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## In Re Akhbar Beirut & Al Amin

Monica Hakimi

*University of Michigan Law School, mhakimi@umich.edu*

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*International criminal law—contempt—interference with prosecution—liability of corporate entities—definition of “person”*

IN RE AKHBAR BEIRUT & AL AMIN. STL-14-06/S/CJ. At <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06>.

Special Tribunal for Lebanon, August 29, 2016.

On August 29, 2016, the Special Tribunal for Lebanon (Tribunal) sentenced a corporate media enterprise and one of its employees for contemptuously interfering with the Tribunal's proceedings in *Ayyash*, a prosecution concerning the February 2005 terrorist attack that killed former Lebanese Prime Minister Rafiq Hariri.<sup>1</sup> The contempt decision is significant for two reasons: (1) it adopts an expansive definition of the crime of contempt to restrict a journalist's freedom of expression; and (2) it is the first international judicial decision to hold a corporate entity criminally responsible.

<sup>1</sup> See In re Akhbar Beirut & Al Amin, Case No. STL-14-06/S/CJ, Reasons for Sentencing Judgment (Spec. Trib. Leb. Sept. 5, 2016), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/other-filings-stl-14-06/5190-f0265>. Documents concerning *Ayyash* are available at <https://www.stl-tsl.org/en/the-cases/stl-11-01>.

*Akhbar Beirut & Al Amin* arose out of two January 2013 articles that appeared in the *Al Akhbar* newspaper and on its Arabic and English language websites. The articles were available online until February 2016. They listed the names, photographs, and other personal identifying information of thirty-two people who were alleged to be witnesses before the Tribunal. In addition, they provided summary accounts of a few purported witness statements before the Tribunal. One article claimed that “close observers of the ‘Hariri Tribunal’ can confirm that most of its files, if not all of them, are disclosed to those who wish to obtain them.”<sup>2</sup> Both articles were attributed to Ibrahim Al Amin, the editor in chief and chairman of the board of directors of *Al Akhbar*.

*Al Akhbar*’s corporate entity, *Akhbar Beirut*, and Mr. Al Amin were charged with contempt under Rule 60*bis*(A) of the Tribunal’s Rules of Procedure and Evidence. That rule provides that “[t]he Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and willfully interfere with its administration of justice . . . .”<sup>3</sup> The rule then contains a nonexhaustive list of conduct that qualifies as contemptuous interference. The list includes intimidating or interfering with a Tribunal witness. But the charge in this case was not that the published articles obstructed or interfered with actual Tribunal witnesses; it was that publishing information about *purported* witnesses interfered with the administration of justice by undermining public confidence in the Tribunal’s ability to protect the confidentiality of information relating to Tribunal witnesses.

Comparable charges were simultaneously filed against a different media organization, *New TV*, and one of its employees, Karma Al Khayat. The *New TV* and the *Akhbar Beirut* defendants all appeared before the same contempt judge, Judge Nicola Lettieri. However, the *New TV* defendants were ultimately acquitted.<sup>4</sup>

Judge Lettieri issued a redacted version of his judgment in *Akhbar Beirut & Al Amin* on July 15, 2016. The judgment asserted that the *actus reus* in this case would be satisfied if: (1) the accused published information on purported confidential witnesses; and (2) such publication created a likelihood of undermining public confidence in the Tribunal’s ability to protect the confidentiality of information relating to Tribunal witnesses. Judge Lettieri underscored that, for the second element, he did not have to find that the *Al Akhbar* publications actually eroded public confidence in the Tribunal; it would suffice if the publications created the likelihood of that effect. The *mens rea* for the offense is, under the plain text of Rule 60*bis*(A), knowledge and willfulness (Judgment, paras. 37–43).

After reviewing the evidence, including the testimonies of five people the articles identified as witnesses, Judge Lettieri found that Mr. Al Amin had committed the offense of contempt—specifically, that his articles “created an objective likelihood that public confidence in the Tribunal would be undermined and that moreover, such a likelihood was intended by the Articles’ authors” (Judgment, para. 111). To support that finding, Judge Lettieri noted

<sup>2</sup> In re *Akhbar Beirut & Al Amin*, Case No. STL-14-06/T/CJ, Public Redacted Version of the Judgment, para. 111 (Spec. Trib. Leb. July 15, 2016), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/judgments-stl-14-06/5092-f0262prv> (quoting *Al Akhbar* article) [hereinafter Judgment].

