

**THE CONTEMPT JUDGE**

**Case No.:** STL-14-06/T/CJ  
**Before:** Judge Nicola Lettieri, Contempt Judge  
**Registrar:** Mr Daryl Mundis, Registrar  
**Date:** 15 July 2016  
**Original language:** English  
**Classification:** Public

**IN THE CASE AGAINST**

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

**PUBLIC REDACTED VERSION OF THE JUDGMENT**

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

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



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## INTRODUCTION

1. This case concerns two Articles published on 15 and 19 January 2013 in Lebanon on purported confidential Tribunal witnesses.<sup>1</sup> *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin are alleged to have been responsible for the publication of both Articles. For this conduct, *Akhbar Beirut* S.A.L. and Mr Al Amin are charged with interfering with the Tribunal's administration of justice.

2. Having completed the trial and after careful deliberation, I now issue the judgment in this case, along with reasons. First, I summarize the charges, as set out in the Order in Lieu of Indictment.

3. *Akhbar Beirut* S.A.L. is a private company, based in Beirut, Lebanon, that owns *Al Akhbar*, a daily newspaper that publishes general interest and news articles. It also publishes the content of its articles on its official Arabic language website and, during the period of time relevant to the charges, on its English language website.<sup>2</sup>

4. Mr Al Amin, born in 1965 in Chakra, Lebanon, was at all times relevant to the Order in Lieu of Indictment, Editor-in-Chief and Chairman of the Board of Directors of *Al Akhbar*.<sup>3</sup>

5. The Order in Lieu of Indictment charges *Akhbar Beirut* S.A.L. and Mr Al Amin with contempt, pursuant to Rule 60 *bis* (A), for knowingly and wilfully interfering with the administration of justice by: publishing information on purported confidential witnesses in the *Ayyash et al.* case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.<sup>4</sup>

6. Mr Al Amin is alleged to have had the authority to decide on behalf of *Akhbar Beirut* S.A.L. which articles would be published in *Al Akhbar* newspaper, and on its Arabic and English

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<sup>1</sup> Order in Lieu of Indictment, p. 2; *see also* P00001, P00002, P00004, P00005, P00006, P00007.

<sup>2</sup> Order in Lieu of Indictment, p. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> Order in Lieu of Indictment, pp. 2-3.

language websites. It is alleged that he also had the authority to remove the content from *Al Akhbar's* web platforms.<sup>5</sup>

7. The Order in Lieu of Indictment alleges that on 15 January 2013, an article co-authored by Mr Al Amin and Mr Hassan Illeik, entitled “STL Leaks: The Prosecution’s Surprise Witnesses”, published information on 17 purported confidential witnesses in the *Ayyash et al.* case in *Al Akhbar's* newspaper, as well as on its Arabic and English language websites (collectively referred to as the “15 January Article”).<sup>6</sup>

8. The Order in Lieu of Indictment further alleges that on 19 January 2013, an article authored by Mr Al Amin, entitled, “The STL List: Why We Published”, containing information on 15 additional purported confidential witnesses in the *Ayyash et al.* case was published in *Al Akhbar's* newspaper and on its Arabic language website.<sup>7</sup> On 20 January 2013, this article was then published on *Al Akhbar's* English language website (collectively referred to as the “19 January Article”).<sup>8</sup>

9. The Order in Lieu of Indictment further states that on behalf of *Akhbar Beirut S.A.L.* Mr Al Amin authorized the publication of the 15 and 19 January Articles in *Al Akhbar's* newspaper, on *Al Akhbar's* Arabic language website and on *Al Akhbar's* English language website.<sup>9</sup> Additionally, it alleges that the 15 and 19 January Articles remained accessible to the public on *Al Akhbar's* Arabic and English language websites.<sup>10</sup>

10. Finally, Mr Al Amin is alleged to have known that publishing the 15 and 19 January Articles would undermine public confidence in the Tribunal’s ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.<sup>11</sup>

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<sup>5</sup> Order in Lieu of Indictment, p. 1.

<sup>6</sup> *Id.* at p. 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

## PROCEDURAL HISTORY

### **I. The Indictment**

11. On 31 January 2014 the initial Contempt Judge, Judge David Baragwanath issued the “Redacted Version of Decision in Proceedings for Contempt with Orders In Lieu of an Indictment”, which included an Order in Lieu of an Indictment against the Accused *Akhbar Beirut S.A.L.* and Mr Al Amin.<sup>12</sup> I was then designated as Contempt Judge on 31 January 2014 by order of the President.<sup>13</sup>

12. On 4 March 2014, the Registrar appointed a replacement *Amicus Curiae* Prosecutor (“*Amicus*”) to investigate and prosecute the contempt allegations, following the resignation of the previous *Amicus Curiae*.<sup>14</sup>

### **II. Initial Appearance and Assignment of Counsel**

13. Summons to Appear were issued on 18 March 2014 for both Mr Al Amin and *Akhbar Beirut S.A.L.*<sup>15</sup>

14. On 24 April 2014, I lifted the confidentiality of the two Summons to Appear<sup>16</sup> and issued a public redacted version of the Decision in Proceedings for Contempt with Orders in Lieu of an Indictment.<sup>17</sup>

15. An oral hearing for the initial appearance of the Accused was scheduled for 13 May 2014 but Mr Al Amin sent correspondence requesting a postponement of the hearing.<sup>18</sup> By Order of 22 May 2014, I rescheduled the initial appearance for 29 May 2014.<sup>19</sup>

16. I subsequently received a letter from Mr Al Amin on 26 May 2014, on behalf of himself and *Akhbar Beirut S.A.L.*, raising several concerns in relation to such appearances and

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<sup>12</sup> Order in Lieu of Indictment.

<sup>13</sup> Order Designating Contempt Judge.

<sup>14</sup> Registrar Decision Appointing Replacement *Amicus Curiae*.

<sup>15</sup> Summons to Appear (*Akhbar Beirut S.A.L.*); Summons to Appear (Ibrahim Mohamed Ali Al Amin).

<sup>16</sup> Order Lifting Confidentiality.

<sup>17</sup> Order in Lieu of Indictment.

<sup>18</sup> Correspondence from the Accused.

<sup>19</sup> Order Rescheduling Initial Appearances, para. 1.

requesting a postponement of the initial appearances for a “serious, sufficient period of time to carry out what is required of me.”<sup>20</sup>

17. In my Order of 27 May 2014, I reiterated the limited purpose of an initial appearance, including my duty to ensure that an accused’s right to counsel is respected, and declined to order any further postponement of the hearing.<sup>21</sup>

18. Just prior to the initial appearances, the Tribunal’s Registry received an email from Mr Al Amin informing the Court that he would participate in the hearing from Beirut via video-conference link without counsel or any other legal representative present either with him or in the courtroom.<sup>22</sup>

19. At the initial appearances, I stated that Mr Al Amin’s email read together with his letter of 26 May 2014 could be understood as a request to represent both himself and *Akhbar Beirut* S.A.L. for the purpose of the initial appearance.<sup>23</sup> I then asked Mr Al Amin if he was indeed appearing as a representative of both himself and *Akhbar Beirut* S.A.L. He responded “Yes”.<sup>24</sup> Before the initial appearance hearing had concluded, Mr Al Amin declared, “I will remain silent during all the proceedings and I refuse to appoint any lawyer to represent me or represent the Akhbar company” and subsequently left the hearing.<sup>25</sup>

20. After discussion and upon reflection, I ordered the Head of Defence Office to assign counsel to represent the Accused pursuant to Rule 59 (F), “because this is necessary in the interests of justice and to ensure a fair and expeditious trial”.<sup>26</sup> I provided written reasons on 5 June 2014.<sup>27</sup>

21. On 12 June 2014, I received a request in which the Accused argued that the implementation of my decision to assign counsel would deprive them of their fundamental right

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<sup>20</sup> Submissions from Mr Al Amin, p. 1.

<sup>21</sup> Further Order on Initial Appearances, paras 3-4.

<sup>22</sup> Transcript of 29 May, p. 1.

<sup>23</sup> *Id.* at pp. 1-2.

<sup>24</sup> *Id.* at p. 2.

<sup>25</sup> *Id.* at pp. 13-14.

<sup>26</sup> *Id.* at p. 19.

<sup>27</sup> Decision on Assignment of Counsel.

to self-representation and the right to a fair trial.<sup>28</sup> On the same day the Head of Defence Office filed a submission “relating to the Request”.<sup>29</sup>

22. On 18 June 2014, I ordered the Accused to make written submissions on whether they intended to participate in the hearings against them and, if so, whether they would appoint counsel of their own choosing or represent themselves, with legal assistance if necessary, and by being present in the courtroom.<sup>30</sup> The Accused responded on 25 June 2014 but failed to respond to the questions specified in my Order.<sup>31</sup> The Accused filed a request asking for certification to appeal my decision to assign counsel,<sup>32</sup> which I denied.<sup>33</sup> Soon thereafter, I also denied a request for reconsideration of the Certification Decision.<sup>34</sup>

23. The Head of Defence Office assigned Mr Antonios Abou Kasm on 30 June 2014.<sup>35</sup> He was sworn in on 3 July 2014.<sup>36</sup>

24. I held a Status Conference on 12 September 2014 in order to discuss the progress towards trial and to again invite Mr Al Amin to participate in the proceedings. However, he did not attend.<sup>37</sup>

### III. Jurisdiction

25. On 18 August 2014, the Defence filed its motion challenging the jurisdiction of the Tribunal to hear cases of contempt against legal persons, and requested the dismissal of the charges against *Akhbar Beirut S.A.L.*, and a finding that the Tribunal lacked jurisdiction over the charges against both Accused or, in the alternative, a referral of the case to the Lebanese Authorities.<sup>38</sup>

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<sup>28</sup> Request for Certification to Appeal Assignment of Counsel, p. 6.

<sup>29</sup> Observations from HDO.

<sup>30</sup> Decision on Requests by HDO and Further Order on Submissions, p. 8.

<sup>31</sup> Response to Demand to Clarify Position.

<sup>32</sup> Accused Request for Certification, para. 1.

<sup>33</sup> Certification Decision, p. 9.

<sup>34</sup> Decision on Defence Request for Reconsideration of Certification Decision, para. 1.

<sup>35</sup> Appointment of Counsel, paras 14-18.

<sup>36</sup> Request for Leave to Reply to Request for Certification to Appeal Assignment of Counsel, para. 17.

<sup>37</sup> Transcript of 12 September 2014, p. 6.

<sup>38</sup> Defence Preliminary Motion, para. 2.

26. On 29 August 2014, the *Amicus* filed his response to the Defence Motion, asserting that the Tribunal has inherent jurisdiction to indict legal persons for contempt under Rule 60 *bis* and requested that the motion be denied.<sup>39</sup> I subsequently ruled that the Tribunal did not have jurisdiction over legal persons,<sup>40</sup> but this decision was reversed by the Appeals Panel who has subsequently affirmed that a legal person may be tried for contempt.<sup>41</sup>

#### IV. Pre-Trial Phase

27. On 5 March 2015, the *Amicus* filed his Pre-Trial Brief, including his witness and exhibit lists,<sup>42</sup> both of which he subsequently amended on 18 December 2015.<sup>43</sup> He further amended his exhibit list on 23 February 2016.<sup>44</sup>

#### V. Trial

28. The Parties gave their opening statements on 24 February 2016.<sup>45</sup> On the same day, the *Amicus* began his case. In total, he called eight *viva voce* witnesses, including one proposed as an expert, Dr Anne-Marie de Brouwer. Pursuant to protective measures that I had ordered, several witnesses gave testimony in either closed or private session.<sup>46</sup> The *Amicus* closed his case on 1 March 2016. I admitted a total of 153 *Amicus* exhibits.

29. On 7 April 2016, the Defence began its case.<sup>47</sup> In total, it called three *viva voce* witnesses, two of whom testified via video-conference link from the Tribunal's Beirut office, and one who was proposed as an expert, Mr Elias Aoun. The Defence closed its case on 8 April 2016. I admitted a total of 58 Defence exhibits.

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<sup>39</sup> Response to Defence Preliminary Motion, paras 5-6, 18, 40.

<sup>40</sup> Jurisdiction Decision, para. 2.

<sup>41</sup> Jurisdiction Appeal Decision, paras 9, 74.

<sup>42</sup> *Amicus* Pre-Trial Brief; F0083, Annex A Prosecution Exhibit List, Confidential, 5 March 2015; F0083, Annex B Prosecution Witness List, Confidential, 5 March 2015.

<sup>43</sup> Public Decision on *Amicus* Motions to Amend Exhibit and Witness Lists, p. 12.

<sup>44</sup> Public Decision on *Amicus* Motion to Amend Exhibit List and Admit Evidence from the Bar Table, pp. 10-11.

<sup>45</sup> Transcript I of 24 February, pp. 4-48.

<sup>46</sup> Public Decision on Application for Protective Measures for *Amicus* Witnesses, pp. 12-13.

<sup>47</sup> Transcript of 7 April, pp. 3-4.



## VI. Final Trial Briefs and Closing Arguments

30. The Parties filed their final trial briefs on 28 April 2016.<sup>48</sup>

31. On 13 May 2016, I heard the Parties' closing arguments.<sup>49</sup> I subsequently adjourned the hearing for deliberation.

### APPLICABLE LAW

32. Contempt of the Tribunal is described in Rule 60 *bis* (A), which provides:

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

(i) being a person who is questioned by or on behalf of a Party in circumstances not covered by Rule 152, knowingly and wilfully makes a statement which the person knows is false and which the person knows may be used as evidence in proceedings before the Tribunal, provided that the statement is accompanied by a formal acknowledgment by the person being questioned that he has been made aware about the potential criminal consequences of making a false statement;

(ii) being a witness before a Judge or Chamber refuses or fails to answer a question without reasonable excuse including the situation described in Rule 150(F);

(iii) discloses information relating to proceedings in knowing violation of an order of a Judge or Chamber;

(iv) without reasonable excuse fails to comply with an order to appear or produce documents before a Judge or Chamber

(v) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Judge or Chamber, or a potential witness;

(vi) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber; or

(vii) threatens, intimidates, engages in serious public defamation of, by statements that are untrue and the publication of which is inconsistent with freedom of expression as laid down in international human rights standards, offers a bribe to, or otherwise seeks to coerce, a Judge or any other officer of the Tribunal.

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<sup>48</sup> Defence Final Trial Brief; *Amicus* Final Trial Brief.

<sup>49</sup> Transcript of 13 May 2016, pp. 3-72.

33. The Tribunal possesses inherent jurisdiction to prosecute the crime of contempt.<sup>50</sup> Such jurisdiction derives from the Tribunal's inherent power, as a judicial institution, to ensure that the exercise of its statutory jurisdiction is not frustrated and that its basic judicial functions are safeguarded.<sup>51</sup> Rule 60 *bis* expresses the Tribunal's contempt jurisdiction, but because this jurisdiction is inherent, its scope is not confined by the Rule's terms.<sup>52</sup>

34. The Accused are charged with one count each. Below, I recite the count and the applicable *actus reus* and *mens rea*. The *Amicus* must prove each element of the offence beyond reasonable doubt before a conviction can be entered.<sup>53</sup>

35. In the sole count, under Rule 60 *bis* (A), the Accused are charged with knowingly and wilfully interfering with the administration of justice by publishing information on purported confidential witnesses in the *Ayyash et al.* case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.<sup>54</sup>

36. There is no doubt that this count engages the freedom of the press,<sup>55</sup> and it has been duly raised by the Defence in abstract as constituting a justification for any alleged conduct.<sup>56</sup> However, its implication in this case is properly addressed only if and after the *Amicus* has proved the elements of the count. Should these elements (*actus reus* and *mens rea*) be proved beyond reasonable doubt, then I am required to consider whether the Accused's conduct was justified by their right to free expression, which encompasses the right to disseminate news and express criticisms. In such an evaluation, I must account for and balance the freedom of the press and the need to ensure the integrity of the Tribunal's proceedings. The journalistic profession may not be used as an impenetrable shield: where different legitimate interests are involved, they must be weighed in light of the priorities in a democratic society. In sum, the freedom of the

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<sup>50</sup> Jurisdiction Appeal Decision, para. 32.

<sup>51</sup> *Ibid*; Jurisdiction Decision, para. 31.

<sup>52</sup> Jurisdiction Appeal Decision, para. 32.

<sup>53</sup> See Rule 148 (A) STL RPE; see also ICTY, *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, Judgement, 30 August 2006 ("Jović Contempt Trial Judgement"), para. 14; ICTY, *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2, Judgement, 10 March 2006 ("Marijačić Contempt Trial Judgement"), para. 16.

<sup>54</sup> Order in Lieu of Indictment.

<sup>55</sup> Jurisdiction Decision, paras 36-40.

<sup>56</sup> Defence Final Brief, paras 136-146.

press does not relate to whether the elements of the offence are made out beyond a reasonable doubt, but, in the event that they are, provides a possible justification for the Accused's conduct.

