

BEFORE THE APPEALS PANEL**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-14-05/PT/AP
Before: The Appeals Panel
Registrar: Mr Daryl Mundis
Date: 31 July 2014
Filing Party: *Amicus Curiae* Prosecutor
Original language: English
Classification: Public

**IN THE CASE AGAINST
NEW TV S.A.L. AND
KARMA MOHAMED TAHSIN AL KHAYAT**

**INTERLOCUTORY APPEAL AGAINST THE DECISION
ON MOTION CHALLENGING JURISDICTION**

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I. INTRODUCTION

1. Pursuant to Rule 126(E) of the Rules of Procedure and Evidence (“Rules”) of the Special Tribunal for Lebanon (“STL”) and the Contempt Judge’s decision certifying this matter for appeal, the *Amicus Curiae* Prosecutor (“*Amicus*”) respectfully appeals and submits his Interlocutory Appeal Against the “Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment” issued on 24-July-2014 (“Jurisdiction Decision”).¹

2. The certified question on appeal is “whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60*bis* has the power to charge legal persons with contempt.”² All of the errors asserted by *Amicus* are errors of law.

II. PROCEDURAL BACKGROUND

3. During the initial appearance on 13-May-2014, the Contempt Judge ordered the Accused to file their preliminary motions by 16-June-2014. The Contempt Judge invited all interested parties to file *amicus curiae* submissions on the Tribunal’s jurisdiction, to be filed by the same date. Responses to the Defence and *amicus* filings were due by 30-June-2014.

4. On 16-June, the Accused filed their “Defence Preliminary Motion Challenging Jurisdiction” pursuant to Rule 90(A)(i) (“Defence Motion”). On the same day, the Legal Representative of Victims (“LRV”) in *Ayyash, et al.* submitted a Request for Leave to Make *Amicus Curiae* Submissions together with their *Amicus Curiae* Brief.

5. On 30-June, *Amicus* submitted his Response to the Defence Motion. The Defence filed a Consolidated Defence Response to the LRV’s Request for Leave to Make *Amicus Curiae* Submissions and *Amicus Curiae* Brief.

6. On 24-July, the Contempt Judge issued his Jurisdiction Decision, which, *inter alia*, (a) granted the Defence Motion, (b) ordered that the charges against New TV S.A.L. be dismissed, and (c) ordered the *Amicus* to file a proposed amended order in lieu of indictment excising all references to New TV S.A.L. as an accused. The Contempt Judge ruled that the

¹ *In the Case Against New TV S.A.L. & Karma Khayat Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of Indictment, (24-July-2014).

² *Id.*, para.83.

Defence Motion was not a preliminary motion under Rule 90, but a motion under Rule 126, and certified his decision for interlocutory appeal, as set out above.

III. APPLICABLE LAW

7. An appeal may be lodged where the Trial Chamber (or, in this case, the Contempt Judge) has committed an error on a question of law invalidating the decision, has committed an error of fact that has occasioned a miscarriage of justice, or has weighed relevant considerations or irrelevant considerations in an unreasonable manner.³ All of the errors asserted here are errors of law.

8. As stated by the STL Appeals Chamber in the *Ayyash* case:

A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.⁴

9. *Amicus* respectfully submits that the errors asserted below invalidate the Jurisdiction Decision.

IV. THE TRIBUNAL HAS THE POWER TO CHARGE LEGAL PERSONS WITH CONTEMPT AND THE CONTEMPT JUDGE ERRED IN RULING TO THE CONTRARY

A. The *raison d'être* of international tribunals is the fight against impunity, wherever it is found, including as to contempt.

10. International tribunals have repeatedly eschewed narrow, technical interpretations in favor of broader, pragmatic interpretations in the spirit of the fight against impunity, to carry out that fight as effectively as possible.⁵ In Decision on Appeal of Pre-Trial Judge's Order

³ Article 26; Rule 176; *In the Matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr. Sayed of Pre-Trial Judge's Decision of 12-May-2011 (19-July-2011), para.22.

⁴ *Prosecutor v. Ayyash, et al*, Decision on Defence Appeals," STL-11-01/PT/AC/AR90.1 (24-October-2012) (Decision on Appeals"), para.10.

