* Prosecutor opposed the Defence Preliminary Motion asserting that the Tribunal has inherent jurisdiction to indict legal persons for contempt under Rule 60 *bis*.[11]

12. On 2 October 2014, an appeals panel consisting of Judges Nosworthy, Akoum, and Hrdličková, Judge Akoum dissenting, overturned a prior decision of the Contempt Judge.[12] In that decision dated 24 July 2014, the Contempt Judge found that the Tribunal had jurisdiction over contemptuous acts but had dismissed the contempt charges against *New TV* S.A.L., a legal person, on the basis that the Tribunal had no jurisdiction *ratione personae* to hold contempt proceedings against legal persons. The appeals panel seized ordered the reinstatement of the charges of contempt against *New TV* S.A.L pursuant to Rule 60 *bis*.[13]

13. On 6 November 2014, the Contempt Judge granted the Defence Preliminary Motion in part and reiterated that the Tribunal has inherent jurisdiction over contempt cases. After considering the findings of the *New TV* Jurisdiction Appeal Decision, the Contempt Judge "decline[d] to follow its legal reasoning and result".[14] In accordance with his prior finding in the case against *New TV* S.A.L. and Al Khayat ("*New TV* S.A.L. case"), the Contempt Judge found that the Tribunal has no jurisdiction *ratione personae* to hold contempt proceedings against legal persons as Rule 60 *bis* applies to natural persons only. Therefore, he dismissed

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[9] 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 ("*New TV* Indictment Decision"), para. 4.
[10] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0055, Preliminary Motion Presented by Counsel Assigned to Represent *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin, 18 August 2014 ("Defence Preliminary Motion").
[11] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0058, Response to the Preliminary Motion Presented by Counsel Assigned to Represent Akhbar Beirut S.A.L. and Mr Ibrahim Mohamed Ali Al Amin, 29 August 2014 ("Response to Defence Preliminary Motion").
[12] 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 ("*New TV* Jurisdiction Decision").
[13] STL, *In the case against* New TV *S.A.L. and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 ("*New TV* Jurisdiction Appeal Decision").
[14] Impugned Decision, para. 74.



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the charges against *Akhbar Beirut* S.A.L.[15] Consequently, he ordered the *Amicus* Prosecutor to file a proposed amended order in lieu of an indictment removing all references to *Akhbar Beirut* S.A.L.[16]

14. With respect to possible appeals of the Impugned Decision, the Contempt Judge held that an interlocutory appeal pursuant to Rule 90 (B) (i) may be directed against the Impugned Decision as a whole and considered that its different parts should not be read in isolation. Therefore, he stated that additional certification would not be required.[17] However, mindful that an appeals panel might disagree with his analysis, he certified *proprio motu* for appeal the issue of "whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge *Akhbar Beirut* S.A.L., a legal person, with contempt" pursuant to Rule 126 ("Certified Issue").[18]

15. On 13 November 2014, the *Amicus* Prosecutor filed the Appeal. Judge Baragwanath, in his capacity as President of the Tribunal, issued an order pursuant to Rules 60 *bis* (M) and 30 (B) of the Rules designating the Appeals Panel on 14 November 2014.[19] The President, in his administrative capacity, ordered the composition of the present panel based on a pre-determined roster of judges for all appeals in contempt matters.[20] This was pursuant to Article 2 (3) of the Practice Direction in Matters of Contempt.[21] According to the Practice Direction, the Judges listed to deal with appeals in contempt were Judges Braidy, Hrdličková and Lettieri. However, because Judge Lettieri issued the Impugned Decision and Judge Braidy was not able to hear the appeal,[22] the President designated Judge Nosworthy as the next international Judge and Judge Chamseddine as the next Lebanese Judge named on the roster. The Defence responded to the Appeal on 24 November 2014 requesting that it be dismissed.[23]

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[15] *New TV* Jurisdiction Decision, paras 61-65, disposition.
[16] *Id.* at disposition.
[17] *Id.* at paras 95-97.
[18] *Ibid.*
[19] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/PRES/AR126.1, F0002, Order Designating Appeals Panel, 14 November 2014 ("Order"), disposition.
[20] Order, para. 4.
[21] STL, Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, STL/PD/2013/06/Rev.2, 2 July 2014 ("Practice Direction").
[22] Order, para. 3.
[23] Response, p. 17.



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## IV. SUBMISSIONS OF THE PARTIES

### A. The *Amicus* Prosecutor

#### 1. On the binding effect of the *New TV* Jurisdiction Appeal Decision

16. In the Appeal, the *Amicus* Prosecutor argues that the Contempt Judge violated the *audi alteram partem* principle by discussing the binding effect of the *New TV* Jurisdiction Appeal Decision without giving the parties an opportunity to make submissions on the matter.[24]

17. With respect to the Contempt Judge's decision to depart from the *New TV* Jurisdiction Appeal Decision, the *Amicus* Prosecutor submits that the Contempt Judge erred in law by failing to find that that Decision was binding upon him.[25] He adds that the rule of law and the process of appeal would be undermined if every judge could determine whether or not to be bound by an appeal decision.[26]

18. Although the principle of *stare decisis* originates in common law jurisdictions, the *Amicus* Prosecutor argues that civil law jurisdictions, in practice, also follow the decisions of higher courts.[27] Referring to the jurisprudence of other international criminal tribunals, he adds that the Contempt Judge should have followed the *ratio decidendi* of the previous appeals panel.[28]

19. According to the *Amicus* Prosecutor, the Impugned Decision is "in essence, an 'appeal' from, or a motion to reconsider" the *New TV* Jurisdiction Appeal Decision.[29] He further argues that the Contempt Judge failed to justify departing from the *New TV* Jurisdiction Appeal Decision as trial judges can only depart from appeals decision if there are new or different facts that were not considered in the previous decision or if the relevant law

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[24] Appeal, para. 15, referring to ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeal Judgement, 5 July 2001, paras 27-28.
[25] Appeal, para. 12, referring to STL, *In the case against* New TV *S.A.L. and Al Khayat*, STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction on Contempt Proceedings, 2 October 2014.
[26] Appeal, para. 17.
[27] Appeal, para. 18, quoting ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Appeal Judgement, 24 March 2000, paras 92-93.
[28] Appeal, para. 21. *See* Appeal, paras 19-20, 22, referring to ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Appeal Judgement, 24 March 2000, paras 97, 110, 112-113; ICTY, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 October 2002, para. 2; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeal Judgement, 26 May 2003, para. 26; ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, 23 May 2005, para. 202.
[29] Appeal, para. 16.



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has materially changed.[30] He argues that the contempt proceedings against *New TV* S.A.L are not different from the contempt proceedings against *Akhbar Beirut* S.A.L. as both relate to charges against legal entities and their respective senior managers.[31]

20. In addition, referring to the Contempt Judge's decision to wait for the *New TV* Jurisdiction Appeal Decision before issuing the Impugned Decision, the *Amicus* Prosecutor contends that the Contempt Judge implicitly recognised that "the two cases are identical".[32] Consequently, he submits that the *ratio decidendi* of the previous decision should apply in the "identical case here".[33]

### 2. On the alleged errors of law in the Impugned Decision

21. The *Amicus* Prosecutor refers to his prior submissions made in the case against *New TV* S.A.L. and elaborates certain arguments in more detail.[34]

22. First, the *Amicus* Prosecutor argues that the Impugned Decision repeats previous arguments rejected in the *New TV* Jurisdiction Appeal Decision, namely on the principles of legality (*nullum crimen sine lege*), specificity (*nulla poena sine lege certa*) and the prohibition of analogy (*nulla poena sine lege stricta*).[35] With respect to the principle of legality argument, the *New TV* Jurisdiction Appeal Decision held that the "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 crime sine lege*".[36] The *Amicus* Prosecutor further submits that the *New TV* Jurisdiction Appeal Decision specifically addressed the Contempt Judge's assertions on the "expansive interpretation" of Rule 60 *bis* as a violation of the rights of the accused[37] and the foreseeability of the crime[38] as well as the prohibition of analogy.[39]

23. Second, the *Amicus* Prosecutor argues that the Contempt Judge erred with regard to the definition of "person".[40] He states that the *New TV* Jurisdiction Appeal Decision analysed

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[30] *Ibid.*
[31] Appeal, para. 25. *See* Appeal, paras 23-24.
[32] Appeal, para. 13.
[33] Appeal, para. 22, referring to ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Appeal Judgement, 24 March 2000, para. 110.
[34] Appeal, paras 27-38.
[35] Appeal, para. 28.
[36] Appeal, para. 28, quoting *New TV* Jurisdiction Appeal Decision, para. 85.
[37] Appeal, para. 29, quoting *New TV* Jurisdiction Appeal Decision, paras 34, 35.
[38] Appeal, para. 30, quoting *New TV* Jurisdiction Appeal Decision, para. 91.
[39] Appeal, para. 31, quoting *New TV* Jurisdiction Appeal Decision, paras 74, 91.
[40] Appeal, para. 34.