37. In order to satisfy the *actus reus* for this count, the prosecution must first prove that the Accused actually published information on purported confidential witnesses in the *Ayyash et al.* case.<sup>57</sup> Exactly what or how much information is sufficient will depend on the circumstances. However, I consider that the disclosed information must at least be significant enough that the relevant individual is reasonably identifiable in the circumstances.<sup>58</sup>

38. In addition, the prosecution must show that such publication created a likelihood of undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.<sup>59</sup> It must be noted indeed that disclosing information on purported confidential witnesses does not automatically constitute contempt in the way that, for example, violating a court order *per se* amounts to an interference with the administration of justice.<sup>60</sup>

39. Notwithstanding, the *Amicus* need not demonstrate that public confidence was, in fact, undermined. Like intimidation of or interference with a witness or potential witness, where "likelihood" is the applicable standard, publishing information on purported confidential witnesses is a crime of "concrete danger", and thus does not require proof of a particular result.<sup>61</sup> These two types of acts are discouraged for the same reason: they tend to obstruct justice. The potential harm from such conduct is sufficiently serious that just creating a concrete danger may justify a criminal sanction.<sup>62</sup> Accordingly, the conduct must, when it occurred, have been of sufficient gravity to create, objectively, the likelihood of undermining the public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. Whether or not the Accused's conduct in fact caused harm can be relevant to, but is not dispositive of the existence of the objective likelihood at the relevant time.<sup>63</sup>

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<sup>57</sup> *New TV Judgment*, para. 43.

<sup>58</sup> Appeals Panel Judgment, para. 42.

<sup>59</sup> *Id.* at para. 31.

<sup>60</sup> *New TV Judgment*, paras 44-45; Appeals Panel Judgment, para. 95.

<sup>61</sup> *New TV Judgment*, para. 44; Appeals Panel Judgment, para. 95.

<sup>62</sup> *New TV Judgment*, para. 44.

<sup>63</sup> *Id.* at para. 46.

40. Where certain conditions are met, undermining public confidence in the Tribunal and interference with the administration of justice are a hendiadys; *id est* proof of an objective likelihood of undermining public confidence in the Tribunal, in the sense articulated above, is sufficient to prove interference with the administration of justice. This is because maintaining public confidence in the courts' authority and their ability to administer justice is undoubtedly essential to protecting its proper functioning.<sup>64</sup>

41. I cannot find that public confidence has been undermined on the basis of common sense, uncorroborated by evidentiary proof.<sup>65</sup> Nor can such a likelihood be proved in mere subjective terms (for example, on the basis of the personal feelings or opinions of a small number of people – which constitute speculative data vulnerable to arbitrary interpretations).<sup>66</sup> Under the required objective test, likelihood can only be proved through ascertainable facts<sup>67</sup> that emerge from concrete, tangible information substantiated by evidentiary proof.<sup>68</sup>

42. I already ruled that the *mens rea* required for a violation of Rule 60 *bis* (A) is *knowing and wilful* interference with the Tribunal's administration of justice.<sup>69</sup> I do not consider that, on a plain reading of the text and in line with relevant case-law, "knowing and wilful" is a mere stand-in for "specific intent". Indeed, I find no basis in the law to conclude that Rule 60 *bis* (A), which articulates the general *mens rea* for interference with the administration of justice, requires a higher degree of culpability than the specific conduct listed below as constituting such interference *per se* and for which *knowing and wilful* is required.<sup>70</sup> In other words, the *Amicus* need not separately prove a specific intent to interfere with the administration of justice.

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<sup>64</sup> See ECtHR, *Case of Worm v. Austria*, Application 22714/93, Judgment, 29 August 1997, para. 50 ("[T]he limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice."); *Marijačić* Contempt Trial Judgement, para. 50 ("Any deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal."). In my view, the reasoning with respect to the public's confidence in a court's ability to grant effective protective measures applies as well to protecting confidentiality. See also *New TV* Judgment, para 40; Appeals Panel Judgment, para 95.

<sup>65</sup> *New TV* Judgment, para. 45; Appeals Panel Judgment, paras 27-34.

<sup>66</sup> *New TV* Judgment, para. 46; Appeals Panel Judgment, para. 102.

<sup>67</sup> *New TV* Judgment, para. 46.

<sup>68</sup> This is assessed, *inter alia*, according to the parameters of *id quod plerumque accidit*, a legal term which points to the most probable outcome of an act or event.

<sup>69</sup> *New TV* Judgment, para. 48.

<sup>70</sup> *Id.* at para. 49.

43. The essential question is what state of mind renders the conduct in question sufficiently culpable to constitute a knowing and wilful interference with the administration of justice. I find that, in this context, what is required for the prosecution is to establish that the Accused (1) deliberately published information on purported confidential witnesses, and (2) in doing so, they knew that their conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. Actual knowledge that the conduct created such a likelihood, which can be inferred from a variety of circumstances, suffices, as does wilful blindness. Wilful blindness can be considered equally culpable as actual knowledge and sufficient to prove knowledge.<sup>71</sup> For wilful blindness, the prosecution must first show that the Accused had a suspicion of the likelihood. In addition, the Accused must have wilfully kept himself unaware of facts that would confirm this likelihood, so as to be able to deny knowledge of it and therefore escape liability. On the other hand, basic recklessness representing a lower degree of culpability, cannot amount to the "knowing and wilful" conduct required for contempt.<sup>72</sup>

#### ***A. Corporate Liability***

44. *Akhbar Beirut* S.A.L, a legal person, is charged with contempt of court under Rule 60 *bis* (A). Reversing my Jurisdiction Decision, which held that this Tribunal's contempt provisions apply to natural persons only<sup>73</sup>, the Appeals Panel found that the Tribunal has personal jurisdiction to prosecute legal persons under Rule 60 *bis*.<sup>74</sup> The Appeals Panel, however, provided no clear guidance as to the applicable material elements in attributing liability to legal persons charged with contempt before this Tribunal, including with respect to the relationship between the modes of responsibility in the Statute and corporate accused. Because of and despite this, I had to identify these elements, recognizing that no international model of corporate criminal liability existed. I eventually concluded that it was most appropriate in the circumstances to look to Lebanese law on corporate liability.<sup>75</sup> The Appeals Panel later confirmed my decision that the applicable law in relation to the elements of attributing criminal

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<sup>71</sup> See ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 43.

<sup>72</sup> *New TV* Judgment, para. 50.

<sup>73</sup> Jurisdiction Decision.

<sup>74</sup> Appeals Panel Judgment, para. 73.

<sup>75</sup> *New TV* Judgment, paras 55, 67.

liability to legal persons is Lebanese law.<sup>76</sup> I am therefore bound to follow the principle that the Tribunal has jurisdiction to prosecute legal persons under Rule 60 *bis*, despite my previous reservations, and apply Lebanese law to the present matter.

45. Thus, under Lebanese law, in order for the corporate Accused to be held criminally responsible for the count charged, the prosecution must: (1) establish the criminal responsibility of a specific natural person; (2) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and (3) prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.<sup>77</sup>

## **FINDINGS**

### **I. *Actus Reus***

46. In order to satisfy the *actus reus* for this count, the *Amicus* must first prove that the Accused actually disclosed information on purported confidential witnesses in the *Ayyash et al.* case. He then must show that, at the time, such disclosure was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.

#### **1. Disclosures of information on purported confidential witnesses of the Tribunal**

##### ***a) Evidence on the Articles and their authors***

47. First, I note that the Parties do not appear to take issue with the evidence presented in respect of this first element of the offence. The evidence shows that on 15 January 2013, the newspaper *Al Akhbar*, published an Arabic-language article entitled "Special Tribunal for Lebanon – Witnesses' Leaks – the Surprise"<sup>78</sup> which claims to identify 17 "individuals whose testimonies will be used by the prosecution team to expose its strength in order to incriminate

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<sup>76</sup> Appeals Panel Judgment, para. 196.

<sup>77</sup> *New TV* Judgment, para. 72; Appeals Panel Judgment, para. 196.

<sup>78</sup> P00001; *see also* P00116, P00117, P00118.

Hezbollah in the assassination of Hariri and others.”<sup>79</sup> In addition to publishing the article in print, the article was posted on *Al Akhbar* newspaper’s Arabic language website on the same day.<sup>80</sup> Both versions included photographs of the purported witnesses and personal identifying information including their name, mother’s name, residential address and, in most cases, their place and date of birth as well as their occupation.<sup>81</sup> For two of these purported witnesses, a summary of their purported statement to the Tribunal was also provided.<sup>82</sup> *Al Akhbar* newspaper’s English-language website published a translation of the same article on the same date<sup>83</sup> but did not include the photographs or personal identifying information, supplying instead a link to the list of witnesses on its Arabic website.<sup>84</sup>

48. The evidence further demonstrates that on 19 January 2013, *Al Akhbar* newspaper published a second article in Arabic entitled “List of witnesses – Surprise 2: Why we had to publish this information” in print and on its Arabic-language website.<sup>85</sup> *Al Akhbar*’s English-language website published a translation of the same article, entitled “The STL Witness List: Why We Published” on 20 January 2013.<sup>86</sup> The article is attributed to Mr Ibrahim Al Amin, who is identified as the Editor-in-Chief of the newspaper, and concludes with a note clarifying that the 15 January Article was authored by Mr Al Amin and his colleague Mr Hassan Illeik.<sup>87</sup> Only the Arabic-language article reveals the names and photos of an additional 15 individuals identified as purported Tribunal witnesses.<sup>88</sup> The mother’s name, place and date of birth, place of residence, occupation and in one case, a brief summary of the witness’s statement<sup>89</sup>, are included with each of the named purported witnesses.<sup>90</sup>

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<sup>79</sup> P00001, p. 2.

<sup>80</sup> P00001, P00002.

<sup>81</sup> *Ibid.*

<sup>82</sup> P00001, pp. 2-3 (ENG).

<sup>83</sup> P00004, the title of which is “STL Leaks: The Prosecution’s Surprise Witnesses”. The first impugned article published in Arabic and English on 15 January 2013 is referred to as the “15 January Article”.

<sup>84</sup> *Id.* at p. 2.

<sup>85</sup> P00005, P00006.

<sup>86</sup> P00007. The articles published on 19 and 20 January 2013 that refer to Tribunal witnesses are collectively referred to as the “19 January Article”.

<sup>87</sup> P00005, p. 3; P00007, p. 3.

<sup>88</sup> P00005, P00006.

<sup>89</sup> P00005, p. 3 (ENG).

<sup>90</sup> P00005, P00006.

49. When shown a copy of the pertinent *Al Akhbar* newspaper article during the trial, witnesses AP06<sup>91</sup>, AP07<sup>92</sup>, AP09<sup>93</sup>, DT01<sup>94</sup> and DT02<sup>95</sup> gave *viva voce* evidence confirming that their name, photo and other identifying information were published in the impugned Articles, alongside claims that they were Tribunal witnesses. Similarly, they all testified to having seen the print or online version of the *Al Akhbar* article that published their photograph, name and identifying information after being alerted to the publication by one or more persons in their entourage, around the time of the initial publications in January 2013.<sup>96</sup>

50. I have already found Mr Al Amin's suspect interview to be relevant, probative, and made voluntarily in circumstances where Mr Al Amin was fully informed of his judicial rights.<sup>97</sup> Mr Al Amin admitted in the interview to having both authored and published the 15 and 19 January Articles.<sup>98</sup>

#### ***b) Conclusion***

51. I am satisfied beyond a reasonable doubt of the authenticity and reliability of the news articles in evidence which are attributed to Mr Al Amin and *Al Akhbar*. The *Amicus* has therefore proved that the Accused actually published highly detailed information which fully identified a total of 32 individuals as purported confidential Tribunal witnesses.

## **2. Availability of the 15 and 19 January Articles**

#### ***a) Arguments of the Parties***

52. The *Amicus* argues that the 15 and 19 January Articles published on *Al Akhbar*'s English and Arabic-language websites remained accessible online until at least 29 February 2016.<sup>99</sup>

53. The Defence does not appear to contest the fact that such articles were published and disseminated online and does not address whether it accepts the alleged period of time that such

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<sup>91</sup> Transcript of 29 February, pp. 63-64.

<sup>92</sup> Transcript of 26 February, pp. 5-6.

<sup>93</sup> Transcript of 29 February, pp. 8, 10-11.

<sup>94</sup> Transcript of 7 April, pp. 7, 8, 10, 11, 13, 14, 19, 27.

<sup>95</sup> *Id.* at, pp. 37-38, 53-54.

<sup>96</sup> *See* fn 89-93.

<sup>97</sup> Decision on Admission of Suspect Interviews, paras 19-22.

<sup>98</sup> P00017, pp. 48-50; *see also* P00118, pp. 4-5.

<sup>99</sup> *Amicus* Final Brief, para. 12.



publications were accessible. It argues, rather, that the fact that the *Amicus* provided web links to witness AP15 casts doubt on the reliability of his testimony and the authenticity of the documents on those sites, suggesting for example that the screenshots could have been captured on “cached Google pages”.<sup>100</sup> The Defence also objected to the evidence of this witness on the basis that he had been paid by the *Amicus* to monitor these websites, information that was not disclosed before the witness’s testimony in court.<sup>101</sup>

**b) AP14**

54. Witness AP14, [REDACTED]<sup>102</sup>, testified to having viewed the online versions of the *Al Akhbar* articles on or about their day of publication, being 15 January 2013 and 19 January 2013.<sup>103</sup> She stated that she viewed the same two online articles later that same week and again on 15 May 2014 [REDACTED].<sup>104</sup> Between these dates, witness AP14 [REDACTED].<sup>105</sup> She confirmed their availability [REDACTED] but could not recall from memory the specific dates that she had completed such tasks and had also not recorded such dates in writing.<sup>106</sup>

**c) John Allen Comeau**

55. As [REDACTED] at the time of the *Al Akhbar* publications<sup>107</sup>, Mr Comeau testified that [REDACTED].<sup>108</sup> He also testified that after ceasing his employment with the Tribunal in December 2013,<sup>109</sup> he checked the English-language website of *Al Akhbar* to confirm the continued availability of the impugned articles and the photographs of the concerned witnesses, and had last seen both in November 2015.<sup>110</sup> When confronted in cross-examination that the English-language articles never featured any witness photographs, Mr Comeau acknowledged that he may have been mistaken and clarified that after leaving his position with the Tribunal, he had accessed the impugned Articles with web links provided to him by the present *Amicus*.<sup>111</sup> He

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<sup>100</sup> Defence Final Brief, para. 130.

<sup>101</sup> Transcript of 1 March, pp. 34-37.

<sup>102</sup> Transcript II of 24 February, pp. 9-10.

<sup>103</sup> *Id.* at pp. 9-10.

<sup>104</sup> *Id.* at pp. 9-10.

<sup>105</sup> *Id.* at pp. 20.-21.

<sup>106</sup> *Id.* at p. 21.

<sup>107</sup> *Id.* at pp. 32, 41, 55.

<sup>108</sup> *Id.* at p. 78.

<sup>109</sup> P00124, para. 7.

<sup>110</sup> Transcript II of 24 February, p. 76.

<sup>111</sup> *Id.* at p. 85.

testified that he had last viewed the articles on 20 or 21 February 2016 but that on that occasion he noted that the photographs of the purported witnesses had been pixelated.<sup>112</sup>

56. Mr Comeau's evidence with respect to the ongoing availability of the Articles is primarily second-hand information [REDACTED]. However, witness AP14's testimony was not corroborative of Mr Comeau's information and, at times, contradicted him. For instance, while Mr Comeau testified to [REDACTED]<sup>113</sup>, witness AP14 testified that [REDACTED].<sup>114</sup> [REDACTED], which lists the dates on which she had verified the online availability of the *Al Akhbar* articles.<sup>115</sup> However, witness AP14 testified that she never wrote down, or logged into a computer, the dates on which she verified the availability of the articles.<sup>116</sup> When asked about whether she prepared any such Annex, she was unable to confirm or deny doing so without being provided a document to review.<sup>117</sup> In sum, these inconsistencies give me pause with respect to the reliability of the hearsay evidence given by Mr Comeau. Accordingly, I am not able to give any weight to his hearsay evidence in respect of the availability of the online Articles where it is unsupported by other reliable, independent evidence. I do accept, however, that Mr Comeau was able to personally access and verify the availability of the impugned Articles during the times that he personally viewed the *Al Akhbar* website in the period between December 2013 and November 2015.

**d) Witness AP15**

57. Witness AP15 is a native Arabic speaker hired as a paid consultant by the *Amicus* to monitor the availability of the *Al Akhbar* articles on various internet websites.<sup>118</sup> He testified that starting on 23 December 2015, he logged on to the Arabic language version of [www.al-akhbar.com](http://www.al-akhbar.com), using hyperlinks provided to him by the *Amicus*, in order to verify the availability of articles published on 15, 19, 20 January 2013 and 10 April 2013<sup>119</sup> which identified individuals

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<sup>112</sup> Transcript II of 24 February, p. 76.

<sup>113</sup> *Id.* at pp. 79-80.

<sup>114</sup> *Id.* at p. 26.

<sup>115</sup> *Id.* at pp. 77-78.

<sup>116</sup> *Id.* at pp. 20-21.

<sup>117</sup> *Id.* at p. 25.

<sup>118</sup> Transcript of 1 March, pp. 4, 5, 27.