⁵ ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06 OA 15 OA 16, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 (8-December-2009),

Regarding Jurisdiction and Standing,⁶ the Appeals Chamber rejected a strict interpretation of jurisdiction and gave a broad interpretation to “indictment,” in finding that the Tribunal had jurisdiction to hear Jamil El Sayed’s application for access to his file, even though he was not a “suspect” within the Statute’s meaning.⁷

B. Contempt and obstruction of justice are inherent international crimes, not based on the Statute or Rule 60bis.

11. The Contempt Judge correctly ruled that the crime of contempt⁸ is based on the Tribunal’s inherent power and jurisdiction.⁹ The Statute does not mention the word “contempt” and is not the source of the crime or the Tribunal’s jurisdiction over it. Nor does the contempt power have its source in Rule 60bis. Even if Rule 60bis had never been adopted and did not exist, the crime of contempt would still exist and the Tribunal would still have full power and jurisdiction to investigate, indict, prosecute and adjudicate such crimes. A tribunal’s contempt power must be broad, in order to allow the tribunal to function and to function effectively, in addressing any situation which may interfere or impede the administration of justice.¹⁰

C. The contempt power exists in its broadest, fullest sense, without any substantive or jurisdictional limitation (except that the alleged criminal conduct must be linked in some way to the Tribunal’s work or functions).

12. Contempt rules at the international tribunals, such as Rule 60bis, are drafted broadly, to reflect the full and flexible scope of a tribunal’s inherent power.¹¹ Tribunals have

para.77. As to the inherent power of international courts generally, *see* Decision on Appeals, *supra*, paras.41-57.

⁶ *In the Matter of El Sayed*, STL CHI AC/20 10/02, Decision On Appeal Of Pre-Trial Judge’s Order Regarding Jurisdiction And Standing (10-November-2012), para.17.

⁷ *Id.*, para.61.

⁸ As used hereafter, the crime of contempt also includes “obstruction of justice.”

⁹ Jurisdiction Decision, para.26-35. *See Prosecutor v. Tadić*, IT-94-1-A-AR77 (31-January-2000) (“*Tadić*”), paras.12, 24; *see also* Judge Ebo-Osui’s statement at the ICC (“apart from any specific provision of the Rome Statute, conducts such as those may also amount to contempt of Court under customary international law or general principles of law recognised by civilised nations”), *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11 (“*Ruto*”), Transcript of 18-September-2013, at 3, ll.19-22.

¹⁰ *Tadić*, para.18.

¹¹ ICTY Rule 77; ICTR Rule 77; SCSL Rule 77; ECCC Extraordinary Chambers Internal Rule 35.

repeatedly refused to give such rules a narrow or technical meaning, but have, e.g., held that the types of conduct enumerated in such rules are non-exhaustive and illustrative only,¹² so that the contempt power may reach even unforeseen situations.

13. The Contempt Judge correctly ruled that “the [Tribunal’s] inherent [contempt] jurisdiction . . . certainly broaden[s] the scope of the Tribunal’s authority *ratione materiae* (and *ratione temporis/loci*) by allowing it to punish conduct after 2005 not criminalized under the terms of the Statute” -- that is, that the statutory limits on jurisdiction do not apply to contempt.¹³ Indeed, the Contempt Judge recognized that it would not make sense to confine the Tribunal’s inherent contempt power to the limits on *ratione materiae*, *ratione loci* and *ratione temporis* stated in the Statute because it would render the inherent power “toothless,” as, e.g., not able to reach contemptuous conduct concerning the STL after December 2005 or outside the territorial jurisdiction of the statutory war crimes (e.g., only contemptuous conduct on the territory of the former Yugoslavia, but not in The Hague or elsewhere). As the Contempt Judge rightly concluded, “if the Tribunal’s subject matter, temporal and territorial jurisdiction for contempt here were confined by the Statute, no interference with the administration of the Tribunal’s justice could be prosecuted; the inherent power of contempt, and Rule 60*bis*, would effectively be rendered meaningless.”¹⁴