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the word "person" in its ordinary meaning, in the Tribunal's official languages and basic documents as well as in the practice of other international tribunals.[41]

24. Third and with respect to the alleged lack of precedents for the *New TV* Jurisdiction Appeal Decision, the *Amicus* Prosecutor argues that the Contempt Judge failed to consider that decision's reasoning and that of the Indictment Decision which found that the lack of legal pronouncements on the criminal responsibility of legal entities for contempt is explained by prosecutors simply not initiating such proceedings.[42]

25. The *Amicus* Prosecutor contends that there is no need for any special regime for contempt cases against legal entities,[43] in response to the Contempt Judge's assertion that if the interpretation of "person" in the *New TV* Jurisdiction Appeal Decision is upheld, the Contempt Judge would operate in a "legal vacuum". In support of a pragmatic interpretation of the texts in order to fight impunity, the *Amicus* Prosecutor relies on examples of legal development by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), in particular with respect to the definition of rape and joint criminal enterprise.[44] He submits that, as such, the "principle *nullum crimen sine lege* does not 'preclude the progressive development of the law by the court'".[45]

### B. The Defence

#### 1. <u>On the binding nature of the *New TV* Jurisdiction Appeal Decision</u>

26. With regard to the *audi alteram partem* principle, the Defence contends that the Contempt Judge did not err by determining whether or not he was bound by the *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision – without hearing from the parties before deciding on the merits – as a judge must be able to determine the principles and decisions he is bound to apply before ruling on the matter. [46]

27. The Defence further responds that the Contempt Judge committed no error by finding that the *New TV* Jurisdiction Appeal Decision was not binding on him[47] as there is no formal

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[41] *Ibid.*
[42] Appeal, para. 35, quoting *New TV* Jurisdiction Appeal Decision, paras 41, 63-67.
[43] Appeal, para. 36.
[44] Appeal, para. 37.
[45] Appeal, para. 38, quoting ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 38.
[46] Response, para. 14.
[47] Response, paras 7-40.



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system of precedent at the Tribunal and the *New TV* Jurisdiction Appeal Decision could not constitute persuasive authority.[48] The *New TV* case should be distinguished from the case at hand as "it does not involve the same parties, cause and object"[49] and the two cases are legally distinct.[50]

28. In addition, the Defence refers to Article 28(2) of the Statute and submits that the Rules must be interpreted in light of the Lebanese Code of Criminal Procedure.[51] It argues that the Lebanese judicial system does not recognise judicial decisions as a source of law[52] and that decisions will be binding only on the parties of the case.[53] It quotes the Civil Division of the Court of Cassation which held that the Appeals Court is guided but not absolutely bound by the decisions of the Chambers of the Court of Cassation.[54] Finally, in the Lebanese judicial system, an "isolated decision cannot be considered a legal trend".[55]

29. Consequently, contrary to the *Amicus* Prosecutor's submission that new facts would be the only basis for departing from the *New TV* Jurisdiction Appeal Decision, the Defence argues that judges from the civil law system and those of this Tribunal can depart from prior decisions which they find to be "erroneous in law and contrary to their convictions".[56]

30. The Defence submits that should the Appeals Panel find that the principle of *stare decisis* is applicable at the Tribunal, it should determine whether the *New TV* Jurisdiction Appeal Decision was erroneous in law and if so, the Appeals Panel should depart from it.[57] In any event, it asserts that the *New TV* Jurisdiction Appeal Decision is an "isolated and individual decision".[58]

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[48] Response, para. 9.
[49] Response, para. 11, referring to ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Decision on Veselin Šljivančanin's Motion Requesting Simultaneous Adjudication of the *Prosecutor v. Milan Martić* and *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* Cases, 16 April 2008, paras 6-7.
[50] Response, para. 13.
[51] Response, para. 23.
[52] Response, para. 21.
[53] Response, para. 24, referring to Articles 306 and 6 of the Lebanese Code of Civil Procedure.
[54] Response, para. 24, referring to Court of Cassation, Civ. Div., Judgment, No.13/2013, 7 February 2013.
[55] Response, para. 26.
[56] Response, para. 29.
[57] Response, para. 33.
[58] Response, para. 37.



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## 2. On the legal analysis and the applicable principles with regard to the jurisdiction over legal persons

### a. On the principle of legality

31. In response to the *Amicus* Prosecutor's submission that the *New TV* Jurisdiction Appeal Decision considered the principle of legality and its corollaries, the Defence argues that that Decision "merely" indicated that it did not create a new offence.[59] It posits that the fight against impunity or the effectiveness of the jurisdiction of the Tribunal cannot be employed when interpreting the applicable law and, instead, the principle of legality should be relied upon.[60] Based on the principle of strict interpretation of criminal law, it also argues that the scope of criminal provisions cannot be extended by analogy.[61]

32. The Defence relies on the European Court of Human Rights' ("ECtHR") jurisprudence that a person must know from the provision or its interpretation what constitutes a criminal offence and that the interpretation by the court must be accessible and reasonably foreseeable to him.[62] As there was no legal provision or a prior interpretation on this matter when the alleged acts of contempt took place, it was not foreseeable that proceedings might be initiated against *Akhbar Beirut* S.A.L.[63]

33. The Defence also posits that courts cannot create new offences by giving new definitions to a crime or by criminalising new acts.[64] It also highlights the general principle of law that uncertain or ambiguous provisions must be interpreted in favour of the accused.[65]

### b. On the interpretation of "person"

34. According to the Defence, the *Amicus* Prosecutor failed to demonstrate that the Contempt Judge erred in law when interpreting "person" as natural person for the purpose of Rule 60 *bis*. Contrary to the *New TV* Jurisdiction Appeal Decision, unless there is an express

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[59] Response, paras 45-46.
[60] Response, para. 47.
[61] Response, para. 49.
[62] Response, para. 50, referring to ECtHR, *M. V. Germany*, No. 19359/04, Judgment, 17 December 2009, para. 119, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos 2312/08 and 34179/08, Judgment (GC), 18 July 2013, para. 66, *S.W. v. United Kingdom*, No. 20166/92, Judgment, 22 November 1995, paras 34-35, *Dragotoniu and Militari-Pidorni v. Romania*, Nos 77193/01 and 77196/01, Judgment, 24 August 2007, para. 43.
[63] Response, para. 51.
[64] Response, para. 52, referring to ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, paras 193, 196.
[65] Response, para. 53.



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provision to that effect, no contemporary legal system understands the term "person" as also meaning a legal person.[66]

35. The Defence submits that the legal provisions and sources relied on in the *New TV* Jurisdiction Appeal Decision are not applicable before the Tribunal.[67] In addition, the principle of effectiveness should not be used to achieve "substantive justice" in contempt proceedings.[68] The *New TV* Jurisdiction Appeal Decision has erroneously set aside the *favor rei* principle.[69] The Defence also argues that the teleological approach in the *New TV* Jurisdiction Appeal Decision contradicts its conclusion that Article 2 of the Statute does not provide for corporate criminal liability.[70] On this point, the Defence refers to the spirit of the Statute as well as interviews of Mr Nicolas Michel and President Baragwanath to argue that according to the spirit of the Statute, the Tribunal was established to prosecute natural persons only.[71]

**c. On the lack of precedents, clear provisions and specific mechanisms for proceeding against legal persons**

36. The Defence recalls that although there have been contempt proceedings held against journalists, no legal persons have been indicted before any international court[72] and that the *New TV* Jurisdiction Appeal Decision was selective in its sources and disregarded uncertainties in State practice.[73] The Defence refers to the practice of Lebanon where the Court of Cassation held that "Article 210 of the Criminal Code [...] has recognised, on an exceptional basis, that legal persons are criminally liable for the acts of their agents or representatives and not the other way around".[74] Finally, the Defence recalls the Contempt

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[66] Response, paras 56-58.
[67] Response, para. 59.
[68] Response, para. 65.
[69] Response, para. 66.
[70] Response, para. 67.
[71] Response, para. 68, referring to Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. S/2005/783, 13 December 2005; United Nations Security Council Resolution, UN Doc. S/RES/1644(2005), 15 December 2005; United Nations Security Council Resolution, UN Doc. S/RES/1664(2006), 29 March 2006; Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc. S/2006/893,15 November 2006; Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, Addendum, S/2006/893/Add.1, 21 November 2006, p. 2, para. 1; Nicholas Michel, *Le TSL ne jugera que des individus*, *An-Nahar* (Lebanon), 7 February 2008; President Baragwanath, Interview *Al-Akhbar* (Lebanon), No. 1678, 6 April 2012, available at http://english.al-akhbar.com/print/5958.
[72] Response, para. 72.
[73] Response, para. 77, referring to *New TV* Jurisdiction Appeal Decision, para. 51.
[74] Response, para. 79.



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Judge's comments that the Tribunal does not have the requisite and specific procedural mechanisms to charge legal persons.[75]

## V. DISCUSSION

### A. Standard of review

37. Under Article 26 of the Statute and Rule 176 of the Rules, an appeal may be lodged on the grounds of "[a]n error on a question of law invalidating the decision" or "[a]n error of fact that has occasioned a miscarriage of justice". The *Amicus* Prosecutor asserts that the Contempt Judge committed errors of law that invalidate the Impugned Decision.[76]

38. The Appeals Chamber has adopted the following standard of appellate review applicable to alleged errors of law as informed by the jurisprudence of 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.[77]

39. As stated by the Appeals Chamber, "not every error of law leads to a reversal or revision of a decision of a Trial Chamber".[78] While we will mainly review errors of law that have the potential to invalidate the Contempt Judge's Decision, we may also address legal issues that would not lead to the invalidation of the Impugned decision, but are nevertheless of general significance to the Tribunal's jurisprudence.[79]

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[75] Response, para. 78.
[76] Appeal, paras 12-38.
[77] 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 ("Jurisdiction Decision"), para. 10 (with reference to case-law of the ICTY, ICTR, SCSL and ICC).
[78] Jurisdiction Decision, para. 10 referring to ICTY, *Prosecutor v. Kunarac et al.*, Case Nos IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 38.
[79] Jurisdiction Decision, para. 10, fn. 31.



