



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE APPEALS PANEL**

**Case No.:** STL-14-05/A/AP

**Before:** Judge Ivana Hrdličková, Presiding  
Judge Janet Nosworthy  
Judge Walid Akoum

**Registrar:** Mr Daryl Mundis

**Date:** 8 March 2016

**Original language:** English

**Classification:** Public

**IN THE CASE AGAINST**

***AL JADEED* [CO.] S.A.L./NEW T.V. S.A.L. (N.T.V.)  
KARMA MOHAMED TAHSIN AL KHAYAT**

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**PUBLIC REDACTED VERSION OF JUDGMENT ON APPEAL**

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Mr Kenneth Scott

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New T.V. S.A.L. (N.T.V.) and  
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Ms Shyamala Alagendra  
Ms Maya Habli



<b>I.</b>	<b>INTRODUCTION .....</b>	<b>5</b>
<b>II.</b>	<b>PROCEDURAL HISTORY.....</b>	<b>7</b>
<b>III.</b>	<b>STANDARD OF APPELLATE REVIEW.....</b>	<b>9</b>
A.	GENERAL .....	9
1.	Standard Applicable to Errors of Law .....	10
2.	Standard Applicable to Errors of Fact .....	11
3.	Summary Dismissal .....	12
B.	SENTENCING .....	14
<b>IV.</b>	<b>APPEAL OF JUDGMENT.....</b>	<b>14</b>
A.	COUNT 1 .....	14
1.	Ms Al Khayat.....	14
a.	Alleged Errors of Law Relating to the <i>Actus Reus</i> Standard ( <i>Amicus</i> Grounds 1, 2 and 3) .....	14
i.	Alleged Error of Law Relating to the Legal Standard of Objective Likelihood Applied to the <i>Actus Reus</i> ( <i>Amicus</i> Ground 1) .....	15
(a)	Submissions.....	15
(b)	Analysis.....	16
ii.	Alleged Error of Law in Requiring Proof of Actual Harm ( <i>Amicus</i> Ground 2) ..	20
(a)	Submissions.....	20
(b)	Analysis.....	21
iii.	Alleged Error of Law in Requiring that the Individuals Featured in the Episodes be Reasonably Identifiable ( <i>Amicus</i> Ground 3) .....	22
(a)	Submissions.....	22
(b)	Analysis.....	22
b.	Alleged Errors of Law and Fact Relating to the Review of the <i>Actus Reus</i> Evidence ( <i>Amicus</i> Grounds 4 in Part, 5 in Part and 6-12) .....	23
i.	Alleged Error of Fact Relating to the Review of the Evidence of Expert Witness Dr de Brouwer ( <i>Amicus</i> Grounds 4 in Part, 5 in Part and 9).....	25
(a)	Submissions.....	25
(b)	Analysis.....	27
ii.	Alleged Error of Fact Relating to the Review of Documentary Evidence ( <i>Amicus</i> Grounds 4 in Part, 5 in Part and 10).....	30
(a)	Submissions.....	31
(b)	Analysis.....	32
iii.	Alleged Error of Fact Relating to the Review of Certain Pieces of Documentary Evidence ( <i>Amicus</i> Ground 11) .....	36
(a)	Submissions.....	36
(b)	Analysis.....	37
iv.	Alleged Error of Fact Relating to the Review of Exhibit P00151 ( <i>Amicus</i> Ground 12) .....	38
(a)	Submissions.....	38
(b)	Analysis.....	38
v.	Alleged Error of Fact Relating to the Identifiability of Those Featured in the Episodes ( <i>Amicus</i> Ground 6).....	39