14. Unfortunately, the Contempt Judge departed from all of these correct statements by erroneously ruling that the Tribunal’s inherent contempt power is nonetheless limited by the Statute to reaching only natural persons, even though there is no international law so limiting a court’s inherent contempt power (unless expressly stated, specifically as to contempt, in a tribunal’s statute) and there is no express language in either the Statute or Rule 60*bis*, specifically as to contempt (as opposed to the Tribunal’s jurisdiction as to statutory crimes), imposing such a limitation.¹⁵

D. The Contempt Judge erred in ruling that the inherent contempt power is limited to natural persons.

¹² *Prosecutor v. Aleksovski*, IT-95-14/1-AR77 (30-May-2001) (“*Aleksovski*”), paras.38-40; *Tadić*, *supra*, paras.12, 24.

¹³ Jurisdiction Decision, para.65 (emphasis added).

¹⁴ *Id.*

¹⁵ ICTY, Art. 6; ICTR, Art. 5; ICC Art. 25; ECCC, art. 2, MICT, Art.1(1).

15. Contrary to all of the foregoing, and despite having found (a) that contempt is based on a court's inherent power and is not based on either the Statute or Rule 60*bis* and (b) that the statutory limits that otherwise apply to the Tribunal's *ratione materiae, temporis and loci* do not apply to contempt, the Contempt Judge committed error in ruling that Statute Articles 2 and 3 limit the Court's contempt power to natural persons, and that the court's inherent contempt jurisdiction could only be expanded or extended to legal persons if Rule 60*bis* indicates such an expansion.

16. First, and once again, the Tribunal's contempt power is not based on or derived from the Statute, and without expressly saying so, the Statute does not limit the court's inherent power. Second, and with every respect, the Tribunal has no power to expand its jurisdiction by adopting a rule, so it is a fallacy to suggest that this could even happen. As the ICTY Appeals Chamber stated in *Tadić*:

Care must be taken not to treat the considerable amount of elaboration which has occurred in relation to Rule 77 (ICTY contempt rule) over the years as if it has produced a statutory form of offence enacted by the judges of the Tribunal, notwithstanding the form in which Sub-rules (A) to (D) may be expressed. Article 15 of the Tribunal's Statute gives power to the judges to adopt only-

[...] *rules of procedure and evidence* for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

That power does not permit rules to be adopted which constitute *new* offences, but it does permit the judges to adopt *rules of procedure and evidence* for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction.¹⁶

17. The situation here is exactly the opposite: the Tribunal's full contempt jurisdiction, over all actors and conduct, which is inherent and not based on either the Statute or Rule 60*bis*, is in no need of expansion, and, contrary to being expanded, could only be limited by the adoption of express language in Rule 60*bis* imposing such a limitation. There is no such language in Rule 60*bis*, and such a limitation cannot be manufactured based solely on the word "person," which is not inherently limited to natural persons.

E. The Tribunal's contempt power is not, and should not be limited based on a smattering of definitions in the Statute and Rules

¹⁶ *Tadić*, supra, para.24.

18. The *Amicus* position is that there is no need for, and no resort should be taken to definitions or particular words in the Tribunal's Statute and Rules, as they are not the source or basis of the Tribunal's contempt power. If the Appeals Chamber, however, is minded to consider these matters, *Amicus* respectfully submits that no compelling support can be found there for limiting the court's inherent powers.

19. The Contempt Judge erroneously concluded that the word "person" in the Statute and Rules is limited to "natural person."¹⁷ There is, however, no single interpretation and no compelling reason why "person" must be given a narrow meaning limited to natural persons, when it is widely known in national and international legal circle that, in law, "person" can and very often does mean both natural and legal persons.

