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

THE CONTEMPT JUDGE

Case No.:	**STL-14-06/PT/CJ**
Before:	**Judge Nicola Lettieri, Contempt Judge**
Registrar:	**Mr Daryl Mundis, Registrar**
Date:	**6 November 2014**
Original language:	**English**
Classification:	**Public**

IN THE CASE AGAINST

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

DECISION ON MOTION CHALLENGING JURISDICTION

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

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

Headnote[*]

The Defence for Akhbar Beirut *S.A.L. and Mr Ibrahim Mohamed Ali Al Amin—the Accused in this case—has challenged the Tribunal's jurisdiction over both Accused. The Defence argues that Rule 60* bis*, providing for the crime of contempt and obstruction of justice in the Tribunal's Rules of Procedure and Evidence is* ultra vires *the Statute and Rules. It also submits that the particular crime as charged is not contained in the list of offences set out by Rule 60* bis*. With respect to the corporate Accused Akhbar Beirut S.A.L., the Defence submits that the Tribunal cannot prosecute legal persons. Finally, as an alternative, the Defence suggests that the case be transferred to the Lebanese judicial system.*

The Contempt Judge first recalls his decision in the case STL-14-05, in which he already addressed the purpose of Rule 60 bis*. He repeats his holding in that case that, consistent with the case-law of the Tribunal's Appeals Chamber and other international courts, the Tribunal, in addition to the jurisdiction given to it by its Statute, may and—in some cases—even must exercise jurisdiction that is ancillary or incidental to its primary jurisdiction and that this is necessary so as to ensure a good and fair administration of justice. This doctrine of inherent jurisdiction originates in the common law. However, a principle of international law has crystallized that allows the Tribunal (and other international criminal courts) to deal with allegations of obstruction of justice. This means that the Tribunal must have the authority to ensure that the exercise of its main jurisdiction—to prosecute those responsible for the attack which killed Rafik Hariri and others as well as connected cases—is safeguarded and not frustrated by any interference with its procedures. Rule 60* bis *is an expression of this authority. Even assuming that such incidental jurisdiction must be prescribed in written law, this has been the case here, given that the applicable Rule on contempt and obstruction of justice has existed since 2009. No unfairness to the Accused therefore arises. The Contempt Judge also considers that the procedure under Rule 60* bis *is similar to how an incidental question would be addressed in Lebanon: if the incidental question is connected to the main trial and there is no other jurisdiction competent to resolve it, then it is up to the court vested with jurisdiction in the main case to deal with the connected, incidental proceedings. Finally, the Contempt Judge rejects the distinction drawn between other courts and this Tribunal. He notes that all international criminal courts and tribunals provide for the crime of contempt in their Statutes or Rules regardless of how they were created or which crimes they are prosecuting.*

The Contempt Judge is also satisfied that the particular conduct charged in this case falls under Rule 60 bis*. The rule contemplates prosecution for conduct even beyond the various acts listed in Rule 60* bis *(i)-(iv), which merely serve as specific examples of prosecutable offences. It unambiguously states that contempt and obstruction of justice "includes, but is not limited to" such acts. This case involves a charge of knowing and wilful interference with the Tribunal's administration of justice, further specified in the Order in Lieu of an Indictment to facilitate defence preparations. Whether this charge can be proven is a matter for the trial, not a question of jurisdiction.*

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

In sum, the Contempt Judge concludes that the Tribunal has inherent jurisdiction over contempt and obstruction of justice. When allegations of interference with the Tribunal's administration of justice are made, it is unquestionably within the Tribunal's purview to act. Failing this, interference with the main proceedings before the Tribunal would not be prosecutable, thus impairing the effectiveness of the Tribunal's primary jurisdiction.

However, the Contempt Judge holds that Rule 60 bis *applies to natural persons only. While exercising jurisdiction over corporate entities might be preferable as a matter of policy, the Contempt Judge considers that Rule 60* bis *does not allow for their prosecution. To hold otherwise would infringe the principle of* nullum crimen sine lege*, which prohibits the punishment of conduct if at the time the conduct occurred it was not criminalized by law. The principle also requires that criminal law provisions must specify the potential accused and the potential criminal conduct in precise terms to make it foreseeable. Moreover, the principle also prohibits the interpretation of criminal law provisions by analogy. Here, the term "any person who" must be understood in its natural meaning, i.e. it does not refer to legal persons. This is also borne out by the context of the Statute and the Rules as a whole.*

In deciding so, the Contempt Judge has analysed the contrary decision of the Appeals Panel in case STL-14-05. He is not persuaded by the Appeals Panel's reasoning. In particular, he considers that the Appeals Panel failed to give due deference to the nullum crimen sine lege *principle and the rights of the accused and that its interpretation of Rule 60* bis *appears to be grounded in the doctrine of substantive justice. In particular, the Contempt Judge finds that criminal law cannot be extensively construed or applied by analogy; according to these principles, the expression "any person who" in Rule 60* bis *may only refer to natural persons. The Contempt Judge further rejects the relevance of the case-law on which the Appeals Panel relied to reach its conclusions. The Contempt Judge moreover considers that he is not bound to follow the Appeals Panel decision, given that there exists no formal doctrine of* stare decisis *at this Tribunal; that the Appeals Panel decision was an isolated holding, not supported by international criminal precedents; that it was issued by majority only; and that its consequences have a negative impact on basic principles and fundamental rights of the accused.*

Finally, given the Tribunal's inherent jurisdiction over contempt and obstruction of justice and its need to ensure the integrity of its proceeding, as well as the absence to date of any external actions to guarantee the Tribunal's administration of justice, the Contempt Judge finds no basis for considering a referral of this case to the Lebanese authorities.

INTRODUCTION

1. The Defence challenges the jurisdiction of the Special Tribunal for Lebanon ("Tribunal") over both Accused in this contempt case.[1] With respect to both Accused, it argues that Rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") is *ultra vires* and, in addition, that the charges contained in the Order in Lieu of an Indictment are not expressly provided in the Rule. With respect to *Akhbar Beirut* S.A.L., the corporate Accused, the Defence argues that the Tribunal has no jurisdiction to prosecute legal persons. The Defence consequently argues that all charges against the two Accused should be dismissed. In the alternative, it submits that the case should be referred to the competent Lebanese courts. The *Amicus Curiae* Prosecutor ("*Amicus*") opposes the Defence Motion.

2. Having considered the arguments, I conclude that the Tribunal has inherent jurisdiction over the alleged contempt as charged in the Order in Lieu of an Indictment given that it is necessary to protect the administration of justice, but that such jurisdiction does not extend to legal persons.

PROCEDURAL HISTORY

3. Judge Baragwanath, acting as the original Contempt Judge, found that there were sufficient grounds to proceed for contempt with respect to Mr Al Amin and *Akhbar Beirut* S.A.L., the company operating the newspaper *Al Akhbar*, for what was published (i) in its newspaper and on its Arabic and English websites on 15 January 2013; (ii) in its newspaper and on its Arabic website on 19 January 2013; and (iii) on its English website on 20 January 2013.[2] In his Order in Lieu of an Indictment charging Mr Al Amin and *Akhbar Beirut* S.A.L. (together, the "Accused"), Judge Baragwanath found that there was *prima facie* evidence that the publication of information relating to the identity of alleged confidential witnesses entailed knowing and wilful interference with the administration of justice in breach of Rule 60 *bis* (A) of

[1] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0055, Preliminary Motion Presented by Counsel Assigned to Represent *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin, 18 August 2014 ("Defence Motion"). All further references to filings and decisions refer to this case number unless otherwise stated.

[2] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014 ("Indictment Decision"), para. 3 (ii).

the Rules.[3] He specifically added that "public interest in protecting [the main] proceedings against undue outside influence is of the highest importance. The *Amicus* charges that alleged criminal conduct in this matter had a detrimental effect on the Tribunal's administration of justice".[4] He thus linked the current prosecution to the Tribunal's main jurisdiction.

4. In the Indictment Decision, Judge Baragwanath recused himself from these proceedings. Acting in his role as President of the Tribunal, he then designated me as Contempt Judge.[5] The Registrar subsequently appointed Mr Kenneth Scott as the *Amicus* in the case.[6]

5. The initial appearance of the Accused was held on 29 May 2014, and at that time I ordered the Head of Defence Office to assign counsel to the Accused.[7] The Head of Defence Office assigned Mr Antonios Abou Kasm on 30 June 2014.[8] He was sworn in on 3 July 2014.[9]

6. On 18 August 2014, the Defence filed its motion challenging the jurisdiction of the Tribunal and requesting the dismissal of the charges against the Accused. It argued that Rule 60 *bis* is *ultra vires*, that the charges contained in the Order in Lieu of an Indictment are not expressly provided for and that the Tribunal has no jurisdiction to prosecute legal persons. In the alternative, the Defence sought referral of the case to the Lebanese authorities.[10]

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[3] Indictment Decision, para. 4.
[4] *Id.* at para. 64.
[5] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014.
[6] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/I/CJ, F0004, Registrar's Decision Under Rule 60 *bis* (E) (ii) to Appoint a Replacement *Amicus Curiae* to Investigate and Prosecute Contempt Allegations, 4 March 2014.
[7] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06, Transcript of 29 May 2014, p. 19 (EN). Written reasons were provided on 5 June 2014 (F0018, Reasons for Decision on Assignment of Counsel, 5 June 2014).
[8] F0028, Assignment of Counsel Pursuant to Rule 59 (F) of the Rules of Procedure and Evidence, 30 June 2014.
[9] *See* F0035, Application from Assigned Counsel for Leave to Reply to the "Further Response to Defence Request for Certification to Appeal 'Reasons for Decision on Assignment of Counsel'" Filed on 7 July 2014 by the *Amicus Curiae* Prosecutor, 14 July 2014, para. 17.
[10] Defence Motion, pp. 21-22.

7. On 29 August 2014, the *Amicus* filed his response to the Defence Motion, asserting that the Tribunal has inherent jurisdiction for contempt under Rule 60 *bis* and that such jurisdiction encompasses the conduct of legal persons. He therefore requested that the motion be dismissed.[11] The Defence sought leave to reply to the *Amicus*'s Response,[12] which the *Amicus* opposed.[13] I denied the Defence request for leave to reply in an oral decision at the status conference of 12 September 2014.[14]

DISCUSSION

I. Admissibility of the Defence Motion

8. Rule 60 *bis* (H) makes applicable, *mutatis mutandis*, parts Four to Eight of the Rules. These include Rule 90, which specifies that a party may bring a preliminary motion challenging the jurisdiction of this Tribunal if the motion "challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal".[15] Here, the Defence makes the general argument that the Tribunal has no jurisdiction over the crime of contempt.[16] This argument falls squarely under Rule 90 because it implies that the charges against the Accused are not connected to the Tribunal's subject-matter jurisdiction. In this regard, the Defence Motion is admissible under Rule 90.

9. With respect to the Defence challenges relating to the indictment of a legal person, such arguments relate to the Tribunal's personal jurisdiction and are not within the scope of Rule 90.[17] Neither is the claim that the case should be referred to Lebanon. I note in this regard the strict

[11] F0058, Response to the Preliminary Motion Presented by Counsel Assigned to Represent Akhbar Beirut S.A.L. and Mr Ibrahim Mohamed Ali Al Amin, 29 August 2014 ("Response").
[12] F0060, Request from Assigned Counsel Seeking Leave to Reply to the "Response to the Preliminary Motion Presented by Counsel Assigned to Represent *Akhbar Beirut* S.A.L. and Mr Ibrahim Mohamed Ali Al Amin" Dated 29 August 2014, 2 September 2014.
[13] F0061, Response to "*Demande du conseil commis d'office aux fins d'autorisation de répliquer à la* « Response to the Preliminary Motion Presented by Counsel Assigned to Represent Akhbar Beirut S.A.L. and Mr Ibrahim Mohamed Ali Al Amin » *datée du 29 Août 2014*", 2 September 2014.
[14] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06, Transcript of 12 September 2014, pp. 7-8 (EN).
[15] *See* Rule 90 (E) STL RPE; *see also* STL, *In the case against New TV S.A.L. & Khayat*, STL-14-05/PT/CJ, F0054, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014 ("*New T.V. & Khayat* Jurisdiction Decision").
[16] *See, e.g.,* Defence Motion, para. 11.
[17] *See New T.V. & Khayat* Jurisdiction Decision, para. 11.

interpretation of Rule 90 by the Appeals Chamber.[18] Nevertheless, the Appeals Chamber has also clarified that the first-instance Judge retains discretion to treat motions containing arguments not covered by Rule 90 as "other motions" pursuant to Rule 126.[19] Here, I find it is in the interests of justice to do so, given the importance of this particular Defence challenge for these proceedings. Whether this Tribunal has jurisdiction over legal persons significantly determines the scope of the dispute and consequently there are practical benefits to resolving the question at the outset. It is in the interests of justice and conservation of judicial resources to presently decide these matters. I will therefore address these arguments on the merits, but under Rule 126, instead of under Rule 90.