<sup>119</sup> P00042; This article published on 10 April 2013 on *Al Akhbar's* Arabic language website, entitled "The Special Tribunal for Lebanon vacillates" republishes the content of a website created by online group "Journalists for the Truth" that revealed the names and identifying information of 153 alleged confidential Tribunal witnesses. It does

as purported Tribunal witnesses.<sup>120</sup> He testified that he was able to confirm the availability of all four articles each day until 29 February 2016, and took screenshots of the pertinent articles on each occasion, which were subsequently tendered into evidence.<sup>121</sup> At the request of the *Amicus*, witness AP15 began to also monitor the Facebook and Twitter pages of *Al Akhbar* starting on 28 January 2016.<sup>122</sup> He similarly confirmed that, on a daily basis, the two web platforms maintained links to the websites hosting the 15 and 19 January Articles.<sup>123</sup>

58. Witness AP15 noted that as of 19 February 2016, all of the photos and identifying personal information of purported witnesses in the *Al Akhbar* articles had been blurred with a note from the newspaper stating that it had done so pursuant to “an order from the International Tribunal.”<sup>124</sup>

***e) Conclusion***

59. AP14 testified that she periodically checked the online availability of the 15 and 19 January Articles between January 2013 and May 2014.<sup>125</sup> Mr Comeau testified that he personally verified the availability of the impugned Articles in the *Al Akhbar* website in the period between December 2013 and November 2015. Witness AP15 was unchallenged on the veracity of his evidence that the *Al Akhbar* articles of 15 and 19 January 2013 were available on various online platforms from 28 December 2015 through 29 February 2016, with the caveat that after 19 February 2016 the photographs and identifying information of the purported witnesses had been obscured in the online articles. I further note that the screenshots tendered into evidence fully support the witness’s oral testimony in this regard.<sup>126</sup> Consequently, I accept this witness’s evidence without reservation as concerns the online availability of the 15 and 19 January Articles on *Al Akhbar*’s Arabic-language website, where purported witness photographs and identifying information was disclosed. Furthermore, all of the witnesses who testified to the online

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not form the basis for the current charges but appears to have been monitored nevertheless by AP15 as part of his tasks for the *Amicus*.

<sup>120</sup> Transcript of 1 March, pp. 5-10.

<sup>121</sup> *Id.* at p. 10; *see also* P00127, P00128, P00129, P00130, P00131, P00132, P00133, P00134, P00135, PP00136, P00136, P00137, P00138.

<sup>122</sup> *Id.* at pp. 6, 9.

<sup>123</sup> *Id.* at pp. 6-7.

<sup>124</sup> *Id.* at p. 9.

<sup>125</sup> Transcript II of 24 February, pp. 20.-21.

<sup>126</sup> P00127, P00128, P00129, P00130, P00131, P00132, P00133, P00134, P00135, PP00136, P00136, P00137, P00138.

availability of the 15 and 19 January Articles attested that on each occasion that they visited the *Al Akhbar* websites, they were able to confirm the continued presence of the Articles.<sup>127</sup> In particular, I also note that witness AP09 provided uncontroverted testimony, which will be further discussed below, that he had verified the continued availability of the 15 January Article on the *Al Akhbar* website around April or May 2015 and again around Christmas 2015.<sup>128</sup>

60. Thus, I find that the only reasonable inference available from the evidence points to the continuous availability of the Articles on *Al Akhbar*'s online platforms between January 2013 and February 2016, where a total of 32 purported confidential witnesses for this Tribunal, among them witnesses AP06, AP07, AP09, DT01 and DT02, were fully identified. I note, however, that as of 20 February 2016 and until 29 February 2016, the day before witness AP15 provided testimony in this trial, the 15 and 19 January Articles remained accessible online with the photographs and identifying details pixelated.

### **3. Effect of the disclosures on the public's confidence in the Tribunal's ability to protect confidential information**

#### ***a) Arguments of the Parties***

61. The *Amicus* submits that conduct, of sufficient gravity, which poses a real risk or creates an objective likelihood of undermining public confidence in the Tribunal's ability to ensure the confidentiality of information amounts to interference with the administration of justice.<sup>129</sup> Therefore, the *Amicus* argues that the 15 and 19 January Articles were objectively likely and sufficiently grave to undermine public confidence in the Tribunal by disclosing confidential information about alleged protected Tribunal witnesses, and furthermore casting blame for such leaked information on the Tribunal itself.<sup>130</sup> He further argues that portraying the exposed individuals as witnesses against Hezbollah exposed them to harm, given the sectarian and political fragmentation in Lebanon.<sup>131</sup> He avers that the Accused's publications make out the

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<sup>127</sup> Transcript II of 24 February, pp. 10, 16, 20, 21, 76.

<sup>128</sup> Transcript of 29 February, p. 23.

<sup>129</sup> *Amicus* Final Brief, paras 14, 16-18.

<sup>130</sup> *Id.* at para. 19.

<sup>131</sup> *Id.* at paras 23-24.

required elements of this offence<sup>132</sup>, and are supported by the testimony of the exposed purported witnesses<sup>133</sup>, the condemnation of Lebanese media<sup>134</sup> and expert victimologist Dr de Brouwer.<sup>135</sup>

62. The Defence responds that the *Amicus* has failed to demonstrate any real impact on the exposed individuals as a result of the publications,<sup>136</sup> and further notes that many of them, including those who appeared as witnesses for the Defence in this case, aver that they maintain confidence in the Tribunal's ability to ensure confidentiality.<sup>137</sup> Moreover, it cites the ongoing trial in the main proceedings as proof that witnesses continue to testify, many with the benefit of protective measures, and that public confidence in the Tribunal has not been undermined.<sup>138</sup> Finally, it argues that the documentary evidence presented by the *Amicus* is not reliable<sup>139</sup> and that Dr de Brouwer's testimony is of no probative value.<sup>140</sup>

63. I have reviewed the relevant evidence in light of the Parties' arguments and summarize below the evidence on which my findings are based.

**b) John Allen Comeau**

64. John Allen Comeau was charged with [REDACTED].<sup>141</sup> Mr Comeau was unable to communicate in Arabic and, as a result, either spoke [REDACTED].<sup>142</sup> [REDACTED].<sup>143</sup> Mr Comeau was not the author of the document but maintained that it originated in information that he had personally input into an [REDACTED], based on summaries he collected [REDACTED] or the notes he took [REDACTED].<sup>144</sup> The document details that a number of the exposed individuals expressed upset, anger and fear for their personal safety and that of their families, as well as of repercussions on their life, relationships, work or reputation.<sup>145</sup>

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<sup>132</sup> *Amicus* Final Brief, para. 27.

<sup>133</sup> *Id.* at paras 47-54.

<sup>134</sup> *Id.* at paras 29, 31.

<sup>135</sup> *Id.* at paras 32-40.

<sup>136</sup> Defence Final Brief, paras 15-16.

<sup>137</sup> *Id.* at paras 77-84.

<sup>138</sup> *Id.* at para. 87.

<sup>139</sup> *Id.* at paras 100-103.

<sup>140</sup> *Id.* at paras 104-108.

<sup>141</sup> P00124, para. 10.

<sup>142</sup> Transcript II of 24 February, pp. 83, 92-93.

<sup>143</sup> P00124, paras 14-15.

<sup>144</sup> Transcript II of 24 February, pp. 39-40, 91-93; Transcript of 25 February, pp. 2-4.

<sup>145</sup> P00125, para. 16.

65. The *Amicus* argues that Mr Comeau's testimony regarding the [REDACTED] is corroborated by the above-mentioned [REDACTED], a document he submits is authentic, reliable and probative.<sup>146</sup> The Defence disagrees, noting that the document is heavily redacted, [REDACTED] and that the source, author, date and way in which the document was compiled are not in evidence.<sup>147</sup> While I acknowledge that hearsay evidence is admissible before international criminal tribunals, I must take care not to rely upon such information where it is not substantiated by other reliable evidence.<sup>148</sup> Witness AP14 gave evidence, in the form of her admitted written statement, that she [REDACTED] but a copy of such a document was not appended to her statement<sup>149</sup>, nor was it put to her at trial for authentication. Therefore I have no evidence before me to demonstrate with a sufficient degree of certainty the author or provenance of [REDACTED]. However, I find that the exhibit generally confirms Mr Comeau's evidence that [REDACTED].<sup>150</sup> It is similarly supported by the evidence of witnesses AP06, AP09, DT01 and DT02 that [REDACTED].<sup>151</sup> But while I find that this document is generally reliable, it is of minimal probative value. Mr Comeau gave direct evidence that [REDACTED]. Moreover, such reactions are not supported by ascertainable facts that link any purported impact to the witnesses' exposure in the *Al Akhbar* Articles. At best, the document demonstrates that [REDACTED] and, consequently, this document will figure as but one piece of evidence of limited value that will be weighed against the entirety of the evidence presented when determining the overall impact, if any, of the publications on public confidence in the Tribunal.

**c) AP06**

66. Witness AP06 is a [REDACTED]<sup>152</sup>, who [REDACTED].<sup>153</sup> He learned that his photograph and personal details had been published in the *Al Akhbar* 19 January Article when he was alerted by phone calls from neighbours, friends and work colleagues.<sup>154</sup> The witness

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<sup>146</sup> *Amicus* Final Brief, para. 42.

<sup>147</sup> Defence Final Brief, para. 70.

<sup>148</sup> ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15; *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, Order on Revised Guidelines on the Admission and Presentation of Evidence, 2 October 2009, Annex A, para. 5.

<sup>149</sup> P00123, para. 17.

<sup>150</sup> Transcript II of 24 February, pp. 33-34, 48-50; P00124, paras 12-15.

<sup>151</sup> Transcript of 29 February, pp. 53, 88; Transcript of 7 April, pp. 7, 87-88.

<sup>152</sup> *Id.* at p. 63.

<sup>153</sup> *Id.* at pp. 72-73.

<sup>154</sup> *Id.* at pp. 63-64.

expressed surprise that his picture was published in the newspaper and in particular [REDACTED].<sup>155</sup> Thereafter he was the subject of gossip and fielded daily questions from people inquiring about his relationship with the Tribunal, his political affiliation and what he had done to have his picture published.<sup>156</sup> The witness testified that in his opinion, every individual in Lebanon who collaborates with the Tribunal is considered to be opposed to the “Resistance”, and, being identified as a witness of the Tribunal in his neighbourhood is a “bad thing”, particularly since [REDACTED].<sup>157</sup> Witness AP06 attested that his business was affected [REDACTED], but mostly because he had lost a number of clients opposed to the Tribunal as a direct result of his exposure as a purported witness in the 19 January Article.<sup>158</sup>

67. The witness stated that [REDACTED].<sup>159</sup> The witness testified that [REDACTED]<sup>160</sup>, never gave his consent to *Al Akhbar* to publish his information<sup>161</sup> and expressed concern that should those opposed to the Tribunal find out about his testimony, “it’s possible that I do not even reach my home.”<sup>162</sup> Although witness AP06 was clear that he maintained trust in the Tribunal in general, I find that his confidence in the Tribunal’s ability to protect confidential witness information was undermined as a result of the *Al Akhbar* publications and [REDACTED].<sup>163</sup>

68. The Defence avers that witness AP06 presented inconsistent explanations with respect to the impact of the 19 January Article on his business.<sup>164</sup> It argues that in one respect witness AP06 linked the publication to a loss of clients, [REDACTED].<sup>165</sup>

69. However, the witness was clear that while [REDACTED]<sup>166</sup>, this was but one factor that affected his business. He was consistent in his attestations that he suffered a loss of business independently of [REDACTED], attributing such loss directly to his identification by *Al Akhbar*

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<sup>155</sup> Transcript of 29 February, p. 68.

<sup>156</sup> *Id.* at pp. 66-67, 74-75.

<sup>157</sup> *Id.* at p. 69.

<sup>158</sup> *Id.* at pp. 71, 87, 98.

<sup>159</sup> *Id.* at p. 76.

<sup>160</sup> *Id.* at p. 10.

<sup>161</sup> *Id.* at p. 77.

<sup>162</sup> *Id.* at pp. 76-77, 81.

<sup>163</sup> *Id.* at p. 96.

<sup>164</sup> Defence Final Brief, para. 18.

<sup>165</sup> *Id.* at para. 19.

<sup>166</sup> Transcript of 29 February, p. 73.

as a purported witness for a Tribunal that a number of his clients oppose.<sup>167</sup> In particular, the witness clarified in cross-examination that in his [REDACTED].<sup>168</sup> After the publication of the 19 January Article, [REDACTED].<sup>169</sup> Although witness AP06 met with legal counsel and considered legal action against *Al Akhbar*, he ultimately declined to do so as he considered the newspaper to be too powerful and politically affiliated.<sup>170</sup> The witness did acknowledge, however, that he and his family received no threats and were never attacked in the aftermath of the *Al Akhbar* publications.<sup>171</sup>

70. Therefore, I find that witness AP06's testimony demonstrates that his exposure as a purported confidential witness in the *Al Akhbar* publications caused direct and negative impacts, *id est* a loss in his business and in his confidence in the confidentiality of Tribunal information. Proof of actual harm concerning an individual's business and an actual loss in confidence in the Tribunal constitute additional ascertainable facts supportive of a finding that the Accused's conduct created an objective likelihood that public confidence in the Tribunal would be undermined.

**d) AP07**

71. Witness AP07 is [REDACTED].<sup>172</sup> His picture, name, mother's name, birth year and occupation appeared in the 15 January Article.<sup>173</sup>

72. Witness AP07 [REDACTED],<sup>174</sup> and indicated that he was initially upset and troubled when his picture was published in the *Al Akhbar* newspaper.<sup>175</sup> He described that his friends and family had varied reactions to his name and picture being featured in the articles, which included warnings such as “[d]on’t be too happy about this”, “[b]e careful”, “[w]atch it” and “[t]here is a huge political problem in the country, so be very careful.”<sup>176</sup> The witness believed that he could be harmed as a result of being identified as a purported witness, noting that “anybody who deals

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<sup>167</sup> Transcript of 29 February, p. 87. The witness [REDACTED], Transcript of 29 February, p. 98.

<sup>168</sup> *Id.* at p. 9.

<sup>169</sup> *Id.* at p. 91.

<sup>170</sup> *Id.* at pp. 93-95.

<sup>171</sup> *Id.* at pp. 75, 81, 92, 97.

<sup>172</sup> Transcript of 26 February, p. 4.

<sup>173</sup> *Id.* at p. 5.

<sup>174</sup> *Id.* at p. 14.

<sup>175</sup> *Id.* at p. 8.

<sup>176</sup> *Id.* at pp. 7-8.



with the Tribunal, there are some areas in Lebanon where they cannot set foot [...] I will challenge anybody in the Tribunal to go to some parts of Lebanon saying: I work for the Special Tribunal. This person will disappear. He will disappear after (*sic*) the face of the earth.”<sup>177</sup> He also testified to fear of being harmed by someone politically opposed to *Al Akhbar* who wished to cast blame on them.<sup>178</sup> The witness interpreted the *Al Akhbar* article as harmful to the Tribunal and concluded that the article’s author sought to impede the Tribunal’s success.<sup>179</sup>

73. As a result of the publications, witness AP07 testified that he limited his children’s time out at night and refused [REDACTED].<sup>180</sup> When confronted in cross-examination with [REDACTED].<sup>181</sup> The witness further clarified that he was most afraid of [REDACTED].<sup>182</sup> While witness AP07 admitted that [REDACTED]<sup>183</sup>, [REDACTED].<sup>184</sup> However, he affirmed that he was never threatened in any way due to the *Al Akhbar* publications.<sup>185</sup>

74. The Defence has characterized witness AP07’s testimony as inconsistent, contradictory or unreliable. For instance, the Defence notes that [REDACTED].<sup>186</sup> However the witness provided reasonable explanations as to why he may have [REDACTED].<sup>187</sup> I also find irrelevant the Defence’s argument that the witness was well known in Lebanon for his profession and that his name and contact information were already part of the public domain before the *Al Akhbar* publications.<sup>188</sup> Indeed, it is the association of this witness’s name and personal information alongside allegations that he was a confidential Tribunal witness that is relevant to the determination of whether the Accused’s actions created an objective likelihood that public confidence in the Tribunal would be undermined.

75. Notwithstanding the witness’s purported concerns and changes in behaviour following his exposure as a purported confidential witness, I find that the link between any real impact he

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<sup>177</sup> Transcript of 26 February, p. 18.

<sup>178</sup> *Id.* at p. 11.

<sup>179</sup> *Id.* at p. 18.

<sup>180</sup> *Id.* at pp. 11, 16.

<sup>181</sup> *Id.* at pp. 32-37.

<sup>182</sup> *Id.* at p. 40.

<sup>183</sup> *Id.* at p. 42.

<sup>184</sup> *Id.* at p. 17.

<sup>185</sup> *Id.* at p. 43.

<sup>186</sup> Defence Final Brief, para. 31.

<sup>187</sup> Transcript of 26 February, pp. 32, 35.

<sup>188</sup> Defence Final Brief, para. 29.

experienced and his identification in the *Al Akhbar* publications is tenuous at best. The witness admitted that [REDACTED]<sup>189</sup> and that his fears about going out late at night [REDACTED]. Therefore, I am left with a doubt as to whether the purported impact on this witness is directly related to his exposure in the *Al Akhbar* publications. I do note, however, that this witness has provided direct, unchallenged evidence that after the publications, persons known to him had warned him to be careful in light of the political problems in Lebanon.<sup>190</sup> Therefore I find that the witness's subjective fears are borne out by the ascertainable fact that people in his entourage expressed serious concerns about the publications, and this is reflective of the existence of negative public discourse surrounding the impugned Articles which further supports that the publications were objectively likely to undermine confidence in the Tribunal.

