

BEFORE THE CONTEMPT JUDGE
SPECIAL TRIBUNAL FOR LEBANON

Case No.: STL-14-05/PT/CJ

Before: Judge Nicola Lettieri, Contempt Judge

Registrar: Mr Daryl Mundis, Registrar

Filing Party: *Amicus Curiae*

Date: 26 May 2014

Original language: Arabic

Classification: Public

IN THE CASE AGAINST

AL JADEED TV S.A.L.
KARMA MOHAMMED TAHSIN AL KHAYAT

LEGAL OPINION SUBMITTED BY
LEBANESE LAWYER ANTOINE JOSEPH SABEH*

ON CASES NO. STL-14-05 AND STL-14-06



Preamble

Given that both of the above-mentioned cases are based upon the same legal grounds and same criminal provisions, the opinion put forward below shall address them both in one text. We shall use the following abbreviations to refer to terms associated with these cases:

- **STL**: the Special Tribunal for Lebanon;
- **Judge**: Judge David Baragwanath, who issued the “Orders in lieu of indictments”;
- **Statute**: the Statute of the STL;
- **Rules**: the amended Rules of Procedure and Evidence;
- **CCP**: the Lebanese Code of Criminal Procedure;
- **CC**: the Lebanese Criminal Code;
- **LS 104/77**: the Lebanese Criminal Publications Act, promulgated pursuant to Legislative Statute no. 104/77 (amended);
- **Order**: the Order in lieu of indictment issued by the Judge;
- **The accused**: Al Jadeed TV s.a.l., Akhbar Beirut s.a.l., Ms Karma Al Khayat and Mr Ibrahim Al Amin.

Our opinion shall be limited to consideration of the jurisdiction of the STL, as we believe that this issue represents the basic premise for the decisions to be taken by the STL prior to addressing the substance of the two cases brought before it.

The jurisdiction of the STL

The conclusions of our study of this issue will confirm that the STL lacks jurisdiction to consider the crimes with which the accused are charged. Details of the study are as follows.

I. Description of the crimes with which the accused are charged

The four accused were summoned to appear before the STL pursuant to the Order prepared by the President of the STL, Judge David Baragwanath, charging them with committing the crimes of contempt and obstruction of the course of justice.

The Order alleges that the four accused intentionally published information relating to the identity of confidential witnesses and that such publication was designed to obstruct the

administration of justice in a manner incompatible with the provisions of Rule 60 *bis* (A) of the Rules (see paragraphs 3 and 4 of the Order).

It is understood from the above-mentioned charge that the accused published information relating to procedures, in the knowledge that this was in breach of an Order issued by a Judge (Rule 60 *bis* (A) (iii) of the Rules), thereby making themselves liable to a penalty of not more than seven years imprisonment and/or a fine of not more than EUR 100,000 (Rule 60 *bis* (J) of the Rules).

Summary: the criminal act with which the accused are charged is that of committing the crime of publishing that which it is forbidden to publish and which, according to the Order, will result in interference in the administration of justice, given that publication of the names of confidential witnesses is inconsistent with the principle of guaranteeing a fair and expeditious trial provided for in Article 28 of the Statute, as concluded by the Judge in his Order (item 10, page 5/31).

Note: the criminal act stipulated in the Rules corresponds to that stipulated in Article 12 of LS 104/77:

All publications are forbidden to publish:

1. The findings of criminal investigations before these have been read out in open session, and of trials *in camera*.....

However, the penalty stipulated in the aforementioned Article 12 is limited to a fine of between LBP 10,000,000 and LBP 30,000,000 only.

II. Original national jurisdiction

It should be stated at the outset that territorial jurisdiction in respect of the prosecution of crimes alleged to have been committed by Lebanese, by means of the Lebanese media, on Lebanese territory, belongs to the Lebanese judicial authorities, pursuant to the provisions of territorial jurisdiction stipulated in Article 15 et seq. of the Criminal Code.

It should also be stated that qualitative jurisdiction to hear cases of crimes committed by means of publication in any Lebanese print media or any Lebanese aural or visual media belongs

to the special exceptional court (the Court of Publications) appointed by Lebanese law to hear cases arising from such crimes.