20. In fact, the Report of the Secretary-General on the Establishment of the Special Tribunal for Lebanon, in explaining why Statute Article 1 does not prescribe personal jurisdiction, states:

Article 1 of the statute . . . provides that the tribunal shall have jurisdiction 'over persons' responsible for the crimes falling within its subject matter jurisdiction, whose modes of criminal responsibility are further elaborated upon in article 3. Within the all-inclusive definition of the personal jurisdiction of the tribunal, the prosecutor will be free to pursue her or his prosecutorial strategy and to determine the list of potential indictees according to the evidence . . .¹⁸

21. Consistent with the STL's "all-inclusive" jurisdiction, Rule 2(A) makes an important distinction in defining "Accused," "Suspect" and "Victim." In defining "Accused" and "Suspect," only the word "person" is used, without qualification or limitation, whereas the Rule uses "natural person" in defining "Victim." By these definitions, "Accused" and "Suspect" include any and all persons, of all sorts, both natural and legal, while a "Victim" is limited to natural persons. The rule makers clearly understood the difference between "persons" and "natural persons" and if they had intended to limit suspects and accused to natural persons, they would have clearly said so, just as they did as to victims.

22. The fact that Article 3 on superior responsibility concerns a mode of responsibility for natural persons does not contradict Articles 1 and 2 or dictate that every occurrence of

¹⁷ Jurisdiction Decision, para.72.

¹⁸ *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, U.N. Doc. S/2006/893, at 15 (emphasis added).

“person” in the STL’s documentation be limited to “natural persons.” Likewise, the fact that Article 16 makes limited use of the pronouns “he” and “she” is not a compelling basis for limiting the Tribunal’s inherent contempt power. Texts setting out the rights of accused in legal systems which recognize corporate criminal liability have not been changed to include “it.”

23. The Contempt Judge also stated that “the fact that [Rule 60*bis*] provides for custodial sentences and fines . . . suggests that its drafters did not envisage legal persons as under its purview.”¹⁹ To the contrary, the fact that Rule 60*bis* provides for custodial sentences and/or a fine plainly allows for the punishment of both natural and legal persons. In fact, domestic criminal codes which provide for corporate criminal liability routinely include punishment provisions that envisage both custodial sentences and/or fines, which are then applied as the case may be. Article 210 of the Lebanese Criminal Code states that a legal person can be sentenced to a fine, confiscation and publication of the judgment, and if the law should provide for a principal penalty other than a fine, the fine shall replace the penalty.²⁰

24. Nor can support for the Contempt Judge’s narrow interpretation of “person” be found in the debates concerning the statute of the International Criminal Court (“ICC”). During the conference negotiations, France proposed that the ICC’s jurisdiction concerning statutory crimes include legal persons.²¹ While many States had no difficulties with the proposal, in the end, it was not adopted.²² This result must be taken for what it was -- a negotiated result among compromising parties and not as a statement (and certainly not a judicial statement) of international law, which, in any event, is not binding on the STL. It is noteworthy, however, that when ICC negotiators chose to limit the court’s statutory jurisdiction to natural persons,

¹⁹ Jurisdiction Decision para 69.

²⁰ Lebanese Criminal Code, Version française (publiée par la Librairie Antoine, éd. de 2009) Article 210. « Lorsqu'une peine principale autre que l'amende est portée par la loi, elle sera remplacée à l'encontre de l'entité juridique par cette dernière peine dans les limites établies par les articles 53, 60 et 63 ».

²¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II*, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, pp.49-51; Draft Statute for the International Court, U.N. Doc A/CONF 183/2/Add.1 (1998), art.23.

²² Andrew Clapham, “The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court” as cited in Menno T. Kamminga & Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000), at 156.

they specifically used the term “natural persons,” not the broader, more encompassing “persons.”²³

F. No other jurisdictional aspect of the contempt power (temporal, territorial or otherwise) is limited by the Statute or Rule 60bis, and there is no basis for applying a different approach to personal jurisdiction.

25. The justification offered by the Contempt Judge for this singular limitation on the Tribunal’s inherent contempt jurisdiction is that because natural persons associated with a corporation can be prosecuted for contempt, his limitation of the Tribunal’s contempt jurisdiction to natural persons does not render the contempt power completely meaningless.²⁴ As further set out below, *Amicus* respectfully submits that this does not provide anything like sufficient justification for an unwritten limitation on the contempt power and, contrary to all other interpretations and rulings concerning such power, substantially limits its effectiveness and may result in complete impunity where a corporation clearly engages in contemptuous conduct, but no particular natural person, for any number of reasons, can be prosecuted.