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### B. Scope of the Appeal

40. We are seized of an interlocutory appeal filed under Rule 126 related to the Tribunal's jurisdiction *ratione personae* vis-à-vis legal persons in contempt proceedings, for which certification has been granted.

41. We recall that the Contempt Judge held that the arguments relating to the Tribunal's jurisdiction *ratione materiae* over the crime of contempt attracted the application of Rule 90 as a preliminary motion.[80] Indeed, Rule 90 (A) (i) (challenges to jurisdiction) "refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the *subject-matter*, temporal or territorial jurisdiction of the Tribunal [...]".[81] The Contempt Judge considered that the arguments relating to the Tribunal's jurisdiction *ratione personae* over legal persons did not fall under Rule 90 as this was not a ground listed in Rule 90 (E). Instead, he held that these arguments attracted the application of Rule 126[82] as "motions other than preliminary motions".[83] We concur with this approach which is reflective of the Appeals Chamber's approach to jurisdictional arguments.[84]

42. However, the Impugned Decision held that "an interlocutory appeal under Rule 90 (B) (i) may be directed against the decision as a whole"[85] and because the different parts of the Impugned Decision "should not be read in isolation, additional certification [wa]s not required". [86] Nevertheless, the Contempt Judge proceeded to elucidate the Certified Issue *proprio motu* by addressing the certification elements contained in Rule 126 (C).[87] This was done in order "to avoid any doubt, *and in the event the Appeals Panel* [...] *disagrees with this* [Rule 90] *analysis* [...]".[88]

43. Having considered the Impugned Decision's reasoning and the content of the relevant Rules, the Appeals Panel does not concur with the Contempt Judge's approach. In circumstances where a motion contains a mix of issues that can be appealed as of right – such as jurisdictional challenges as defined in Rule 90 (E) – and those that cannot, the correct approach is to differentiate the application of the Rules depending on the nature of the

[80] Impugned Decision, para. 8.
[81] Rule 90 (E) (emphasis added).
[82] Impugned Decision, para. 9.
[83] Rule 126 (A).
[84] Jurisdiction Decision, paras 11-23.
[85] Impugned Decision, para. 95.
[86] Impugned Decision, para. 96.
[87] Impugned Decision, paras 96-97.
[88] Impugned Decision, para. 96 (emphasis added).



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matters raised. In the present case, this means that only those matters concerning the Tribunal's jurisdiction *ratione materiae* could be appealed as of right. Arguments relating to the Tribunal's jurisdiction *ratione personae* required certification, which in this case was granted by the Contempt Judge *proprio motu*.

44. Accordingly, we consider that the Appeals Panel's jurisdiction is limited to those issues that are in fact certified.[89] In this case, our jurisdiction is therefore limited to:

> [W]hether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge *Akhbar Beirut* S.A.L., a legal person, with contempt.[90]

All arguments relating to issues that have not been certified are liable to be summarily dismissed.[91]

### C. Merits of the Appeal

45. The question before the Appeals Panel is whether the Contempt Judge erred in finding that the Tribunal lacks jurisdiction to charge *Akhbar Beirut* S.A.L., a legal person, with contempt. For the reasons discussed below, we conclude that the Contempt Judge erred and we reverse the Impugned Decision.

#### 1. The interpretation of the word "person" in Rule 60 *bis* in light of the principle of legality

##### a. Whether the Contempt Judge erred in considering that there is no ambiguity in the term "person" under Rule 60 *bis*

46. The Contempt Judge considered that Rule 60 *bis* "provides for criminal responsibility of natural persons who have knowingly and wilfully interfered with the Tribunal's administration of justice".[92] He emphasized several times that this Rule is clear and unambiguous. In his view:

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[89] *See New TV* Jurisdiction Appeal Decision, para. 25, referring to 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.
[90] Impugned Decision, para. 97, Disposition.
[91] *See New TV* Jurisdiction Appeal Decision, para. 25 referring to 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.
[92] Impugned Decision, para. 61.



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> [W]ith the word "person" in Rule 60 *bis*, the Plenary expressed a clear and precise concept, given that "[a]ny person who" clearly refers to "person" in its natural meaning, namely, a human being.[93]

He further mentioned:

> If we understand "ambiguous" as a concept, term or phrase with more than one meaning, then in my view the expression cannot be ambiguous, because – in the absence of any additional qualification – it only has one meaning, related to human beings.[94]

Similarly, he said:

> [T]he Rule is anchored to a concrete and well-defined concept (the term "person"), with clear contours.[95]

47. We note that the Contempt Judge's view that there is no ambiguity under Rule 60 *bis* is contrary to his prior view expressed in the *New TV* Jurisdiction Decision[96] and in the Impugned Decision.[97] In both decisions, the Contempt Judge considered whether the term "person" could have a different meaning in its *implicit* reading and in doing so, he acknowledged the lack of clarity or uncertainty of the term.[98]

48. We find that if the word "person" can implicitly (rather than explicitly) refer to legal persons, it follows that the term "person" is subject to interpretation. A word that can potentially have more than one meaning in a legal context is ambiguous. Furthermore, the Contempt Judge twice granted *proprio motu* certification for appeal of the issue of the Tribunal's jurisdiction to charge legal person with contempt, at the heart of which is the interpretation of the word "person" in Rule 60 *bis*.

49. We consider that the Contempt Judge erred in concluding that Rule 60 *bis* is not ambiguous insofar as it relates to the word "person".

50. In any event, even if, as the Impugned Decision suggests, there were no ambiguity present, that would by no means mark the end of the discussion. In this respect, we note the Appeals Chamber's previous view on this subject:

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[93] Impugned Decision, para. 35.
[94] Impugned Decision, para. 38.
[95] Impugned Decision, para. 61.
[96] *New TV* Jurisdiction Decision, para. 70 (inquiring as to "whether Rule 60 *bis* can be said to *implicitly* allow prosecution of legal persons for contempt and obstruction of justice").
[97] Impugned Decision, para. 45 (original emphasis):

> Even if one were to resort to interpretation as to what Rule 60 *bis* might *implicitly* mean, [...] an interpretation of 'any person who' encompassing legal persons would not sufficiently put on notice a corporate accused that it could incur criminal liability.

[98] It also runs counter to Judge Baragwanath's initial decisions in lieu of indictments that initiated both contempt cases. He too identified that "[o]n its face, Rule 60 *bis* neither embraces nor rejects such liability in the contempt context. [...] No other provision of Rule 60 *bis* in terms limits the Rule's application to natural persons". *See New TV* Indictment Decision, para. 19; *see* also Indictment Decision, para. 19.



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> Interpretation is an operation that always proves necessary when applying a legal rule. One must always start with a statute's language. But that must be read within the statute's legal and factual contexts. Indeed, the old maxim *in claris non fit interpretatio* (when a text is clear there is no need for interpretation) is in truth fallacious, as has been rightly emphasised by distinguished scholars.[99]

51. Further, the Appeals Chamber recognised that "society alters over time and interpretation of a law may evolve to keep pace", and as such "a statute is presumed to be 'always speaking'".[100] The Appeals Panel fully concurs with the reasoning of the Appeals Chamber. This is of course subject to limitations, such as the *nullum crimen sine lege* principle, a matter to which we now turn.

### b. Whether the Contempt Judge erred in his application of the principle of legality

52. The Contempt Judge considered that interpreting "any person who" in Rule 60 *bis* as including legal persons violates the principle of *nullum crimen sine lege* and implies that the prior Appeals Panel 'created' an offence via the interpretation of Rule 60 *bis*.[101]

53. This, in our view, is incorrect. Rather, the Appeals Panel in the *New TV* case interpreted who could be criminally responsible under Rule 60 *bis*, but did not create a new crime, nor did it alter the *mens rea* or the *actus reus* of an already existing crime. The lack of specificity as to who can potentially be prosecuted for contempt results from the ambiguity of Rule 60 *bis*, which, in turn, required interpretation consistent with Rule 3.

54. We consider that the Contempt Judge's application and conclusion with respect to the *nullum crimen sine lege* principle to this case was erroneously based on his interpretation of the *New TV* Jurisdiction Appeal Decision. He asserted that specificity requires "the precise identification of the ingredients of the crime and, among them, of who can potentially be the accused in a criminal case".[102] He concluded that "since the term 'person' is part and parcel of the definition of an element of the crime of contempt, an expansive interpretation of this term collides with the fundamental rule of *nullum crimen sine lege*".[103] In his view, since a

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[99] STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/I, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("Interlocutory Decision"), para. 19 (footnote omitted).
[100] *Id.*, para. 21 (footnote omitted).
[101] Impugned Decision, paras 39-42.
[102] Impugned Decision, para. 32 (i).
[103] Impugned Decision, para. 36.



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"person" under Rule 60 *bis* is confined to natural persons, the *New TV* Jurisdiction Appeal Decision violated the *nullum crimen sine lege* principle.