II. Merits of the Defence Motion

10. The Defence raises three main challenges against the Order in Lieu of an Indictment. The broadest, applicable to both Accused, concerns the alleged *ultra vires* nature of Rule 60 *bis*. Somewhat narrower, but also applicable to both Accused, the Defence argues that the particular crime as charged is not contained in the list of offences set out by Rule 60 *bis.* With respect to the corporate Accused *Akhbar Beirut* S.A.L. only, the Defence submits that the Tribunal cannot prosecute legal persons. Finally, as an alternative, the Defence suggests that the case be transferred to the Lebanese judicial system. I will address these arguments in turn.

A. The alleged ultra vires *nature of Rule 60* bis

1. Position of the Defence

11. The Defence argues that Rule 60 *bis* was adopted *ultra vires*, contrary to the spirit of the Agreement between the United Nations and Lebanon annexed to Security Council resolution 1757—which restricts the jurisdiction of the Tribunal to the events set out in Article 1 of the Statute—and of Article 4 of the Statute—which provides for concurrent jurisdiction between Lebanon and the Tribunal.[20]

[18] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 ("*Ayyash et al.* Jurisdiction Appeal Decision"), paras 11-17.
[19] *Id.* at paras 19, 22 (with references to the case-law of the ICTY).
[20] Defence Motion, para. 18.

12. The Defence specifies that it is not challenging the legality of the Tribunal in general, but rather the legality of Rule 60 *bis*.[21] It submits that the Contempt Judge has the authority to decide this issue.[22] With respect to the alleged illegality of the Rule, the Defence submits that, while authority for adopting the Rules is entrusted to the Judges of the Tribunal,[23] they do not have the authority to "create criminal offences, modify the terms of reference expressly provided for by the Statue, and to determine the penalties to be applied to those […] offences".[24] The Defence also tries to distinguish this Tribunal from other international criminal courts and tribunals. It submits that unlike these courts, the Tribunal is an "internationalised criminal tribunal *sui generis*", the jurisdiction of which is *rationae materiae* based on Lebanese law. Given that Lebanese law expressly provides for offences against the administration of justice, legislation adopted by the Tribunal in this respect is invalid.[25] Finally, the Defence submits that the Tribunal's exercise of inherent jurisdiction is not applicable when certain matters, such as obstruction of justice, fall under the jurisdiction of the Lebanese courts.[26]

2. Position of the *Amicus*

13. The *Amicus* responds that Rule 60 *bis* was adopted pursuant to the Tribunal's inherent power to safeguard its own proceedings and ensure the proper administration of justice.[27] He submits that all international criminal tribunals can adopt rules of procedure and evidence necessary to effectuate this inherent power, which covers contempt.[28] The fact that this Tribunal is hybrid and has a "closer connection" to the Lebanese legal system does not create an exception to this inherent jurisdiction.[29] Rather, the *Amicus* submits that the Tribunal is "independently responsible" for ensuring the integrity of its own proceedings, as it has a separate identity from both the United Nations and Lebanon.[30]

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[21] Defence Motion, para. 19.
[22] *Id.* at paras 20-24.
[23] *Id.* at paras 27-29.
[24] *Id.* at para. 31.
[25] *Id.* at paras 33-36.
[26] *Id.* at para. 37.
[27] Response, para. 32.
[28] *Id.* at paras 29-30.
[29] *Id.* at para. 31.
[30] *Ibid*.

3. Discussion

14. I first recall the relevant portions of my decision in case STL-14-05, where I have explained why Rule 60 *bis,* which invokes the Tribunal's inherent jurisdiction to safeguard the proper administration of justice, was properly adopted under the Tribunal's Statute.[31] Given that my reasoning in that decision addresses the arguments of the Defence raised here, I adopt it in full as reproduced below:

> 27. The Appeals Chamber of this Tribunal has unequivocally held that the Tribunal has inherent jurisdiction, characterised as follows:
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> > [Inherent jurisdiction is] the power of a Chamber [. . .] to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. It can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. *The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice*, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.
> >
> > [. . .]
> >
> > The practice of international bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings. More specifically, it serves one or more of the following purposes: (i) to ensure the fair administration of justice; (ii) to control the process and the proper conduct of the proceedings; (iii) to safeguard and ensure the discharge by the court of its judicial functions (for instance, by dealing with contempt of court). It follows that *inherent jurisdiction can be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction* (as is the case with the *compétence de la competence*), or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.[32]
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> 28. The Appeals Chamber's holding is consistent with the case-law of other international courts and tribunals, both non-criminal and criminal. For example, the International Court of Justice ("ICJ"), the principal judicial organ of the United Nations ("UN"), has held that it possesses

[31] *New T.V. & Khayat* Jurisdiction Decision, paras 26-35.
[32] STL, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 ("*El Sayed* Jurisdiction Decision"), paras 45, 48 (emphasis added).

> inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that *the exercise of its jurisdiction* […] *shall not be frustrated*, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function" […], and to "maintain its judicial character'.[33]

Other courts and tribunals have also claimed inherent powers to ensure their proper functioning, as courts of law.[34]

29. While the doctrine of inherent judicial powers originated in common law jurisdictions, it makes eminent sense for international criminal tribunals to adopt it. Just like common law courts, international criminal tribunals—or tribunals of an international character, as the Tribunal has been defined—enjoy scant statutory provisions on procedural matters, as opposed to criminal procedural codes in civil law countries. Their statutes do not (and could not be expected to) elaborate exhaustively on all of the powers and competences these tribunals may require to effectively carry out their mandates.[35]

30. Moreover, due to the lack of the development so far of an integrated and coherent international judiciary (which exists in contemporary domestic systems), each of these international criminal courts and tribunals is a separate and self-contained institution in its own right, and in the case of the Tribunal an international entity distinct even from the UN and Lebanon.[36] These courts therefore do not benefit from an independent external means of ensuring the integrity of their own proceedings, and must therefore be internally empowered with such means.[37] They of course should exercise this power cautiously, so as not to encroach on other subjects with legal authority and competences and so as not to appropriate for themselves powers not strictly necessary for their smooth and efficient functioning. But exercise this inherent jurisdiction, in exceptional circumstances, they must.

31. With respect to contempt and obstruction of justice, the other international criminal courts and tribunals have consistently affirmed their inherent jurisdiction over these

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[33] ICJ, *Nuclear Tests* (*New Zealand v. France*), Judgment, I.C.J. Reports 457 (1974), para. 23 (emphasis added).
[34] *See*, for instance, the cases cited in the *El Sayed* Jurisdiction Decision, paras 44-46, including: ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), paras 18-20; ICTY, *Prosecutor v. Blaškić*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras 25-26, 28; ICTR, *Prosecutor v. Rwamakuba,* ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 45-47, 62; ICTR, *Rwamakuba v. Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 26; SCSL, *Prosecutor v. Norman et al*., SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 32; ILOAT, *In re Vollering (No. 15)*, Judgment No. 1884, 8 July 1999, para. 8.
[35] Though in relation to offences against the administration of justice, this is changing. *See* Art. 70 ICC St. ("Offences against the administration of justice"); Art. 1 MICT St. ("Competence of the Mechanism"); SC Res. 1966, UN Doc. S/RES/1966 (22 December 2010), Annex 2 (Transitional Arrangements), Art. 4 ("Contempt of Court and False Testimony").
[36] *Cf.* [*Ayyash et al.*] Jurisdiction Appeal Decision, para. 39.
[37] *Cf. Tadić* Jurisdiction Decision, para. 11.

matters,[38] and have continuously tried these cases pursuant to their respective procedural rules. In doing so they are affirming their inherent authority to deal with contempt as a general principle of law. Indeed, I agree with the well-accepted holding of the Appeals Chamber of the ICTY that an international criminal tribunal possesses

> an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it [. . .] is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which further interferes with its administration of justice. The content of that inherent power may be discerned by reference to the usual sources of international law.[39]

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

33. Moreover, I note that the contempt procedure envisioned in Rule 60 *bis* is similar to how an incidental question would be dealt with in Lebanon. In Lebanon, as in most domestic jurisdictions, the judge of the main case must be deemed competent to adjudicate on any incidental question that arises in that case—this is the crux of the inherent jurisdiction discussed above by the Tribunal's Appeals Chamber. This is enshrined, in Lebanon, in Article 30 of the new Code of Civil Procedure, and is a principle also applicable to criminal proceedings according to Article 6.[40] According to

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[38] ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Contempt Judgement"), paras 13-29. Although no specific customary international law seemed directly applicable to the issue, the ICTY Appeals Chamber recalled that the contempt power was effectively provided for in the Charter of the International Military Tribunal and exercised by the United States Military Tribunals sitting in Nurnberg. *Vujin* Contempt Judgment, para. 14. Furthermore, by looking to the general principles of law common to the major legal systems of the world, the Tribunal observed that the power to deal with contempt historically originated as a "creature of the common law", but at the same time "many civil law systems have legislated to provide offences which produce a similar result." *Vujin* Contempt Judgement, para. 15. Finally, the Tribunal declared the contempt power a "necessity [. . .] to ensure that its exercise of [its statutory] jurisdiction is not frustrated" and stated that "[t]he inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence" *Vujin* Contempt Judgement, paras 18, 28. From this moment on, the power to deal with contempt has consistently been recognized as an inherent power of an international tribunal in the following judgments, *inter alia*: ICTY, *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 9; ICTY, *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 23; ICTY, *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgment, 15 March 2007, para. 34.

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

[40] […] *See also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, F0396, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("Applicable Law Decision"), fn. 397, where the Appeals Chamber has found that "Article 6 of the Code of civil procedure […]

> this concept, if the incidental question is connected to the main trial (*i.e.*, resolution of the former impacts on the latter) and there is no other jurisdiction competent to resolve it, then it is up to the court vested with jurisdiction in the main case to deal with the connected, incidental proceedings. […]
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> 34. Furthermore, even if one were to accept the suggestion made by some *Amici Curiae* with specific regard to the *nullum crimen*, *nulla poena sine lege* principle that contempt must be spelled out in writing before any charges are brought,[41] this *was* the case here. Rule 60 *bis* was issued, in its first form, in 2009 (as Rule 134).[42] From then through the present, written law has explicitly set out that this type of conduct is criminally punishable, thus providing the necessary notice to any person. No unfairness to the Accused arises.
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> 35. In sum, I conclude that a principle of international criminal law enshrining inherent jurisdiction for contempt and obstruction of justice has crystallized and is directly applicable to the Tribunal. The Tribunal possesses inherent jurisdiction and that jurisdiction includes the power to deal with allegations of contempt and obstruction of justice.

15. I add that I find unpersuasive the Defence attempt to distinguish other international courts and tribunals from this Tribunal.[43] Contrary to the Defence arguments, a court's inherent power to protect its proceedings is neither dependent on the type of crimes under its main jurisdiction nor on the precise process of its establishment. Indeed, all international criminal courts and tribunals provide for the offence of contempt and obstruction of justice in either their statutes or their rules of procedure, regardless of whether they were created by the Security Council[44] or through an agreement[45] and irrespective of whether they prosecute international,[46] domestic[47] or both international and domestic crimes.[48]

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provides that the provisions contained in the Code may be applied whenever other Codes of Procedure lack such provisions".

[41] […].

[42] *See* Rule 134 STL RPE (STL/BD/2009/01/Rev.1).

[43] Defence Motion, paras 34-35.

[44] The International Criminal Tribunal for the former Yugoslavia (ICTY) (Rule 77 ICTY RPE), the International Criminal Tribunal for Rwanda (ICTR) (Rule 77 ICTR RPE) and the Mechanism for International Criminal Tribunals (MICT) (Art. 1 (4) MICT St., Rule 90 MICT RPE) were all established by the Security Council under Chapter VII of the UN Charter. So was—contrary to the Defence argument (*see* Defence Motion, para. 35)—this Tribunal (*see Ayyash et al.* Jurisdiction Appeal Decision, para. 31.).

[45] The International Criminal Court (ICC) (Art. 70 ICC St.) was established by multilateral treaty. The Special Court for Sierra Leone (SCSL) (Rule 77 SCSL RPE) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) (Rule 35 ECCC IR) were established through agreements between the UN and Sierra Leone and the UN and Cambodia, respectively.