G. Unlike the inherent crimes of contempt and obstruction, *societas delinquere non potest* is not a rule of international law, but only a maxim currently found in a decreasing number of legal systems.

26. The Contempt Judge incorrectly ruled that “to read ‘person’ in the Statute as including legal persons would require explicit language to that effect, or some other positive expression of such intent, in the Statute or the Annex to Security Council Resolution 1757,”²⁵ even though the contempt power is not based on, or in fact found in the Statute. The Contempt Judge incorrectly ruled that only some such language, in either the Statute or Rule 60bis, would allow him to depart from the maxim *societas delinquere non potest* and “extend” or “expand” the contempt jurisdiction, as if the maxim is somehow international law binding on the Tribunal.²⁶ In fact, the maxim is not a statement of international law, but only a statement followed in a decreasing number of legal systems.

²³ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra.*

²⁴ Jurisdiction Decision, para 67.

²⁵ *Id.*, para.63.

²⁶ *Id.*, para.68 (“extension of the authority to prosecute legal persons must have at least *some* basis); para.71 (“to expand the interpretation of the term “persons” to cover legal persons”); and para.75 (“an expansion of the meaning of the term “persons” to include entities beyond natural persons”).

H. The Contempt Judge committed error in disregarding relevant national law and major international trends recognizing the criminal liability of legal persons.²⁷

27. The global reality is that legal persons (and in particular, corporations) have become powerful actors in every sector of modern life, often dwarfing natural persons and playing dominant roles in our societies, for both good and bad. In this context, the vast majority of national legal systems have recognized the need to close the gap of corporate impunity and hold legal persons, as well as natural persons, criminally responsible. The overwhelming trend is to extend criminal liability to legal persons.

28. Corporate criminal liability has long been a feature of common law systems, and in 1988, the European Union encouraged its member States to adopt some form of corporate criminal responsibility:

To render enterprises liable, consideration should be given in particular to:

- a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require;
- b. applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal.²⁸

29. Since that time, a great many civil law systems have rejected the outdated maxim *societas delinquere non protest* and adopted various forms of criminal or quasi-criminal corporate liability.²⁹ A 2012 draft Statute of the African Court of Justice and Human Rights includes criminal responsibility for legal persons.³⁰

²⁷ Jurisdiction Decision, para.74

²⁸ Recommendation No. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities (20-October-1988). See also Second Protocol of the Convention on the Protection of the European Communities' Financial Interests Art.3, "Liability of legal persons" (Official Journal C 221, 19-July-1997); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art.2, "Responsibility of Legal Persons" (21-November-1997) (adopted by 34 OECD member countries and seven non-member countries: Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa).

²⁹ The following States, *inter alia*, have instated some forms of corporate criminal liability: Argentina (Art.303, Argentine Code of Commerce); Australia (Section 12.3 Criminal Code Act 1995); Austria (Section 2 Law on the Responsibility of Associations 2006); Belgium (Art.5 Criminal Code); Brazil (Art.3 Law 9.605 on Environmental Crimes 1998); Canada (Section 718.21 Criminal Code); Chile (Law 20.393 on Criminal Responsibility of Legal Persons 2009); China (Art.30 of Criminal Code "unit crimes"); Croatia (Law on Criminal Liability of Legal Entities 2003); Cyprus (Criminal Code); Denmark (Art.25-27 Criminal Code); Finland (Chap.9 Finnish Penal Code); France (Art.121-2 Penal Code); Guatemala (Art.38 Criminal Code);

30. Most notable among the civil law countries which have adopted corporate criminal responsibility, for the purposes of this case, are France and Lebanon. France has often been considered the archetypical civil law system and the Lebanese legal system, including its Criminal Code, is largely based on or derived from the French system. In 1992, France implemented the Nouveau Code Pénal, a comprehensive revision of the French criminal code which includes corporate criminal liability.³¹ Lebanon was one of the earliest countries to adopt corporate criminal liability, in 1943, in Article 210 of the Lebanese Criminal Code.³² The fact that Lebanese law clearly includes corporate criminal liability and that jurisdiction over legal persons was not expressly excluded from the Tribunal Statute demonstrates the intention of the drafters not to exclude it. There is certainly no reason to exclude it from the Tribunal's inherent powers.