55. This is an error. While the status, identity or even the function of the perpetrator may indeed, depending on the offence, be an element of the crime, – such as the crime of high treason committed by "citizens" who betray their country for example, – that is simply not the case here. The *actus reus* of the offence of contempt are enumerated in, but are not limited to, Rule 60 *bis* (A) (i) to (vii), whilst the *mens rea* is found in Rule 60 *bis* (A): the intention to commit that criminal conduct while "knowingly and wilfully interfer[ing] with [the] administration of justice". In neither of these two ingredients which collectively constitute the crime of contempt, is the status of the perpetrator of any relevance. In other words, contrary to the Impugned Decision, the status of the perpetrator as a legal or physical person is not, as such, an element of the crime under Rule 60 *bis*.

### c. Foreseeability of the application of Rule 60 *bis* to legal persons and consideration of Lebanese Law

56. The Contempt Judge considered that the application of Rule 60 *bis* to legal persons would violate the rights of the accused by making the contours of the offence of contempt unforeseeable. He held the following:

> [I]f it were true that the provision in question [...] is ambiguous, this lack of clarity would amount to an infringement of the *nullum crimen sine lege* principle and particularly its corollary, the principle of specificity (*nullum crimen sine lege certa*), unless it is interpreted strictly in favour of the accused. This is because ambiguity in the wording of a law and vagueness of legal notions could make the crime in question unforeseeable at the time of the conduct. This, in practice, would prevent potential accused from knowing in advance if their conduct constitutes an offence.[104]

57. We recall that, unlike other *ad hoc* tribunals, this Tribunal is primarily mandated to apply Lebanese criminal law and not exclusively international law.[105] As such, the Tribunal has consistently looked to the Lebanese legal order to inform its work in various areas – even

[104] Impugned Decision, para. 39, footnotes omitted.
[105] Interlocutory Decision, para. 33:
> [I]t is indisputable that under Article 2 of the Statute, the Tribunal is to apply Lebanese law as the *substantive law* governing the crimes prosecuted before it. In this regard, our Tribunal is different from most international tribunals. These tribunals apply international law when exercising their primary jurisdiction [...] but may need to have recourse to national law incidentally (*incidenter tantum*), in order to decide whether the precondition for the applicability of an international rule has been satisfied [...]. In contrast, under our Statute we are called upon primarily to apply *national* law to the facts coming within our jurisdiction. In other words, we are mandated to apply national law – in particular, Lebanon's – *principaliter* (that is, in the exercise of our primary jurisdiction over particular allegations).



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when it does not directly concern the offences over which the Tribunal has primary jurisdiction.[106] In that respect, we concur with the holding of the *New TV* Jurisdiction Appeal Decision that it is foreseeable under Lebanese Law that a legal person owning a journalistic publication or a television station may be held criminally liable for contempt provided that actual complicity in the crime committed is proven.[107] Indeed, article 26 of Law on Publications as amended by Legislative Decree No. 104/77 (30 June 1977) states that:

> Liability 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. The 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.

And article 210, paragraph 2 of the Lebanese Criminal Code reads:

> 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.

58. Consequently, under Lebanese law, a legal person can be criminally liable for its own actions as well as the actions of its agents and employees acting on its behalf or using its means. Furthermore, a legal person may be criminally liable for similar offenses related to the administration of justice. For example, according to the Lebanese Law on Publications, all publications are prohibited from publishing:

> The facts of felony and misdemeanour investigations prior to their being read out in a public hearing [...];
>
> The facts of investigations by the Central Inspection and Judicial Inspection Department, with the exception of decisions and statements issued by the aforementioned Department;

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[106] *See* for example, STL, *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, paras 53-61 (considering Lebanese law on the matter of a suspect's access to his criminal file during an investigation); 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" – Separate and Partially Dissenting Opinion of Judge Riachy, 24 October 2012, para. 7 (considering Lebanese law on the matter of the admissibility of an appeal); STL , *The Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1178, Decision on Application by Counsel for Messrs Badreddine and Oneissi Against President's Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 16 (considering Lebanese law on the matter of whether the Defence could challenge the irregular composition of a bench).

[107] *New TV* Jurisdiction Appeal Decision, paras 69-71. *See* also Lebanese Court of Cassation, Criminal Chamber 9, Decision No. 21/2014, 8 May 2014 (published in Almarjaa-Cassandre); Lebanese Court of Cassation, Criminal Chamber 9, Decision No. 41/2014, 10 July 2014 (published in Almarjaa-Cassandre). In these two decisions, the legal person was not held criminally liable because its complicity in the crime had not been proven. *A contrario*, if complicity had been established, there would have been no legal impediment on the legal person being held criminally responsible.



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> Letters, documents, files, or any parts of files of any public administrations and which are affixed with a stamp containing the word "Confidential [...];
>
> The facts of any legal case the publication of which the court has prohibited [...].[108]

59. It would be an oddity for a Lebanese company to face criminal sanction in Lebanon for interfering with the administration of justice with respect to cases before Lebanese courts and at the same time enjoy impunity for similar acts before an internationalised Tribunal guided by Lebanese law in carrying out its judicial work. In light of Lebanese law on this subject and the unique link between that body of law and this Tribunal, it was not unforeseeable for a Lebanese company to be prosecuted for contempt before the Tribunal under Rule 60 *bis*.

#### d. Interpretation, analogy and the progressive development of the law

60. According to the Contempt Judge, interpreting the Rules in a way that permits the charging of legal persons with contempt violates the rights of the accused and constitutes an application of the doctrine of substantive justice that allows judges to expand criminal law through analogy.[109]

61. We understand that in its consideration of the term "person", the previous appeals panel in the *New TV* Jurisdiction Appeal Decision did not apply an interpretation by analogy or the doctrine of substantive justice. It simply applied the principles of interpretation under Rule 3 in order to resolve an ambiguity in an existing criminal provision in a manner compatible with international criminal law. The process of bringing clarity to the law through interpretation is an ordinary and core function of the judiciary. The Appeals Panel concurs with the finding of the *New TV* Jurisdiction Appeal Decision 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".[110]

62. In the view of the Appeals Panel, the Impugned Decision confuses analogy with interpretation. As one scholar has explained:

> Interpretation and analogy share the same logical structure [...] insofar as interpretation is also arrived at by way of a process of analogy; namely it is based on identifying points of contact, correspondences and interconnections on the one hand, and differences and discordance on the other, in order to determine whether or not the law which is being interpreted covers the

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[108] Article 12 of the Lebanese Law on Publications as amended by the Legislative Decree No. 104/77 (30 June 1977).
[109] Impugned Decision, para. 33.
[110] *New TV* Jurisdiction Appeal Decision, para. 91.



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> particular factual situation which must be judged. But between the two, there is a qualitative difference [...] Interpretation exists when one remains within the confines whereby it is still possible to give a literal meaning [...] to the terms of a provision; analogy exists when one has gone beyond those confines – in this case what we have is nothing less than the creation of a new law by the judge. In other words, analogy goes beyond interpretation and is based on a legislative shortcoming which has become evident at the very time of interpreting and applying the law within the legal system.[111]

63. In any event, the Impugned Decision's understanding of analogical reasoning is mistaken in part. Whilst the Impugned Decision was correct in stating that the *nullum crimen sine lege* principle forbids "[t]he use of analogy in criminal law [which] entails convicting and punishing an accused on the basis of a legal provision that is formally inapplicable [...] but covers over similar cases (*analogia legis*)", it was an error to then state that *analogia juris* (the application of a rule by reference to general principles of the legal system in question) was also forbidden.[112] In the words of the late President Cassese:

> ICL [International Criminal Law] only prohibits the so-called *analogia legis* (that is, the extension of a rule so as to cover a matter that is formally unregulated by law). It does not bar the regulation of a matter not covered by a specific provision or rule, by resorting to general principles of ICL, or to general principles of criminal justice, or to principles common to the major legal systems of the world (so-called *analogia juris*). National and international criminal courts have repeatedly affirmed that it is permissible to rely upon such principles for establishing whether an international rule covers a specific matter in dispute. [...] It should, however, be clear that drawing upon general principles should never be used to criminalize conduct that was previously not prohibited by a criminal rule. [...] [T]his approach may only be resorted to for the interpretation of existing rules, not for the creation of new classes of criminal conduct.[113]

64. Further, the Appeals Panel notes that a progressive approach to legal interpretation is compatible with human rights standards and has been long practiced at the international criminal tribunals.[114]

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[111] Mario Romano, *Commentario sistematico del codice penale*, Vol. I (Giuffrè 1987), pp. 45-46 (emphasis omitted). STL unrevised translation.

[112] Impugned Decision, para. 32(ii). As the Impugned Decision put it, the approach of the *New TV* Jurisdiction Appeal Decision "is a typical example of interpretation by analogy, because it means to convict and punish an accused on the basis of a legal provision that is formally not applicable in the particular context of a case but is derived from general principles of other legal systems [...]" Impugned Decision, para. 43.

[113] Antonio Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (Oxford University Press ), p. 34.