[46] ICC; ICTY; ICTR; MICT.

[47] STL.

[48] SCSL; ECCC.

16. In short, Rule 60 *bis* is an expression of the Tribunal's inherent power to protect the administration of its justice and its proceedings. It was adopted by the Judges in conformity with Article 28 of the Statute. I thus reject the Defence challenges in this respect.

B. The claim that the crime as charged is not provided by Rule 60 bis

1. Position of the Defence

17. The Defence submits that the criminal offence charged in the Order in Lieu of an Indictment is not included in Rule 60 *bis* and therefore violates the principle of legality.[49] It asserts that clear legal principles recognized in all legal systems, such as *nullum crimen, nulla poena sine lege*, ensure that no one can be convicted of a crime except by virtue of a clear and specific text.[50] Furthermore, criminal provisions must be interpreted strictly and may not be extended by analogy.[51] The Defence relatedly argues that when the meaning of a provision is unclear or ambiguous, the interpretation must favour the rights of the accused.[52]

2. Position of the *Amicus*

18. The *Amicus* responds that the crime charged is clearly provided by the legal text, and that there is no violation of the *nullum crimen sine lege* principle.[53] He argues that Rule 60 *bis* specifies that conduct amounting to contempt and obstruction of justice "includes but is not limited to" the enumerated acts therein.[54] The "core of the crime of contempt is simply represented by the 'knowing and wilful interference with the administration of justice' as indicated in the [...] chapeau", which is consistent with the law of other international tribunals.[55] The *Amicus* asserts that this crime encompasses the specific conduct alleged here.[56] He also submits that the *nullum crimen sine lege* principle does not require that an accused person knows the specific legal definition of each element of the crime he committed.[57]

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[49] Defence Motion, paras 12-17.
[50] *Id.* at para. 12.
[51] *Id.* at paras 13-14, 16.
[52] *Id.* at para. 13.
[53] Response, para. 28.
[54] *Id.* at para. 21.
[55] *Id.* at paras 21-25.
[56] *Id.* at para. 26.
[57] *Id.* at para. 27.

3. Discussion

19. The Order in Lieu of an Indictment in this case alleges that the Accused "knowingly and wilfully interfered 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".[58] The Defence essentially argues that this particular conduct is not expressly included in Rule 60 *bis* and that prosecution of such conduct would therefore violate the *nullum crimen sine lege* principle.[59]

20. I am not persuaded by this argument. On its face, 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*"[60] such acts. Rule 60 *bis* provides for the prosecution of any knowing and wilful interference with the Tribunal's administration of justice. A charge of such interference, as in this case, does not violate the *nullum crimen sine lege* principle.[61] Moreover, the description in the Order in Lieu of an Indictment of specific conduct that allegedly amounts to contempt and obstruction of justice actually serves to provide particulars of the conduct in question and facilitate the Defence preparation (without this information, an indictment would not perform its role). Whether or not the conduct can actually be proven and, if so, whether it constitutes a violation of Rule 60 *bis* are matters for the trial, not questions of jurisdiction.

[58] Indictment Decision, Order in Lieu of an Indictment, pp. 2-3.
[59] Defence Motion, paras 30-32.
[60] Emphasis added.
[61] *See* Indictment Decision, paras 11-13 (citing ICTY, *In the matter of Šešelj*, IT-03-67-R77.4, Public Redacted Version of Judgement issued on 28 June 2012, 28 June 2012, para. 38 ("Rule 77(A) of the Rules identifies, in a non-exhaustive fashion, conduct falling under the Tribunal's inherent jurisdiction."); ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgement, 7 July 2009, para. 156 ("The listed punishable acts are non-exhaustive, and do not limit the Tribunal's jurisdiction to punish contempt."); SCSL, *Independent Counsel Against Samura*, SCSL-2005-01, Judgment in Contempt Proceedings, 26 October 2005, para. 16 [" […] Rule 77(A) identifies and describes certain conducts relating to the offence of contempt of court throughout a defined, non-exhaustive, list of acts."]); *see also* ICTR, *Prosecutor v. Nshogoza*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, paras 52-55. For the principle of *nullum crimen sine lege*, *see* in detail below, paras 30 *et seq*.

C. Corporate liability for contempt

1. Position of the Defence

21. The Defence also challenges the jurisdiction of the Tribunal to indict the corporate Accused *Akhbar Beirut* S.A.L. It submits that the drafters of the founding texts of the Tribunal did not intend to extend jurisdiction to cover legal persons.[62] It further submits that jurisdiction over contempt cannot be extended to legal persons because; (i) the Statute of the Tribunal makes no reference to "legal persons"; (ii) the fact that the Tribunal is not authorized to prosecute legal persons would not render moot its power to bring proceedings against those responsible for contempt; (iii) Rule 60 *bis* does not expressly state "legal persons"; (iv) this interpretation follows the spirit of the meaning of the word "person" in the Statute; (v) not all States accept the possibility of prosecuting legal persons for contempt; (vi) the practice before international criminal tribunals reveals that "person" does not include legal persons; and (vii) this is the most favorable interpretation to the accused.[63]

22. The Defence further submits that; (i) the International Criminal Court expressly limited its jurisdiction to natural persons; (ii) Rule 60 *bis* should be strictly interpreted, which is consistent with the practice of other international criminal tribunals and the principle of *ubi lex non distinguit, nec nos distinguere debemus*; (iii) limiting jurisdiction to natural persons conforms with Article 2 of the Statute and the definition of "victim" which is defined as a "natural person"; (iv) the Lebanese law on publication does not provide for the prosecution of legal persons and explicitly refers to "natural persons"; and (v) the prosecution of legal persons will set a dangerous precedent that undermines the principle of individual responsibility that is the foundation of international criminal justice.[64]

23. Finally the Defence, making reference to case STL-14-05, argues that any decision rendered in another case before this Tribunal should necessarily be applied to the current case because of the principle of legal certainty.[65]

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[62] Defence Motion, para. 5.
[63] *Id.* at para. 4.
[64] *Id.* at para. 6.
[65] *Id.* at para. 7.

2. Position of the *Amicus*

24. The *Amicus* supports the application of Rule 60 *bis* to legal entities and requests that I dismiss the challenge to the Tribunal's contempt jurisdiction over legal persons.[66] The *Amicus* disagrees that Articles 2 and 3 of the Statute limit the Tribunal's contempt power to "natural persons" and submits that the scope of contempt could only be limited by express language.[67] The *Amicus* argues that consideration should be given to national law and major trends in international law recognizing criminal liability for legal persons, including relevant law of the European Union.[68] Furthermore, he notes that both France and Lebanon have adopted provisions on corporate criminal liability,[69] and Italy and Germany have adopted "quasi-criminal/administrative schemes for holding legal persons accountable".[70] Finally, the *Amicus* argues that the Rule 3 (B) requirement to interpret any ambiguity in the Rules in the way most favourable to the accused does not apply in this case as abundant law, legal standards and principles, including the Lebanese Criminal Code and Code of Criminal Procedure, confirm under Rule 3 (A) – which prevails over the mentioned Rule 3 (B) – that the Tribunal's contempt power includes the prosecution of legal persons.[71]

3. Discussion

a) Overview

25. On 24 July 2014, in case STL-14-05 (which is currently the case brought against *Al Jadeed* [Co.] / *New TV* S.A.L. (*N.T.V.*) and Ms Karma Mohamed Tahsin Al Khayat), I have held that the Tribunal does not have jurisdiction for contempt with respect to corporate accused. My reasoning was that the word "person" in Rule 60 *bis* (A) must be interpreted in a manner consonant with the spirit of the Statute and "in good faith in accordance with the ordinary meaning to be given to the terms of the [Rules] in their context and in the light of [their] object and purpose."[72] On this basis, and considering that (i) the Statute does not provide for corporate

[66] Response, paras 4, 18.
[67] *Id.* at paras 6-11.
[68] *Id.* at paras 13-14.
[69] *Id.* at para. 15.
[70] *Id.* at para. 16.
[71] *Id.* at para. 17.
[72] *New T.V. & Khayat* Jurisdiction Decision, para. 70.

liability for the statutory crimes,[73] (ii) that the ordinary meaning of the word "person" in the context of Rule 60 *bis* is limited to natural persons[74] and (iii) that, if any ambiguity remains, the interpretation more favourable to the accused is to be applied,[75] I held that the Tribunal lacked jurisdiction to hear the charges brought against the corporate Accused in that case.[76]

26. After receiving the Parties' submissions in this case, the Appeals Panel reversed my decision on jurisdiction in case STL-14-05, concluding that Rule 60 *bis* does provide for corporate liability.[77] The Panel reasoned that the provision in question is ambiguous and that I had erred, when faced with ambiguity, by not applying the step-by-step considerations contained in Rule 3 (A). After having considered the requirements of Rule 3 (A), the Appeals Panel held that legal persons were included in the ambit of the term "person" in Rule 60 *bis*.[78] The Appeals Panel found that, in resolving the "ambiguity" related to the term "person",[79] I had erred in adopting an interpretation that was consonant with the letter of the Statute, rather than its spirit.[80] More specifically, the Appeals Panel held that the interpretation of the term "person" contained in Rule 60 *bis* requires a teleological interpretation of the Statute,[81] combined with an analysis of various domestic and international legal instruments.[82] The Appeals Panel stressed "that this outcome does not create any new and/or unforeseeable crime and is therefore consistent with the rights of the accused".[83]

27. Against this background, my decision in the current matter must account for the Appeals Panel Decision in case STL-14-05. In addition, I need to decide whether I am bound to follow the *ratio decidendi* of that in the present case.

28. As a preliminary matter, I consider that, despite the various and multifaceted arguments developed by the parties (as well as the holdings of the Appeals Panel in case STL-14-05) on this

[73] *New T.V. & Khayat* Jurisdiction Decision, paras 70-72.
[74] *Id.* at paras 73-75.
[75] *Id.* at para. 76.
[76] *Id.* at. 79.
[77] STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 ("*New TV & Khayat* Jurisdiction Appeal Decision").
[78] *Id.* at para. 90.
[79] *Id.* at para. 74; *see also* para. 85 ("We do acknowledge that there is ambiguity as to the meaning of 'person' in Rule 60 *bis* in the present case.").
[80] *Id.* at para. 92.
[81] *Id.* at paras 35, 38, 88.
[82] *Id.* at paras 46-67.
[83] *Id.* at para. 91.

issue, the crux of the matter is rather simple: whether Rule 60 *bis* envisages a criminal offence, *formulated with sufficient precision*, for which a legal person can be tried and, if convicted, sanctioned.

29. In analysing the Appeals Panel Decision, I will first discuss the general principles that I believe are involved in this decision, and in particular the principle of legality (*nullum crimen sine lege*) and its corollaries and requirements. I will then interpret the word "person" in light of this principle. In doing so, I will also consider how the Appeals Panel in case STL-14-05 has analysed and applied the relevant legal principles.

b) The general principles involved in this decision: the principle of legality (*nullum crimen sine lege*) and its corollaries and requirements vs. the doctrine of substantive justice (*nullum crimen sine iniuria*)

30. As mentioned, any discussion of the proper interpretation of the word "person" in Rule 60 *bis* requires a brief analysis of the principle of legality (*nullum crimen sine lege*). This principle essentially prohibits criminal punishment for conduct which, at the time it occurred, was not criminalized by law. The *nullum crimen sine lege* principle expresses the conscious choice to limit the judiciary and the executive in confirming charges and issuing convictions. Conduct (even if socially harmful conduct) is not punishable unless it is expressly made criminal by law.[84]

31. The *nullum crimen sine lege* principle is accepted and codified in modern democratic states, including—as pointed out by the Defence—in Lebanon,[85] as a basic requirement of the rule of law. It is also expressed in countless contemporary international instruments. Chief among them are the International Covenant for Civil and Political Rights (Article 15), the Arab Charter on Human Rights (Article 15), the American Convention on Human Rights (Article 9) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7). International law has long since shifted towards the *nullum crimen sine*

[84] The European Court of Human Rights has clarified that adherence to the *nullum crimen sine lege* principle does not bar prosecution for those international crimes (such as crimes against humanity) which, at the time of their commission, were criminal according to the general principles of law recognized by civilized nations (*see* ECtHR, *Papon v. France*, 54210/00, Decision on Admissibility, 15 November 2001).
[85] Defence Motion, para. 12.

lege principle in the form of the doctrine of strict legality,[86] and the Tribunal has adopted this principle.[87]

32. The *nullum crimen sine lege* principle in domestic and international criminal law entails, for the purposes relevant to the present discussion, two main corollaries or requirements: the principle of specificity (*nulla poena sine lege certa*) and the prohibition of analogy (*nulla poena sine lege stricta*):[88]

(i) According to the principle of specificity (*nulla poena sine lege certa*), the law must provide descriptions of the criminalized conduct that are as precise as possible, in order to clearly indicate what individuals may expect from criminal law. In other words ambiguity in the wording of a law and vagueness of legal notions are forbidden because they could make the crime in question unforeseeable at the time of the conduct. Ambiguity and vagueness indeed prevent potential accused from knowing in advance if their conduct constitutes an offence: in essence, they are deprived of the fundamental right to obtain direction by the law as to how to behave in order not to meet with a criminal conviction. In its leading case on this subject, decided by the Grand Chamber, the European Court of Human Rights found in this regard that:

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

[86] *See*, *e.g.*, Antonio Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (Oxford University Press 2013), pp. 24 *et seq*.