**e) AP09**

76. Witness AP09 is [REDACTED]<sup>191</sup> and the 15 January 2013 Article contained his photograph, name, mother's name, birthdate, place of birth, address, occupation and [REDACTED].<sup>192</sup> [REDACTED].<sup>193</sup>

77. At the time of the *Al Akhbar* publication, the witness was [REDACTED] and began receiving phone calls advising him that his picture was in the newspaper and that he was identified as a key witness in the Hariri assassination case.<sup>194</sup> The callers expressed surprise, shock and fear for the repercussions of the publications, and the witness testified that the callers advised him to "be cautious and to be careful, not to deal with any newspaper or television station regarding this case because it puts my family's life and my life in danger."<sup>195</sup>

78. Witness AP09 [REDACTED].<sup>196</sup> As a result, he reported being very upset with the *Al Akhbar* publication identifying him as a Tribunal witness and considered it as a direct threat to

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<sup>189</sup> Defence Final Brief, para. 29.

<sup>190</sup> Transcript of 26 February, pp. 7-8.

<sup>191</sup> Transcript of 29 February, p. 6.

<sup>192</sup> *Id.* at p. 8.

<sup>193</sup> *Id.* at p. 8.

<sup>194</sup> *Id.* at pp. 10-11.

<sup>195</sup> *Id.* at p. 11.

<sup>196</sup> Transcript of 29 February, p. 10.

himself and his family.<sup>197</sup> [REDACTED] and consequently he felt he was in danger after the *Al Akhbar* publications.<sup>198</sup>

79. Witness AP09 explained that he feared for himself and his family because of the amount of his personal information made public by *Al Akhbar* and that his identification as a Tribunal witness left him vulnerable to Hezbollah who he viewed as opposed to the STL and able to “do whatever they want”.<sup>199</sup> The witness also saw the publications as a message to the STL [REDACTED].<sup>200</sup> The witness described that [REDACTED].<sup>201</sup>

80. The witness attributed a number of concerning events to his identification as an STL witness. Witness AP09 described that frequent calls to his home came between the hours [REDACTED]<sup>202</sup> [REDACTED]<sup>203</sup> [REDACTED].<sup>204</sup> The witness estimated that the calls began 2-3 weeks after the 15 January 2013 publication, averaged two to four calls per night and lasted for six to eight months<sup>205</sup>, although he later agreed in cross-examination that he continued to receive suspicious phone calls up until February 2015.<sup>206</sup> He further clarified during cross-examination that he had received [REDACTED].<sup>207</sup>

81. The witness further described an incident about two to three months after the *Al Akhbar* publications in which an individual [REDACTED].<sup>208</sup> The witness understood this to be a direct threat from Hezbollah for being exposed as a witness for the STL.<sup>209</sup> In that incident, the witness testified that he [REDACTED].<sup>210</sup> The witness explained that he had no faith that the judicial authorities would do anything to improve his situation and as a result had not reported the phone calls to police and declined to file a law suit against the newspaper.<sup>211</sup> When confronted during

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<sup>197</sup> Transcript of 29 February, p. 11.

<sup>198</sup> *Id.* at pp. 21-22.

<sup>199</sup> *Id.* at pp. 11-13.

<sup>200</sup> *Id.* at p. 21.

<sup>201</sup> *Id.* at pp. 21, 23.

<sup>202</sup> *Id.* at p. 14.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> Transcript of 29 February, p. 15.

<sup>206</sup> *Id.* At p. 30.

<sup>207</sup> *Ibid.*

<sup>208</sup> Transcript of 29 February, p. 14.

<sup>209</sup> *Id.* at p. 17.

<sup>210</sup> *Id.* at pp. 18, 36.

<sup>211</sup> *Id.* at pp. 18-19.

cross-examination with a government report suggesting that the described incident had actually taken place in 2011, the witness remained certain that the incident had taken place in 2013 after the publication of the *Al Akhbar* articles.<sup>212</sup>

82. The *Amicus* argues that the Defence's attempts to discredit the witness through the introduction of the government report should not be given any weight.<sup>213</sup>

83. The Defence points out important inconsistencies in this witness's testimony and avers that nothing in his evidence demonstrates a causal link between the bizarre and threatening incidents that the witness and his family suffered and the publication of the witness's identity as a confidential Tribunal witness in the 15 January Article.<sup>214</sup> For example, witness AP09 initially explained that he began to receive nighttime phone calls at his residence two to three weeks after the 15 January Article, which lasted for two or three weeks in length.<sup>215</sup> He thereafter immediately expanded the duration of the calls to six to eight months.<sup>216</sup> In cross-examination, he then insisted that the calls had been fairly constant between 2013 and 2015.<sup>217</sup>

84. The witness's inconsistencies in relation to the duration of the phone calls are so important, as pointed out by the Defence, that they lead me to give little weight to this portion of the witness's evidence. I am unable to conclude with any degree of certainty the time period during which the concerning calls were made to witness AP09's residence. [REDACTED] also leaves me with a doubt that the calls were effectively linked with the witness's exposure in *Al Akhbar* as a purported Tribunal witness. Moreover, the evidence with respect to the incident [REDACTED] does not demonstrate a link between the threatening behaviour and the witness's exposure as an STL witness by *Al Akhbar* specifically. Given the potential to [REDACTED], I am left with a doubt as to the timing of and motives for both the nighttime phone calls and the threatening incident. However, the witness has provided direct, unchallenged evidence that, after the publications, persons known to him expressed their fear that his exposure as a Tribunal

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<sup>212</sup> Transcript of 29 February, pp. 36, 41, 42.

<sup>213</sup> *Amicus* Final Brief, paras 7, 23, 49; *see also* fn 154 and 159.

<sup>214</sup> Defence Final Brief, paras 43, 49.

<sup>215</sup> Transcript of 29 February, p. 15.

<sup>216</sup> *Ibid.*

<sup>217</sup> Transcript of 29 February, p. 31.

witness had put his life and that of his family in danger.<sup>218</sup> Therefore I find that the witness's subjective fears are borne out by the ascertainable fact that people in his entourage expressed grave concerns about the publications, a concrete and tangible piece of information independent of the witness's own feelings. Again, this demonstrates the existence of negative public discourse surrounding the impugned Articles and therefore supports that their publication was objectively likely to undermine public confidence in the Tribunal.

*f) Defence Witnesses DT01 and DT02*

85. Witness DT01 is a [REDACTED].<sup>219</sup> His identity and personal information were published in the 15 January Article.<sup>220</sup> He expressed surprise at being portrayed as a confidential witness for the Tribunal [REDACTED].<sup>221</sup> However, he testified that the publication did not affect his professional or personal life in any way.<sup>222</sup> He insisted that the publication did not change his perception of the Tribunal and [REDACTED].<sup>223</sup> He further stated his belief that [REDACTED].<sup>224</sup> While the witness admitted feeling annoyed at the publication, he made clear that he was never threatened and that any feeling of annoyance abated after no one came to ask him questions about his appearance in the publication.<sup>225</sup>

86. Throughout his testimony, and at times when it was not relevant to the question asked of him, witness DT01 repeated that he [REDACTED].<sup>226</sup> When pressed by the *Amicus* on why he insisted on making this clarification and whether he had specific concerns about being labelled as a "key witness used to incriminate Hezbollah", witness DT01 continued to respond evasively but eventually clarified that "...[REDACTED]."<sup>227</sup> I find that this witness's evasive manner and insistence on [REDACTED] demonstrate a general concern for the negative impact that could result from his exposure as a purported witness in the *Al Akhbar* articles.

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<sup>218</sup> Transcript of 29 February, p. 11.

<sup>219</sup> Transcript of 7 April, p. 7; *see also* D00021, p. 1.

<sup>220</sup> Transcript of 7 April, pp. 10-11.

<sup>221</sup> *Id.* at p. 17.

<sup>222</sup> *Id.* at pp. 8-9.

<sup>223</sup> *Id.* at p. 9.

<sup>224</sup> *Id.* at pp. 9, 11, 24.

<sup>225</sup> Transcript of 7 April, pp. 21-22.

<sup>226</sup> *Id.* at pp. 12, 25, 26, 28-31, 34.

<sup>227</sup> *Id.* at p. 31.

87. Witness DT02 is the manager of the Sidon branch of Capital Insurance and Reinsurance Company in Lebanon and a sworn expert on motor vehicle accidents before Lebanese tribunals.<sup>228</sup> He was initially alerted by someone he knew that the 19 January Article included his name, picture and personal information.<sup>229</sup> The witness expressed surprise at the Article since [REDACTED].<sup>230</sup> He testified that after verifying that he was indeed featured in the Article, he immediately called the offices of *Al Akhbar* to request that they publish a clarification about him in accordance with the law.<sup>231</sup> Witness DT02 followed up by going to *Al Akhbar*'s offices in person, spoke directly with Mr Al Amin and later drafted his own clarification letter that was published in the *Al Akhbar* newspaper on 1 February 2013.<sup>232</sup> In particular, witness DT02 testified that he wanted the clarification to show that he had nothing to do with the main case at this Tribunal and no relation whatsoever to its accused<sup>233</sup>, was not a witness who had seen anything and did not belong to any organization or party and "was not taking sides".<sup>234</sup> The witness testified that *Al Akhbar* newspaper was "everywhere in Lebanon, in Europe, and in America"<sup>235</sup> and that he felt a clarification needed to be published so that "it reached more people".<sup>236</sup> Nevertheless, the witness relayed that he still trusts the STL and in fact, testified in open court in the main proceedings on 1 October 2015.<sup>237</sup>

88. The witness authenticated the clarification letter that has been tendered in evidence and acknowledged that he wrote the document on his own initiative.<sup>238</sup> I also note that this letter was published shortly after the publication of the 15 and 19 January Articles, long before this witness was selected to provide testimony in this manner. Where the contents of this letter and the witness's *viva voce* testimony differ, I accept the information as written in the clarification letter and I am satisfied of its reliability beyond a reasonable doubt as it was written so close in time to the publication that the witness would not have an opportunity to have his evidence influenced. When repeatedly asked in cross-examination why it was so important to publish an article that

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<sup>228</sup> Transcript of 7 April, pp. 37, 48.

<sup>229</sup> *Id.* at pp. 37-38.

<sup>230</sup> *Id.* at p. 38.

<sup>231</sup> *Ibid.*

<sup>232</sup> Transcript of 7 April, pp. 38, 41, 50.

<sup>233</sup> *Id.* at p. 42.

<sup>234</sup> *Id.* at pp. 80, 82-83.

<sup>235</sup> *Id.* at p. 79.

<sup>236</sup> *Id.* at p. 81.

<sup>237</sup> *Id.* at pp. 44-45

<sup>238</sup> *Id.* at p. 66; *see also* D00023.

reached more people in order to clarify that he was merely an ancillary witness, the witness was evasive and repeatedly failed to answer the question.<sup>239</sup> In the published clarification, witness DT02 wrote that the 19 January Article that featured him as a Tribunal witness “generated a few negative comments among malignant people in my surroundings.”<sup>240</sup> When asked to elaborate upon this portion of his letter during his examination-in-chief, the witness initially relayed that people had wrongfully suggested his involvement in the case was borne out of a desire for fame or financial reward.<sup>241</sup> During cross-examination, the witness stated that he wrote the clarification only to pre-empt any questions or reactions and denied having been the subject of any specific comments.<sup>242</sup> I find that these inconsistencies and the witness’s generally evasive responses during his cross-examination make his *viva voce* testimony on this point unreliable. Nevertheless, I note that witness DT02’s clarification letter explicitly links the negative comments with the 19 January Article and emphasises that he did not know and had never met the accused Salim Ayyash.<sup>243</sup> When pressed by the *Amicus*, the witness acknowledged that his portrayal in the Article as a witness against Hezbollah was erroneous.<sup>244</sup>

89. Upon reflexion on the entirety of his evidence, I accept that witness DT02 feared the impact on his life if the public were left to believe that he was a key witness against Hezbollah, as *Al Akhbar* had initially reported, and issued the clarification to minimize his role as a witness at the Tribunal and distance himself from any perceived political affiliations. I find beyond a reasonable doubt that these actions taken by witness DT02 were directly linked to his exposure as a Tribunal witness in the 19 January Article, dictated by fear aroused by the Article, and therefore constitute an additional ascertainable fact in support of the negative impact of the *Al Akhbar* publications.

**g) Anne-Marie de Brouwer**

90. In my decision of 19 January 2016, I recalled my ruling in the *New TV* Judgment that Dr de Brouwer’s expert evidence lacked sufficient probative value with respect to the alleged

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<sup>239</sup> Transcript of 7 April, pp. 79-81.

<sup>240</sup> D00023.

<sup>241</sup> Transcript of 7 April, p. 47; *see also* D00023.

<sup>242</sup> *Id.* at pp. 75-76.

<sup>243</sup> D00023.

<sup>244</sup> Transcript of 7 April, p. 85.

impact of the disclosure of purportedly confidential information in Lebanon and thus, on this occasion I found it proper not to rule on the admissibility of her report or her status as a proposed expert until having heard her testimony in court.<sup>245</sup>

91. Dr de Brouwer testified primarily about her conclusions on the effects of the disclosure of purported confidential witness information, opining that such disclosures lower public confidence in the criminal justice system.<sup>246</sup>

92. The *Amicus* acknowledges that Dr de Brouwer lacks expertise on Lebanon *per se* but argues that her report and testimony can provide me with an analytical overview and framework to assess the overall evidence and issues presented in this case.<sup>247</sup>

93. The Defence submits that Dr de Brouwer's testimony and expert report lack probative value and relevance to the present case.<sup>248</sup> It argues that Dr de Brouwer's report remains unchanged since it was considered in the *New TV* case and consequently the Appeals Panel's conclusions about the value of her evidence should apply in the present case.<sup>249</sup>

94. Indeed, Dr de Brouwer admitted in cross-examination that she maintains the same positions, many impugned<sup>250</sup>, as stated in her testimony in the *New TV* case.<sup>251</sup> Her proposed expert report remains unchanged from that case.<sup>252</sup> In that matter, I found that Dr de Brouwer lacked both expertise on the Lebanese context and a sufficiently comprehensive understanding of the relevant international jurisprudence in order for her to apply her knowledge or form an opinion about the impact of the *Al Akhbar* disclosures.<sup>253</sup> The Appeals Panel has ruled that I was not unreasonable to conclude that Dr de Brouwer's testimony had no probative value.<sup>254</sup> Accordingly, absent a material change in circumstances, there is no basis for me to give any weight to Dr de Brouwer's testimony and I decline to admit her proposed expert report in the present case.

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<sup>245</sup> Decision on *Amicus* Motion for Admission of Evidence from the Bar Table, para. 25.

<sup>246</sup> Transcript of 1 March, pp. 51-52.

<sup>247</sup> *Amicus* Final Brief, para. 32.

<sup>248</sup> Defence Final Brief, para. 104.

<sup>249</sup> *Id.* at paras 106-107.

<sup>250</sup> Appeals Panel Judgment, paras 54, 55, 57, 58.

<sup>251</sup> Transcript of 1 March, pp. 89-90.

<sup>252</sup> *Id.* at p. 89.

<sup>253</sup> *New TV* Judgment, para. 107; *see also* Appeals Panel Judgment, para. 54.

<sup>254</sup> Appeals Panel Judgment, para. 58.



*h) Elias Aoun*

95. Elias Aoun is the President of the Order of Lebanese Press Editors and was called by the Defence as an expert witness in the area of freedom of the press in Lebanon.<sup>255</sup> The Defence limits its submissions on the value of Mr Aoun's testimony to the issue of *mens rea* and the defence of media freedom<sup>256</sup> and I will accordingly address those arguments in the relevant section below. The Defence does not address in its submissions the reasons for which Mr Aoun can be properly qualified as an expert.

96. The *Amicus* has objected to the admission of Mr Aoun's report, arguing that it does not possess the characteristics of an expert report.<sup>257</sup> He asserts that the report does not meet the minimum standard of reliability, is not relevant and does not have probative value, given that the author does not set out his mandate for the report or in which way he hopes to assist the trier of fact.<sup>258</sup> He further submits that the content of the report is mostly speculative, lacks an objective, statistical and factual foundation for its partial views and is largely an expression of the author's personal opinion on the value and challenges of Lebanese journalism.<sup>259</sup> In essence, he argues that Mr Aoun places himself in the position of an advocate instead of an expert.<sup>260</sup> Finally, the *Amicus* avers that the report does not fall within the witness's area of expertise, and instead simply provides an opinion that the Tribunal has failed to recognize the freedom of the press in this prosecution.<sup>261</sup>

97. The case-law of this and other international criminal tribunals provides precedent and guidance as to how to treat expert evidence. The term "expert" in international jurisprudence means "a person who by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute" and accordingly I must consider a proposed expert's past and current professional experience and training, publications and other

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<sup>255</sup> Transcript of 8 April, pp. 2, 5.

<sup>256</sup> Defence Final Brief, paras 11, 120, 142-143.

<sup>257</sup> Notice on Defence Expert, para. 6.

<sup>258</sup> *Id.* at para. 9.

<sup>259</sup> *Id.* at para. 10.

<sup>260</sup> *Id.* at para. 10.