<sup>3</sup> STL Rules of Procedure and Evidence, Rule 60*bis*(A), STL-BD-2009-01-Rev.8 (as amended and corrected on April 3, 2017), at <https://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence>.

<sup>4</sup> See In re *Al Jadeed/New TV & Al Khayat*, Case No. STL-14-05/A/AP, Public Redacted Version of Judgment on Appeal (Spec. Trib. Leb. Mar. 8, 2016), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/appeal-1/judgments-stl-14-05/4823-f0028>.

that the articles divulged details about alleged witnesses “in a politically charged environment with sectarian tensions and significant, powerful opposition to the Tribunal . . .” and that “individuals publicly denounced as opponents of the Resistance were placed at an elevated risk of harm” (*id.*). In this environment,

[t]he allegation that anyone desiring confidential information from the Tribunal can obtain it, in conjunction with the publication of photographs and personal information allegedly associated with such confidential information, strongly contribute[d] to the negative impact on public confidence in the Tribunal’s ability to protect confidentiality. (*Id.*)<sup>5</sup>

After determining that Mr. Al Almin committed the offense of contempt, Judge Lettieri assessed whether Mr. Al Almin’s conduct could nevertheless be excused by his freedom of expression. Judge Lettieri stated that, under international and Lebanese law, an individual’s freedom of expression must be balanced against other societal interests, including “the need to protect the integrity of judicial proceedings and to ensure the safety of justice system participations” (Judgment, para. 158). Judge Lettieri asserted that, while journalists may report on and criticize the Tribunal’s work, there is a “clear distinction” between that kind of journalism and “publishing the names, photographs and other identifying information of 32 purported confidential witnesses.” He found that the latter “serves no journalistic value or pressing social need” and is not “consistent with journalistic standards or ethics” (Judgment, paras. 161, 163). For example, Mr. Al Amin had not demonstrated that he had tried to substantiate his allegations from reliable sources or that he had adopted the perspective of a “neutral observer,” as opposed to a “political advocate” (Judgment, para. 111).<sup>6</sup> Judge Lettieri concluded that “the prohibition on publishing this kind of information, that is objectively likely to undermine public confidence in the Tribunal, constitutes a proper limit on the freedom of the press as it protects a conflicting but worthy social need: the integrity and proper functioning of judicial proceedings by ensuring the safety of witnesses called to collaborate with the justice system” (Judgment, para. 163).

Having found Mr. Al Amin guilty as charged, Judge Lettieri turned to assessing the conduct of Mr. Al Amin’s corporate employer, Akhbar Beirut. The case had already gone through several twists and turns on the issue of corporate liability. Judge Lettieri had earlier decided, in the sister case of *New TV & Al Khayat*, that the Tribunal lacked personal jurisdiction to hold contempt proceedings against legal persons.<sup>7</sup> In particular, he decided that the word “person” in Rule 60*bis* refers only to natural persons and does not authorize the Tribunal to conduct contempt proceedings against legal persons. Here, Judge Lettieri relied on the interpretive canon of *ubi lex voluit dixit, ubi noluit tacuit*: one who wants something says it; one who does not want anything is silent. He reasoned that, because the Tribunal’s Statute

<sup>5</sup> See also Judgment, para. 120 (finding that the articles “received widespread and negative attention in Lebanon by the public in general [and] . . . that the lives of Tribunal witnesses had been put at risk by the disclosures”).

<sup>6</sup> See also Judgment, para. 146 (“[T]he content and tone of the 15 and 19 January Articles fail to demonstrate objective reporting of a journalistic investigation, but rather, manifest the views of a political advocate who paints purported STL witnesses in a negative light and portray them as counter to Hezbollah. . .”).