[87] *See* Applicable Law Decision, para. 32 ("[I]n the field of criminal law one has also to take into account a particular facet of the principle of legality (*nullum crimen sine lege*), namely the ban on retroactive application of criminal law. These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.").

[88] Two other corollaries, the prohibition of retroactive application of criminal law (*nulla poena sine lege praevia*) and the requirement for written law (*nulla poena sine lege scripta*), are only marginally relevant in this discussion.

> concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. [89]

While of course specificity itself is a somewhat general concept, it certainly requires the precise identification of the ingredients of a crime and, among them, of who can potentially be the accused in a criminal case.[90] In order to ensure specificity, it is important, in the wording of the relevant provision, to define the elements of the crime by terms expressing concepts which allow for a reliable assessment *ex ante* of whether a particular conduct could implicate the legal provision in question and to whom this provision is addressed. On the contrary, vague and inconclusive concepts, which make it difficult to reasonably identify the criminalized conduct or the possible perpetrators, are extremely dangerous when applied to criminal provisions.

(ii) There also exists the prohibition of analogy (*nulla poena sine lege stricta*) when applying criminal law. The use of analogy in criminal law entails convicting and punishing an accused on the basis of a legal provision that is formally inapplicable in the particular context of the accused's case but covers other similar cases (*analogia legis*) or by applying general principles of the legal system in question (*analogia juris*). The use of *analogia legis* is premised on the assumption that there is one sole underlying legal rationale for two different cases, one explicitly foreseen by the law and the other not foreseen (*ubi eadem legis ratio, ibi eadem legis dispositio*). The *nullum crimen sine lege* principle forbids interpretation of substantive criminal laws through the use of analogy when to the detriment of the accused. While analogy is permissible in civil and administrative matters, and even in criminal *procedural* matters, it cannot be applied in *substantive* criminal law.[91] In criminal law, indeed, the proper interpretative principle is *ubi lex voluit dixit, ubi noluit tacuit*, which is essential to safeguard foreseeability and therefore the rights of the accused. In international criminal law specifically, this prohibition is concisely set out in Article 22 (2) of the ICC Statute, which provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted". This legal

[89] ECtHR, *Başkaya and Okçuoğlu v. Turkey*, 23536/94 and 24408/94, Judgment (GC), 8 July 1999 ("*Başkaya and Okçuoğlu* Judgment"), para. 36 (citations omitted). For a case involving legal persons, *see* ECtHR, *Fortum Oil and Gas Oy v. Finland*, 32559/96, Decision on Admissibility, 12 November 2002, p. 13.
[90] *See, e.g.,* Ferrando Mantovani, *Manuale di diritto penale parte generale* (Cedam 1979), pp. 95-109.
[91] The use of analogy in criminal law is of course permitted when in *favour* of the accused (for instance, arguably, in some cases of anticipatory self-defence).

text undoubtedly constitutes part of the reference materials which the Tribunal's Judges must consider when adopting and interpreting the Rules.[92]

33. In contrast with the *nullum crimen sine lege* principle, the doctrine of substantive justice (*nullum crimen sine iniuria*) is premised on the danger of certain types of conduct to the interests of society, even if such conduct remains ill-defined. The underlying *ratio* of this doctrine is not the proper balance between the protection of the rights of the individual and safeguarding societal needs (like in the doctrine of strict legality), but rather a *favor societatis*, a collectivistic approach that puts the rights of individuals in the second place.[93] In essence, it allows judges to expand criminal law through analogy in order to fill the regulatory gaps in order to protect what they perceive as the interests of society in a historical context.[94]

34. In my view, the Judges of the Tribunal must keep the *nullum crimen sine lege* principle and its corollaries and requirements in mind when rendering their decisions and not be swayed by any impulses arising from the doctrine of substantive justice. I will do so in the following analysis.

[92] Art. 28 (2) STL St. I note that the prohibition of analogy in substantive criminal law is not a new concept and has been recognized by international courts for a long time, even pre-dating modern human rights conventions, *see, e.g.,* PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, PCIJ Series A./B., No. 65 (1935) ("*Danzig* Advisory Opinion"), p. 51 (referring to "the well-known twofold maxim: *Nullum crimen sine lege*, and *Nulla poena sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy".).

[93] Mantovani, pp. 71-109.

[94] And indeed totalitarian regimes have anchored their legal systems to the doctrine of substantive justice, whereas this doctrine has of course no place in modern legal discourse rooted in human rights law. For an illustrative example in this respect, *see* the Soviet regime's Criminal Code of 1922 which penalized any conduct dangerous to the socialist system (Article 6) and, as a logical consequence, permitted judges to resort to analogy in order to punish individuals for "dangerous conduct" not envisaged as a crime by the law (Article 10). *See* also revised Article 2 of the German Criminal Code laid down in 1935, expressly permitting conviction by analogy, and the decision of the Reichsgericht (Germany, Reichsgericht [Reich Supreme Court], RGSt. 72, 91 [93], [23 February 1938]), according to which "[t]he judiciary can only fulfil the duty conferred upon it by the Third Reich if, in its interpretation of the laws, it does not simply adhere to their wording, but goes to their very core and thereby seeks to play its part in ensuring that the intentions of the legislator are realized. This also requires an interpretation that is not confined to the individual provisions of a law, but which conveys the law as a whole. If, in so doing, it transpires that the legislator did not make express provision for certain questions, then it is the right and the duty of the judiciary, inferring from the totality of the legal provisions, which solution accords with the intentions of the legislator and with the sound judgement of the people".

c) Application of these principles in the case at hand

i) The interpretation of the term "person" in Rule 60 *bis*

35. In my reading, when adopting Rule 60 *bis*, the Plenary applied the above-mentioned principle of *nullum crimen sine lege*, applicable to the Tribunal not only under international customary law, but also through Article 28 (2) of the Statute. This provision enjoins the Judges, when drafting the Rules, to be guided "by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial". These require criminal provisions solidly rooted in clear and immediately perceivable concepts, rather than in vague or aspirational ones. In fact, Rule 60 *bis* was conceived in such a manner to prevent margins of uncertainty or ambiguity, in line with the highest standards: with the word "person" in Rule 60 *bis*, the Plenary expressed a clear and precise concept, given that "[a]ny person who" clearly refers to "person" in its natural meaning, namely, a human being. To read the term more expansively, so as to encompass even legal entities, would be applying an entirely different concept.[95] I cannot find any contemporary legal system where the term "person" means "legal person" without another explicit legal provision clarifying this *before* the crime was committed.[96]

36. My view is therefore that, since the term "person" is part and parcel of the definition of an element of the crime of contempt, an expansive interpretation of this term collides with the fundamental rule of *nullum crimen sine lege*. Indeed, only if the applicable law is sufficiently foreseeable may a legal person reasonably appreciate, at the material time of the alleged criminal conduct, that it runs a real risk of being found in violation of the law and of being sanctioned

[95] As examples, a crime of ill-treatment of animals, although generally intended for domesticated animals, can also be applied to wild animals through legitimate extensive interpretation, but not, for example, to robotic animals. The latter would be an interpretation by analogy, going beyond the natural concept of an animal. Similarly, the crime of high treason, which exists in most countries to punish "citizens" who betray their country, could never be applied to "foreign citizens" because such interpretation would impermissibly extend the concept of the crime beyond its intended and foreseeable addressees.

[96] The Appeals Panel cited, among others, two old US cases to support corporate liability. In the US Supreme Court case (*NY Central & Hudson River Railroad Co. v. US* (212 US 481)), the criminal statute passed by the legislature explicitly held corporations liable, so is irrelevant to the question of whether a corporate person can be criminally liable in the absence of an express provision to that effect. In the second case, *US v. John Kelso Co* (86 F.304, 11 April 1898), the Court did not address the interpretation of the term "person", but rather that of the terms "contractor" and "subcontractor" (excised by the Appeals Panel in its citation), which in US law had already been interpreted as referring to legal persons as well. The point here is that nothing in international criminal law leads me to think that in our system the term "person", with no qualification, has ever been interpreted as also including legal persons, similarly to what happens in domestic systems.

financially or through other proper means, such as dissolution, disqualification from public tenders, confiscation or forfeiture of property, suppression, etc. (when the law provides for them).[97]

37. It is important to remark at this point that the above-mentioned principles must be observed not only when *drafting* the Rules, but also when *interpreting* the Rules. Such a conclusion is further confirmed by Rule 3 (A) (ii) and (iii), which require an interpretation of the Rules in conformity with international standards of human rights and general principles of international criminal law and procedure.

38. On the contrary, in its decision, the Appeals Panel held that the expression "any person who", contained in Rule 60 *bis,* is ambiguous.[98] It is uncontroversial that the word "person" and the relative pronoun cannot be understood to *explicitly* make reference to legal persons.[99] If we understand "ambiguous" as a concept, term or phrase with more than one meaning, then in my view the expression cannot be ambiguous, because—in the absence of any additional qualification—it only has one meaning, related to human beings.[100]

39. The Appeals Panel nevertheless considered that an ambiguous provision could legitimately form the basis of a criminal conviction. Let us follow the consequences of such a finding: if it were true that the provision in question—which is located among the procedural law of the Tribunal, but is in fact a rule of substantive criminal law—is ambiguous, this lack of clarity would amount to an infringement of the *nullum crimen sine lege* principle and particularly

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[97] Rule 60 *bis* only provides for a term of imprisonment (clearly not applicable to legal persons) or a fine.
[98] *New TV & Khayat* Jurisdiction Appeal Decision, paras 74, 85 ("We do acknowledge that there is ambiguity as to the meaning of 'person' in Rule 60 *bis* in the present case.").
[99] *Cf. New TV & Khayat* Jurisdiction Decision, para. 69; *New TV & Khayat* Jurisdiction Appeal Decision, para. 57.
[100] Moreover, the Statute only makes reference to the masculine and the feminine, thus excluding the neutral (which in English denotes corporations). When referring to suspects and accused, the only pronouns used in the Statute are "his" or "her" (Art. 3 STL St.), and not "its" as well as "who", and not "which" (*see*, *e.g.,* Preamble, Arts 5, 15 STL St.). According to Art. 33 of the Vienna Convention, which the Appeals Panel cites (*New TV & Khayat* Jurisdiction Appeal Decision, para. 30) but does not actually apply (*id.* at para. 39), if there is a discrepancy in the languages (as this is the case here between English, on the one hand, and French and Arabic, on the other), the interpretation that reconciles the two possible interpretations should be adopted. In this case, the English version can only be reconciled with the other two if the Arabic and French terms are given a more narrow meaning (limited to the masculine and the feminine). On the contrary, the English cannot be simply interpreted as extending to the neutral. Thus, the proper construction of the different languages *according to the Vienna Convention principles* requires using the English version. The Judges in Plenary confirmed this understanding by stating (in the English version of the Rules) that the masculine shall include the feminine, but not making any provision as to the neutral gender (Rule 2 (B) STL RPE). Moreover, no reference is made to neutral subjects in the English versions of the Statute and the Rules.

its corollary, the principle of specificity (*nullum crimen sine lege certa*),[101] unless it is interpreted strictly in favour of the accused.[102] This is because ambiguity in the wording of a law and vagueness of legal notions could make the crime in question unforeseeable at the time of the conduct. This, in practice, would prevent potential accused from knowing in advance if their conduct constitutes an offence.