In this context, it must be noted that Legislative Statute no. 104/77 (amended), exceptionally, restricts jurisdiction to rule on crimes of publication to the Court of Appeal (Article 28 of LS 104/77). Furthermore, Article 34 of the same statute stipulates that provisions in the Criminal Code and other Lebanese laws which conflict with this legislative statute shall be revoked under the provisions of the legislative statute, and the interests of the accused shall be upheld in relation to acts committed prior to the promulgation of this legislative statute, if the penalties contained in the Articles thereof are lighter than those in the corresponding Articles of the Criminal Code and other Lebanese laws.

Note that, in the context of crimes of publications, that which applies to the press also applies to the aural and visual media, pursuant to Article 35 (2) of the Television and Radio Broadcasting Act, no. 382/94 (amended).

The meaning of the foregoing is that all crimes of publication carried out by means of print, aural and visual media are to be heard, exclusively and compulsorily, by the Lebanese Courts of Publications.

Furthermore, it is worth noting that the jurisdiction of the Court of Publications, the rules it follows and the mandatory penalties derive their specific and absolute legitimacy from the provisions of Legislative Statute no. 104/77, which it is mandatory to apply. There may be no agreement to the contrary. Note that the said statute was originally formulated and subsequently amended a number of times to bring it into line with the principle of freedom of expression and freedom of opinion, and thus to protect the press and writers from arbitrary governmental and judicial regulations. Accordingly, we may see that it forbids preventive custody in respect of crimes of publication (final paragraph of Article 28), lightens prison sentences in several instances and reduces the authority of the Office of the Public Prosecutor at the Court of Appeal in respect of the right of seizure and halting publication or broadcasting. In other words, this statute has given the Lebanese press, its writers and journalists, fundamental legitimate rights, which may only be superseded by the promulgation of a law abolishing or amending these, and under no other circumstances.

III. Jurisdiction contested between the Lebanese Court of Publications and the STL

Pursuant to the description of the criminal act presented in the Order, the STL believes that it has jurisdiction to convict anyone who commits the act of publishing information the publication of which has been banned by judicial order. It considers that this jurisdiction is a sub-jurisdiction relating to the Rules, and that publication represents an act of contempt that wilfully obstructs the proper conduct of the trial, pursuant to the provisions of Rule 60 *bis* (A) (iii) of the Rules (see item 9 of the Order, page 4/31 of the Arabic version).

Pursuant to all of the above, the Order has created a dispute over jurisdiction between the exclusive and exceptional jurisdiction enjoyed by the Lebanese Court of Publications and the international jurisdiction granted by the Order to the STL.

IV. The study

It is noteworthy that the Order upholds the jurisdiction of the STL to hear the case against the accused, affirming that this jurisdiction derives from the jurisdiction of the STL under its Statute.

Referring to the STL Statute, specifically to Article 1 and 2 thereof, we find that Article 1 grants the STL exclusive jurisdiction to determine responsibility for the attack against Rafic Hariri and attacks connected thereto. Article 2 enumerates, exhaustively, the crimes whose perpetrators the STL may prosecute, as follows:

“The following shall be applicable to the prosecution and punishment of the crimes referred to in Article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.

The substance of the foregoing is that the STL has full jurisdiction over the crimes stated in Article 1, with the proviso that it examine them in accordance with the precepts of the Lebanese Criminal Code in matters relating to acts of terrorism and crimes and offences against life and personal integrity, and in accordance with Articles 6 and 7 of the Law of 11 February 1958 (see also the statement of the International Prosecutor on the issue of exclusive competence given

within the context of the Jamil El Sayed case and the opinion of the STL upholding this view in paragraph 30 of its related ruling of 17 March 2010).

It will be observed that, among the acts which the STL has been granted jurisdiction to hear pursuant to Article 1, there is no mention of the acts of contempt stipulated in Rule 60 *bis*, subsequently added to the Rules, and particularly as regards publication of information, which was added in the amendment to Rule 60 *bis* of 10 October 2010. Furthermore, Article 2 contains no legal reference other than the clauses relating exclusively to acts of terrorism, and crimes and offences against life and personal integrity. Certainly, the acts of terrorism and the crimes and offences intended in Articles 1 and 2, above, do relate to the assassination of Rafic Hariri and those killed with him, as well as to other connected cases, in accordance with the mechanism specified under Articles 11 and 12 of the Rules.