[114] *See* for example the ICTY Appeal Chamber's interpretation of the term "nationals" in Article 4 of the Fourth Geneva Convention (1949) in *Tadić*. In that case, it was held that this term refers not to nationality, but instead hinged on substantial relations and allegiance more than formal bonds, despite the relative clarity as to when a person is a "national" or not of a State. We emphasize that in this example, unlike Rule 60 *bis*, the status of the victim(s) as a "national" is an element of the offence under Article 2 of the ICTY Statute: ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras 163-166. Further, in a previous jurisdictional decision in the *Tadić* case, the view was expressed, in a progressive interpretation of the law at that time, that war crimes could be committed in international as well as non-international armed conflicts. The Appeals Panel notes that in light of the charges against Mr Tadić and the state of international law in 1995, the ambiguity with respect to this question was not resolved in a manner that favoured the accused: ICTY,



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65. We stress, however, that the interpretation of a criminal provision should be consistent with the essence of the offence, its object and purpose, and should be reasonably foreseen by the accused in order to align with international human rights standards. This was the case with respect to the *New TV* Jurisdiction Appeal Decision. We concur with the European Court of Human Rights position in that regard:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[115]

### 2. The similarities between the current Appeal's Panel Decision and the *New TV* Jurisdiction Appeal Decision

66. The Contempt Judge found that he was not formally bound by the *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision positing that the Tribunal has jurisdiction to charge legal persons with contempt.[116] He further held that the specific facts of the present case must be distinguished from the *New TV* case:

> In particular, the charges here are directed against both *Akhbar Beirut* S.A.L. as the legal person doing business as the newspaper *Al Akhbar* and Mr Al Amin, as the newspaper's editor in-chief and chairman of the board of directors. In these circumstances the prosecution of a natural person alone can hardly be said to "potentially lead to unacceptable impunity for criminal actions", which was one of the rationales of the Appeals Panel to uphold corporate criminal liability in case STL-14-05.[117]

67. We note that, contrary to the finding of the Contempt Judge, the legal issue that arose in both the *New TV* case and in the present case concerning the jurisdiction of the Tribunal to

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*Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 96-136. This holding, and its prompt acceptance by States, has been described by one academic as an example of a "Grotian Moment" in international law. *See* Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013), pp. 139-156. In *Hadžihasanović*, the ICTY Appeals Chamber similarly determined the existence of command responsibility in non-international armed conflicts, which the late President Cassese stated was warranted by "an 'adaptation' of existing rules (corroborated by a logical construction)": Antonio Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (Oxford University Press), p. 32. *See* ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 10-36.

[115] ECtHR, *S.W. v. The United Kingdom*, Application No. 20166/92, Judgment, 22 November 1995, para. 36; ECtHR, *C.R. v. The United Kingdom*, Application No. 20190/92, Judgment, 22 November 1995, para. 34.

[116] Impugned Decision, para. 70.

[117] Impugned Decision, para. 73, footnotes omitted.



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charge legal persons with contempt cannot be distinguished. The fact that the newspaper's editor in-chief and chairman of the board of directors of *Al Akhbar* stands as an accused in the present case does not mean that the impunity gap referred to in the *New TV* Jurisdiction Appeal Decision – i.e. impunity of the legal person - is nullified.

68. We emphasise that the legal person *Akhbar Beirut* S.A.L. is a distinct entity from its managers and employees. The mere fact that Mr Al Amin is senior representative of *Akhbar Beirut* S.A.L. does not mean that he is the only person (potentially) responsible for the charged offences. Prosecuting a legal person is not the equivalent of prosecuting the senior representative of a corporation as a natural person. This, in our view, is identical to the *New TV* case, where a natural person and a legal person are jointly charged with contempt. In sum, we underline that there are no distinguishing features in the present case from those in the *New TV* case.

69. In any event, as recalled by the *Amicus* Prosecutor, the Contempt Judge had himself acknowledged the direct link between the two cases on the jurisdictional issue and thought that "it might be wise to await the decision by the Appeal Panel on the Amicus challenge to [his] decision in case 14-05 [*New TV* case]"[118], before issuing a decision on the preliminary motion challenging jurisdiction in the present case.

70. Furthermore, Article 16 (1) of the Statute provides that "[a]ll accused shall be equal before the Special Tribunal" whereas following the Contempt Judge's reasoning, the Tribunal would try *New TV* S.A.L. for Contempt, while the charges against *Akhbar Beirut* S.A.L. would be dismissed. This would be difficult to reconcile with the principle of equality of all accused before the Tribunal.

71. In these circumstances, regardless of the discussion on the applicability of the *stare decisis* principle raised in the Impugned Decision, the Appeals Panel, Judge Nosworthy dissenting, considers that it would have been preferable and important for judicial certainty as well as to avoid the fragmentation of the law, for the Contempt Judge to have followed the conclusions of the *New TV* Jurisdiction Appeal Decision.

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[118] STL-14-06, *In the case against* Akhbar Beirut *S.A.L. and Al Amin,* Transcript of 12 September 2014, p. 24 (EN).



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## VI. CONCLUSION

72. In light of the above, we consider that the current Appeal attracts the same reasoning as the *New TV* Jurisdiction Appeal Decision, since the legal issue at stake is exactly the same: whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis*, has the power to charge a legal person with contempt. We see no reason to depart from the reasoning adopted in the *New TV* Jurisdiction Appeal Decision. As a result, the Impugned Decision is invalidated for the same reasons that the *New TV* Jurisdiction Decision was invalidated.

73. In particular, we find that the Contempt Judge erred in considering that Rule 60 *bis* is a clear and unambiguous provision that provides for criminal responsibility for contempt for natural persons only. We consider that the word "person" in Rule 60 *bis* is generic and does not refer strictly to natural persons. It does not explicitly include or reject legal persons. This ambiguity justifies an interpretation according to the Rules. We refer and adhere to the interpretation of the term "person" adopted by the previous appeals panel in the *New TV* Jurisdiction Appeal Decision, which includes legal persons as well as natural persons.[119]

74. We concur with the *New TV* Jurisdiction Appeal Decision that the "interpretation of Rule 60 *bis* does not create a new offence where there was none before – therefore, it is not in violation of the principle of *nullum crimen sine lege*".[120] We further consider that the Impugned Decision's arguments related to foreseeability isolate the Tribunal's operations from Lebanese law and jurisprudence by which this Tribunal is guided in its work. Consistent with the analysis contained in the *New TV* Jurisdiction Appeal Decision and the reasons previously discussed, we hold that the application of Rule 60 *bis* to legal persons is consistent with the essence of the offence, its object and purpose, and was reasonably foreseeable. As such, the Contempt Judge erred in holding to the contrary.

75. Consequently, we reverse the Impugned Decision and reinstate the Order in Lieu of Indictment of 31 January 2014.

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[119] *New TV* Jurisdiction Appeal Decision, paras 33-74.
[120] *New TV* Jurisdiction Appeal Decision, para. 85.



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## 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 Chamseddine appends a separate opinion;

Judge Nosworthy appends a separate and partly dissenting opinion.

Done in Arabic, English and French, the English version being authoritative.
Leidschendam, 23 January 2015

Afif Chamseddine, Presiding Judge

Janet Nosworthy, Judge

Ivana Hrdličková, Judge



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**Separate Opinion of Judge Afif Chamseddine**

1. I voted in favour of reversing the Impugned Decision. But I would like, in this separate opinion, to raise a specific matter worthy of discussion: the possible referral of part of the case, related to the legal person, to the Lebanese authorities.

2. In his Preliminary Motion before the Contempt Judge, the Defence Counsel had asked that "the case against Mr Ibrahim Mohamed Ali Al Amin be referred to the authorities of the Lebanese Republic, so that those authorities might submit this case to the competent national courts".[1] The Contempt Judge found no basis for considering such a referral because, among other reasons, the "Tribunal's ability to ensure the integrity of its proceedings cannot and should not be dependent on action by, or the standards of, another judicial system".[2]

3. In my view, the Contempt Judge should have given more consideration to a possible referral of part of the case to the Lebanese authorities, especially after he had decided that the Tribunal had no jurisdiction to prosecute *Akhbar Beirut* S.A.L., a legal person.

4. The prosecution of a crime is an issue of public order. When seized of a criminal case, a Judge should not close a file for lack of jurisdiction without indicating an alternative competent authority that could potentially prosecute the alleged crime.

5. The application of the principle of legality by the Contempt Judge in the Impugned Decision should not lead to impunity or to exemption from punishment, assuming that criminal liability is established. No crime should remain unpunished.

[1] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0055, Preliminary Motion Presented by Counsel Assigned to Represent *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin, 18 August 2014, p. 22.
[2] Impugned Decision, para. 93.

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6. *Akhbar Beirut* S.A.L. resides in Lebanon and the crime was committed in Lebanon, which would give jurisdiction to the Lebanese judiciary to prosecute the alleged crime, according to article 9 of the Lebanese Code of Criminal Procedure.[3]

7. Therefore, I consider that the Contempt Judge could have at least informed the Lebanese authorities that he considers having no jurisdiction to prosecute a legal person for contempt, and then it would have been for them to decide what to do with this information.

Afif Chamseddine, Judge

[3] Article 9 of the Lebanese Code of Criminal Procedure stipulates: "The public prosecution shall be initiated before the criminal authority which has jurisdiction over the area in which the offence was committed, the place of residence of the defendant, or the place in which the defendant was arrested".



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# Separate and Partially Dissenting Opinion of Judge Nosworthy

## 1. Introduction

1. I write this separate and partially dissenting opinion confined to the issue of whether or not the Contempt Judge erred in law when, in the Impugned Decision, he departed from the *New TV* Jurisdiction Appeal Decision with respect to the Tribunal's jurisdiction *ratione personae* in contempt proceedings under Rule 60 *bis* (A).