40. The Appeals Panel stated moreover that the ambiguity in Rule 60 *bis* "is where our analysis begins, not where it ends".[103] In other words, the Appeals Panel found that the Rule was ambiguous *at the time of the conduct in question*. But it cannot matter that the Appeals Panel has now tried to clarify the issue *ex post facto*; what matters is that the corporate Accused in this case is on trial for acts committed in the past, when the norm in question, according to the Panel, remained ambiguous. The approach of the Appeals Panel paves the way for judge-made law creating new crimes or expanding the scope of already existing crimes, which turns criminal law precepts from *prius* (prior definition) to a *posterius* (a definition of the crime effectively made after the conduct in question took place). However, as pointed out above, the European Court of Human Rights and other international bodies have constantly stated that "an offence and the sanctions provided for it must be clearly defined in the law", elaborated, if need be, through the courts' legitimate interpretation of it.[104] Indeed, this Tribunal's Appeals Chamber stated in no uncertain terms that:

> [t]his operation [of interpretation] must of course be undertaken by way of construction and without the judges arrogating to themselves the role of lawmakers beyond that inherent in interpretation, that is, without permitting the will of the interpreter to override that of the standard-setting body.[105]

41. Furthermore, the Appeals Panel in case STL-14-05 stated that: "[w]e emphasise that our interpretation of Rule 60 *bis* does not create a new offence where before there was none – therefore, it is not in violation of the principle of *nullum crimen sine lege.* Rule 60 *bis* exists and

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[101] *See* above, para. 32 (i).
[102] Rule 3 (B) STL RPE.
[103] *New TV & Khayat* Jurisdiction Appeal Decision, para. 85.
[104] *Başkaya and Okçuoğlu* Judgment, para. 36; *see also* ICTY, *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, 29 November 2002, paras 195-196 ("[U]nder no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.").
[105] Applicable Law Decision, para. 24.

defines those who can be held in contempt as 'any person'".[106] Following the logic of the Appeals Panel's approach, indeed, any criminal provision, once set out by the law, could be expanded by means of (unpermitted) interpretation to other categories of persons or to other conduct not foreseen by the original provision, simply because a provision of some sort already existed. But this amounts to circumventing and frustrating the *nullum crimen sine lege* principle.

42. In the same context the Appeals Panel added that even if a rule "did not exist, our inherent jurisdiction grants the Tribunal the power to adequately address such conduct".[107] For one, I recall that a provision does exist here in the form of Rule 60 *bis*. The Panel's hypothetical scenario is therefore inapplicable. Once the Plenary of Judges adopts a specific provision, its application must be based on its wording. Moreover, the Appeals Panel's reasoning is precisely what the governing principles of international criminal and human rights law prohibit: judge-made law and construction by analogy in criminal matters.

ii) The use of analogy

43. The Appeals Panel indeed examined at length international and domestic laws as to the criminal responsibility of legal persons[108], and concluded that Rule 60 *bis* is applicable to a corporate accused "in light of domestic developments and evolving international law standards".[109] The Appeals Panel conclusively stated: "[W]e consider that the interpretation of Rule 60 *bis*, taking into account international standards of human rights, leads to the conclusion that – in principle – judicial remedies are not barred against a legal person".[110] This is a typical example of interpretation by analogy, because it means to convict and punish an accused on the basis of a legal provision that is formally not applicable in the particular context of a case but is derived from general principles of other legal systems (not even from the one applicable to the Tribunal). The Appeals Panel essentially relied on legal systems or cases,[111] which would

[106] *New TV & Khayat* Jurisdiction Appeal Decision, para. 85.
[107] *Ibid*.
[108] *Id.* at paras 45-71.
[109] *Id.* at para. 91.
[110] *Id.* at para. 48.
[111] Apart from my remarks on cited US case-law above, I also note that several sources cited by the Appeals Panel refer to corporate liability only for specific offences, and not in general terms. There is essentially no distinction (in the State practice cited) between systems where corporate liability is a general rule or where it applies only to certain specific offences. Moreover, the Appeals Panel cites not a single case of corporate liability for offences against the administration of justice, which is the case at hand.

provide for the prosecution of legal persons for contempt, whereas our Rules are instead completely silent with respect to corporate liability.

44. Moreover, as I stated in the *New TV & Khayat* Jurisdiction Decision, "a principle of international criminal law enshrining inherent jurisdiction for contempt and obstruction of justice has crystallized and is directly applicable to the Tribunal" due to (i) the practice of other international criminal tribunals in this matter, (ii) the pronouncements of our own Appeals Chamber, as well as (iii) the adoption of Rule 60 *bis* (originally, Rule 134) by the Plenary of Judges in March 2009.[112] But none of these authorities ever suggested that this inherent jurisdiction extended to corporate persons. In my view, indeed, when there is no explicit provision prior to the conduct in question, judges may not attach *criminal* liability with respect to such persons.[113]

45. In sum, the interpretation of Rule 60 *bis* is clear: the Rule is not ambiguous. It does not explicitly provide for the prosecution of legal persons. Even if one were to resort to interpretation as to what Rule 60 *bis* might *implicitly* mean,[114] I believe that, in accordance with the ordinary meaning to be given to the terms of the Rules in their context and in the light of their object and purpose (as required by Rule 3), an interpretation of "any person who" encompassing legal persons would not sufficiently put on notice a corporate accused that it could incur criminal liability.[115]

46. Although this is sufficient to show why I cannot agree with the Appeals Panel in its holding that corporate liability for contempt is included in Rule 60 *bis*, two additional lines of reasoning deserve to be explored.

iii) Lack of real precedents

47. First, the Appeals Panel's references to domestic developments, evolving international law standards and the Lebanese Criminal Code are misleading. In fact, for obvious reasons, the Appeals Panel does not cite any instances where an international criminal tribunal has indicted a

[112] *New TV & Khayat* Jurisdiction Decision, paras 26-35.
[113] The critical point is therefore not that "the relevant legal provision did not expressly exclude legal persons" (*New TV & Khayat* Jurisdiction Appeal Decision, para. 57), but that nothing in our legal instruments expressly *included* them.
[114] *Cf. New TV & Khayat* Jurisdiction Decision, para. 70.
[115] *Cf. id.* at paras 71-79.

corporate accused. Indeed, there are no such cases.[116] Instead, the Appeals Panel relied on the "possibility of proceedings",[117] "potential corporate liability"[118] and a "draft law on corporate liability",[119] which clearly denote that international law does not (yet) properly foresee corporate liability.[120] Norms that do not exist cannot form the basis of legal interpretation.

48. Moreover, I cannot discern in the Appeals Panel's consideration of legal instruments and case-law any modern[121] instance of indictments against legal persons where domestic legislation did not explicitly foresee criminal liability for legal persons prior to the indictment itself.

49. Finally, laws on a domestic level related to corporate liability not only expressly provide for the criminal liability of the corporations (which—again—our Rules do not), but also establish complex regimes for the imputation of criminal responsibility to these legal persons and for their participation in the criminal proceedings. For example, they often provide for criminal liability of corporations with respect to some crimes while excluding others.[122] They also establish the relationship between individual criminal responsibility of natural persons working for a company and the responsibility of the company itself, which do not necessarily coincide.[123] They

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[116] I find highly unpersuasive the suggestion that the absence of prosecutions of legal persons at other international criminal tribunals with similar contempt provisions can be explained by the fact that "different Prosecutors […] have not previously sought to undertake such an endeavour". (*New TV & Khayat* Jurisdiction Appeal Decision, para. 41). Indeed, the *Hartmann* case cited by the Appeals Panel (*id.* at fn. 78) involved the publishing of a book divulging confidential information in violation of court orders. Yet the publishing house was not charged. Nor were the media companies in cases where the ICTY indicted journalists. If there is indeed an impunity gap as postulated by the Appeals Panel, then it is hardly comprehensible why legal persons were not charged before. On the contrary, the absence of such prosecutions simply indicates that the contempt rules at these other Tribunals, like ours, do not provide for corporate criminal responsibility.

[117] *New TV & Khayat* Jurisdiction Appeal Decision, paras 46, 49.

[118] *Id.* at para. 50.

[119] *Id.* at para. 53.

[120] The same can be said of the various statutes of international criminal courts and tribunals to which the decision refers.

[121] Post-ICCPR, after the recognition of *nullum crimen sine lege* as a fundamental rule of human rights.

[122] In Luxemburg, for example, one of the latest European countries to explicitly introduce this type of criminal liability, legal entities are only criminally liable for crimes ("*crime ou délit*") and not for less serious offences ("*contraventions*") (*see Loi du 3 mars 2010 introduisant la responsabilité pénale des personnes morales dans le Code pénal et dans le Code d'instruction criminelle et modifiant le Code pénal, le Code d'instruction criminelle et certaines autres dispositions législative*); *see also*, *e.g.*, the *Act on Criminal Liability of Corporations and Proceedings Against Them* 2011 (Czech Republic, Act No. 418/2011), which is limited to certain enumerated criminal offences (Art. 7).

[123] *See, e.g.*, Art. 5 of the Belgian Criminal Code ("Toute personne morale est pénalement responsable des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte. Lorsque la responsabilité de la personne morale est engagée exclusivement en raison de l'intervention d'une personne physique identifiée, seule la personne qui a commis la faute la plus grave peut être condamnée. Si la personne physique identifiée a commis la faute sciemment et volontairement, elle peut être condamnée en même temps que la personne morale responsable.")

frequently state the penalties that are reserved for corporations, which are of course different from those envisaged for natural persons.[124] Moreover, they often include provisions on conflicts of interests between corporate accused and natural persons indicted for connected offences[125] and require certain internal procedures in order for the legal person to acquit itself of criminal liability.[126] On the contrary, any such clarifications are entirely absent from both the Statute and the Rules (consciously, one would assume), and the Contempt Judge would be forced to proceed in a legal vacuum without any guidance, risking arbitrary decision-making. This must be an additional reason to carefully appraise Rule 60 *bis* in its context, also in light of the consideration that an unjustified prejudice (through legal proceedings) to a corporation necessarily reflects upon its shareholders, stockholders, partners etc., who might not be aware of the criminal conduct of an employee/representative of their corporation and could be unfairly prejudiced.

iv) Teleological interpretation

50. Second, and as already mentioned above, in its decision the Appeals Panel invoked "a cardinal principle of interpretation that texts should be applied in a manner consistent with the spirit of the law"; in other words that there is "a clear distinction […] between the *letter* of the law, which requires strict adherence to the words used and employed in the provisions under consideration and the more literal approach, as against the *spirit* of the law which is more liberal and necessitates ascertaining the aim and scope of the Statute as a whole".[127] On this basis,

[124] For instance, Art. 7 *bis* of the Belgian Criminal Code ("Les peines applicables aux infractions commises par les personnes morales sont: en matière criminelle, correctionnelle et de police: 1° l'amende; 2° la confiscation spéciale; la confiscation spéciale prévue à l'article 42, 1°, prononcée à l'égard des personnes morales de droit public, ne peut porter que sur des biens civilement saisissables; en matière criminelle et correctionnelle: 1° la dissolution; celle-ci ne peut être prononcée à l'égard des personnes morales de droit public; 2° l'interdiction d'exercer une activité relevant de l'objet social, à l'exception des activités qui relèvent d'une mission de service public; 3° la fermeture d'un ou plusieurs établissements, à l'exception d'établissements où sont exercées des activités qui relèvent d'une mission de service public; 4° la publication ou la diffusion de la décision.").

[125] Art. 2 *bis* of the Belgian Criminal Procedure Code ("Lorsque les poursuites contre une personne morale et contre la personne habilitée à la représenter sont engagées pour des mêmes faits ou des faits connexes, le tribunal compétent pour connaître de l'action publique contre la personne morale désigne, d'office ou sur requête, un mandataire ad hoc pour la représenter.").

[126] For example, in the United States, federal sentencing guidelines binding on federal judges mandate reductions in the sentences of entities which have implemented an effective compliance and ethics program. *See* United States Sentencing Commission, 2013 USSC Guidelines Manual, §8C2.5 (f). Further, federal regulations call for various agencies not to recommend criminal prosecution when an entity has undertaken certain disclosure or compliance measures, *see e.g.,* United States, Federal Register, FRL-6576-3, Vol. 65, No. 70, p. 19620.