vi.	Alleged Error of Fact Relating to the Review of the <i>Actus Reus</i> Evidence Concerning the Effects of the Episodes’ ( <i>Amicus</i> Grounds 4 in Part, 5 in Part, 7 and 8).....	40
(a)	Submissions.....	40
(b)	Analysis.....	42
vii.	Conclusion on the Alleged Errors of Law and Fact Relating to the Review of the Evidence in Support of the <i>Actus Reus</i> .....	48
c.	Alleged Errors of Law Concerning the <i>Mens Rea</i> Standard ( <i>Amicus</i> Ground 15 in Part).....	49
2.	<i>Al Jadeed</i> ( <i>Amicus</i> Grounds 16 in Part, 17 in Part, 18 in Part, 19 in Part, 20 in Part, 21 in Part and 22 in Part) .....	49
B.	COUNT 2 .....	49
1.	Ms Al Khayat.....	50
a.	Alleged Errors of Law and Fact Relating to the Online Availability of the Episodes in Violation of the 10 August 2012 Order (Defence Ground 1, <i>Amicus</i> Grounds 4 in Part, 5 in Part, 13 and 14).....	50
i.	Submissions .....	51
(a)	Defence Ground 1 .....	51
(b)	<i>Amicus</i> Grounds 4 in Part and 5 in Part.....	53
(c)	<i>Amicus</i> Grounds 13 and 14.....	54
ii.	Analysis.....	57
(a)	Alleged Error of Law and Fact Relating to the Episodes’ Availability on Al Jadeed TV’s Website (Defence Ground 1, <i>Amicus</i> Grounds 4 in Part, 5 in Part, 13, 14) .....	58
(b)	Alleged Error of Law and Fact Relating to the Episodes’ Availability on Al Jadeed TV’s YouTube Channel ( <i>Amicus</i> Grounds 4 in Part, 5 in Part, 13 and 14) .....	61
(c)	Alleged Error of Law and Fact Relating to the Episodes’ Availability on Al Jadeed TV’s Facebook Page ( <i>Amicus</i> Grounds 4 in Part, 5 in Part, 13 and 14) .....	67
iii.	Conclusion .....	71
b.	Alleged Errors of Law and Fact Relating to Ms Al Khayat’s <i>Mens Rea</i> ( <i>Amicus</i> Ground 15 in Part, Defence Grounds 2, 3, 4 and 5).....	71
i.	Alleged Error of Law Relating to the <i>Mens Rea</i> Standard ( <i>Amicus</i> Ground 15 in Part).....	72
ii.	Alleged Errors of Fact Relating to Ms Al Khayat’s <i>Mens Rea</i> (Defence Grounds 2, 3, 4 and 5).....	73
(a)	Submissions.....	73
(b)	Analysis.....	75
2.	<i>Al Jadeed</i> .....	78
a.	Alleged Errors of Law Relating to Elements of Criminal Liability of Legal Persons ( <i>Amicus</i> Grounds 16 in Part, 17 in Part).....	78
i.	Alleged Error of Law in Relying on the Lebanese Criminal Code ( <i>Amicus</i> Ground 16 in Part).....	80
(a)	Submissions.....	80
(b)	Analysis.....	83
ii.	Alleged Error of Law in Requiring the Identification of a Natural Person ( <i>Amicus</i> Ground 17 in Part).....	85
(a)	Submissions.....	85

(b)	Analysis.....	87
b.	Alleged Errors of Law and Fact in Failing to Attribute the Conduct of Natural Persons to <i>Al Jadeed</i> ( <i>Amicus</i> Grounds 18 in Part, 19 in Part, 20 in Part, 21 in Part and 22 in Part).....	89
i.	Alleged Errors of Law and Fact Relating to the Attribution of Ms Al Khayat’s Conduct to <i>Al Jadeed</i> ( <i>Amicus</i> Grounds 18 in Part, 21 in Part, 22 in Part) .....	89
ii.	Alleged Errors of Law and Fact Relating to the Attribution of Ms Al Bassam’s Conduct to <i>Al Jadeed</i> ( <i>Amicus</i> Grounds 18 in Part, 19 in Part and 20 in Part) ...	89
(a)	Submissions.....	90
(b)	Analysis.....	92
<b>V.</b>	<b><i>AMICUS’ APPEAL OF MS AL KHAYAT’S SENTENCE</i>.....</b>	<b>92</b>
<b>VI.</b>	<b>DISPOSITION .....</b>	<b>93</b>
<b>VII.</b>	<b>SEPARATE OPINION OF JUDGE IVANA HRDLIČKOVÁ CONCURRING IN RESULT .....</b>	<b>95</b>
<b>VIII.</b>	<b>PARTIALLY DISSENTING OPINION OF JUDGE JANET NOSWORTHY ..</b>	<b>97</b>
A.	WHETHER MS AL BASSAM HAD THE ABILITY TO REMOVE THE EPISODES FROM <i>AL JADEED TV’S ONLINE PLATFORMS (AMICUS GROUND 20 IN PART)</i> .....	97
B.	WHETHER MS AL BASSAM’S CONDUCT IS ATTRIBUTABLE TO <i>AL JADEED (AMICUS GROUND 18 IN PART AND 19 IN PART)</i> .....	100
C.	CONCLUSION .....	104
<b>IX.</b>	<b>SEPARATE OPINION OF JUDGE WALID AKOUM CONCURRING IN RESULT .....</b>	<b>106</b>
<b>X.</b>	<b>ABBREVIATIONS OF CITED MATERIALS AND DEFINED TERMS .....</b>	<b>109</b>
A.	GLOSSARY OF ABBREVIATIONS .....	109
B.	ABBREVIATED TITLES OF STL FILINGS AND OTHER DOCUMENTS.....	111
C.	ABBREVIATED TITLES OF OTHER JURISPRUDENCE AND LEGAL SOURCES CITED .....	115