31. Although the Contempt Judge recognized that "unanimity is certainly not required," he went on to say that "I do not believe it would be appropriate to discount the many important legal systems where corporate liability is not accepted."³³ But in doing so he discounted the great number of those who do, including Lebanon.

32. The Contempt Judge identified Germany and Italy as two national systems which have not recognized corporate criminal responsibility, but in fact, both countries have adopted quasi-criminal/administrative schemes for holding legal persons accountable --

Iceland (Art.19 Penal Code); India (Sections 2&11 Penal Code); Ireland (Section 9(1) Prevention of Corruption Act2001); Israel (Section 23 Penal Law 1977); Japan (Act Preventing Escape of Capital to Foreign Countries 1932, introducing the Ryobatsu-Kitei (double punishment) concept, according to which in the event of a natural person committing an offence, an associated legal person may also be punished); Lithuania (Art.20 Criminal Code 2003); Kenya (Section 23 Penal Code); Malaysia (Article 6(11) Penal Code); Netherlands (Art.51 Penal Code); New Zealand (Section 2(1) Crimes Act 1961); Norway (Section 48a Criminal Code); Panama (Art.51 Penal Code); Poland (Law on Liability of Collective Entities for Acts Prohibited under Penalty 2002); Portugal (Law 59/2007); Romania (Art.19.1 Penal Code); South Africa (Section 332 Criminal Procedure Act 51, 1977); South Korea (Art.4 Act Preventing Bribery of Foreign Public Officials in International Business Transactions); Switzerland (Art.102 Penal Code); Thailand (Commercial Banking Act 1962; Anti-Money Laundering Act 1999); UAE (Art.65 Penal Code); UK (Corporate Manslaughter and Corporate Homicide Act2007); USA (Model Penal Code §2.07 1985; United States v. Singh, 4th Cir. 2008); Montenegro (Law on Criminal Liability of Legal Persons 2006); Serbia (Law on Criminal Liability of Legal Persons 2009).

³⁰ Jurisdiction Decision, para.117.

³¹ B. Boulloc, *La Criminalisation du Comportement Collectif-France*, in *Criminal Liability of Corporations*, XIVth International Congress of Comparative Law, *supra* note 75, at 235, 237.

³² Lebanese Criminal Code, Legislative Decree No. 340 of 1 March 1943, art. 210.

³³ Jurisdiction Decision, para.74.

Germany in 1968³⁴ and Italy in 2001.³⁵ In Italy, it was clear that the previous system was not working, when, concerning corporate crime, a responsible natural person was often not easily identified,³⁶ and the required elements of *actus reus* and *mens rea* might be spread over a number of individuals.³⁷ The Tribunal, of course, has only its inherent contempt power, and not an alternative quasi-criminal apparatus.

33. Criminal responsibility of, and jurisdiction over legal persons has been widely adopted as essential to closing an impunity gap,³⁸ and the Contempt Judge committed error in finding it “preferable” not to do so.³⁹

I. The Contempt Judge erroneously concluded that the fact that natural persons can be prosecuted “does not render [the Tribunal’s] contempt power meaningless,” since “natural persons who comprise a corporation . . . can still be held responsible for interfering with the administration of justice and this makes the Tribunal’s authority to deal with contempt and obstruction of justice effective.”⁴⁰

34. The Tribunal’s fair and effective administration of justice may be attacked, undermined, impeded and threatened in an almost unimaginable number of ways and by a wide range of actors, especially in the hostile circumstances in which many international criminal courts work and with the constantly evolving technological capabilities for doing harm and putting a tribunal’s work at risk. It is for this very reason that the contempt powers of international tribunals have been given a broad and flexible construction. As stated by the Appeals Chamber, “[t]he tenet of construction that a statute is presumed to be ‘always speaking’ recognizes the reality that society alters over time and interpretation of the law may

³⁴ Gesetz über Ordnungswidrigkeiten, OWiG, vom 24. Mai 1968, Bundesgesetzblatt 1968 I, 481 (German Act on Regulatory Offences) (“OWiG”), §30.