[127] *New TV & Khayat* Jurisdiction Appeal Decision, para. 27. I find highly unpersuasive the Appeals Panel's reliance on a selective citation to John Salmond's volume on *Jurisprudence*, 4th ed. (Stevens and Haynes 1913) to justify the broadest possible approach when interpreting a criminal law provision (*New TV & Khayat* Jurisdiction Appeal Decision, para. 27, fn. 64). Indeed, Salmond stresses that "in all ordinary cases grammatical interpretation is the sole

according to the Appeals Panel, the first-instance decision was in error for having been "in a manner consonant with the letter of the Statute rather than its spirit".[128] The Appeals Panel suggested that, since in this case the Tribunal's "authority is made *most effective* by way of the ability to hold legal (and natural) persons responsible where allegations of contempt arise", then my decision to exclude legal persons was in error.[129]

51. In my view, this reasoning is incompatible with the *nullum crimen sine lege* principle, in particular given the shift under international law away from concepts of substantive justice and towards the doctrine of strict legality.[130] On the contrary, it appears to apply notions of substantive justice.[131]

52. Here, in extending criminal liability for contempt to legal persons through teleological interpretation, the Appeals Panel relied on vague and aspirational concepts such as "effectiveness",[132] "unacceptable impunity"[133] and the "interests of justice",[134] which are problematic when invoked to interpret the scope of substantive criminal law provisions.[135] Indeed, the Appeals Panel's reasoning suggests that the ultimate goal of any interpretation is to make the Tribunal "most effective".[136] Such an approach does not comport with the highest standards of criminal justice. What is required is adherence to a strict interpretation of criminal

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form allowable" (Salmond, p. 138) and allows for broader types of interpretation only in exceptional cases. One of these is that "the letter of the law is *logically defective*, that is to say, when it fails to express some single, definite, coherent and complete idea" (Salmond, p. 139, emphasis in the original). Rule 60 *bis* can hardly be considered defective. More importantly, however, Salmond's volume refers to the interpretation of legal statutes in general but does not make specific allowance for *criminal* statutes. Indeed, as pointed out by his contemporary Henry Campbell Black, caution must be exercised when interpreting criminal statutes: "[C]riminal and penal statutes are to be constructed strictly, and not extended or enlarged by implications, intendments, analogies, or equitable considerations." (*see* Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws*, 2nd ed. (West Publishing 1911), pp. 451-452).

[128] *New TV & Khayat* Jurisdiction Appeal Decision, para. 38.

[129] *Id.* at para. 81 (emphasis added).

[130] *See* above, paras 30-34; *see also*, *e.g.*, Cassese, pp. 24 *et seq*.

[131] *See* para. 33.

[132] *New TV & Khayat* Jurisdiction Appeal Decision, paras 73, 81.

[133] *Id.* at para. 83.

[134] *Id.* at para. 84.

[135] *See Danzig* Advisory Opinion, p. 53 ("A judge's belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the facts […]. Instead of applying a penal law equally clear to both the judge and the party accused […] there is the possibility […] that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Nor should it be overlooked that an individual opinion as to what was the intention which underlay a law […] will vary from man to man.")

[136] *New TV & Khayat* Jurisdiction Appeal Decision, para. 81.

provisions solidly rooted in concrete and precise notions, such as natural concepts or legal elements qualified by other provisions whose content is well defined.[137]

53. The premise of the Appeals Panel's reasoning is questionable: it would mean that Judges of this Tribunal could decide to indict for contempt, in addition to natural (and now legal) persons, *inter alia* international "legal persons" like States and international organizations.[138] Arguably, this might have the potential to make the Tribunal's authority "most effective". However, if it was the intention of the Judges in Plenary to expand the scope of Rule 60 *bis* beyond that of the Statute, they should have expressed such intent by adopting the relevant Rules in an unambiguous manner. Yet, they did not do so, as acknowledged by the Appeals Panel itself, which did not address this question.

54. I pause here to note that following the logic of the Appeals Panel's reasoning,[139] the Tribunal could conceivably indict legal persons for the crimes set out in the Statute and not just for contempt. Indeed, the Appeals Panel, in interpreting Rule 60 *bis* consistent with Rule 3 (A), repeatedly emphasized the "spirit of the Statute".[140] But given the Appeals Panel's implicit holding that that there is no corporate criminal liability for crimes under Article 2 of the Statute,[141] the question then arises: how can the Rules be said to follow the spirit of the Statute if, in a matter so fundamental as personal jurisdiction, the same term ("person") is given two entirely different meanings, one under the Statute and one under the Rules? And this, no less, in two legal texts that are supposed to be consonant?

55. In support of its approach, the Appeals Panel also refers to the Appeals Chamber's seminal decision on the Tribunal's applicable law. In particular, the Appeals Panel relied only on some excerpts of paragraphs 27, 28 and 29 of that ruling,[142] stating:

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

[137] For instance "witness" in Rule 60 *bis* (A) (ii); but also property in the crime of robbery, where the legal elements of the crime are well qualified respectively in procedural law and in substantive civil law. The Appeals Panel took the opposite approach (*see New TV & Khayat* Jurisdiction Appeal Decision, para. 28.).
[138] Indeed, it would be more appropriate to describe States and international organizations as "subjects of international law" rather than corporations (*cf. New TV & Khayat* Jurisdiction Appeal Decision, para. 46).
[139] *See* in particular *New TV & Khayat* Jurisdiction Appeal Decision, paras 82-83.
[140] *See, e.g., id.* at para. 38.
[141] *Id.* at paras 86, 88.
[142] *Id.* at paras 27-28.

> agreed upon". The principle of effectiveness "with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen)" is therefore emphasised.[143]

However, these citations appear to have been taken out of context. Indeed, the view of the Appeals Chamber on this important question becomes clear when reading paragraphs 28 and 29 not isolating some sentences but in their entire and proper context, in particular together with paragraph 32 (the extracts used by the Appeals Panel are highlighted):

> 28. Subject to the caveat suggested by the Kosovo Advisory Opinion, under international law seeming inconsistencies in a text must be resolved by reference to the general principle of construction enshrined in Article 31(1) of the Vienna Convention (and the corresponding customary rule of international law): rules must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The latter portion of this clause embodies the principle of teleological interpretation, which emphasises the need to construe the provisions of a treaty in such a manner as to render them effective and operational with a view to attaining the purpose for which they were agreed upon.
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> 29. Let it be emphasised that, in the present context, contrary to what has been argued by the Defence Office, the principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that—when applied to the interpretation of treaties and other international rules addressing themselves to States—calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice. It is indeed no coincidence that, although this canon of interpretation was repeatedly relied upon by the Permanent Court of International Justice in its heyday, it is no longer or only scantily invoked by modern international courts. Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.
>
> […].
>
> 32. With regard to the Tribunal's Statute, the principles of teleological interpretation just referred to require an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner. If however this yardstick does not prove helpful, one should choose that interpretation which is more favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as "in favour of the accused"). This principle, a corollary of the

[143] *New TV & Khayat* Jurisdiction Appeal Decision, para. 28 (internal citations omitted).

> overarching principle of fair trial and in particular of the presumption of innocence, has been upheld by international criminal tribunals and is codified in Article 22(2) of the ICC Statute ("[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted or convicted"). The same principle, in its more trial-orientated facet, when it is referred to as the *in dubio pro reo* standard (in case of doubt one should hold for the accused) or *in dubio mitius* (as a principle applying to conviction and sentencing of individuals: in case of doubt one should apply the more lenient penalty), normally guides the trial judge when appraising the evidence and assessing the culpability of the accused or determining the penalty to be inflicted. As we shall see, in the field of criminal law one has also to take into account a particular facet of the principle of legality (*nullum crimen sine lege*), namely the ban on retroactive application of criminal law. These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.[144]

56. In sum, as the complete reading of the relevant holding clearly shows, the Appeals Chamber referred to the teleological interpretation of the Statute *not* in the context of the interpretation of criminal law (or procedural criminal law) provisions *vis-à-vis* the accused, but rather with respect to how to interpret the constitutive instrument of an international organization (in that case, the Tribunal's Statute) *vis-à-vis States and other international subjects*. This is clear from the overall discussion, and in particular from the passage stating that such teleological interpretation is justified because "the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community".[145]

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[144] The underlined portions are those relied upon by the Appeals Panel.

[145] Applicable Law Decision, para. 29. Paragraphs 30 and 31 read as follows:

> 30. An element of teleological interpretation is the principle of effectiveness, also expressed in the maxim *ut res magis valeat quam pereat* (in order that a rule be effective rather than ineffectual): as enunciated by the UN International Law Commission, this principle requires that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted". One must assume that the lawmaker intended to pursue an objective through the set of norms he created; hence, whenever a literal interpretation of the text would set a norm at odds with other provisions, an effort must be made to harmonise the various provisions in light of the goal pursued by the legislature.
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> 31. An example of this notion, in the case of conflicting languages, is Article 33(4) of the Vienna Convention, dealing with the case of "a treaty authenticated in two or more languages, when a comparison of the authentic text discloses a difference of meaning" that cannot be resolved by other means of interpretation. In such a case, that Article requires that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". This provision, which to a large extent codifies existing law, particularizes the general principle of effectiveness with regard to conflicts between texts drafted in different languages. Indeed,

57. For the Appeals Chamber, the purpose of teleological interpretation is therefore that of countering parochialism and undue deference to the sovereignty of States. This does not mean that it can or should be employed to encroach on the fundamental rights of suspects and accused. Indeed, the Appeals Chamber pointed out in paragraph 32 that:

> *in the field of criminal law* one has also to take into account a particular facet of the principle of legality (*nullum crimen sine lege*), namely the ban on retroactive application of criminal law. These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.[146]

The Appeals Chamber, when specifically discussing the interpretation of criminal law provisions, thus confirmed that the doctrine of strict legality and the principle of *favor rei* serve as the Tribunal's guiding principles.

58. For the interpretation of Rule 60 *bis*, the Appeals Panel further relied on international human rights standards (as indeed required by Rule 3 (A)) and stated that they:

> include not only the rights of the accused – legal persons in the present case – but also the standards that are applicable to remedying the result of their conduct. As such, we look to trends that address corporate acts that violate human rights in our interpretation of Rule 60 *bis*, while ensuring consistency with the accused's rights in a criminal context.[147]

On this basis, the Appeals Panel held that the trend of domestic practice criminalizing the acts of legal entities allowed an interpretation of the term "person" in Rule 60 *bis* which includes legal entities.[148] However, as stated by the Appeals Chamber, and cited by Judge Akoum in his dissent,[149] under the relevant international human rights standards, the rights of an accused must prevail when other rights, including those of the victims of a crime, might otherwise lead to prejudice against the accused.[150] This is all the more so in a case such as the present one, where

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instead of leaving a treaty clause inoperative on account of discrepancies of expression in texts employing two or more authoritative languages, the court will adopt such content as is common to both (as expression of the shared will of the parties) provided it is consonant with the object and purpose of the treaty.

[146] Emphasis added.

[147] *New TV & Khayat* Jurisdiction Appeal Decision, para. 45.

[148] *Id.* at para. 60.

[149] *New TV & Khayat* Jurisdiction Appeal Decision, Dissenting Opinion of Judge Akoum ("Judge Akoum Dissent"), para. 13.

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

there are other ways to provide justice to the victims (if one can truly talk about victims in a case of offences against the administration of justice).[151] Indeed, in this case, charges are also brought against Mr Al Amin, a natural person, who is alleged to be the newspaper's editor in-chief and chairman of the board of directors.[152]

59. Finally, our Rules of Procedure and Evidence codify both substantive criminal law (with respect to Rule 60 *bis* and also Rule 152) and procedural law provisions. I cannot accept that their sole object and purpose is to make the proceedings "effective".[153] Rather, they provide for the proper balance between the rights of the accused (fairness and expeditiousness of the proceedings, *etc.*), on the one hand, and the needs of the Lebanese and international community (expeditiousness of the proceedings, search for the truth, bringing to justice those who are found responsible for the crimes committed), on the other.[154] I note that, historically, detailed legislation and codes have been carefully developed in domestic systems to ensure that the judiciary in exercising its power does not enjoy unfettered freedom to frustrate an accused's essential defence rights.

60. In sum, I cannot agree with an interpretation of the object and purpose of the Statute and the Rules that does not attempt to properly balance the need for protecting the integrity of the proceedings with the rights of the accused (in this case, corporate accused) to be fully aware of the possible charges against them prior to their conduct. These considerations must find recognition when comprehensively considering the overall objective of the Tribunal's Statute and Rules.

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[151] *See, mutatis mutandis,* ECtHR, *Osman v. United Kingdom*, 87/1997/871/1083, Judgment (GC), 28 October 1998, para. 153 ("The Court is not persuaded either by the Government's plea that the applicants had available to them alternative routes for securing compensation […]. In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case […]."); ECtHR, *Cordova v. Italy*, 40877/98, Judgment, 30 January 2003, para. 65 ("[T]he decisions to quash all rulings favourable to the applicant and to freeze all other proceedings brought to protect his reputation did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.").