<sup>7</sup> In re *New TV S.A.L. & Al Khayat*, Case No. STL-14-05/II/CJ, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment (Spec. Trib. Leb. July 24, 2014), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/main-case/orders-and-decisions-stl-14-05/3375-f0054>.

and Rules of Procedure and Evidence do not specifically provide for the Tribunal to exercise jurisdiction over legal persons, Rule 60*bis* unambiguously applies only to natural persons.<sup>8</sup> Judge Lettieri noted that “many important legal systems” have not yet accepted the concept of corporate criminality, that “[n]o international criminal court or tribunal has ever been granted explicit authority to or found that it had authority to try legal persons,” and that “there is no general principle of international criminal law, international treaty or customary law supporting corporate liability. . . .”<sup>9</sup> Finally, Judge Lettieri explained that if Rule 60*bis* is ambiguous on whether it applies to legal persons, it ought to be interpreted in the light most favorable to the accused and limited to natural persons.<sup>10</sup>

However, in October 2014, an Appeals Panel (Panel) overturned Judge Lettieri’s decision on jurisdiction in *New TV*, deciding that Rule 60*bis* covers both natural and legal persons.<sup>11</sup> The Panel found, contrary to Judge Lettieri, that the rule is not silent; it is instead ambiguous on this point. In interpreting the rule, the Panel used the methods of interpretation that are provided for in Rule 3(A) of the Tribunal’s Rules of Procedure and Evidence:

The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.<sup>12</sup>

With respect to Rule 3(A)(ii) and (iii), the Appeals Panel found substantial evidence that corporate responsibility is now recognized in most domestic legal systems and, increasingly, in international human rights law. The Panel admitted that states differ on the question of whether corporations can be held responsible in criminal, or only in civil, actions. But the Panel ultimately found that many states recognize corporate criminal liability. The Panel thus concluded that “corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”<sup>13</sup> In light of that evidence, it decided that the “singular fact” that “no post-World War II international criminal court or tribunal has previously found that it had the authority to try legal persons. . .” was an insufficient reason to interpret Rule 60*bis* to exclude legal persons.<sup>14</sup>

Next, the Appeals Panel turned to Lebanese law. Although Rule 3(A)(iv) points interpreters to the Lebanese Code of Criminal Procedure, the Panel decided that, in a case like this one, it could also look to the Lebanese Criminal Code. The Panel explained that

<sup>8</sup> *Id.*, para. 71.

<sup>9</sup> *Id.*, paras. 74–75.

<sup>10</sup> *Id.*, para. 76.

<sup>11</sup> In re *New TV S.A.L. & Al Kayaht*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Spec. Trib. Leb. Oct. 2, 2014), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/main-case/orders-and-decisions-stl-14-05/3515-f0012-ar126-1> [hereinafter *New TV Appellate Decision on Jurisdiction*].

<sup>12</sup> See also *id.*, para. 26.

<sup>13</sup> *Id.*, para. 67.

<sup>14</sup> *Id.*

where a rule is declarative of the Tribunal's inherent power over the crime of contempt, it is relevant to draw upon the Lebanese Criminal Code which lists substantive criminal offences as opposed to the Lebanese Code of Criminal Procedure which, by nature, merely addresses procedural aspects.<sup>15</sup>

The Panel found that "it is foreseeable under Lebanese law that the owner of a journalistic publication or a television station could be either a natural or a legal person and could be criminally liable. . . ."<sup>16</sup>

The very next month—in November 2014—Judge Lettieri issued his decision on jurisdiction in *Akhbar Beirut & Al Amin*, and he declined to follow the reasoning of the Appeals Panel in *New TV*.<sup>17</sup> He again held that the Tribunal lacked personal jurisdiction over corporate entities, like *Akhbar Beirut*, in contempt proceedings. He insisted that, in the absence of any specific provision defining "person" to include legal persons, the word must be interpreted to refer only to natural persons. Here, he emphasized that

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. (Decision on Jurisdiction, para. 49)

Further, he claimed that, if Rule 60*bis* is ambiguous, then interpreting it to cover legal persons would run afoul of the principle of *nullum crimen sine lege*. "This is because ambiguity in the wording of a law and vagueness of legal notions could make the crime in question unforeseeable . . . [which] would prevent potential accused from knowing in advance if their conduct constitutes an offence" (Decision on Jurisdiction, para. 39).