In this context, it should be pointed out that the legitimacy of the STL Statute is an exceptional, penal legitimacy. Its interpretation cannot be widened or analogies drawn. It must be narrowly applied. Here, the fundamental question arises: Does the STL have the right, of its own volition and without consulting the Lebanese judicial authorities, to widen the scope of its jurisdiction and set new penalties for new criminal acts that are not indicated clearly and explicitly in its Statute, particularly as the principles of international criminal procedure all stipulate that there is no penalty or crime in the absence of an explicit legal provision that is not the product of inference?

Accordingly, the text of Article 4 of the STL Statute needs to be examined very carefully, as it provides the basis for transferring jurisdiction to hear the crimes stipulated in Articles 1 and 2 from the Lebanese judicial authorities to the STL. We note that the STL only derives jurisdiction to hear all the crimes listed in the two aforementioned Articles following relinquishment by the Lebanese authorities of the jurisdiction of their courts (in this regard, see also the preamble to Rule 17 of the Rules). This means that, each time it wants to obtain a file relating to the criminal cases referred to it, and which is essentially subject to the competence of the national courts, the STL has to request that the Lebanese authorities relinquish the jurisdiction of their courts.

In this context, we draw attention to the fact that, even in cases arising from attacks that may be connected to the attack on Hariri, Rule 12 (B) of the Rules stipulates: “At the request of the President, the Registrar shall transmit the reasoned conclusions of the Prosecutor to the

Secretary-General [of the United Nations] so that the Security Council and the Government of Lebanon may determine whether or not to grant the Tribunal jurisdiction over the alleged crime”.

The request for the relinquishment of jurisdiction by the national courts in favour of the STL is a fundamental precept in the system of concurrent jurisdiction stipulated in Article 4 of the Statute and in Rule 17 of the Rules, and it is common legal logic that this precept should always regulate the jurisdiction of the STL. Otherwise, the competence of the national courts would be liable to infringement whenever the STL saw fit, of its own accord and its own volition, to amend its Statute and Rules in order to expand the scope of its jurisdiction to other crimes not directly linked to its original jurisdiction (which is confined to the assassination of Hariri and his escort and related crimes). Such is the situation in the present case, resting as it does upon the crime of publishing banned material which, of itself, represents a crime independent of those subject to the provisions of Articles 1 and 2 of the STL Statute.

On the basis of this fundamental precept, which regulates issues associated with concurrent jurisdiction, it is certain that the STL may not expand the scope of its jurisdiction to acts that are not indicated clearly and explicitly in its Statute (pursuant to the principle of the legitimacy of crime and punishment – Articles 1-11 of the Criminal Code). We cannot consider that the jurisprudence employed in the Order to maintain the jurisdiction of the STL in the present case – on the grounds that the STL has the right to hear matters relating to procedure and to ensuring the proper administration of justice (item 10 of the Order) – means that the present charge against the accused falls within that right, which remains:

1. Constrained by the authority of the STL to manage the trial and associated procedures; and the rules of trial should provide “the highest standards of international criminal procedure with a view ensuring a fair and expeditious trial” (Article 28 (2) of the Statute). This includes ensuring the soundness of the trial, the right to be represented by a lawyer, the right to study the case file and documents and other principles relating to the rights of defence and the rights of victims, without this right exceeding the scope of the rules and entering the sphere of crimination and punishment. In this context, any interpretation of Article 28 of the Statute that expands to give the STL powers to convict for crimes independent of those specified in Articles 1 and 2 of the Statute and within a mechanism that conflicts with or is inconsistent with the provisions of Articles 11 and 12 of the Rules, under the pretext of “ensuring a fair and expeditious trial”, will

represent a violation of the sovereignty of the Lebanese judiciary. Likewise, any interpretation of procedures relating to rules that widens to hold that these include the absolute and unconditional right of prosecution will represent an infringement of Lebanese law, the rules of jurisdiction stipulated in the Code of Criminal Procedure, the STL Statute and the Rules of Procedure and Evidence. Moreover, such an “elastic” interpretation will conflict with the international standards of interpretation enshrined in Articles 30 and 31 of the Vienna Convention (see “Interpretation of the Rules” in Rule 3 of the Rules);

2. Conditional upon requesting the Lebanese judicial authorities to relinquish the jurisdiction of their courts, for the reason we explained above, particularly as the act of publishing information which it is forbidden to publish and the punishment relating thereto were added to the Rules pursuant to Rule 60 *bis* subsequent to the date of the Lebanese authorities relinquishing the jurisdiction of their courts, which had been considering the case of the attack on Rafic Hariri and related attacks. It cannot then be claimed that the said relinquishment also includes what the Order calls related and implicit secondary cases;

3. Qualified by the special character which distinguishes the STL from other international tribunals, such as the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, Sierra Leone or Rwanda. Some of these tribunals apply only international law, while others apply both national law and international law. However, the STL applies the precepts of Lebanese law, while taking into consideration those international legal precepts which provide a greater degree of guarantee for the accused or convicted person (Article 2 and Article 28 (2) of the Statute; see also the speech of President Cassese on 16 February 2011 on the STL decision relating to applicable law).