[152] Indictment Decision, para. 50.

[153] *New TV & Khayat* Jurisdiction Appeal Decision, paras 72-73.

[154] I also note that the Appeals Panel held that the Rules should be interpreted in a manner consonant with the spirit of the Statute and, pursuant to Rule 3 (A), according to their own object and purpose (*New TV & Khayat* Jurisdiction Appeal Decision, para. 26). However, it proceeded to consider the object and purpose not of the Rules as a whole, but merely of the term "person" as contained in the Rules and in the Statute (*id.* at para. 42 ("the object and purpose of the term "person" used in Rule 60 *bis* […]")). Of course, if one looks at the supposed object and purpose of one word detached from its context, almost any outcome is possible.

d) Conclusions on corporate liability

61. Rule 60 *bis*, properly interpreted, is a clear and unambiguous provision. It provides for criminal responsibility of natural persons who have knowingly and wilfully interfered with the Tribunal's administration of justice. Indeed, the Rule is anchored to a concrete and well-defined concept (the term "person"), with clear contours. Rule 60 *bis* thus cannot be extended to a legal concept (such as "legal person") through interpretation by analogy, prohibited in criminal law, or other oblique interpretative tools not foreseeable by the addressees of the provision.[155] In contrast, neither the Statute nor the Rules contain any reference to corporations as possible accused. When legislators (in contemporary domestic or international criminal law) intended the word "person" to encompass legal persons, they have explicitly provided for that. Given the absence of such authorization in Rule 60 *bis* or anywhere else in the Statute or Rules, this by itself would be enough to exclude criminal liability of corporations for the purposes of contempt proceedings before the Tribunal.

62. The Appeals Panel's approach on the other hand, in particular its resort to interpretation by analogy and its overreliance on the "spirit of the Statute" as permitting anything to make the Tribunal "most effective", appears grounded in notions of substantive justice. It thus fails to comply with the fundamental *nullum crimen sine lege* principle and violates the rights of the accused by making the contours of the offence in question unforeseeable.

63. Finally, the spirit of the Statute is also that of protecting the rights of the accused to the maximum extent possible. This is not only borne out by Articles 15, 16 and 28. I note that in other areas that could give rise to concerns as to the rights of the accused, such as Article 22 (trial *in absentia*), the Statute mandates careful protection of those rights (according to some,

[155] In this regard, I am not persuaded by the Appeals Panel's reliance on Rule 2, which defines "victim" as a "natural person" whereas it does not provide a definition for "accused" (*New TV & Khayat* Jurisdiction Appeal Decision, para. 8). I fully adopt Judge Akoum's reasoning on this issue: "I read the qualification that victims before the Tribunal must be natural persons as simply clarifying that the Lebanese practice of having associations representing victims cannot take place before the Tribunal, and nothing more." (Judge Akoum Dissent, fn. 24). It would be indeed arbitrary to infer from a provision of *procedural* law (such as Rule 2) the content of a provision of *substantive criminal* law. Moreover, in my view, it would be unrealistic to expect this type of sophisticated analysis of procedural provisions (and their application in the realm of substantive criminal law) by ordinary accused, who should instead receive clear and unambiguous notice from the legal provisions, in compliance with human rights principles.

even exceeding the guarantees dictated by the European Court of Human Rights for this type of trial).[156]

64. On this basis, I cannot fathom how the Tribunal's jurisdiction for contempt can be extended to legal persons on a reading of the Statute and Rules that focuses on vague and aspirational concepts, such as "effectiveness",[157] "unacceptable impunity"[158] and "interests of justice",[159] rather than taking into account the rights of the accused under the *nullum crimen sine lege* principle and its corollaries and requirements.

65. I reiterate that I share several aspects of Judge Baragwanath's reasoning and that I am not in principle against criminal liability for legal persons *per se*.[160] I only express hesitation in creating it by impermissible judicial interpretation rather than by the clear wording of the law.

e) Whether the Appeals Panel's decision has binding effect

66. For the reasons discussed above, I cannot agree with the reasoning and the result of the Appeals Panel's decision in case STL-14-05. The question now is whether I am nonetheless bound to follow that decision, which was issued in proceedings distinct from the present case.

67. In deciding this delicate matter, I am cognizant of the general need for consistency, certainty and predictability in the judicial decision-making at this Tribunal. Having due regard to decisions taken by other judges and chambers in similar factual and legal circumstances is of importance. However, there is a difference between an established body of case-law expressing coherent legal principles and a single prior holding. The precedential value of the former is necessarily much higher than that of the latter. Indeed, while it may not be proper to disregard established case-law (unless there are exceptional circumstances), it is much less problematic to reject the legal reasoning of one isolated individual decision. I will come back to this issue below.

68. First of all, I note that other international criminal tribunals have sought to establish a formal system of precedent, somewhat akin to the common law doctrine of *stare decisis*. For

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[156] Paola Gaeta, "Trials '*In Absentia'* before the Special Tribunal for Lebanon", in A. Alamuddin *et al.* (eds), *The Special Tribunal for Lebanon* (Oxford University Press 2014) pp. 229-250.
[157] *New TV & Khayat* Jurisdiction Appeal Decision, paras 73, 81.
[158] *Id.* at para. 83.
[159] *Id.* at para. 84.
[160] *Cf. New TV & Khayat* Jurisdiction Decision, paras 68 and 79.

example, both the ICTY Appeals Chamber[161] and ICTR Appeals Chamber[162] have concluded that a proper construction of their Statutes requires that the *ratio decidendi* of the Appeals Chambers' decisions is binding on Trial Chambers.[163] However, this approach has often been criticized.[164] The ICC, as a permanent court, has so far not developed any comparable system. Article 21 of the ICC Statute merely provides that the "Court may apply principles and rules as interpreted in its previous decisions." The ICC Appeals Chamber has always refrained from deciding whether this means that its legal holdings are binding on the Pre-Trial and Trial Chambers.[165]

69. Of importance for this case is that the Appeals Chamber of this Tribunal has not made any ruling to the effect that the first-instance judges of this Tribunal are bound to follow the *ratio decidendi* of its decisions in other cases. Given the particular nature of the Tribunal, I must also consider that Lebanese law—like that of many civil law countries—does not know a concept of binding precedent or *stare decisis*.[166] Furthermore there is no provision in the Statute or Rules of the Tribunal that deals expressly with the question of the binding force of decisions of the Appeals Chamber. Article 26 of the Statute[167] provides that the Appeals Chamber, when hearing appeals, may affirm, reverse or revise the decisions taken by the Trial Chamber. While this stands for a general principle that the Appeals Chamber is the ultimate arbiter of the law in a given case, Article 26 is silent on the impact of the decisions taken in one case on other cases.

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[161] ICTY, *Prosecutor v. Aleksovski*, IT-95-14-/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgment"), para. 113.
[162] ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, para. 92.
[163] However, it is doubtful that this reflects a principle of *stare decisis* under international law: *see* ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, Separate Opinion of Judge Shahabuddeen, fn. 7 ("The *Aleksovski* principle rests on practice, not on law. The decisions of the Appeals Chamber may provide precedents but not in the sense of binding precedents. The doctrine of *stare decisis*, which *Aleksovski* mimics, does not apply in international law."); fn. 41 ("Largely, it seems to me, as a matter of internal discipline and not because of any general principle of binding precedent, it has been decided by the Appeals Chamber that Trial Chambers must follow the decisions of the Appeals Chamber, but it is hard to see any exemption from the general principle that there is no doctrine of binding precedent in international law. There are elements of the Tribunal's jurisprudence which mimic that general principle.").
[164] *See* Alphons Orie, "*Stare Decisis* in the ICTY Appeal System? Successor Responsibility in the *Hadžihasanović* Case", 10 *Journal of International Criminal Justice* 635 (2012).
[165] The International Court of Justice is not an international *criminal* court. I do note, however, that while the precedential value of the Court's decisions is undisputed, it has never developed a doctrine of *stare decisis*. There are a number of reasons for that (*see* in detail Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 1996), pp. 97-110.) One of them relates to the language of Art. 38 of the Court's Statute which in stating the sources of international law assigns a relatively low degree of importance to previous judicial decisions (*see Aleksovski* Appeal Judgment, Declaration of Judge David Hunt, para. 2).
[166] *See* Applicable Law Decision, para. 142.
[167] Rule 176 STL RPE has similar language.

70. It follows from this that, formally, I am not bound by the *ratio decidendi* of the Appeals Panel Decision in case STL-14-05, positing that the Tribunal has jurisdiction to charge legal persons with contempt. But what about the precedential value of the decision by itself? I have explained above why I am not persuaded by the legal reasoning provided by the Appeals Panel. But there are further considerations.

71. Indeed, the holdings of the Appeals Panel were expressed in what is an isolated decision that finds no precedent in international law. It is for the first time in history that a court has held that international criminal courts and tribunals have jurisdiction to prosecute legal persons for contempt and offences against the administration of justice without any explicit provision to that effect. It cannot be argued therefore that I should follow this decision for reasons of consistency with international case-law in general. On the contrary, by following the decision and extending its reasoning to yet another case and another Accused, I would further add to the fragmentation of international criminal law, since international criminal law has thus far developed pursuant to principles and case-law other than those relied upon by the Appeals Panel. Consistency—both with respect to this Tribunal and international criminal law as a whole—is better served by a decision rejecting the Tribunal's exercise of jurisdiction over legal entities. This will allow for fresh consideration by the competent Appeals Panel, which would have the opportunity to clarify the matter in order to provide legal certainty.

72. Next, I am bound to consider that the Appeals Panel Decision in case STL-14-05 was not taken unanimously, but rather by majority. While this does not change the formal authority of the decision in that case, it does affect its substantive authority with respect to other cases:[168] "An opinion concurred in by the whole bench is naturally of higher rank and value than one from which one or more of the judges dissent".[169] Moreover, the dissenting judge did not limit himself to casting a vote contrary to the majority, but rather extensively reasoned his dissent, which I find potent and persuasive.[170]

73. Finally, the specific facts of this case distinguish it from the case in which the Appeals Panel made its decision. In particular, the charges here are directed against both

[168] *Cf.* Shahabuddeen, pp. 179-180; *cf. also id.* at pp. 143-145.
[169] Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws*, (1896 [reprinted by the Lawbook Exchange 2008]), p. 421.
[170] *See* Judge Akoum Dissent.

Akhbar Beirut S.A.L. as the legal person doing business as the newspaper *Al Akhbar* and Mr Al Amin, as the newspaper's editor in-chief and chairman of the board of directors.[171] In these circumstances the prosecution of a natural person alone can hardly be said to "potentially lead to unacceptable impunity for criminal actions", which was one of the rationales of the Appeals Panel to uphold corporate criminal liability in case STL-14-05.[172]

74. In sum, while I may seek guidance from the Appeals Panel Decision in case STL-14-05, it does not form binding precedent. Nor do I find that it holds persuasive precedential value. I add that the matter at stake is not a minor procedural issue, but rather goes to the heart of the application of substantive criminal provisions to an accused as well as to the "paramountcy" of human rights in the world community.[173] The conclusions of the Appeals Panel in case STL-14-05 can be reached, in my view, only by adopting the principle of substantive justice (instead of strict legality) and by rejecting the *nullum crimen sine lege* rule; this is, in other words, a matter concerning fundamental principles. In light of this, one isolated ruling cannot by itself force a novel course, one with unpredictable consequences. As pointed out by Henry Campbell Black, "[j]udicial decisions are evidences of the law; but when they are not long established, and are palpably erroneous and plainly productive of injustice, they should be overruled, and it is the right and duty of the courts to do so".[174] In this light, and considering that fundamental rights of the Accused are at stake, I am unable to treat the decision of the Appeals Panel in case STL-14-05 as binding precedent and I decline to follow its legal reasoning and result.

D. The referral of the case to the competent Lebanese courts

1. Position of the Defence

75. The Defence submits that, as an alternative to dismissing the charges against the Accused for lack of jurisdiction, "it is in the interest of justice to order that the case against Mr Ibrahim Mohamed Ali Al Amin be referred to the authorities of the Lebanese Republic, so that those

[171] Indictment Decision, para. 50.
[172] *New TV & Khayat* Jurisdiction Appeal Decision, para. 83.
[173] Applicable Law Decision, para. 29.
[174] Black (1911), p. 619.

authorities might submit this case to the competent national courts".[175] The Defence presents its arguments in four groups, certain of which contain multiple arguments.