³⁵ D.LGS 231/2001.

³⁶ Or, even when identified, the company would not itself pay any consequence from the crime and could keep on pursuing its activity without any damage. The same logic applies to the corporations led by criminal enterprises. See Relazione Ministeriale al D.Lgs 231/2001; R.Zannotti *Il nuovo diritto penale dell'economia: reati societari e reati in materia di mercato finanziario*, Giuffrè 2008, citing the “Siemens Case,” Trib.Milano-GIP, Ord.27-April-2004.

³⁷ G. Lattanzi, *Reati e responsabilità degli enti. Guida al d. lgs. 8 giugno 2001*, Giuffrè 2010.

³⁸ “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.” *El Sayed, supra*, paras. 44-46.

³⁹ Jurisdiction Decision, para.79.

⁴⁰ *Id.*, para 67.

always evolve to keep pace.”⁴¹ The power and capabilities of corporations, in terms of the assets that they can bring to bear, the harm they can do and the ways they can shield individual natural persons in the corporate machinery from accountability are realities that international courts cannot ignore, but must address.

35. In the situation here, it was entirely appropriate for the Tribunal President, in applying the principle of effective remedy and the rights of victims to obtain justice, to look at the role and realities of "media" legal persons, in connection with the charged efforts to undermine the Tribunal's work. Indeed, the large-scale, widespread publication and dissemination of information to an entire country or population is, in most instances, not accomplished by the work of one or two natural persons, but by the very substantial apparatus, resources and workings of a corporation or similar entity operating newspapers, television stations, internet sites and other media outlets. And while the immediate victim of the crime of contempt is the court itself, contemptuous conduct can have significant, harmful impacts on individuals, including victims and witnesses and their efforts to obtain justice.⁴² Here, the example of a

⁴¹ *Prosecutor v. Ayyash et al.*, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16-February-2011) ("Applicable Law"), para.20.

⁴² It was error and unfair for the Contempt Judge to exclude the LRV's Request for Leave to Make *Amicus Curiae* Submissions (16-June-2014, where the LRV, in representing persons who may be the victims of contemptuous conduct or violations of court orders or improper disclosure, has just as legitimate an interest in the matters on which the Contempt Judge invited submissions as the eighteen parties from whom the Contempt Judge accepted submissions. The Contempt Judge's invitation was broad, allowing "any interested party" to make a submission. (Transcript of 13-May-2014 (T2), at 21.) In rejecting the LRV submission, the Contempt Judge stated that, "especially in light of the seeming collaboration between the LRV and the *Amicus Curiae* Prosecutor [footnote omitted], I find that the position of the LRV could be considered as partial." (Jurisdiction Decision, para. 9.) First, even assuming that any such collaboration could somehow be improper (as parties having similar interests often collaborate and properly so, in the interests of efficiency, word limits and judicial economy), any alleged collaboration concerning the LRV submission is simply untrue. *Amicus* did not discuss or see that submission until it was filed. Second, the Contempt Judge might just as well have speculated that there was collaboration between the Accused and the various friendly media and similar organizations in Lebanon who made eighteen submissions, such as the Order of Lebanese Press Editors, the Federation of Arab Journalists General Secretariat, the Arab Reporters for Investigative Journalism and Talal Salman, as Editor-in-Chief of the *As-Safir* newspaper, and might as well have considered that such organizations or individuals "could be considered as partial" to the Accused and their interests. (Indeed, it appears that the *amicus* brief from Marhaba News was sent to Al Jadeed TV's corporate counsel for filing, before this information was subsequently removed from the filing.) Further, the possibility that a party "could be considered partial" should not have been a factor in any event, as the only relevant considerations were whether the party was "any interested party" and had something at least facially relevant to say within the scope of the court's invitation, which the LRV submission plainly did. Of interest, the Contempt Judge noted that "not all of the briefs received complied fully with the required formalities, [but] I exceptionally ordered the Registry to file them all on the record." (Jurisdiction Decision, fn.10). It seems that, at least generally speaking, only parties sharing interests with or possibly partial to the Accused were allowed to make submissions. Further, it was unfair to only exclude the LRV submission after all briefing was concluded and as part of the Jurisdiction Decision, whereby *Amicus* could not have known (until it was too late) that the submission was rejected, for purposes of referring to or adopting various of the LRV's arguments, which is a perfectly legitimate thing for a party to do. Further, if the LRV submission was rejected (as it was), the Contempt Judge should not have considered on-the-