<sup>261</sup> *Id.* at para. 20.

relevant information as described in the individual's curriculum vitae.<sup>262</sup> I recall that the jurisprudence of the ICTY and the ICTR stipulate that the following criteria must be met before an expert report is admitted into evidence and I apply them to the present matter: i) the report must meet the minimum standard of reliability, be relevant and of probative value; ii) the content of the report must fall within the witness's area of expertise; and iii) the author of the report must be classified as an expert.<sup>263</sup>

98. After having carefully reviewed Mr Aoun's report and considering his testimony in court, I find that none of the three requirements are met in the circumstances and I decline to consider him as an expert. Although I acknowledge his extensive experience as a journalist with various media outlets in Lebanon between 1960 and 1989, his more than 20 years as the executive manager of a publishing house and his current position as President of the Order of Lebanese Press Editors, Mr Aoun's report is highly partial and focuses principally on expressing his personal disagreement with the Tribunal's decision to prosecute journalists for contempt,<sup>264</sup> instead of providing an informed opinion on the basis of facts. In short, for the reasons outlined in the paragraphs below, Mr Aoun's report does not meet the minimum standard of reliability nor is it relevant or probative to the specific issues of whether the Accused's conduct in the circumstances can be justified by press freedoms. Consequently, the content of the report does not fall within the witness's proposed area of expertise and therefore I will attach no weight to Mr Aoun's evidence unless it is supported or corroborated by other evidence on the record that I have deemed to be sufficiently reliable and credible.

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<sup>262</sup> *Ayyash et al.* Decision on Experts, para. 6; see also ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Expert Report by Richard Phillips, 10 March 2009, para. 7; ICTY, *Prosecutor v. Popović, Beara, Nikolić, Borovčanić, Miletić, Gvero, and Pandurević*, IT-05-88-T, Second Decision regarding the evidence of General Rupert Smith, 11 October 2007, p. 3; ICTY, *Prosecutor v. Galic*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002, p.2; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4; see also, SCSL, *Prosecutor v. Brima, Kamura, and Kanu*, SCSL2004-16-T, Decision on Prosecution Request for Leave to call an additional witness (Zainab Hawa Bangura) pursuant to Rule 73 bis(E), and on Joint Defence Notice to Inform the Trial Chamber of its position via-a-vis the proposed expert witness (Mrs. Bangura) pursuant to Rule 94bis, 5 August 2005, para. 31.

<sup>263</sup> Decision on *Amicus* Request for Addendum to Expert Report, para. 12; see also ICTY, *Prosecutor v. Ratko Mladić*, IT-09-92-T, Decision on Defence Request to Disqualify Richard Butler as an Expert and bar the Prosecution from presenting his reports, 19 October 2012, para. 7; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for admission of evidence of Eight Experts pursuant to Rules 92 bis and 94 bis, 9 November 2009, para. 16; see also, ICTR, *Prosecutor v. Karemera, Ngirumpatse, and Nzirorera*, ICTR-98-44-T, Decision on Edouard Karemera's Motion for the Admission of an Expert Witness, 22 May 2009, para. 5.

<sup>264</sup> Notice on Defence Expert, para. 13; see also P00144 and D00026, paras 9-12, 49, 51, 55, 59, 61.

99. In his *viva voce* testimony, Mr Aoun displayed a degree of hostility towards this Tribunal and this particular prosecution unfitting of an objective expert. He refused to answer the vast majority of questions put to him by the *Amicus* and myself, and made clear either explicitly or through his frequently off-topic and evasive responses, that his sole interest in testifying in this matter was to defend press freedoms.<sup>265</sup> Indeed, the role of an expert is to assist the court by applying his specialized knowledge and experience to facts at issue before the court. When the witness fails to assist the court in this way and refuses to answer questions relevant to his proposed expertise, he then fails to fulfil the requirements for an expert witness. For example, when Mr Aoun was asked whether the Lebanese practice of publishing only the initials of individuals accused of crimes<sup>266</sup> would also extend to witnesses, – a crucial point in the case- Mr Aoun simply repeated his understanding of how media crimes are dealt with by the Lebanese legal system and, thereby, refused to answer the question.<sup>267</sup> Exceeding the scope of his proposed area of expertise, Mr Aoun testified that in his view, Rule 60 *bis* restricts the freedom of journalists and advanced his belief that the Accused should “not be threatened by an international tribunal”<sup>268</sup>, explaining that he had previously come to speak to the Tribunal’s former President to “tell him not to try and blackmail the press”.<sup>269</sup> I must emphasize that Mr Aoun’s criticism of this Tribunal is not *per se* the basis to reject his evidence; it is rather due to his lack of objectivity, his refusal to answer crucial questions linked to his specialized knowledge, his failure to support his conclusions with any discernible facts and finally, his blinding focus on topics unrelated to whether the impugned articles were justified by journalistic standards, in light of the need to safeguard the confidentiality of protected witnesses in a sensitive and, at times, insecure political and social climate. Put simply, Mr Aoun’s evidence was largely irrelevant and unhelpful to determining the Accused’s liability, and in particular, if their conduct was justified by press freedoms. Thus, Mr Aoun has failed to fulfil the requirements of an expert.

100. The value of Mr Aoun’s testimony is therefore limited to some of the factual areas he covered that are corroborated or supported by other documentary and testimonial evidence

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<sup>265</sup> Transcript of 8 April, p. 105.

<sup>266</sup> The practice was acknowledged and described by Mr Aoun in his examination-in-chief: Transcript of 8 April, pp. 20-21.

<sup>267</sup> Transcript of 8 April, p. 27.

<sup>268</sup> *Id.* at p. 22.

<sup>269</sup> *Id.* at p. 23.

presented during trial that I have deemed reliable and credible. In turn, Mr Aoun's factual testimony may also serve to corroborate or support other evidence. Indeed, although I have declined to treat Mr Aoun as an expert, I am still able to accept some parts of his evidence as a factual witness.<sup>270</sup> For instance, Mr Aoun testified that *Al Akhbar* is a successful newspaper, widely circulated and respected.<sup>271</sup> This is supportive of testimony from witness DT02 that the Accused enjoyed broad readership in Lebanon and abroad and that the information it conveyed was considered credible by its readers.<sup>272</sup> Moreover, Mr Aoun emphasized that while the source of the information "leaked" to *Al Akhbar* remained a pressing question, he also confirmed the condemnation in media circles of the publication of purported confidential witness names.<sup>273</sup> This corroborates a number of the media articles tendered into evidence, and discussed below, which provide a sample of the media criticism and general outcry in the wake of the *Al Akhbar* publications. It is further supportive of the 19 January Article in which Mr Al Amin directly addresses the "huge political and judicial clamour about the published information."<sup>274</sup> Mr Aoun himself testified that he personally blames the Tribunal for failing to uncover the source of the "leaks"<sup>275</sup>, and I am able to infer from his testimony that even his confidence in the Tribunal's ability to ensure the confidentiality of its witness information was undermined as a result of the *Al Akhbar* publications.

101. Accordingly, I decline to treat Mr Aoun's testimony or report as expert evidence but accept certain factual elements of his testimony which are corroborated by and tend to support evidence presented by other witnesses or that are contained in the various media articles admitted from the bar table.

***i) Documentary evidence***

102. The *Amicus* tendered a number of exhibits pertaining to reactions by Lebanese media outlets and others to disclosures of purported confidential Tribunal witnesses, including those at

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<sup>270</sup> See for instance SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope and on Urgent Prosecution Request for Decision, 19 June 2008, paras 17, 27. This decision was not appealed nor did it figure among the grounds of appeal for the Final Judgment.

<sup>271</sup> Transcript of 8 April, p. 71; see also P00144 and D00026, para. 21.

<sup>272</sup> Transcript of 7 April, p. 79.

<sup>273</sup> Transcript of 8 April, p. 75.

<sup>274</sup> P00005, p. 1.

<sup>275</sup> Transcript of 8 April, p. 100.

issue here. He similarly tendered a large number of articles published by *Al Akhbar* on topics covering the Tribunal, the disclosure of confidential information, and the reasons underlying the publication of purported confidential witness information in response to criticism for having done so. The *Amicus* has tendered such evidence to demonstrate the effects of the Accused's acts and conduct and/or that publishing identifying information about alleged confidential witnesses violates journalistic standards in Lebanon.<sup>276</sup> I admitted these exhibits because I determined that they could provide informative context on the effects that the disclosures in this case may have had on the public's confidence in the Tribunal's ability to protect confidentiality.<sup>277</sup> I recall that before giving any weight to such articles, I must assess their reliability, and in particular determine whether the documents are genuine articles originating from media outlets at the pertinent times.<sup>278</sup> I find that the admitted media articles that reflect negative public discourse and criticisms of *Al Akhbar's* decision to publish the identities of purported confidential witnesses, are genuine. Not only do they bear URLs, dates, titles, and markers of provenance to a particular media outlet, but their content is also generally supported by the factual assertions and acknowledgement of negative public discourse as contained in the 19 January Article, which was written by Mr Al Amin as he confirmed in his suspect interview.<sup>279</sup> Indeed, I note that the media reports describe various reactions to and concerns about the 15 and 19 January Articles including the criticisms, concerns and clamour which are similarly discussed in the above-mentioned 19 January Article.

103. I note with particular attention the articles published by *Al Akhbar* in and around the period in which the 15 and 19 January Articles were issued. Mr Al Amin is noted as the author of "Al Akhbar and the STL: We Will not be Silenced", published on the English language website on 21 January 2013, and which confronts criticism from MP Marwan Hamade on behalf of "a sizeable political camp in Lebanon", who believed the publication of purported confidential witness identities put people's lives at risk.<sup>280</sup> Notably, the article states that *Al Akhbar* had been contacted by STL witnesses, including individuals who had been featured in the 15 and 19 January Articles, that "were in the process of annulling their testimonies", even if provided

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<sup>276</sup> Decision on *Amicus* Motion for Admission of Evidence from the Bar Table, para. 13.

<sup>277</sup> Decision on *Amicus* Bar Table Motion, para. 14.

<sup>278</sup> Appeals Panel Judgments, para. 68.

<sup>279</sup> P00117, pp. 43-52; P00118, pp. 4-5.

<sup>280</sup> P00038, pp. 1-2 ("21 January Article"); *see also* P00036 and P00037.

willingly to the Prosecution.<sup>281</sup> In “Controversies of the Hariri Court”, attributed to As’ad AbuKhalil and dated 17 April 2013, the article describes a “hue and cry in Lebanon and beyond” because of the publication of lists of witnesses for the STL.<sup>282</sup> In the article, the author maintains that the Tribunal “is itself responsible for the leaks of the names and is responsible for any harm that may befall those witnesses because it failed to protect its own files.”<sup>283</sup>

104. The *Amicus* has equally tendered a series of media articles authored by third parties which address the various reactions and concerns that arose in the wake of the publication of the 15 and 19 January Articles. In an article on the El Khiam online platform entitled “I am not a witness” author Abdallah Rachidi expresses surprise at being identified by *Al Akhbar* as a Tribunal witness, clarifying that he had limited interactions with the UNIIC and had never “agreed with anyone inside or outside the Tribunal on giving any testimony in favour of any judicial or non-judicial party, especially the International Special Tribunal for Lebanon”.<sup>284</sup>

105. An article dated 9 March 2013 from the New York Times states that *Al Akhbar*’s actions “underscore the lengths to which opponents of the tribunal will go to undermine its mandate” and that “the leaks will raise the likelihood that witnesses may be silenced by fear or coercion, which could seriously weaken the prosecution’s case.”<sup>285</sup>

106. An article by Elnashra dated 16 January 2013 cites a statement by the Lebanese Minister of Justice that “there are some who are working on undermining the International Tribunal’s credibility and on obstructing its work through leaks” and that such leaks were “sowing doubt in some people’s minds and are scaring some witnesses”.<sup>286</sup>

107. An article by Now dated 17 January 2013 reports on the disclosure by the newspaper *Al Akhbar* of a list of purported witnesses in the *Ayyash et al.* case.<sup>287</sup> The article quotes a Lebanese lawyer by the name of Marwan Saqr stating that the *Al Akhbar* publication is an attempt to

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<sup>281</sup> P00038, p. 2; *see also* P00036 and P00037

<sup>282</sup> P00045, p. 1 (“17 April Article”).

<sup>283</sup> P00045, p. 2.

<sup>284</sup> P00149, p. 1.

<sup>285</sup> P00096, p. 1.

<sup>286</sup> P00090.

<sup>287</sup> P00091.

intimidate the witnesses who may decide to recant their testimonies, which would in turn sabotage the work of the Tribunal.<sup>288</sup>

108. A report by Shia Watch dated 29 April 2013 discusses the disclosure of purported confidential witness information by an unknown website.<sup>289</sup> According to this article, “a commentator” declared that incidents such as this “would scare away all the witnesses”.<sup>290</sup> It also states that the intention of the disclosure was to intimidate witnesses and that it had achieved this outcome “immediately and effectively”.<sup>291</sup> In reference to the publication of 32 “secret” witnesses by *Al Akhbar* in January 2013, the article describes that “numerous sources questioned and even attacked the newspaper for its actions”.<sup>292</sup>

### *j) Conclusions*

109. In evaluating the entirety of the evidence on the record to determine whether the *Amicus* has proven that the publication of the 15 and 19 January Articles created an objective likelihood of undermining public confidence in this Tribunal, I must carry out a holistic evaluation and weighing of all the evidence taken together.<sup>293</sup> Furthermore, consistent with well-established legal principles, when the *Amicus* relies upon circumstantial evidence to prove the facts constituting the elements of an offence by inference, that inference must be the only reasonable conclusion available from the evidence.<sup>294</sup> In order to draw any such inferences, I am also guided by key factors such as the insinuating tone and the cryptically threatening content of the impugned articles, which are self-evident, and any evidence that demonstrates actual harm caused by the publications or the existence of negative public discourse surrounding the purported disclosures.<sup>295</sup> This must be proven through ascertainable facts such as reliable evidence pointing to the existence of tangible harm, the worried reactions of the relatives, friends and acquaintances of the exposed witnesses or media articles that report on or echo outrage, criticism or concern about the *Al Akhbar* disclosures. Importantly, such media articles have not

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<sup>288</sup> P00092, p. 2.

<sup>289</sup> P00103.

<sup>290</sup> *Id.* at p. 1.

<sup>291</sup> *Id.* at p. 1.

<sup>292</sup> *Id.* at p. 3.

<sup>293</sup> Appeals Panel Judgment, para. 126.

<sup>294</sup> *Id.* at para. 104.

<sup>295</sup> *Id.* at paras 69, 97.

been admitted for the truth of their contents, but rather to demonstrate the existence and tone of the discourse circulating in the wake of the *Al Akhbar* publications.

110. It is important to note, however, that the *Amicus* need not prove beyond a reasonable doubt that public confidence was *actually* undermined as a result of the publications.<sup>296</sup> Therefore, the Defence's argument that witnesses continue to testify with the benefit of protective measures in the main proceedings is not determinative of whether the conduct created an objective likelihood of undermining confidence.

111. The content of the impugned Articles, combined with their eloquent language and insinuating tone, contribute to a finding that the publications created an objective likelihood that public confidence in the Tribunal would be undermined and that moreover, such a likelihood was intended by the Articles' authors. In the 15 January Article, before publishing the list of what it characterizes as individuals whose testimonies will be used "[...] to incriminate Hezbollah", the author describes that "close observers of the 'Hariri Tribunal' can confirm that most of its files, if not all of them, are disclosed to those who wish to obtain them."<sup>297</sup> Furthermore, in portraying the 32 individuals as witnesses against Hezbollah, the author does not place himself as a neutral observer simply reporting on the results of an investigative inquiry, he positions himself as a political advocate. This conclusion is further supported by the revealing tone and language found in the 19 January Article when Mr Al Amin provides among his reasons for publishing the first list of witnesses as retaliation "to counter the [Tribunal's] international campaign of fabrication targeting the Resistance."<sup>298</sup> Mr Al Amin also writes that the interviewees of the Investigation Commission, hundreds of whom were set to be witnesses, had "struck secret deals with the Prosecution" and "engaged in ample gossip".<sup>299</sup> In this sense, the author has painted the Tribunal witnesses in a negative manner, positioning them as contrary to the Lebanese "Resistance" of purported hostile powers and thus, as individuals to be ostracized by the Lebanese people. Moreover, it has not been demonstrated that there was any journalistic purpose or added benefit

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<sup>296</sup> *New TV* Judgment, paras 44, 52; Appeals Panel Judgment, para. 39.

<sup>297</sup> P0001, pp. 1-2.

<sup>298</sup> P0007, p. 3; the English translation of the Arabic-language article is slightly different and is as follows: "This is the leak which Al Akhbar has relied on to publish what it deems necessary to confront an international smear campaign against the Resistance.", p. 2.

<sup>299</sup> P00005, p. 2 (English translation); The English-language version of the article is worded slightly differently, P00007, p. 3 and reads "Those who thought they had struck secret deals with the prosecution did a lot of chattering too [...]"



in the decision to publish the photographs and personal details of those individuals whose information was purportedly “leaked”. Furthermore, because the evidence demonstrates that these personal details were divulged in a politically charged environment with sectarian tensions and significant, powerful opposition to the Tribunal, there is no doubt that the individuals publicly denounced as opponents of the Resistance were placed at an elevated risk of harm.<sup>300</sup> The allegation that anyone desiring confidential information from the Tribunal can obtain it, in conjunction with the publication of photographs and personal information allegedly associated with such confidential information, strongly contributes to the negative impact on public confidence in the Tribunal’s ability to protect confidentiality.