2. While I agree with the outcome of the present Appeal, I differ fundamentally from my learned judicial colleagues in their view that it would merely have been '*preferable*' that the Contempt Judge follow the *New TV* Jurisdiction Appeal Decision on the issue of the Tribunal's jurisdiction *ratione personae*.[1] Instead, I consider that it has binding and obligatory force for the reasons set forth in this opinion and that the Contempt Judge was not entitled to disregard it.

3. I recall that in the Impugned Decision, the Contempt Judge, acting *proprio motu*, undertook a critical examination of the *New TV* Jurisdiction Appeal Decision in order to ascertain whether it had binding and compelling force on him. It is of some relevance and materiality that the *New TV* Jurisdiction Appeal Decision concerned the very same issue with which the Appeals Panel is seized in this case: the Tribunal's jurisdiction *ratione personae* over legal persons in contempt cases under Rule 60 *bis* (A) in factual circumstances where both cases are virtually indistinguishable. The Impugned Decision held that as a matter of law, the Contempt Judge was not obliged to follow the *New TV* Jurisdiction Appeal Decision and resorted to the reasoning and outcome in the *New TV* Jurisdiction Decision which a prior appeals panel had previously rejected. As a consequence, the Contempt Judge dismissed all charges against the corporate Accused in the present proceedings, *Akhbar Beirut* S.A.L. In doing so, the Contempt Judge committed errors of law invalidating the Impugned Decision.

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[1] STL, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, STL-14-06/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015 ("*Akhbar Beirut* Jurisdiction Appeal Decision"), para. 71.

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4. I am of the view that the Contempt Judge's refusal to follow the prior *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision amounts, in and of itself, to an error of law invalidating the Impugned Decision. This error inevitably resulted in him resolving the issue of the Tribunal's jurisdiction *ratione personae* over legal persons under Rule 60 *bis* (A) erroneously and with equal invalidating effect.

## 2. Preliminary matter: Whether the Contempt Judge breached the *audi alteram partem* principle in failing to hear the parties on the binding effect of the *New TV* Jurisdiction Appeal Decision before handing down the Impugned Decision

5. The *Amicus* Prosecutor contends that the Contempt Judge violated the *audi alteram partem* principle and the rule of law as the parties were deprived of the opportunity to make submissions on the issue of the binding effect of the *New TV* Jurisdiction Appeal Decision before the Impugned Decision was handed down.[2] Regrettably, the majority did not address this argument, despite it being raised by the *Amicus* Prosecutor. In my view, this matter raises the question of whether, in the circumstances of this case, the Contempt Judge was duty bound to hear the parties before rendering the Impugned Decision in so far as it concerned the question of the precedential value of the *New TV* Jurisdiction Appeal Decision which in turn materially affected its outcome.

6. I note that the Appeals Chamber has previously recognized the importance and relevance of the *audi alteram partem* principle before this Tribunal:

> Pursuant to the *audi alteram partem* principle, a decision that is not entirely and unconditional [sic] favourable to an individual must not be taken without allowing that individual to state their position on that issue. In a criminal trial, the right to adversarial trial means that "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party"[...].[3]

7. I fully concur. Nevertheless, I also recognize the inherent power of a Chamber to raise matters *proprio motu* where it believes it is necessary in the exercise of its judicial discretion. This was stated by the ICTY Appeals Chamber in *Erdemović*[4] and has been exercised

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[2] Appeal, para. 15.
[3] STL, *The 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, para. 28, fn. 64 (citation omitted).
[4] ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeal Judgement, 7 October 1997, para. 16: "The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".



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countless times since. However, it is important to stress that the exercise of this inherent power is not unlimited.

8. In *Jelisić*, the ICTY Office of the Prosecutor raised the violation of the *audi alteram partem* principle on appeal after the Trial Chamber had denied its motion to be heard on whether the evidence it had presented at trial was sufficient to sustain a conviction for genocide. As the ICTY Appeals Chamber correctly stated:

> [T]he fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include the right of the parties to be heard in accordance with the judicial character of the Trial Chamber. [...] The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction; it was denied that right.[5]

9. Indeed, when a Chamber raises legal issues *proprio motu* that have not been previously submitted by the parties, it is common practice for that Chamber to ask the parties to address them on such matters before a decision or judgment is rendered. In these instances, it is particularly important, as the *Jelisić* case states, to hear the party against whom the judge was inclined to rule. In this respect, I see no reasons why this notion would not apply here as argued to the contrary in the Defence's Response.[6]

10. In this case, the parties were not formally put on notice by the Contempt Judge that the precedential value of the *New TV* Jurisdiction Appeal Decision was a live issue in the litigation before the Impugned Decision was handed down. Further, and as the *Amicus* Prosecutor highlights,[7] the Contempt Judge informed the parties that he would wait until the *New TV* Jurisdiction Appeal Decision was handed down before issuing the Impugned Decision.[8]

11. In my view, the actions of the Contempt Judge created a reasonable expectation that he would follow the *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision in this case.

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[5] ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeal Judgement, 5 July 2001 ("*Jelisić* Appeal Judgment"), paras 27, 28 (footnotes omitted).
[6] Response, para. 14.
[7] Appeal, para. 13.
[8] STL-14-06, *In the case against* Akhbar Beirut *S.A.L. and Al Amin*, Transcript of 12 September 2014, p. 24 (EN), lines 7-12: "So that any disclosure has been made and you are happy about your proposed timeline, whereas the Defence counsel proposes an alternative timeline, so that I will give the dead-lines after I have issued my decision on the preliminary motion challenging jurisdiction. I think it might be wise to await the decision by the Appeals Panel on the *Amicus* challenge to my decision in case 14-05 [the *New TV* case]".



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Indeed, unless he felt compelled to follow its outcome, there would appear to be little reason to wait for the *New TV* Jurisdiction Appeal Decision to be handed down – the Impugned Decision could have been rendered regardless of the outcome of the jurisdictional appeal in the *New TV* case.

12. While it could be said that, under the circumstances, the parties were aware that the *New TV* Jurisdiction Appeal Decision would play a role, in some form or another, in the Impugned Decision, this was only apparent *after* they had submitted their filings on the issue of the Tribunal's jurisdiction *ratione personae* over legal persons in contempt proceedings. The parties simply had no way of knowing in advance that the Impugned Decision would be rendered after the *New TV* Jurisdiction Appeal Decision.

13. Given that the Contempt Judge, seized of a motion challenging the Tribunal's jurisdiction *ratione personae* in this case, had not been briefed by the parties on the question of the precedential value, if any, of the *New TV* Jurisdiction Appeal Decision, and in light of the aforementioned *Jelisić* case, it was in the interests of justice that the parties be heard on the matter. As such, it was the Contempt Judge's duty to hear the parties – particularly the party against whom he was inclined to rule. This is even more pertinent in instances where a judge issues a decision that has no contemporary equal – I can find no prior decision in international criminal law that has so expressly and categorically refused to follow the decision of a superior chamber on a specific legal issue as the Impugned Decision purported to do in the present case.

14. In these circumstances and for the reasons expressed above, I find that the Contempt Judge violated the *audi alteram partem* principle by not affording the *Amicus* Prosecutor and the Defence the opportunity to be heard on the matter of the precedential value of the *New TV* Jurisdiction Appeal Decision before reaching his contrary finding. This was markedly against the interest of the *Amicus* Prosecutor. It occasioned prejudice to the presentation of argument and of his case, one of the fundamental bases of natural justice, and is contrary to the rule of law.

15. The subsequent question that arises is that of an appropriate remedy. In this respect, in an appellate function, a court is afforded some discretion.[9] In exercising this discretion, I am

[9] *See* for example ICTR, *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 324 (reducing the sentence of the accused despite the absence of any express provision to that effect); ICTR, *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request



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cognizant of the various factors at play that are relevant in this case. Chief among them is the fact that the *Amicus* Prosecutor has ultimately succeeded in this appeal: the Impugned Decision has been overturned and the Appeals Panel has reinstated the Order in Lieu of an Indictment of 31 January 2014. In my view, this outcome serves to redress the unfairness that has arisen from the conduct of the proceedings by the Contempt Judge. No useful or practical purpose would be served by sending this case back to the Contempt Judge on a limited issue only to have another round of appellate litigation on the same matter. Such a process would be an unjustified waste of the Tribunal's valuable resources. Indeed, the issue of remedy could even be said to be moot, considering that the disposition in this case aligns with the relief requested by the *Amicus* Prosecutor in the Appeal.[10]

16. For these reasons, I would hold that while the Contempt Judge erred in his conduct of the proceedings, the *Amicus* Prosecutor has been remedied by the final outcome of this appeal. In these circumstances, this serves as a sufficient and adequate remedy.

### 3. Discussion: the need to determine the issue of the precedential value of the *New TV* Jurisdiction Appeal Decision, the effect of not doing so and the binding force of that decision

17. I unreservedly consider it a duty and absolutely essential that the Appeals Panel should determine the issue of the precedential value of the *New TV* Jurisdiction Appeal Decision as there is no third tier appellate body or other higher judicial entity to which the *Amicus* Prosecutor may resort as matter of principle and procedure.[11] I have considered too that beyond an appeal as provided for in Rule 60 *bis* (M), there is no other mechanism or provision that offers the opportunity for a final decision on the issue to satisfy the requirements of finality and certainty.