media outlet is quintessentially pertinent, in the massive distribution of information alleged here. In a recent ICC hearing, Judge Chile Eboe-Osuiji issued a special reminder to “[m]embers of the press, bloggers, social media members or participants, and their web hosts are particularly called upon to desist from doing anything that would reveal or attempt to reveal the identity of protected witnesses or to engage in secondary dissemination of such wrongful and illegal information.”⁴³

36. Given the operation of complex corporate machinery, it may be very difficult or even impossible to identify the most responsible individuals, and the *actus reus* and *mens rea* elements may be spread among multiple persons at various corporate levels such that no natural person can be effectively prosecuted. Senior corporate managers may hide behind the corporate entity itself and delegate to lower-level employees the carrying-out of particular steps in an alleged crime. In these situations, there may be no alternative to prosecuting the corporate entity. Or if individual actors in a corporate environment repeatedly commit acts of contempt, a tribunal may tire of or find it less than effective to continue prosecuting each cog in the wheel, where prosecuting the corporation might put an end to the crimes, once for all.

37. A narrow interpretation of the Tribunal’s contempt power creates a zone of impunity for legal persons and indirectly for natural persons, too, where, as indicated above, they can hide among the corporate machinery. The fact that a particular interpretation of the court’s important power to administer justice and police its proceedings does not render that power entirely “meaningless” does not mean that it can operate effectively, in addressing a continuing array of challenges.

J. Recognizing the full scope of the Tribunal’s contempt power does not involve circumstances which require that Rule 60bis be interpreted in a way most favourable to the accused.

38. Rule 3(B) only requires “the adoption of such interpretation as is considered to be the most favourable to” the accused in circumstances where there is (a) an ambiguity and (b) the ambiguity is not resolved as provided in Rule 3(A). *Amicus* submits that abundant law,

merits arguments made in the Accused’s Consolidated Response [opposing] the LRV *Amicus Curiae* Brief, which he apparently did at footnote 119.

⁴³ “Web hosts” refers to the legal persons managing the servers hosting a website. *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Transcript of 18-September-2013, p.4, ll.7-11.

standards and principles, including the Lebanese Criminal Code and Code of Criminal Procedure, plainly resolve and confirm that the full scope of the Tribunal's inherent contempt power includes the prosecution of legal persons, so that Rule 3(B) does not apply. Further, the principle stated in Rule 3(B) is subject to the principle of effectiveness,⁴⁴ which requires "an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner."⁴⁵ The Tribunal is "best enable[d]" if its inherent contempt power is applied in its full scope, including as to legal persons.

V. CONCLUSION

39. The Contempt Judge erroneously limited the Tribunal's inherent contempt power, without support in the law and contrary to the spirit and policy of the fight against impunity. In doing so, the Contempt Judge reduced the Tribunal's capacity to deal with the full range of actors, threats and conduct which may interfere with or impede the administration of justice, contrary to the broad, encompassing and flexible nature of the contempt power.

40. The Jurisdiction Decision is erroneous. Had the Contempt Judge not made the errors set out above, the outcome concerning the Defence Motion would have been different, in that the Contempt Judge would have concluded that the Tribunal has the "power to charge legal persons with contempt" and the corporate accused New TV S.A.L. would not have been dismissed.

VI. RELIEF SOUGHT

41. **WHEREFORE**, *Amicus* asks that the Jurisdiction Decision be reversed and the charges against New TV S.A.L. be reinstated.

Word count: 5864

⁴⁴ Applicable Law, *supra*, para.32.

⁴⁵ ICTY, *Prosecutor v. Furundzija*, Declaration of Judge Robinson, Judgement of 21 July 2000, para. 276.

RESPECTFULLY SUBMITTED ON THIS 31 JULY 2014.

Kenneth Scott

Mr Kenneth Scott
Amicus Curiae Prosecutor