112. I am persuaded that publishing the identities of purported confidential witnesses in an ongoing criminal matter constitutes grave conduct in Lebanon. Defence witness Mr Elias Aoun acknowledged the actual application to Lebanese journalists of a number of provisions and principles in Lebanese and international law that variously prohibit the publication of “the proceedings of investigations into a crime or a misdemeanour before they are recited in a public hearing”<sup>301</sup>, recommend that “the provision of information about (...) parties to criminal proceedings should respect their right to protection or privacy”<sup>302</sup> and that “particular protection should be given (...) to witnesses [and] (i)n all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on [witnesses]...”<sup>303</sup> while also stating that “the identity of witnesses should not be disclosed, unless a witness has given his or her prior consent (...) [and] the identity of witnesses should never be disclosed where this endangers their lives or security.”<sup>304</sup> Although I have declined to accept Mr Aoun’s testimony as expert evidence, I am able to accept parts of his factual testimony. I find that his explicit and implicit acknowledgement of the above-mentioned laws’ application to journalists is supported both by the language of the texts of such documents tendered in evidence<sup>305</sup> as well as by Mr Al Amin himself when he describes in the 19 January Article that

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<sup>300</sup> Transcript of 26 February, pp. 8, 10-12, 14-15, 17-18 ; Transcript of February 29, pp. 11-13, 68, 69; Transcript of 7 April, p. 91.

<sup>301</sup> Legislative Degree No. 104/1977, art. 12(1); P00144, para. 45; *see also* Lebanese Criminal Code, art. 420; *see also* Transcript of 8 April, pp. 52-54.

<sup>302</sup> P00145, p. 3; *see also* Transcript of 8 April, pp. 47-48.

<sup>303</sup> European Convention on Human Rights, art. 8; *see also* Transcript of 8 April, p. 48.

<sup>304</sup> P00145, p. 4; *see also* Transcript of 8 April, p. 49.

<sup>305</sup> *See* fn 299, 301, 302.

politicians, jurists, journalists and security personnel had contacted the newspaper about the 15 January Article to, among others, “stress [...] that *Al Akhbar* was breaking the law.”<sup>306</sup>

113. Furthermore, *Al Akhbar*'s 17 April Article acknowledged the potential “harm that may befall those witnesses” as a result of their public identification because the Tribunal “failed to protect its own files”.<sup>307</sup> Indeed, several individuals exposed as purported witnesses in the impugned Articles took actions [REDACTED] so that the potential harm or negative impact they faced as a result of the Articles would be lessened.<sup>308</sup> Such actions also demonstrate that the *Al Akhbar* publications were viewed as serious and potentially harmful.

114. In particular, despite denying that any harm arose from their identification as witnesses at the Tribunal, I find that the reactions of [REDACTED] DT02, who found it necessary to clarify and minimize any involvement with the Tribunal, support that they experienced subjective fear of the consequences of being identified as collaborators of the Tribunal and opponents of the Resistance. For example, witness DT02 continued to insist during his *viva voce* evidence that he was not a Tribunal witness even though he had already provided open-court testimony in the main proceedings.<sup>309</sup>

115. I further find that DT02's evidence that he immediately took steps to disseminate his minimal and non-political involvement with the Tribunal shares significant similarities to the El Khiam article “I am not a witness”<sup>310</sup>, in which the author, identified as a purported confidential witness for the STL, seeks to correct information that *Al Akhbar* published which suggested that he had a particular political affiliation or had collaborated with the Tribunal. Such evidence demonstrates that several individuals took direct steps after the *Al Akhbar* publications to minimize or mitigate the harm they perceived could come to them for being publicly exposed as purported Tribunal witnesses. Such perceived fear is consistent with witness AP07 when he explained that he believed that he could be harmed as a result of being identified as a purported witness, given the hostility of certain groups in certain regions of Lebanon to known

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<sup>306</sup> P00007, p. 2.

<sup>307</sup> P00045, p. 1.

<sup>308</sup> See above paras 86, 87, 104.

<sup>309</sup> Transcript of 7 April, pp. 80, 82-83.

<sup>310</sup> P00149.

collaborators of the Tribunal.<sup>311</sup> I am able to conclude that the Accused, the exposed purported witnesses who testified and various media reports in Lebanon all demonstrated an awareness of the dangerous and therefore serious nature of the impugned Articles.

116. An additional factor relevant to the determination of whether an objective likelihood of undermining public confidence is made out, and concomitantly related to the gravity of the Accused's conduct, is whether reliable evidence has been introduced that points to authentic and negative public discourse, true or not, surrounding the disclosures.<sup>312</sup> The media articles tendered by the *Amicus* similarly support that there was outcry from various sectors of the Lebanese population who believed that the publications constituted grave conduct, criminal conduct and/or was intentioned to intimidate witnesses and interfere with the Tribunal's administration of justice.<sup>313</sup> For instance, the NOW media piece<sup>314</sup> which references a legal opinion that the publications could incite witness recantations, is corroborated by *Al Akhbar*'s 21 January Article<sup>315</sup> which reported that witnesses had informed them that they were in the process of cancelling their testimonies with the Tribunal. Witnesses AP07 and AP09 provided uncontroverted evidence that friends, family and acquaintances had warned them that their exposure as purported Tribunal witnesses had put them in danger.<sup>316</sup> Even witness DT02 provided evidence, which I accept, that his exposure as a purported witness had elicited "negative comments among malignant people in my surroundings."<sup>317</sup> Therefore, I find overwhelming evidence, both testimonial and documentary, that points to negative public discourse surrounding *Al Akhbar*'s identification of purported confidential Tribunal witnesses.

117. I am satisfied that ascertainable facts – including actions taken by exposed individuals to minimize what they perceived as dangerous involvement with the Tribunal, negative public discourse in the media and the concerns expressed by the family and friends of the purported

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<sup>311</sup> Transcript of 26 February, p. 18.

<sup>312</sup> Appeals Panel Judgment, para. 69.

<sup>313</sup> See P00090, P00091, P00092, P00093, P00094, P00096, P00097, P00103, P00149.

<sup>314</sup> P0009, p. 2.

<sup>315</sup> P00038, p. 3.

<sup>316</sup> See above paras 72, 75, 77, 84.

<sup>317</sup> See above para. 88.

witnesses – substantiate the subjective fears expressed by the purported witnesses following their exposure in the *Al Akhbar* articles.<sup>318</sup>

118. Next, I have previously held that whether or not the Accused’s conduct in fact caused harm can be relevant to, but is not dispositive of, the existence of objective likelihood of undermining public confidence in the Tribunal at the relevant time.<sup>319</sup> Therefore, in light of its relevance, I also look to any objectively proven impact or harm on the purported witnesses in order to determine whether the publications created an objective likelihood of undermining public confidence in the Tribunal’s ability to protect confidential information. In this respect, I find it particularly relevant that AP06 suffered actual harm as a direct result of the disclosures, with his business having suffered a loss of clients, many of whom were opposed to the Tribunal, as a result of the publication that featured him as a Tribunal witness.<sup>320</sup>

119. Evidence that individuals lost confidence in the Tribunal is also pertinent, though not dispositive, to whether the publications created an objective likelihood of undermining public confidence in the Tribunal. In this sense, it is highly relevant that [REDACTED].<sup>321</sup> Although he was clear that he maintained trust in the Tribunal, I find that his confidence in the Tribunal’s ability to protect confidential information was undermined as a result of the *Al Akhbar* publications [REDACTED].<sup>322</sup> This further contributes to a finding that the Articles created an objective likelihood of undermining confidence in the Tribunal.

120. In conclusion, I am satisfied on a review of the entirety of the evidence, that the *Amicus* has demonstrated beyond a reasonable doubt that the 15 and 19 January Articles received widespread and negative attention in Lebanon by the public in general, including “outcry” and widespread criticism from politicians, lawyers and fellow journalists, public rebuttals by some purported witnesses and suggestions by relatives, friends and acquaintances of the exposed witnesses that the lives of Tribunal witnesses had been put at risk by the disclosures. I further accept that this media and public clamour proves both the seriousness of the newspaper’s conduct as well as the likely impact on the public’s confidence in the Tribunal’s ability to

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<sup>318</sup> See above paras 72, 75, 84, 89.

<sup>319</sup> *New TV* Judgment, paras 43-46; Appeals Panel Judgment, paras 39, 97.

<sup>320</sup> Transcript of 29 February, p. 87.

<sup>321</sup> *Id.* at p. 76.

<sup>322</sup> *Id.* at p. 96.

maintain the confidentiality of its information. This finding is moreover corroborated by the testimony of several individuals who were exposed as purported Tribunal witnesses, including witness AP06 who not only suffered direct harm as a result, but revealed that the publications caused him to lose confidence in the Tribunal.<sup>323</sup> Accordingly, I find that in publishing highly identifying information about these purported confidential witnesses, the Accused created an objective likelihood that the public's confidence in the Tribunal's ability to maintain confidentiality would be undermined, and therefore interfered with the administration of justice.

121. The *Amicus* has therefore proven the second element of the *actus reus* for this count. Consequently, I must next consider whether the requisite mental element for this offence has been proven beyond a reasonable doubt.

## II. *Mens Rea*

122. The element of *mens rea* for this charge is satisfied if the *Amicus* demonstrates that the Accused deliberately published information on purported confidential witnesses, and in doing so knew that his conduct was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.

### 1. Arguments of the Parties

#### a) *The position of the Amicus*

123. The *Amicus* submits that both *Al Akhbar* and Mr Al Amin knew, or should have known, that publishing information on purported confidential witnesses was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.<sup>324</sup> In support of his submissions the *Amicus* raises four main arguments.

124. Firstly, the *Amicus* argues that the Accused admitted their purpose was to undermine public confidence in the Tribunal.<sup>325</sup> In the *Amicus's* view the Articles' purpose was to

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<sup>323</sup> See above paras 67, 70.

<sup>324</sup> *Amicus* Final Trial Brief, paras 62-75.

<sup>325</sup> *Id.* at paras 63-65.

undermine public confidence in the Tribunal, as a counter-attack on what the Accused described as a smear campaign against Hezbollah.<sup>326</sup> The *Amicus* argues that the Articles directly address the general public and use language that attempts to influence the public and attack their confidence in the Tribunal, including “corrosive” expressions such as “surprise,” “hidden cards,” “leak,” “reveal,” “gained access,” “conceal,” “unknown, secret information,” “secret witnesses,” “confidential evidence,” “uncovering,” “enshroud,” and “secret witness list,” all suggesting that the Tribunal’s witnesses and information could not be protected.<sup>327</sup> The *Amicus* argues that the Articles were not isolated pieces but rather, part of an extended campaign to undermine public confidence in the Tribunal.<sup>328</sup>

125. Secondly, the *Amicus* argues that the evidence shows that, before the publication of the 19 January 2013 Article, *Al Akhbar* knew that the Tribunal was considering legal action for “contempt of court” against them for publishing purported confidential witnesses, in response to the 15 January 2013 Article.<sup>329</sup> Moreover, on 19 January 2013 *Al Akhbar* published an article that analysed the content of Rule 60 *bis* and included a link to the STL Rules on the STL website. The *Amicus* argues that these articles show that *Al Akhbar* was undoubtedly informed about the unlawfulness of their conduct under STL Rules.<sup>330</sup> The *Amicus* further argues that *Akhbar Beirut* S.A.L. was served a Registrar’s Notice of Cease and Desist on 20 January 2013. The document was served on attorney Nizar Saghieh, representing *Akhbar Beirut* S.A.L. and Mr Al Amin, and on Mr Pierre Abi Saab, vice Editor-in-Chief of *Al Akhbar* newspaper.<sup>331</sup> Further, on 27 August 2013, *Akhbar Beirut* S.A.L. was served with the 5 June 2013 Pre-Trial Judge’s “Order Requesting the Cooperation of the Lebanese Authorities to Cease Dissemination of Information.”<sup>332</sup> Despite full knowledge of the Registrar’s Notice of Cease and Desist and the Pre Trial Judge’s Order, the Articles were not removed from *Al Akhbar* public online platforms.<sup>333</sup>

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<sup>326</sup> *Amicus* Final Trial Brief, para. 63.

<sup>327</sup> *Id.* at para. 64.

<sup>328</sup> *Id.* at para. 65.

<sup>329</sup> *Id.* at paras 66, 69.

<sup>330</sup> *Id.* at para. 66.

<sup>331</sup> *Id.* at para. 67.

<sup>332</sup> *Id.* at para. 68.

<sup>333</sup> *Ibid.*

126. Thirdly, the *Amicus* argues that the Accused had deep knowledge of the STL's legal framework and Rules such that they would have known that disclosing the identity of alleged confidential witnesses could constitute contempt.<sup>334</sup> In the *Amicus's* view the evidence shows that, since its establishment, *Al Akhbar* has closely monitored the Tribunal's work.<sup>335</sup> As a result the Accused are familiar with the Tribunal's features, including the confidentiality of indictments, as well as the confidentiality and protective measures concerning witnesses.<sup>336</sup> The *Amicus* also submits that the Accused closely followed the *New TV* case, knew that disclosing the identity of alleged confidential witnesses was a violation of Tribunal Orders and Rules and could lead to contempt proceedings.<sup>337</sup>

127. Fourthly, the *Amicus* argues that the fact that the Accused deviated from the accepted journalistic standards in publicly exposing alleged protected witnesses is evidence of their contemptuous intent.<sup>338</sup>

***b) The position of the Defence***

128. The Defence submits that the *Amicus* provided no evidence to support his arguments that *Akhbar Beirut* S.A.L. and Mr Al Amin deliberately and knowingly sought to obstruct the course of justice through publishing the 15 and 19 January Articles.<sup>339</sup>

129. The Defence argues that the charges, set out in the Order in Lieu of Indictment, have never been charged in any international criminal court, nor do they correspond to any specific type of conduct listed in Rule 60 *bis* (A) (i)-(vii) of the Rules.<sup>340</sup> It was only in the *New TV* case, after the publication of the *Al Akhbar* Articles, that the definition of this offence was outlined. As a result, it submits that *Akhbar Beirut* S.A.L. and Mr Al Amin could not have been aware of the existence of this particular offence and the basic components of its constituent elements.<sup>341</sup> The Defence further argues that expert witness Mr Elias Aoun stated that no seminar had been held

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<sup>334</sup> *Amicus* Final Trial Brief, paras 70-71.

<sup>335</sup> *Id.* at para. 70.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.*

<sup>338</sup> *Amicus* Final Trial Brief, paras 72-75.

<sup>339</sup> Defence Final Trial Brief, para 112.

<sup>340</sup> *Id.* at para 113.

<sup>341</sup> *Ibid.*

by the Tribunal to explain the content of Rule 60 *bis* of the Rules to the Lebanese press, which means Lebanese journalists were unaware of the specifics of Rule 60 *bis*.<sup>342</sup>

130. The Defence also argues that Mr Amin stated that there was no intent to obstruct justice and that the Articles were produced in the context of carrying out his functions as a journalist exercising his press freedoms.<sup>343</sup> The Defence further argues that Mr Al Amin's agreement to publish a clarification written by witness DT02, who was identified in the 19 January Article, demonstrates his good faith.<sup>344</sup>

131. The Defence avers that *Al Akhbar*'s publications clearly demonstrate that the newspaper's editorial line is devoted to subjects of social interest to the Lebanese public.<sup>345</sup> It argues that the Tribunal was a subject of interest to the Lebanese people<sup>346</sup> and that the impugned Articles simply sought to expose its dysfunction, not to undermine the administration of justice.

132. Moreover, the Defence submits that *Al Akhbar* did not initiate the practice of publishing confidential information obtained from leaks.<sup>347</sup> Well before the publication of the impugned Articles in January 2013, various media outlets such as *Le Figaro*, *Der Spiegel* and *CBC* published confidential material, including the names of potential witnesses and suspects related to the Prosecution's investigation in the *Ayyash et al.* case.<sup>348</sup> As these earlier publications on purported confidential information did not result in any prosecution under Rule 60 *bis*,<sup>349</sup> the Defence argues that Mr Al Amin could have been led to believe that publishing the impugned Articles was not unlawful.<sup>350</sup>

133. The Defence avers that *Akhbar Beirut S.A.L.* and Mr Al Amin never received an order from the Tribunal to cease publication after the Articles were published.<sup>351</sup> It characterizes the Cease and Desist letter from the Registrar as an expression of mere opinion that in no way

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<sup>342</sup> Defence Final Trial Brief, para 113.

<sup>343</sup> *Id.* at para 114.

<sup>344</sup> *Ibid.*

<sup>345</sup> Defence Final Trial Brief, para 115.

<sup>346</sup> *Ibid.*

<sup>347</sup> *Id.* at para 119.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> Defence Final Trial Brief, paras 120-121.

<sup>351</sup> *Id.* at para 122.



amounts to a judicial order.<sup>352</sup> Moreover, as the Registrar's letter was only served after the publication of the 19 January Article, and not on Mr Al Amin personally, the Defence argues that such service failed to comply with the rules of service under Lebanese Law.<sup>353</sup> The Defence also argues that the *Amicus* provides no proof beyond reasonable doubt that the Non-Dissemination Order or other protection orders were served on either Accused.<sup>354</sup>

134. The Defence submits that it was not until 27 January 2016 that an order to "cease publication of the information identifying the persons concerned in the two articles of January 2013" was issued by the Trial Chamber.<sup>355</sup> Upon receiving the Order, the Accused complied immediately by blurring the details of these persons on the newspaper's official websites, making them invisible to the public.<sup>356</sup> The Defence argues that this shows that the Accused are willing to comply with Tribunal orders when served.<sup>357</sup>

135. Finally, the Defence avers that it is striking that three years after the publication of the Articles had passed before such an Order was served on the Accused, arguing that this demonstrates that even the Tribunal did not appear to consider the Articles as a threat at the time of their publication.<sup>358</sup>

## 2. Discussion

### a) *The Accused deliberately published information on purported confidential witnesses*

136. During his suspect interview of 19 November 2013, Mr Al Amin stated,

I would like to confirm, in my capacity as Chairman of *Akhbar* Beirut, publisher of *Al Akhbar* newspaper, and as editor-in-chief and manager responsible for the work of the newspaper before the Lebanese authorities, that I am the only person responsible for granting the orders to publish, regarding everything related to the Special Tribunal for Lebanon's file and the role assumed by any other person, in this case, was limited to carrying out my orders in my above-mentioned capacity.<sup>359</sup>

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<sup>352</sup> Defence Final Trial Brief, para 123.