“Let me start with the question of the interpretation of our Statute.

Here our point of departure has been that this Tribunal is different from other international courts, which only apply international law (as is the case, for instance, with the International Court of Justice or the International Criminal Tribunal for the Former Yugoslavia) and also from other tribunals, such as the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia, which apply both international law and national law. In contrast, the STL is called upon to apply to the facts that will be submitted to it only the rules of Lebanese substantive law relating to the definition of the crimes.

In consonance with international case law, generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts, unless such interpretation or application appears to be unreasonable, might result in manifest injustice, or proves not consonant with international principles and rules binding upon Lebanon.

More generally, when construing the provisions of our Statute, we hold that the Tribunal must interpret them with a view to furthering the purpose underlying the Statute: that of administering justice in a fair and efficient manner. We must also opt for the 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)."

Therefore the right of the STL to ensure the administration of justice will remain dependent upon the proper application of Lebanese law, particularly the Code of Criminal Procedure and other criminal laws, especially Legislative Statute no. 104/77 (amended), which regulates specifically and exceptionally the procedure for the prosecution of printed materials and writers and journalists who commit crimes by means of publication. This statute is the law most in tune with the rights of the accused.

On this basis, the independent judgements of other international tribunals, which apply specific procedures in prosecuting crimes of contempt and obstruction of the course of justice, such as the tribunals for Yugoslavia, Cambodia, Sierra Leone etc., do not apply to the STL, given the different circumstances and different legal practices, as explained above, particularly in relation to the mandatory condition of relinquishment of jurisdiction.

On this basis, too, the Lebanese jurisprudence adopted in the Order – page 8 of the Arabic text (footnote 34) – supports our view and does not contradict it, because the order was delivered by “the Court of Publications”, which has jurisdiction to prosecute crimes committed by means of publication, like a special court with binding authority.

On this basis, also, a narrow application of Article 4 (1) of the Statute is required. This paragraph stipulates: “Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon”. In other words, this primacy remains confined within the jurisdiction of the STL and may not be used as a pretext to grant the STL jurisdiction which is not stipulated or specified clearly and explicitly in the Statute. In other words, this primacy comes at a stage subsequent to the establishment of jurisdiction and may not be held to be a source of jurisdiction. As such, as long as it is the condition of relinquishment which grants jurisdiction, the said precept may not be applied to the present case.

V. Conclusion

Pursuant to the above, it is clear and unambiguous that the STL cannot put itself in the place of a special exceptional Lebanese court (the Court of Publications) to rule on a crime categorized by the Lebanese Criminal Code as a publications crime (LS 104/77, Article 12), and divest it of its mandatory jurisdiction without the Lebanese authorities having relinquished this jurisdiction to the STL, in accordance with the precepts expounded in the foregoing study. Consequently, the STL must recuse itself from the case against the four accused brought before it, due to lack of jurisdiction.

It must also be pointed out that relinquishment of jurisdiction by the Lebanese judiciary in favour of the STL is an exceptional measure that challenges mandatory precepts stipulated by Lebanese law and ratified by the Lebanese Parliament. Accordingly, to accord full legitimacy to the assumed relinquishment, it must be ratified by an act promulgated by Parliament pursuant to the principle of equivalence of form.

Such is what we have thought fit to put before that element of public opinion concerned with issues of the Special Tribunal for Lebanon, in fulfilment of the stated wish of the Judge responsible for hearing cases of contempt and for the benefit of the law in general.

As regards our opinion on the issues of the law to be applied and the criminal prosecution of a corporate body, we have the honour to refer you to our summary opinion published in the Lebanese newspaper, *L'Orient le Jour*, page 4, issue no. 14042 (16 May 2014), under the title, “UN AVOCAT LIBANAIS PASSE AU CRIBLE L’AFFAIRE DE L’OUTRAGE CONTRE LE TSL”.

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