Judge Lettieri claimed that he was not bound to follow the reasoning of the *New TV* Panel because the Appeals Chamber had not established a rule of *stare decisis* for the Tribunal. Further, he argued that the interest of consistency in judicial decision making weighed against following *New TV*. He reasoned that, because *New TV* "is an isolated decision that finds no precedent in international law . . . [c]onsistency—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" (Decision on Jurisdiction, para. 71). This way, Judge Lettieri explained, another Appeals Panel would have the opportunity to consider the issue of corporate criminal responsibility.

As it turned out, the Appeals Panel that reviewed Judge Lettieri's decision on jurisdiction in *Akhbar Beirut* was composed of two of the appellate panelists from the *New TV* decision.<sup>18</sup> The Panel again reversed him, explaining that it did not see any reason to depart from the reasoning in *New TV*. The Panel emphasized three points. First, Rule 60*bis* is ambiguous

<sup>15</sup> *Id.*, para. 68.

<sup>16</sup> *Id.*, para. 71.

<sup>17</sup> In re *Akhbar Beirut & Al Amin*, Case No. STL-14-06/PT/CJ, Decision on Motion Challenging Jurisdiction (Spec. Trib. Leb. Nov. 6, 2014), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/orders-and-decisions-stl-14-06/3593-f0069> [hereinafter *Akhbar Beirut Decision on Jurisdiction*].

<sup>18</sup> In re *Akhbar Beirut & Al Amin*, Case No. STL-14-06/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Spec. Trib. Leb. Jan. 23, 2015), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/orders-and-decisions-stl-14-06/3742-f0004-ar126-1>.

on the question of whether it applies to legal persons. Second, interpreting the rule to apply to legal persons does not contravene the principle of legality because it does not create a new offense or element of an offense; it only addresses the status of perpetrators over whom the Tribunal has jurisdiction. Third, this Tribunal is unlike other international criminal tribunals in that it is substantially guided by Lebanese law, which permits the criminal responsibility of legal persons for contempt.<sup>19</sup>

Thus, by the time Judge Lettieri issued his judgment in *Akhbar Beirut & Al Amin*, the jurisdictional question on legal persons had already been extensively litigated and resolved. Judge Lettieri relied on Lebanese law to identify the attribution requirements for holding legal persons responsible for contempt. He explained that, under Lebanese law, a judge may hold a corporation responsible upon finding that a specific natural person: (1) is criminally responsible; (2) was in a position to act on the corporate accused's behalf; and (3) committed the criminal conduct on behalf of or using the means of the corporate accused (Judgment, paras. 44–45). Judge Lettieri found that those elements of corporate criminality were satisfied here and thus that Akhbar Beirut had contemptuously interfered with the Tribunal's administration of justice (Judgment, paras. 164–71).

At the sentencing stage, Judge Lettieri imposed a fine of 20,000 euros on Mr. Al Amin and a fine of 6,000 euros on Akhbar Beirut. The sentencing decision is unremarkable, except that it seems to go out of its way to impose a low fine on Akhbar Beirut, despite the earlier finding that the contemptuous behavior in this case was particularly egregious. Judge Lettieri explained that,

[g]iven the novelty of sentencing a legal person for contempt of an international tribunal, the foreseeability of the range of fines as set out in the Lebanese Law of Publications, as well as the separate penalty already imposed on Mr Al Amin as an individual, I find that a fine of 6,000 Euros—a quantum roughly equivalent to the minimum fine contemplated for a similarly positioned Accused in Lebanese law—is appropriate. . . . (Reasons for Sentencing Judgment, para. 24)

\* \* \* \*

*Akhbar Beirut & Al Amin* is perhaps most significant for its determination on corporate criminal responsibility. It is the first international judicial decision to hold a corporate entity criminally responsible under international law. As such, it provides an opening for other international or national courts to find that corporate criminality is cognizable in, or at least not foreclosed by, international law. The question is whether other courts will exploit that opening and rely on *Akhbar Beirut & Al Amin* as persuasive authority.

Some of the Tribunal's reasoning on corporate criminality clearly extends beyond this specific institution. Recall, for example, that the *New TV* Panel reviewed the domestic and human rights practice on corporate responsibility and then asserted that “corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”<sup>20</sup> That assertion is bold and likely to be invoked by proponents of corporate criminality in future cases.