<sup>353</sup> *Ibid.*

<sup>354</sup> Defence Final Trial Brief, para 124.

<sup>355</sup> *Id.* at para 125.

<sup>356</sup> *Ibid.*

<sup>357</sup> Defence Final Trial Brief, para 126.

<sup>358</sup> *Id.* at para 127.

<sup>359</sup> P00117, p.50.

As a result, I am satisfied that Mr Al Amin authored, approved and published both the 15 and 19 January Articles, and I address below the issue of his knowledge surrounding the purported confidential nature of the information he chose to publish.

137. In the 15 January Article, titled “STL Leaks: The Prosecution’s Surprise Witnesses” the author Mr Al Amin purports a number of claims including:

The prosecution team at the Special Tribunal for Lebanon investigating the assassination of Prime Minister Rafic Hariri, promises to reveal surprises that will ascertain the assumption upon which the indictment is based. The most prominent of these surprises is the list of witnesses whose actual number was concealed by the Office of the Prosecutor. *Al Akhbar* publishes today a ‘sample’ of the names of these witnesses.<sup>360</sup> [...]

In past years, *Al Akhbar* [...] ha[s] revealed much of the internal proceedings of the case, published leaked documents from both the investigation and the Special Tribunal for Lebanon.<sup>361</sup> [...]

*Al Akhbar* has gained access to a list of witnesses that the prosecution plans to present at the trial to help prove their case upon which the indictment was based. *Al Akhbar* published (*sic*) below a brief description of a number of those witnesses, which is a “sample” of individuals whose testimonies will be used by the prosecution team to expose its strength in order to incriminate Hezbollah in the assassination of Hariri and others.<sup>362</sup>

138. In the 19 January Article, the author Mr Al Amin states that “[o]ver the past six years, *Al Akhbar* has published tens and even hundreds of documents related to “breach of confidentiality. [...] Therefore, *Al Akhbar* will, without delay publish any material whose authenticity is confirmed.”<sup>363</sup> Also when referring to the international investigation commissions and the STL, Mr Al Amin claimed that,

In each phase, leaks were a general feature, so much so that any observer can become informed of the contents of all the Tribunal’s documents, without the need to wait for the trial, which trial will be odd given its confidential nature, the non-disclosure of the identity of its witnesses, its confidential evidence and the non-disclosure of the identities of its investigators, among other peculiar features.<sup>364</sup>

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<sup>360</sup> P00001, English translation of Arabic-language article.

<sup>361</sup> P00004, p. 2.

<sup>362</sup> P00001, p. 2.

<sup>363</sup> P00005, p. 1.

<sup>364</sup> *Id.* at p. 2.

139. It is clear from the evidence that Mr Al Amin had actual knowledge that the individuals whose identities he disclosed were purported confidential witnesses. Despite this knowledge, he published photographs of the purported witnesses and personal identifying information including the witnesses' names, mother's name, residential address and, in most cases, the place and date of birth and occupation. The statement that *Al Akhbar* would publish any confidential material supports the conclusion that he deliberately published information about purported confidential witnesses and is therefore relevant to his state of mind with respect to the 15 and 19 January Articles.

140. Therefore, I conclude from the foregoing that Mr Al Amin deliberately published information pertaining to purported confidential witnesses.

**b) *The Accused knew that the publication of purportedly confidential witness information was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses***

141. I first address the Defence argument that the Tribunal's previous "tolerance" with respect to the publication of "confidential material" by other media outlets may have led the Accused to believe that the publication of the identities of purported confidential Tribunal witnesses was not unlawful. In my *Jurisdiction Decision*, I have already dismissed the Defence argument that the failure to prosecute other media outlets for publishing confidential material could somehow justify the Accused's alleged conduct in this case.<sup>365</sup> In any event, the Defence has not demonstrated that the content of previous publications of alleged confidential material related in any sense to purported confidential Tribunal witnesses. Lacking substantive factual similarities with the publications of other media outlets, I need not address further whether the Defence's argument holds any legal weight in this case.

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<sup>365</sup> *Jurisdiction Decision*, para. 44 ("I cannot speculate as to why the organs of the Tribunal or other entities have not called upon the relevant Judge or Chamber, as appropriate, to investigate other instances of alleged contempt and obstruction of justice. I am not an investigator or prosecutor. I am seized as Judge of this case, and have to pronounce on its merits. It is not within my authority, after an indictment has been confirmed, to divest myself of the case because of the allegation it might have been selectively identified among other possible cases. As Judge Baragwanath wrote in another context: "While it is greatly preferred that all who commit criminal conduct are brought to justice, failure to meet that standard does not as a rule afford a defence to any who are brought to trial. Their right is to fairness of their trial, not to a discharge on the ground that others have not, or not yet, been charged").

142. The Defence further asserts that the charge against the Accused does not correspond to any of the specific conduct listed in Rule 60 *bis* (A) (i)-(vii) of the Rules. It argues that since the definition of the offence was only outlined in the *New TV* case, after the publication of the *Al Akhbar* Articles, it cannot be reasonable submitted that the Accused were aware of this particular offence.<sup>366</sup>

143. I am not persuaded by the Defence's arguments. Firstly, as already stated in the *Jurisdiction Decision*, "Rule 60 *bis* contemplates prosecution for conduct beyond the various acts listed in Rule 60 *bis* (i)-(vii). The Rule unambiguously states that contempt and obstruction of justice 'includes, but is not limited to' such acts. Rule 60 *bis* provides for the prosecution of any knowing and wilful interference with the Tribunal's administration of justice."<sup>367</sup> Secondly, I am guided by the well-established practise of the ICTY. The jurisprudence holds that "a person's misunderstanding of the law does not, in itself, excuse a violation of it."<sup>368</sup>

144. In the 19 January Article, Mr Al Amin acknowledges the various negative reactions from a wide range of individuals and groups in Lebanon following the publication of the 15 January Article<sup>369</sup>, and makes specific reference to "[...] efforts by powerful figures in the STL to take legal action against the paper on charges of contempt of court, publishing documents that compromise the fairness and integrity of proceedings, and also putting peoples' lives at risk."<sup>370</sup> He also states that the "the political prosecution team, [...] has prejudged that *Al Akhbar* was seeking to obstruct international justice [...]."<sup>371</sup> Finally, Mr Amin notes that *Al Akhbar* had also received questions from politicians, jurists, journalists, and security personnel, as well as some of those whose personal details were published.<sup>372</sup> These questions all focused on the aim behind

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<sup>366</sup> Defence Final Trial Brief, para. 113.

<sup>367</sup> F0069, Decision on Motion Challenging Jurisdiction, 6 November 2014, para. 20.

<sup>368</sup> ICTY, *Prosecutor v. Hartmann*, Judgement on Allegations of Contempt, Case No. IT-02-54-R77.5, 14 September 2009, para. 65; *Jović* Contempt Trial Judgement, para. 21; *Prosecutor v. Jović*, Judgement, Case No. IT-95-14 & 14/2-R77-A, 15 March 2007, para. 27; *Prosecutor v. Haxhiu*, Judgement on Allegations of Contempt, Case No. T-04-84-R77.5, 24 July 2008, para. 29.

<sup>369</sup> P00005, p. 1; Mr Al Amin writes: "At the political level, the political prosecution team, represented by the Future Movement and the March 14 coalition, has prejudged that Al-Akhbar was seeking to obstruct international justice...Al-Akhbar received questions from politicians, jurists, media figures and security personnel, as well as individuals whose personal information was mentioned. Questions centred on the motive behind such publication, and whether it served any party; they also stressed that Al-Akhbar had violated the law."

<sup>370</sup> P00005, p. 1.

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*

the decision to publish, and on whether it served a specific interested party, while stressing that “*Al Akhbar* was breaking the law.”<sup>373</sup>

145. By acknowledging that “powerful figures” in the Tribunal may bring legal actions for “contempt of court” against *Al Akhbar* for publishing the 15 January Article, Mr Al Amin was clearly aware that publishing the identities and personal information of purported confidential Tribunal witnesses was a violation of the Tribunal’s Rules. Nevertheless, he published the identifying information of a further 15 purported confidential witnesses in the 19 January Article. Thus, Mr Al Amin deliberately published these Articles while knowing that such conduct was unlawful under the Tribunal’s Rules. He also deliberately published said Articles with the knowledge that this conduct could put peoples’ lives at risk.

146. Additionally, a separate article published in *Al Akhbar* newspaper on 19 January 2013 entitled “SKeyes Conference: Bias towards ‘International Justice’”, author Omar Nashabe quotes and analyses Rule 60 *bis*.<sup>374</sup> The article identifies that Rule 60 *bis* “clearly provides that legal proceedings shall be initiated against anyone who publishes confidential information because such publication is considered interference in the legal proceedings.”<sup>375</sup> This article is again a clear indication that Mr Amin, the Editor-in-Chief of the newspaper who acknowledged he alone was authorized to approve the publication of any material related to the STL<sup>376</sup>, was fully informed of the unlawfulness of publishing purported confidential witnesses under the Tribunal’s Rules. Despite full knowledge that legal proceedings could be initiated against anyone who publishes confidential information, Mr Al Amin proceeded to publish a further 15 purported confidential witnesses in the 19 January Article. Moreover, I have made findings above that the content and tone of the 15 and 19 January Articles fail to demonstrate objective reporting of a journalistic investigation, but rather, manifest the views of a political advocate who paints purported STL witnesses in a negative light and portray them as counter to Hezbollah<sup>377</sup>, all while acknowledging the potential harm that may come<sup>378</sup> to those the newspaper chose to identify not only in name and photograph but with extremely detailed personal information. No

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<sup>373</sup> P00005, p. 1.

<sup>374</sup> P00030.

<sup>375</sup> *Id.* at p. 2.

<sup>376</sup> P00118, p. 5.

<sup>377</sup> See above para. 111; see also P00005, p. 2; P00007, p. 3.

<sup>378</sup> See above para. 113; see also P00045, p. 1.

reasonable inference can be drawn from such evidence other than the conclusion that Mr Al Amin not only knew that the impugned Articles were objectively likely to undermine public confidence in the Tribunal, but intended such an outcome.

147. I consider Mr Al Amin's admissions in the 15 and 19 January Articles concerning the confidentiality of witness information and the public impact of their publication, to be the strongest evidence of his *men rea*. In particular, I note that Mr Al Amin quoted various negative reactions from a wide range of individuals and groups in Lebanon in response to the publication of the 15 January Article.<sup>379</sup>

148. I find that Mr Al Amin published both impugned Articles deliberately and with the knowledge that such conduct was both unlawful under the Tribunal's Rules and also likely to undermine the public's confidence in the Tribunal. In other words, Mr Al Amin knew that the publication of purported confidential witness information was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. In sum and on the basis of the foregoing, I am persuaded beyond a reasonable doubt that the *Amicus* has proven all of the required elements of the offence with which Mr Al Amin is charged.

### **III. Defence of Media Freedoms**

149. Having found that the *Amicus* has proved the elements of this count beyond a reasonable doubt, I am now required to consider whether the Accused's conduct was justified by their right to freedom of expression, which *inter alia* protects the ability to disseminate news and express criticisms. This evaluation requires that I account for and balance the freedom of the press against the need to ensure the integrity of the Tribunal's proceedings.

#### **1. Arguments of the Parties**

##### **a) *The position of the Amicus***

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<sup>379</sup> See above para. 144.

150. The *Amicus* submits that in the circumstances of this case, the Accused's conduct was outrageous, criminal and unjustifiable by any right to freedom of expression.<sup>380</sup> He argues that every "national and international founding document guaranteeing freedom of expression" plainly recognizes that this freedom is limited.<sup>381</sup> In support of his argument the *Amicus* cites Article 19 of the International Covenant on Civil and Political Rights, Article 10 (2) of the European Convention on Human Rights and Article 13 of the Lebanese Constitution.<sup>382</sup>

151. The *Amicus* avers that national and international jurisprudence establishes that the invocation of the right to free expression is legitimate only where verified, reliable and precise information is provided in good faith on an accurate factual basis and in an objective manner, and where the right is counterbalanced with the right to privacy of all persons whom the information concerns as well as the public interest in the proper administration of justice.<sup>383</sup> The *Amicus* argues that *Al Akhbar* violated fundamental journalistic standards as the Articles are neither accurate nor objective and are coloured with bad faith and dangerous intent. He also asserts that *Al Akhbar* lacks veracity and accuracy when claiming that the 32 exposed individuals were or are STL witnesses against Hezbollah, that confidential information was leaked from inside the Tribunal or that STL documents are accessible to those who want them.<sup>384</sup>

152. The *Amicus* also argues that there is no journalistic value or pressing social need in publishing names, photographs and the personally identifying information of 32 purported confidential witnesses as the Articles could have plainly stated their concerns about the confidentiality of Tribunal information without putting numerous individuals and their families at risk.<sup>385</sup>

**b) *The position of the Defence***

153. The Defence argues that when prosecuting a media outlet and a journalist, it is necessary to strike a balance between freedom of the press and the interest of justice,<sup>386</sup> a position

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<sup>380</sup> *Amicus* Final Trial Brief, para. 84.

<sup>381</sup> *Id.* at para. 85.

<sup>382</sup> *Id.* at paras 85-87.

<sup>383</sup> *Id.* at para. 88.

<sup>384</sup> *Id.* at para. 89.

<sup>385</sup> *Id.* at para. 90.

<sup>386</sup> Defence Final Trial Brief, para. 136.

supported by the United Nations, the Lebanese Constitution, the case law of the European Court of Human Rights and the highest courts of Lebanon.<sup>387</sup>

154. The Defence argues that the 15 and 19 January Articles were published in the context of informing the Lebanese people and others about the work of the Tribunal. The Defence also cites defence witness Mr Elias Aoun, who wrote in his report that the press is an essential medium for informing the public of the Tribunal's work and its role of establishing the truth generally.<sup>388</sup>

155. The Defence further argues that the jurisprudence of the European Court of Human Rights and the ICTY affirms that criticism of a judicial body does not constitute contempt *per se*. The Defence further argues that “[i]t holds that it is justice itself which must be flouted in order for there to be contempt, not the court or judge seeking to administer justice.”<sup>389</sup> It asserts that the Prosecution failed to demonstrate that justice itself was flouted.<sup>390</sup>

156. Finally, the Defence concludes its submissions by arguing that the Accused acted in the name of freedom of the press and that this prosecution ignores that Tribunal staff are “solely responsible for the protection of the confidentiality of their information.”<sup>391</sup>

## **2. Discussion**

157. In this case, the freedom of the press relates only to whether Mr Al Amin and *Akhbar Beirut S.A.L.* were justified in their conduct, which I have already found beyond a reasonable doubt constituted an offence under Rule 60 *bis*. As I have noted, the journalistic profession may not be used as an impenetrable shield; where different legitimate interests are involved, they must be weighed in light of the priorities in a democratic society.

158. At the international level, all of the relevant principles and rules concerning free expression impose limits on journalists in order to safeguard other conflicting and worthy interests. Article 19 of the International Covenant clarifies that the exercise of freedom of

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<sup>387</sup> Defence Final Trial Brief, para. 137.

<sup>388</sup> *Id.* at para. 142.

<sup>389</sup> *Id.* at para. 144.

<sup>390</sup> *Id.* at para. 145.

<sup>391</sup> *Id.* at para. 146.



expression is subject to certain restrictions.<sup>392</sup> The Human Rights Committee –set up under the International Covenant– has consequently observed the need, in some cases, for restrictions proportional to the value which the restrictions serve to protect.<sup>393</sup> As for the ECHR<sup>394</sup>, although it does not bind Lebanon or this Tribunal, it is of assistance in assessing the highest standards of international human rights on this point. With respect to freedom of the press, Article 10(2) of the ECHR states that the exercise of this freedom carries with it duties, responsibilities, conditions and restrictions.<sup>395</sup> Indeed, the need to protect the integrity of judicial proceedings and to ensure the safety of justice system participations, including witnesses, is widely regarded in Lebanon and elsewhere as one such conflicting and worthy of interest that can properly restrict free expression.<sup>396</sup>

159. The above-noted principles are indeed applied in Lebanon. For instance, Lebanese courts – and the Court of Publications in particular– applying current Lebanese laws, routinely try cases involving the publication of the contents of confidential court filings or on-going investigations to in order to safeguard their secrecy, safety and efficiency.<sup>397</sup> The Court of Publications has found, for instance, that a general plea of freedom of expression does not justify slander.<sup>398</sup> Even Mr Aoun, the President of the Order of Lebanese Press Editors and Defense witness, agrees that principles respecting the need to protect the privacy and confidentiality of the identifying information of parties to criminal proceedings, enshrined in the European

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<sup>392</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, “[...]carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”

<sup>393</sup> UNHRC, *Morais v. Angola*, Communication No. 1128/2002, 29 March 2005, UN Doc. CCPR/C/83/D/1128/2002, paras 6-8, “requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.”