18. It is also crucial that there be a clear and definite ruling in Rule 60 *bis* proceedings generally, given the high importance of the proper administration of justice at the Tribunal, the integrity of the judicial process and precepts of fairness as it relates to the guaranteed rights of suspects and accused persons as well as the rights and interests of parties to contempt proceedings. I have not overlooked the Tribunal itself and its legitimacy.

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for Review or Reconsideration), 31 March 2000, para. 75 (providing financial compensation or a reduction in the accused's sentence despite the absence of any express provision to that effect). *See* also *Jelisić* Appeal Judgment, para. 73.

[10] *See* Appeal, para. 40.

[11] *See* Appeal, paras 12-25; Response, paras 7-39.



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19. In addition, I have considered that the potential practical consequences of not so doing are far-reaching and may result in perpetual conflict and multiplicity, to the detriment of the proper administration of justice. If each contempt judge sitting at first instance in a new contempt case may disregard prior decisions of other appeals panels, then the probability looms of several different cases with different outcomes under Rule 60 *bis* (A).

20. There is an acute probability and dangerous risk of a future, incongruous judicial scenario with some contempt judges finding that legal persons may be charged and, by contrast, others finding that they ought not to be charged.

21. There would also be no clear or definitive *ratio decidendi* to apply in view of the fact of multiplicity, as any particular decision would only be binding within the limited ambit of a specific case and need not be followed in any subsequent case. This raises the spectre of different *ratio decidendi*, each becoming a law unto itself alone.

22. This is highlighted by the extraordinary result of the course adopted by the Contempt Judge, if allowed to continue unabated and without a remedy, in the present case and the *New TV* case. In the *New TV* case, *New TV* S.A.L. – a legal person – continues to appear before the Contempt Judge as an accused properly charged. By contrast, in the present case, *Akhbar Beirut* S.A.L. – also a legal person – would have all charges against it dismissed and would take no further part in these proceedings. The havoc that situations like these would wreak on the proper administration of justice, the prospect of effective remedial redress in contempt proceedings, and the deterrent effect of contempt offences are both shocking and unthinkable. The situation that results from the Impugned Decision and its rejection of *stare decisis* in contempt cases before the Tribunal – *vis-à-vis* legal persons – is the very definition of a "manifestly absurd or unreasonable" result as referred to in Article 32 of the Vienna Convention on the Law of Treaties (1969).[12] As Rule 3 (A) commands, this treaty, in so far as it reflects customary international law, is relevant to the interpretation of the Rules.[13]

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[12] *See* also PCIJ, *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ Series B, No. 11 (1925), p. 39: "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".

[13] The ICJ has previously held that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) are codifications of customary international law: ICJ, *Case Concerning Sovereignty over Palau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 625 (2002), p. 645, para. 37; ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection Judgment, I.C.J. Reports 803 (1996), p. 812, para. 23.



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23. This state of affairs certainly could not be countenanced. Legal persons constituting prospective suspects and accused persons before the Tribunal must know whether or not they may properly be charged for contempt. It cannot be merely left to the dictates of each judge to decide as he chooses, resulting in one group of corporations/legal persons being charged and tried, and conversely another group having all charges against them being dismissed in the preliminary stages of proceedings.

24. Prosecutors would, equally, be adversely affected. Not only would they be uncertain as to whether or not to proceed to indict legal persons, but the matter of the settlement of the indictment itself and the crafting of pleadings would now present clear challenges were the matter not clearly and definitively decided rather than left open ended. The same would obtain for Defence Counsel in advising their clients as to corporate liability under Rule 60 *bis*. They would decidedly be disadvantaged. And finally, and perhaps most importantly, future contempt judges, in following the procedural steps in contempt proceedings contained in Rules 60 *bis* (E)-(F), must know from the outset against whom they may or may not proceed.

25. The possibility of future contempt proceedings also requires that the matter be fully, adequately and definitively addressed. Future contempt judges in Rule 60 *bis* proceedings should understand clearly and in an unqualified manner whether they are bound by a decision of other appeals panels or whether they may indeed disregarded them and adjudicate according to his or her own peculiar judicial dictates. Were it otherwise, the entire trial process in contempt proceedings and the administration of justice within the Tribunal would be reduced to nothing more than a wager. I have difficulty in giving judicial sanction to a situation that reduces the law to a ludicrous and unwarranted game of chance.

26. Lastly, this ignoble state of affairs would serve to gravely undermine the statutory requirement and mandatory guarantee of a fair trial. This judicial free-for-all is not a legally sustainable procedure or an acceptable part of the judicial process, whose object is the provision of justice to all and which provides for the equal treatment of accused persons as per Article 16(1) of the Statute. The legitimacy of the Tribunal would flounder and perish under such conditions to the detriment of accused persons and suspects who are alleged to have fall afoul of the Tribunal's contempt provisions.

27. It is the duty of the judiciary to ensure that the judicial landscape is not left submerged under a heavy fog and in darkness, without the benefit of any clarity of course or conduct,



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pushing beyond the sustainable boundaries of reason, logic or justice. As such, it is absolutely essential, in my view, to chart the judicial path ahead in this significant area of the Tribunal's jurisprudence. There is now a pressing and inescapable necessity to definitively decide on the precedential value of the *New TV* Jurisdiction Appeal Decision. This is particularly true in view of the fact that this is the first time in the history of the Tribunal that the matter has been raised and that it is the first time that a judge acting in a pre-trial capacity has challenged the correctness of the ruling of a superior court, and in such an acutely robust manner. In these circumstances, it is the responsibility of the Appeals Panel to rule on the issue. The fact that the Contempt Judge himself in the Impugned Decision acknowledged the "need for *consistency, certainty and predictability*"[14] seemingly underscores the correctness of this approach.

28. I have considered the Defence's submission that the Lebanese legal system does not generally regard judicial decisions as a source of law and that they are binding only to the parties in the relevant case – the one exception, according to the Defence, being *jurisprudence constante*.[15] The *Amicus* Prosecutor has not offered any argument in response on this point.

29. As the Appeals Panel has stated, the Tribunal has previously looked to and considered Lebanese law in informing its judicial work.[16] Lebanon's approach of *jurisprudence constante* – and not *stare decisis*[17] – should have factored into the Appeals Panel's reasoning. Notwithstanding, in my view, there are convincing reasons why, before this Tribunal, *stare decisis* – and not *jurisprudence constante* – ought to be judicially recognized.

30. At the outset, I note the Defence's argument that the *New TV* Jurisdiction Appeal Decision, as a singular isolated decision, does not attract the force of *jurisprudence constante* as recognised in the Lebanese legal order.[18] That may be true. But in my view there is an inherent contradiction in making this submission: *jurisprudence constante* does not appear overnight. It takes a first pronouncement, time and an indeterminate number of decisions on

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[14] Impugned Decision, para. 67 (emphasis added).
[15] Response, paras 21, 24, 26. I note that the Lebanese jurisprudence proffered by the Defence does not support its position on the binding nature of *jurisprudence constante* in the Lebanese legal order.
[16] *Akhbar Beirut* Jurisdiction Appeal Decision, para. 57.
[17] As the Appeals Chamber has previously held, "Lebanon is not a country where a formal doctrine of binding precedent (*stare decisis*) is adopted": Interlocutory Decision, para. 142. See also Impugned Decision, para. 69: "Lebanese law – like that of many civil law countries – does not know a concept of binding precedent or *stare decisis*".
[18] Response, para. 26.



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the same legal question before a particular line of case law can be said to have attained such status. If the Defence were correct in its submission, this would mean that in each and every instance where a decision on a novel legal issue is handed down for the first time, *jurisprudence constante*'s requirement of an initial judicial pronouncement on the matter would never occur. In other words, taking the Defence's position to its logical conclusion would serve to fatally undermine the very thing that *jurisprudence constante* is supposed to facilitate.

31. The consideration of this initial point also touches upon particularly powerful reasons why I believe the *jurisprudence constante* approach to jurisprudence is not applicable or apposite to the particular circumstances of this Tribunal. There is generally no impediment for such a system to work in the domestic legal systems of States that adhere to the rule of law: the judiciary, and the decisions they render, are not easily displaced. It is this permanency and the complexity and diversity of the societies they serve that ensures both that the same legal issues relating to criminal offences will eventually be brought before the courts in sufficient number and affords the opportunity for domestic judges to rule upon them. Without these, the emergence of *jurisprudence constante* would be a very difficult task indeed.

32. This Tribunal could not be further from such an environment. First, unlike the domestic criminal courts of Lebanon, we are not a permanent judicial institution. Rather, the Tribunal has a limited (albeit renewable) life span in which to fulfil its mandate.[19] Given this fact, it would simply not be practical or realistic to expect the Tribunal to develop over time a long line of case law on criminal offences in order to achieve a legal trend.

33. Second, and again unlike the domestic criminal courts of Lebanon, the Tribunal is not envisaged to adjudicate over large numbers of criminal cases. Our jurisdiction only extends to the attack of 14 February 2005, connected attacks that occurred between 1 October 2004 and 12 December 2005, and potentially further attacks that occurred beyond these dates, but only when this is decided by the United Nations and Lebanon together with the consent of the UN Security Council.[20] At present, only three cases have been held to satisfy the requirements of connected cases pursuant to Article 1 of the Statute and are still under investigation by the

[19] Article 21, Agreement between the United Nations and Lebanon, 10 June 2007.
[20] Art. 1 STL St.