But embedded within the case are three grounds for limiting its precedential impact. First, the decision on corporate criminality ultimately rests on an interpretation of Tribunal's own

<sup>19</sup> *Id.*, paras. 72–74 (summary).

<sup>20</sup> *New TV* Appellate Decision on Jurisdiction, *supra* note 11, para. 67.

texts—the ambiguity in Rule 60*bis* and, as the *Akhbar Beirut* Panel underscored, the license in Rule 3(A) to look for interpretive guidance in Lebanese law. Other international courts will have to interpret their texts when determining whether to exercise jurisdiction over legal persons; they might reasonably find that, even if this Tribunal has such jurisdiction, they do not. For example, the drafters of the Rome Statute of the International Criminal Court (ICC) considered, but decided not to provide for, jurisdiction over legal persons. If the ICC were to rely on *Akhbar Beirut* for persuasive authority, it presumably would have to grapple with that negotiating history. Similarly, most national courts are likely to be guided or restricted by their own domestic laws. They might find reasons in domestic law to limit their jurisdiction over corporate entities in cases involving international crimes.

Second, even this Tribunal seems to have jurisdiction over legal persons only in ancillary cases of contempt, not in cases concerning the principal offenses for which the Tribunal was established. The judge who initiated *Akhbar Beirut* and *New TV*, Judge Lettieri, and the *New TV* Appeals Panel all hinted that the Tribunal did not have jurisdiction over legal persons for the principal offenses. The reason for this limitation, to the extent that it exists, relates again to specific language in the Tribunal's foundational texts. Still, the repeated suggestion that the Tribunal lacks jurisdiction over legal persons for the principal offenses suggests a desire to limit the effect of these contempt proceedings. Finally, the Tribunal's reasoning on corporate criminality might be limited because future decisionmakers might reject or refute it on its own terms. Judge Lettieri's decisions provide plenty of material with which to undercut that reasoning and, in Judge Lettieri words, treat the case as “an isolated decision.”<sup>21</sup>

Apart from its ruling on corporate criminality, *Akhbar Beirut & Al Amin* is an important decision on the offense of contemptuous interference. The judgment adopts a broad definition of contempt to proscribe not only conduct that actually and directly obstructs Tribunal proceedings, but also conduct that presents a likelihood of indirectly obstructing the proceedings by undermining public confidence in the institution. This broad definition was necessary to capture the conduct at issue here because the defendants were not charged with releasing information on, intimidating, or harming people who had actually appeared before the Tribunal. The charge was that they interfered with the administration of justice by releasing information on people who were alleged to be confidential witnesses.

That charge might reflect the Tribunal's own reluctance to acknowledge that witness information had been leaked. But perhaps because the harm was amorphously defined, so too was the justification for finding the defendants in contempt. In particular, it is not clear to what extent the decision turns on the content of the *Al Akhbar* articles—the names, photos, and identifying information of alleged witnesses—or why that content matters. If the named people had actually been confidential witnesses, then it would be routine to treat as contemptuous the publication of their identifying information. But because they were not acknowledged to be witnesses, it is not clear why publishing that information was so damaging to the Tribunal. How did the *Al Akhbar* articles undermine public confidence in the Tribunal in ways that other articles criticizing the Tribunal for failing to preserve its confidentiality would not? For example, would the charge of contempt be appropriate if the articles had not released the “false” names but had still persuasively shown that confidential information about the Tribunal is easily obtainable?

<sup>21</sup> *Akhbar Beirut* Decision on Jurisdiction, *supra* note 17, para. 71.

Part of the answer might be that a nonfabricated publication would be excused because it would have more social value and be protected by the journalist's freedom of expression. Recall that Judge Lettieri characterized the *Al Akhbar* articles as politically motivated and poorly substantiated. However, this answer is incomplete. Judge Lettieri's judgment ultimately rests on a determination that the *Al Akhbar* articles were intended to, and probably did, undermine public confidence in the Tribunal. If that is the standard, then the freedom to be critical of the Tribunal would still have to be balanced against the cost to the Tribunal and might, in the end, lose out. Because the judgment does not include a discernable limiting principle for protecting the freedom of expression in cases of contempt, it has the potential to be quite expansive.

MONICA HAKIMI  
*University of Michigan Law School*  
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