76. First, the Defence asserts that the provision of Article 4 of the Statute granting the Tribunal primacy over the national courts of Lebanon within the Tribunal's jurisdiction "does not specify that the primacy of the Tribunal should be applied for the prosecution of offences set out at Rule 60 *bis* [. . . and] cannot therefore be presumed".[176] In light of this, and given that Lebanese courts "have jurisdiction according to Lebanese law"[177] to hear such a criminal case and would be strengthened by such a referral, it is preferable to refer this case to Lebanon.[178] The Defence contends that the Tribunal's jurisdiction here should be examined in the context of the principle of complementarity, as applied by the International Criminal Court.[179]

77. Second, the Defence asserts that the "principle of the hierarchy of norms" requires that criminal laws adopted by the Lebanese Parliament have primacy over the Rules adopted by the Tribunal's Judges.[180] If there is a dispute as to whether a "legal text" or a "regulatory text" should be applied to alleged criminal conduct, the former must prevail.[181] Moreover, the Defence claims that the "principal authority of the Lebanese tribunals in criminal and publication matters should have precedence over the inherent or ancillary jurisdiction of the Tribunal".[182]

78. Third, the Defence asserts that "the principle of the rule of law with regard to criminal law and the principle of legal certainty" support referral.[183] The application of Rule 60 *bis* to the facts alleged, it claims, results in legal uncertainty for the Accused, who could, for the same acts, face different laws, courts and penalties.[184] The Defence then cites the Tribunal's Appeals Chamber for the proposition that if there is a conflict between Lebanese law and the texts of the Tribunal, the Tribunal must apply the law more favourable to the rights of the

[175] Defence Motion, p. 21.
[176] *Id.* at para. 47.
[177] *Id.* at para. 50.
[178] *Id.* at paras 42-63.
[179] *Id.* at para. 63.
[180] *Id.* at paras 64-67.
[181] *Id.* at para. 64.
[182] *Id.* at para. 67.
[183] *Id.* at para. 68.
[184] *Id.* at para. 69.

Accused.[185] The Defence adds that the principle of territoriality implies that Lebanon can assume jurisdiction for any offence committed on Lebanese territory.[186]

79. Fourth, the Defence asserts that the Lebanese courts are better placed to adjudicate the offence alleged in this case because specific provisions of Lebanese law are intended for such offence and the courts are familiar with this type of case.[187] The Defence adds that "the limited nature and the seriousness of the alleged offences, as well as the fact that, if convicted, the sentence will be lighter", support referral to Lebanon.[188]

2. Position of the *Amicus*

80. The *Amicus* responds that the Defence request for referral should be dismissed.[189] He specifically addresses each group of Defence arguments in turn.

81. With respect to concurrent jurisdiction and the putative regime in Lebanon for dealing with a case of this nature, he cites my reasoning in the *New TV & Khayat* Jurisdiction Decision for the proposition that "interference with a court's administration of justice is best addressed – and sometimes can only be addressed – by that court itself".[190] He further asserts that the Defence arguments "become pointless when considering that no steps have been taken in Lebanon to safeguard the Tribunal's proceedings".[191]

82. As for prioritizing legal texts over regulatory texts, and therefore Lebanese law over the Tribunal's Rules, the *Amicus* contends that "concerning its administration of justice, [the Tribunal] is entitled to exercise its own full powers".[192]

83. Regarding the Defence claim that the application of Rule 60 *bis* creates legal uncertainty, he posits that there is "no hierarchy, overlap or conflict between the two systems".[193]

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[185] Defence Motion, para. 69.
[186] *Id.* at para. 71.
[187] *Id.* at para. 72.
[188] *Id.* at para. 73.
[189] Response, para. 40.
[190] *Id.* at para. 35.
[191] *Id.* at para. 36.
[192] *Id.* at para. 37.
[193] *Id.* at para. 38.

84. Finally, to the argument that Lebanese courts are better placed to adjudicate the offence alleged here, he counters that, on the contary, the Tribunal is best placed to protect its administration of justice.[194]

3. Discussion

85. I first note that, in seeking referral, the Defence is not challenging the Tribunal's jurisdiction *per se*, but instead proposing that justice would be better served by sending the case to Lebanese authorities. I could reject the referral request on this basis. Nonetheless, for the reasons given above,[195] and considering that the Defence makes several arguments touching on the Tribunal's jurisdiction and that can be fairly considered "preliminary" to the substance of the case, I am considering the request on its merits.

86. The Defence submission principally relies on Article 4 of the Statute, which provides, in relevant part:

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

The Defence contends that primacy under Article 4 (1) does not apply in this case, which supposedly falls outside the Tribunal's statutory jurisdiction. Therefore, the Tribunal's jurisdiction over contempt and obstruction of justice is concurrent with the national courts of Lebanon.

87. However, as I have held in case STL-14-05, Article 4, in its entirety, only applies to the primary jurisdiction of the Tribunal, under Article 1, to try persons suspected of the attack

[194] Response, para. 39.
[195] *See* above, paras 8-9.

against Prime Minister Rafiq Hariri and others.[196] Considerations of concurrent jurisdiction under Article 4 are thus inapposite in contempt and obstruction of justice cases, which merely follow and are incidental to the exercise of the Tribunal's primary jurisdiction. In other words, the jurisdictional basis for a contempt case is related to but not the same as the Tribunal's primary jurisdiction. Once Lebanon deferred jurisdiction of the *Ayyash et al*. case to the Tribunal pursuant to Article 4, the Tribunal possessed inherent jurisdiction over any ancillary and incidental matters in that case, including the protection of the Tribunal's administration of justice.[197] The "primacy" of this Tribunal in trying alleged contempt and obstruction of justice of the Tribunal has never been founded on Article 4, but rather on its inherent jurisdiction to protect the integrity of its proceedings.

88. Yet while Article 4 is no basis for referring this case to Lebanese authorities, this does not necessarily dispose of the question. That the Tribunal has inherent jurisdiction to try this case does not mean that it must exercise such jurisdiction, or that the conduct alleged here could not have been investigated and prosecuted in Lebanon. Indeed the Defence raises serious points in this regard, and I make no finding as to the ability or capacity of the Lebanese judicial system to deal with this matter. Despite the absence of any explicit reference in the Statute or the Rules to a power of the Tribunal to defer matters within its jurisdiction back to domestic authorities, such course of action might be possible under the Tribunal's inherent powers.

89. However, I note that the Defence has not brought to my attention any provision of Lebanese law for prosecuting contempt or obstruction of justice which occurred, as in this case, in *another* jurisdiction. Moreover, it has not suggested that the Lebanese authorities are actually taking action to actively investigate and prosecute these matters. Conversely, it is the Tribunal that undoubtedly has jurisdiction to ensure the integrity of its proceedings. Here, the previous Contempt Judge exercised his discretion, pursuant to Rule 60 *bis*, in issuing the Order in Lieu of an Indictment.[198] According to him, there were "sufficient grounds" to proceed with a contempt case against the Accused.[199] There is thus no practical justification for considering a referral.

[196] *See New TV S.A.L. & Khayat* Jurisdiction Decision, para. 46.
[197] *Id.* at para. 47.
[198] Indictment Decision, paras 62-67.
[199] *Id.* at para. 60.

90. As I have previously held, this Tribunal, like other international criminal courts and tribunals, does "not benefit from an independent external means of ensuring the integrity of [its] own proceedings".[200] It may thus be "the only authority that can effectively deal with this matter".[201]

91. The remainder of the Defence submissions are also unpersuasive. Reliance on "the principle of the hierarchy of norms" is inappropriate. Hierarchy of norms concerns pre-eminence of sources of law within a particular legal system. The principle is not relevant to determining which legal system should deal with a particular case, but rather what law should be applied in that case. Here, there is no hierarchy of norms issue. When exercising its inherent jurisdiction, as it is doing in this instance, the Tribunal does not apply the substantive criminal laws of Lebanon, which—I add once again—do not appear to be structured in order to protect the judicial process before other jurisdictions, such as this Tribunal. The Accused is charged pursuant to Rule 60 *bis*, whose terms clearly comprise the relevant law for contempt and obstruction of justice at this Tribunal. The Defence submission that Lebanon has "principal authority [...] in criminal and publication matters"[202] is simply incorrect with respect to interference with the Tribunal's administration of justice.

92. Further, as explained above,[203] the specific charge in this case is not inconsistent with the fundamental *nullum crimen sine lege* principle, and therefore the principle provides no basis for considering referral. Relatedly, the mere fact that the Accused *could* face prosecution for the same alleged conduct in Lebanon does not, as the Defence claims, create improper legal uncertainty. Again, the Accused is charged with one count of contempt and obstruction of justice pursuant to Rule 60 *bis* before this Tribunal. The applicable law and procedures are clear. Any conflict with Lebanese process is purely hypothetical, and the Defence citation of an Appeals Chamber finding with respect to resolving existing conflicts between Lebanese and international law is out of context and inapposite.[204]

93. Just like any other judicial body, this Tribunal's ability to ensure the integrity of its proceedings cannot and should not be dependent on action by, or the standards of, another

[200] *See New TV & Khayat* Jurisdiction Decision, para. 30.
[201] *See id. at* para. 55.
[202] Defence Motion, para. 67.
[203] *See* above paras 19-20.
[204] *See* Defence Motion, para. 69.

judicial system. In light of the Tribunal's inherent jurisdiction to deal with contempt and obstruction of justice, and the absence to date of any external actions to guarantee the Tribunal's administration of justice, I find no basis for considering a referral of this case to the Lebanese authorities.

III. Conclusion

94. In summary, I grant the Defence Motion in part and order that the charges against *Al Akhbar* S.A.L. be dismissed for lack of jurisdiction. The *Amicus* is ordered to submit a proposed amended order in lieu of an indictment that excises all references to *Al Akhbar* S.A.L. as an Accused in this case. I dismiss the Defence Motion in all other respects.

IV. Certification

95. As discussed above, some of the Defence challenges fall squarely under Rule 90 (B) (i), while I chose to address others under Rule 126.[205] This distinction is not purely academic because an appeal against my decision lies as of right only with respect to Rule 90. For an appeal under Rule 126, the parties must obtain certification. Another difference is that an interlocutory appeal under Rule 90 (B) (i) may be directed against the decision as a whole, while Rule 126 requires certification that one or more specific issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that immediate resolution of such issue(s) by the Appeals Panel may materially advance the proceedings.[206]

96. In my view, given that Rule 90 (B) (i) allows an appeal against the whole decision, and because the different parts of my decision should not be read in isolation, additional certification is not required. However, to avoid any doubt, and in the event the Appeals Panel (which has to determine this question of admissibility) disagrees with this analysis, I also find that the question of whether the Tribunal has jurisdiction to hear contempt charges against the corporate Accused indicted in this case is plainly an issue that "affects the fair and expeditious conduct" of the proceedings. It also requires "immediate resolution" by the Appeals Panel. While the *Amicus*

[205] *See* above, paras 8-9.
[206] I note that all appeals in contempt proceedings are brought before a specially designated Appeals Panel. *See* Rule 60 *bis* (M) STL RPE; STL, Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, STL-PD-2013-06-Rev.2, 2 July 2014; STL, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Special Tribunal for Lebanon, STL-PD-2013-Rev.1, 13 June 2013.

could—if he were so inclined—appeal my Decision at the end of the trial, it would not be efficient to do so. Indeed, if the Appeals Panel were to disagree with me, a new trial would have to be conducted against *Akhbar Beirut* S.A.L. A timely decision by the Appeals Panel would therefore materially advance the proceedings.[207]

97. Finally, I am satisfied that I have the power to certify an issue in my Decision *proprio motu.* Indeed, Rule 126 (C) does not make certification dependent on a request by the parties. The *Amicus* is of course not bound by such certification and there is no obligation on him to file an appeal. Nevertheless, I find it is in the interests of justice to ensure that appellate resolution of this matter may be sought without delay. I therefore certify the following issue: whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge *Akhbar Beirut* S.A.L., a legal person, with contempt.[208]

[207] *See Khayat & New TV S.A.L.* Jurisdiction Decision, para. 82.
[208] *See id.* at para. 83.

DISPOSITION

FOR THESE REASONS;

PURSUANT TO Rules 60 *bis* (H), 90 and 126 of the Rules;

I

GRANT the Defence Motion in part;

ORDER that the charges against *Akhbar Beirut* S.A.L. be dismissed;

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

CERTIFY for appeal the issue of whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge *Akhbar Beirut* S.A.L., a legal person, with contempt; and

DISMISS the Defence Motion in all other respects.

Done in Arabic, English and French, the English version being authoritative.
Dated 6 November 2014
Leidschendam, the Netherlands

Judge Nicola Lettieri
Contempt Judge