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Prosecutor.[21] In contempt matters, the Tribunal is currently seized of the *New TV* case and the present case, while one further matter is also under consideration.[22] Such a small number of cases, and considering the differing substantive law that govern them, serves only to further frustrate the formation of *jurisprudence constante*.

34. In short, the Tribunal lacks both permanency and the number of cases that are conducive to the crystallisation of *jurisprudence constante*.

35. One final point concerning Lebanon's legal system is worth mentioning. As a country of the civil law tradition, the laws that govern Lebanon are highly codified by its legislature. They are expressed in a relatively clear and comprehensive manner so as to cover most eventualities and have been adapted over time to best serve the Lebanese people. In such an environment, a Lebanese judge is afforded less interpretative latitude and discretion than his or her counterparts of the common law tradition. Whilst I am certain that the Tribunal's Statute and Rules were drafted with precision and forethought, it is true that many of the provisions governing this Tribunal remain untested and are novel at international criminal law and in Lebanon. Indeed, in certain instances the law of the Tribunal is not codified comprehensively at all. One area where this is particularly true is in the exercise of our inherent power: "[w]hen 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".[23]

36. When operating within a legal system that codifies the law to a high degree, there is less need to rely on binding judge-made law as *stare decisis* commands. The same cannot be said of this Tribunal.

37. Additionally, I consider that the role of *jurisprudence constante* in international criminal law is clouded in many respects by *stare decisis*. To be fair, *jurisprudence constante*

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[21] *See* STL-11-02/D/PTJ, F0004, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon, 19 August 2011; STL-11-02/D/PTJ, F0005, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011; STL-11-02/D/PTJ, F0006, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011.
[22] *See New TV* Indictment Decision, paras 3 (iii), 5, 75; Indictment Decision, paras 3 (iii), 5, 75.
[23] *New TV* Jurisdiction Appeal Decision, para. 42.



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features – as a concept – more prominently at the International Court of Justice ("ICJ").[24] However, as the Contempt Judge correctly pointed out, the ICJ is not an international *criminal* court, but instead adjudicates over disputes between States, and "the language of Art[icle] 38 of the [ICJ's] Statute […] assigns a relatively low degree of importance to previous judicial decisions [...]".[25]

38. More relevant in this enquiry are the positions of the various international criminal tribunals. In this respect, both the ICTY and the ICTR have recognised the core feature of *stare decisis*: "that the *ratio decidendi* of [Appeals Chamber] decisions is binding on Trial Chambers [...]".[26] The SCSL, although not specifically seized of the issue, stated that "[t]he Appeals Chamber […] is the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority".[27] The ICC, as the only permanent international criminal tribunal in existence, has not yet definitively ruled on the question of *stare decisis* and it may be too early in its life to speak of *jurisprudence constante* in respect of the crimes over which it has jurisdiction.[28] However, I note that the ICC Statute permits it to "apply principles and rules of law as interpreted in its previous decisions".[29] This constitutes an explicit and formal recognition that prior decisions of the ICC are a source of law that it may apply. Whilst I do not deny that numerous references have been made to "established case law", "established jurisprudence", "*jurisprudence constante*" or the

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[24] *See* ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 624 (2012), p. 661, para. 100 (French); ICJ, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 61 (2009), p. 101, para. 118 (French); ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 3 (2002), p. 12, para. 26 (French); ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 3 (1980), p. 18, para. 37 (French); ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction Judgment, I.C.J. Reports 3 (1973), p. 7, para. 12 (French).

[25] Impugned Decision, para. 68, fn. 165.

[26] ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgment"), para. 113. *See* also ICTR, *Semanza v. The Prosecutor*, Case No. ICTR-97-21-A, Décision, para. 92: « *La Chambre d'appel reprend les conclusions de la Chambre d'appel du TPIY dans l'affaire* Aleksovski, *et rappelle que dans l'intérêt de la sécurité et de la prévisibilité juridiques, la Chambre d'appel doit suivre ses décisions antérieures mais reste libre de s'en écarter si des raisons impérieuses lui paraissent le commander dans l'intérêt de la justice* ».

[27] SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeal Judgment, 26 September 2013, para. 472.

[28] However, the ICC has recognised "established jurisprudence" in relation to procedural law. *See* for example ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-460, Decision on Victim's Representation and Participation, 3 October 2012, para. 11; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-912, Decision on Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), 6 September 2013, para. 18.

[29] Art. 21(2) ICC St.



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equivalent at the ICTY and ICTR,[30] such pronouncements are difficult to detach from the fact that these tribunals recognise the binding force of Appeals Chamber decisions. It is unclear to me whether such pronouncements would have been made in the absence of *stare decisis*. In my view, in international criminal law it is an open question whether *jurisprudence constante*, *stare decisis*, or a mixture of both, have played a harmonizing role in ensuring consistency and predictability in the jurisprudence. This fact goes further against the applicability of *jurisprudence constante* before the Tribunal. In my view, given the particularities of the Tribunal I have previously outlined, this principle would be more prohibitive of justice, fairness and the proper administration of justice.

39. For these reasons, and despite the recognition of *jurisprudence constante* in the Lebanese legal order, I nonetheless hold that cogent reasons exist for the Tribunal to recognise *stare decisis*. In my view, it matters not that the *New TV* Jurisdiction Appeal Decision was a single isolated decision. What matters is that it was properly issued by an appeals panel – an appellate chamber that sits above the Contempt Judge. That, in of itself, was sufficient to attract the application of *stare decisis*. The Contempt Judge was simply not at liberty to decide on the binding effect of the *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision and substitute, in its place, his own mistaken views on the jurisdiction *ratione personae* of the Tribunal in contempt proceedings.

40. I am cognisant of the fact that the present Appeals Panel has no formal jurisdiction over matters in the *New TV* case. Our jurisdiction extends to the case with which we have been seized: the *Akhbar Beirut* case. The *New TV* case has its own appeals panel composed of a different bench. Therefore, two distinct appeals panels have exclusive jurisdiction over different cases and may in theory rule differently on similar issues. Situations such as these, at least in common law systems, would be countenanced by the existence of a third appellate tier that would resolve disputes on the interpretation of the law of lower appellate courts. We do not have that luxury. Yet, the need for certainty, predictability and consistency is equally compelling. Consequently, I consider that in our unique circumstances, it is in the interests of

[30] See ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, *Décision sur la demande de mise en liberté provisoire présentée par l'accusé Vojislav Šešelj*, 23 March 2012, para. 10; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de mise en liberté provisoire de l'accusé Stojić*, 17 June 2009, para. 7; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeal Judgement, 27 January 2014, para. 574; ICTY, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, Decision on Sredoje Lukić's Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief, 30 August 2013, p. 3; ICTR, *Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Appeal Judgement, 16 December 2013, para. 10; ICTR, *Mugenzi and Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Appeal Judgement, 4 February 2013, para. 14.



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justice to hold that any contempt judge at this tribunal is bound by any earlier pronouncement by an appeals panel. As such, it is my view that the Contempt Judge in the *New TV* case is bound by the decisions rendered by this Appeals Panel, notwithstanding the fact that we do not possess *de jure* jurisdiction over matters in that case.

41. With respect to the binding force of decisions rendered by one appeals panel on subsequent appeals panels, I concur with the view set out by the ICTY Appeals Chamber in *Aleksovski*: appeals panels should follow the decisions of prior appeals panels "but should be free to depart from them for cogent reasons in the interests of justice. [...] [However,] the normal rule is that previous decisions are to be followed, and departure from them is the exception".[31] In contempt proceedings, this means that an appeals panel may depart from the position taken by another appeals panel provided that cogent reasons exist and only "after the most careful consideration has been given [...] both as to the law, including the authorities cited, and the facts".[32] In other words, an appeals panel may reconsider and, perhaps, alter or change their view on a particular legal matter that has been previously determined by that appeals panel or by another panel in circumstances that include:

> [W]here the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[33]

42. After having examined all the circumstances in our case, I find there are no grounds for departing from the *New TV* Jurisdiction Appeal Decision.

## 4. Conclusion

43. Based on the above reasoning, I reiterate that while I agree with the outcome in this case, I consider that the question of the binding effect of the *New TV* Jurisdiction Appeal Decision on the issue of the Tribunal's jurisdiction *ratione personae* should have been raised more substantively and definitively addressed by the Appeals Panel. In my view, the *ratio decidendi* of the *New TV* Jurisdiction Appeal Decision was binding on the Contempt Judge and he did not have the power to depart from it for the reasons set forth in this opinion. In addition, I find that the Contempt Judge committed an additional error in violating the *audi alteram partem* principle by not allowing the *Amicus* Prosecutor to be heard on this issue.

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[31] *Aleksovski* Appeal Judgment, paras 107, 109.
[32] *Aleksovski* Appeal Judgment, para. 109.
[33] *Aleksovski* Appeal Judgment, para. 108 (reference omitted).



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44. Finally, for the sake of completeness and clarity, I must indicate here that I concur with the disposition of the Appeals Panel in this case to grant the Appeal, reverse the Impugned Decision and reinstate the Order in Lieu of an Indictment of 31 January 2014.

Janet Nosworthy, Judge



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