<sup>394</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222.

<sup>395</sup> Article 10(2) of the ECHR: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

<sup>396</sup> See above para. 112.

<sup>397</sup> See, e.g., Lebanon, Court of Criminal Cassation, 7<sup>th</sup> Chamber, Decision No. 18/2001 publications (23October2001); Lebanon, Court of Publications, Decision No. 81 (12 July 1999).

<sup>398</sup> See, e.g., Lebanon, Court of Publications, *Omar Nashabe vs. Future TV et al.*, Decision No. 212(14 July 2014) (unofficial STL translation).

Convention on Human Rights and Recommendations from the Council of Europe Committee of Ministers, apply in Lebanese journalism.<sup>399</sup> As I have mentioned above, I am only able to accept Mr Aoun's factual testimony where it is otherwise supported by reliable evidence and I find ample documentary evidence to corroborate this position, including a transcript of an *Al Jadeed* news broadcast of 27 April 2013<sup>400</sup> that reported that the publication of purported confidential witness information from this Tribunal revealed faltering journalistic standards and would likely incite a "torrent of lawsuits".<sup>401</sup> This leads me to infer that the publication of the photographs, names and identifying information of criminal justice witnesses, no less deserving of privacy and protection than an accused person<sup>402</sup>, would support the conclusion that such publications constituted a grave and serious violation of journalistic standards in Lebanon.

160. Thus, in Lebanon, as elsewhere, freedom of expression finds its limits in the legitimate protection of other societal interests.

**a) Findings**

161. The Defence argues that the 15 and 19 January Articles were published in order to inform the Lebanese people and others about the pertinent work of the Tribunal and that criticism of a judicial body does not constitute contempt *per se*.<sup>403</sup> I do not find the Defence's arguments persuasive. The Accused and all other media are free to report on the Tribunal's work, including criticizing it.<sup>404</sup> However, there is a clear distinction between criticizing the Tribunal's work and publishing the names, photographs and other identifying information of 32 purported confidential witnesses. In addition, I find that the Defence simply invokes freedom of the press without addressing the issue of its limits and restrictions. In other words, it has not demonstrated that the publications of 32 purported confidential witnesses in this case, including personal identifying details, was consistent with journalistic standards or ethics. Publishing such

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<sup>399</sup> Transcript of 8 April, pp. 47-48.

<sup>400</sup> The Defence opposed the admission of this document, P00147, on the basis that "the expert witness did not give any opinion on these documents", *see* Transcript of 8 April, p. 108. Nevertheless, I admitted the document on the basis that it was shown to the witness and its weight would be determined later on. In this case, I am able to give weight to the document on the basis that it is corroborated by other evidence including testimony and documentary evidence.

<sup>401</sup> P00147.

<sup>402</sup> Mr Aoun acknowledged that media are generally limited to reporting on criminal defendants by using their initials, *see* Transcript of 8 April, pp. 20-21.

<sup>403</sup> Defence Final Brief, para. 144.

<sup>404</sup> Provided that this is done without exceeding the limits imposed by Rule 60 *bis* (vii).

information is generally prohibited by principles governing the media<sup>405</sup> and serves no journalistic value or pressing social need. On the other hand, the protection of this information by a court of law, and the public confidence in the effectiveness of this protection, is vital to the administration of justice. International and Lebanese journalistic principles serve as the best guide in striking the proper balance between the competing interests of free expression and the need to safeguard the integrity of the Tribunal's proceedings. As I have found above, the publication of the identifying information of purported confidential Tribunal witnesses engendered fear and, in some cases, an ascertainably negative impact on the lives of those exposed<sup>406</sup> while failing to contribute meaningfully to what could otherwise be a genuine criticism of or investigation into the Tribunal's work. On the contrary, the disclosures created negative public discourse and were subject to serious criticisms from a cross-section of Lebanese society.<sup>407</sup>

162. Furthermore, the Accused characterized the publications as investigative journalism and that the Articles purported to address *alleged* leaks coming from inside the Tribunal.<sup>408</sup> Yet, ample evidence demonstrates that the Accused's actions were inconsistent with investigative journalism. Firstly, the Defence has failed to provide any evidence that the Accused, in accordance with journalistic standards, took measures to substantiate from reliable sources the allegation that Tribunal leaks were the source of the purported confidential information they chose to widely disseminate. Secondly, in the 15 January Article, witness AP07 was identified as a Prosecution witness whose testimony would be used to incriminate Hezbollah.<sup>409</sup> [REDACTED].<sup>410</sup> He also testified that *Al Akhbar* never contacted him to confirm the information they later published and also never gave his consent to the publication of his personal details in the Article<sup>411</sup>. Thirdly, witnesses [REDACTED] and DT02 attested that it was inaccurate to classify them as witnesses against Hezbollah.<sup>412</sup> In fact, [REDACTED] DT02 went to some lengths in their personal lives and throughout their testimony at trial to minimize the

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<sup>405</sup> See above paras 158-159.

<sup>406</sup> See above paras 70, 75, 84, 89, 114, 115.

<sup>407</sup> See above paras 75, 84, 102, 109, 116.

<sup>408</sup> Defence Final Brief, para. 131.

<sup>409</sup> P00004, p. 2.

<sup>410</sup> Transcript of 26 February, p. 13.

<sup>411</sup> *Id.* at p. 19.

<sup>412</sup> Transcript of 7 April, pp. 31, 85.

importance of their evidence in the main proceedings.<sup>413</sup> Finally, witnesses AP06, AP09 and DT02 all confirmed that they were never contacted by *Al Akhbar* before the publications for confirmation or consent to disseminate the information to be published.<sup>414</sup> I accept the witnesses' evidence on these points and I am able to conclude, as it concerns these purported witnesses, that the Accused failed to conform to basic standards of investigative journalism which prescribe a preliminary and genuine verification of information and also prohibit the embellishment or fabrication of facts.<sup>415</sup> Therefore, I find irrelevant any evidence presented by the Defence that tends to show *Al Akhbar's* focus on investigative journalism.

163. For the reasons stated above, I find that the Defence has not demonstrated that the publications of the photographs and detailed identifying personal information on purported confidential witnesses in Lebanon were consistent with journalistic standards or ethics. Indeed, the prohibition on publishing this kind of information, that is objectively likely to undermine public confidence in the Tribunal, constitutes a proper limit on the freedom of the press as it protects a conflicting but worthy social need: the integrity and proper functioning of judicial proceedings by ensuring the safety of witnesses called to collaborate with the justice system.

#### **IV. Findings with respect to the corporate Accused**

164. The issue of jurisdiction over legal persons for contempt having been determined conclusively by this Tribunal's Appeals Panel, I am bound to consider whether the *Amicus* has demonstrated beyond a reasonable doubt that the Accused *Akhbar Beirut S.A.L.* committed the charged offence under Rule 60 *bis*.

165. To establish the corporate Accused's conviction for this count, the *Amicus* must (1) establish the criminal responsibility of a specific natural person; (2) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative or an employee of the corporate Accused provided by the legal body with explicit authorization to act in its name; and (3) prove that the natural person's criminal conduct was performed (a) on behalf of or (b) using the means of the corporate Accused.

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<sup>413</sup> *Id.* at pp. 7, 18, 20, 21, 25, 26, 28, 29, 30, 31, 34, 38, 41, 42.

<sup>414</sup> Transcript of 29 February, pp. 19, 77; Transcript of 7 April, p. 64.

<sup>415</sup> *Inter alia*, Transcript of 8 April, pp. 14, 70.

166. In the particular circumstances, the *Amicus* submits that Mr Al Amin had the ability to act on behalf of *Akhbar Beirut* S.A.L.,<sup>416</sup> and that the 15 and 19 January Articles were published under his authority or on his orders.<sup>417</sup> He submits that the impugned articles were part of *Al Akhbar*'s editorial line, rather than Mr Al Amin's personal interest, and that the articles were published using *Al Akhbar*'s means including its print newspaper, website and other affiliated online platforms.<sup>418</sup>

167. The Defence submits that the *Amicus* has not shown evidence beyond a reasonable doubt that Mr Al Amin or any other natural persons acting on behalf of the corporate accused possessed the requisite *mens rea* for the offence charged and, in the alternative, argues that Mr Al Amin's acts were protected by the freedom of the press.<sup>419</sup>

168. As explained above, I have already found Mr Al Amin guilty of contempt for his conduct in publishing the 15 and 19 January Articles, and thus the criminal responsibility of a specific natural person has been established. Although the *Amicus* references other employees of the *Al Akhbar* newspaper to support his argument that corporate liability is made out on the basis of the conduct of several individuals, I will limit my analysis to the position and conduct of Mr Al Amin.

169. With respect to Mr Al Amin's position in the corporate structure, I am satisfied that at all times relevant to this case, he was the Editor-in-Chief and therefore the manager responsible for the work of the newspaper *Al Akhbar*. At all relevant times, the newspaper was owned and published by the corporate Accused, the corporate Board of which Mr Al Amin was also Chairman.<sup>420</sup> As Chairman of the Board of Directors, I find that Mr Al Amin was also a Director and General Manager of the corporate Accused.<sup>421</sup> In his suspect interview of 19 November 2013, Mr Al Amin stated that with respect to any publications on *Al Akhbar* regarding the STL, he was "the only person responsible."<sup>422</sup> He further clarified that any other staff involved in work

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<sup>416</sup> *Amicus* Final Brief, paras 79-80.

<sup>417</sup> *Id.* at para. 81.

<sup>418</sup> *Id.* at para. 83.

<sup>419</sup> Defence Final Brief, paras 133-135.

<sup>420</sup> P00011, p. 4; P00012, p. 4; P00018; P00118, pp. 4-5.

<sup>421</sup> P00011, pp. 11-14.

<sup>422</sup> P00117, p. 50.

regarding the Tribunal was simply carrying out his orders.<sup>423</sup> In accordance with *Akhbar Beirut* S.A.L.'s Commercial Registration and the company's by-laws, members of the Board are liable for all infringements of the law<sup>424</sup> and the Chairman of the Board is responsible for ensuring that the company remains in conformity with the laws of the countries in which it may operate.<sup>425</sup>

170. I am satisfied that the creation and publication of the 15 and 19 January Articles were the exclusive responsibility of Mr Al Amin. Therefore, I am able to conclude beyond a reasonable doubt that Mr Al Amin qualified as an employee, representative and director of both the corporate Accused and its subsidiary newspaper, in accordance with the second required element for corporate responsibility.

171. Equally, with respect to Mr Al Amin's conduct, I find that the 15 and 19 January Articles have been authenticated as publications issued by *Al Akhbar* newspaper<sup>426</sup>, a subsidiary of the corporate Accused, and that Mr Al Amin's criminal conduct was carried out both on behalf of and using the means of the corporate Accused. In light of this evidence, the *Amicus* has proven beyond a reasonable doubt that Mr Al Amin's criminal conduct can be attributed to the corporate Accused and I find it guilty of the charge.

## V. Confidentiality and Service on the Accused

172. In order to safeguard the confidentiality of certain information contained in this Judgment, including information subject to the protective measures that I have ordered with respect to various witnesses<sup>427</sup>, I am issuing this Judgment confidentially and will provide a copy to each Counsel. A public redacted version will also be issued and served personally on both Accused. The Accused may arrange with their Assigned Counsel any access to the confidential version of this Judgment.

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<sup>423</sup> P00117, p. 50.

<sup>424</sup> P00011, p. 8, art. 17(b).

<sup>425</sup> *Id.* at p. 14, art. 22.

<sup>426</sup> P00001, P00002, P00004, P00005, P00006, P00007, P00118.

<sup>427</sup> Public Decision on Application for Protective Measures for *Amicus* Witnesses.

**DISPOSITION**

**FOR THESE REASONS;**

**PURSUANT** to Rules 60 *bis* (A), 60 *bis* (H) and 168 of the Rules;

**I**

**FIND** both Accused **GUILTY** with respect to the charge under the sole count of the Order in Lieu of Indictment;

**ORDER** that a sentencing hearing shall be held on a date to be determined forthwith and subject to the modalities that I will set out in a separate scheduling order to be issued on 18 July 2016;

**INVITE** the Accused to attend the Sentencing Hearing;

**AND**

**ORDER** that the Registry provide a copy of the Arabic and English-language versions of the Public Redacted Judgment to the Lebanese authorities to serve on both Accused, in accordance with Lebanese law.

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

Dated 15 July 2016

Leidschendam, the Netherlands



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Judge Nicola Lettieri  
Contempt Judge

### Glossary of Abbreviations

Abbreviation Used	Full reference
<i>Al Akhbar</i>	<i>Al Akhbar</i> newspaper, owned by the corporate Accused
<i>Amicus</i>	<i>Amicus Curiae</i> Prosecutor
Appeals Panel	Appeals Panel of the Special Tribunal for Lebanon
<i>Ayyash et al.</i> case	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01
Closing arguments	Closing arguments made on 13 May 2016
Contempt Judge	Judge Nicola Lettieri ( <i>see</i> STL, <i>In the Case Against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014)
corporate Accused	<i>Akhbar Beirut S.A.L.</i>
Articles, impugned	Article published in <i>Al Akhbar</i> newspaper and website on 15 January 2013 in the Arabic-language entitled “Special Tribunal for Lebanon – Witnesses’ Leaks – the Surprise” and on its English-language website as “STL Leaks: The Prosecution’s Surprise Witnesses”; Article published in <i>Al Akhbar</i> newspaper and website on 19 January 2013 in the Arabic-language entitled “List of witnesses – Surprise 2: Why we had to publish this information” and on 20 January 2013 on the English-language website as “The STL Witness List: Why We Published”
15 January Article	Article published in <i>Al Akhbar</i> newspaper and website on 15 January 2013 in the Arabic-language entitled “Special Tribunal for Lebanon – Witnesses’ Leaks – the Surprise” and on its English-language website as “STL Leaks: The Prosecution’s Surprise Witnesses”
19 January Article	Article published in <i>Al Akhbar</i> newspaper and website on 19 January 2013 in the Arabic-language entitled “List of witnesses – Surprise 2: Why we had to publish this information” and on 20 January 2013 on the English-language website as “The STL Witness List: Why We Published”
21 January Article	Article published on the <i>Al Akhbar</i> English-language website on 21 January 2013 entitled “Al Akhbar and the STL: We Will not be Silenced” and authored by Mr Al Amin



ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
<i>New TV case</i>	STL, <i>In the case against New T.V. S.A.L. and Khayat</i> , STL-14-05/T/CJ
Opening statements	Opening statements held on 24 February 2016
OTP	Office of the Prosecutor of the Special Tribunal for Lebanon
President	President of the Special Tribunal for Lebanon
Rules	Rules of Procedure and Evidence of the Special Tribunal for Lebanon, amended and corrected on 8 March and 15 March 2016
Statute	Statute of the Special Tribunal for Lebanon
STL/Tribunal	Special Tribunal for Lebanon

**Filings submitted in the present case**

Order in Lieu of Indictment	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0001, Order in Lieu of an Indictment, Annex 2, 31 January 2014.
Order Designating Contempt Judge	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014.
Registrar Decision Appointing Replacement <i>Amicus Curiae</i>	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0004, Registrar's Decision Under Rule 60 bis (ii) to Appoint a Replacement <i>Amicus Curiae</i> to Investigate and Prosecute contempt Allegations, 4 March 2014.
Summons to Appear ( <i>Akhbar Beirut S.A.L.</i> )	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0006, Summons to Appear, Confidential and <i>Ex Parte</i> , 18 March 2014.
Summons to Appear (Ibrahim Mohamed Ali Al Amin)	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0007, Summons to Appear, Confidential and <i>Ex Parte</i> , 18 March 2014.
Order Lifting Confidentiality	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0008, Order Lifting Confidentiality, 24 April 2014.
Correspondence from the Accused	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0010, Correspondence from the Accused, 8 May 2014.
Order Rescheduling Initial Appearances	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0013, Order Rescheduling Initial Appearances, 22 May 2014.
Submissions from Mr Al Amin	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0017, English Translation of letter from Mr Al Amin, 26 May 2014.
Further Order on Initial Appearances	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, F0016, Further Order on Initial Appearances Scheduled for 29 May 2014, 27 May 2014.
Transcript of 29 May 2014	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/I/CJ, Rescheduled Initial Appearance, 29 May 2014.

Decision on Assignment of Counsel	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/PT/CJ, F0018, Reasons for Decision on Assignment of Counsel, 5 June 2014.
Request for Certification to Appeal Assignment of Counsel	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/PT/CJ, F0019/COR, Request for Certification to Appeal a Decision “Reasons for Decision on Assignment of Counsel, Date: 5 June 2014, 12 June 2014.
Observations from HDO	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/PT/CJ, F0020, Observations from the Defence Office Relating to the Request for Certification to Appeal the “Reasons for Decision on Assignment of Counsel” Filed by Mr Ibrahim Al Amin, 12 June 2014.
Decision on Requests by HDO and Further Order on Submissions	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/PT/CJ, F0024, Decision on Requests by Head of Defence Office and Order on Further Submissions, 18 June 2014.
Response to Demand to Clarify Position	STL, <i>In the case against Akhbar Beirut S.A.L. and Al Amin</i> , STL-14-06/PT/CJ, F0026, Response to Demand that I Clarify My Position Pursuant to the Order of 18 June 2014, 25 June 2014.
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