## I. INTRODUCTION

1. The Appeals Panel is seized of appeals against the Judgment rendered by the Contempt Judge on 18 September 2015, regarding alleged violations of Rule 60 *bis* of the STL Rules of Procedure and Evidence (“Rules”), and the Sentencing Judgment rendered orally by the Contempt Judge on 28 September 2015 with written reasons given on 6 October 2015.<sup>1</sup> The case concerns the broadcast of five Episodes, relating to purported confidential Tribunal witnesses, by *Al Jadeed* TV in Lebanon from 6 to 10 August 2012,<sup>2</sup> and their subsequent online availability in violation of an order issued by the Pre-Trial Judge on 10 August 2012.<sup>3</sup> At all relevant times, “*Al Jadeed* TV was a television or media business” managed and operated by *Al Jadeed* S.A.L., which is registered in Beirut, Lebanon.<sup>4</sup> The Appeals Panel will refer to the corporate Accused using the collective term “*Al Jadeed*”, unless otherwise specified.<sup>5</sup> At all relevant times, the second Accused, Ms Al Khayat, was Deputy Head of News and Political Programs at *Al Jadeed* TV and a shareholder of *Al Jadeed* S.A.L.<sup>6</sup>

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<sup>1</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/T/CJ, F0176, Judgment, Confidential, 18 September 2015 (“Judgment”), para. 74. A public redacted version was filed on the same day. STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/S/CJ, F0186, Reasons for Sentencing Judgment, 6 October 2015 (“Sentencing Judgment”).

<sup>2</sup> See STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0108, Table of Agreed Facts, 13 March 2015 (“Table of Agreed Facts”), pp. 1-2, Facts 9-11, 16, 18.

<sup>3</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0372, Order for Immediate Removal of Disseminated Material and Cessation of Dissemination, 10 August 2012 (“10 August 2012 Order”). The Pre-Trial Judge issued the 10 August 2012 Order classifying it as confidential and *ex parte*. A public redacted version was filed on 5 June 2013 and was made available on the STL website on that date (See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0372, Public Redacted Version of the 10 August 2012 “Order for Immediate Removal of Disseminated Material and Cessation of Dissemination”, 5 June 2013). At the *Amicus*’ request, the Trial Chamber reclassified the confidential version of the 10 August 2012 Order as public on 17 April 2015; see STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1914, Decision on *Amicus Curiae* Prosecutor’s Request to Lift the Confidentiality of an Order, 17 April 2015).

<sup>4</sup> Table of Agreed Facts, p. 1, Facts 1-2. See also STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0068, Amended Order in Lieu of an Indictment, Annex A, 17 October 2014 (“Amended Order in Lieu of an Indictment”), p. 1.

<sup>5</sup> The alternative names of the corporate Accused in the case caption, namely “*Al Jadeed* [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.)”, were included to provide further clarity and accuracy on the various names by which the corporate Accused is known. See STL, *In the case against New T.V. S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0061, Decision on *Amicus Curiae* Prosecutor’s Request for Leave to Amend Order in Lieu of an Indictment and Scheduling Order, 7 October 2014, para. 10.

<sup>6</sup> Table of Agreed Facts, p. 1, Facts 4-5. The Appeals Panel notes that the Judgment, at para. 4, incorrectly states that Ms Al Khayat was “a shareholder of *Al Jadeed* TV”.

2. *Al Jadeed* and Ms Al Khayat were each charged with two counts of contempt, pursuant to Rule 60 *bis* (A) of the Rules, for knowingly and wilfully interfering with the administration of justice by:

- a) broadcasting and/or 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 (Count 1);<sup>7</sup> and
- b) failing to remove from *Al Jadeed* TV's website and its YouTube channel, information on purported confidential witnesses in the *Ayyash et al.* case, thereby violating the 10 August 2012 Order (Count 2).<sup>8</sup>

3. In their respective appeals, the *Amicus* and the Defence challenge the Judgment on the above counts. Namely, the *Amicus* appeals *Al Jadeed*'s acquittal on both counts and Ms Al Khayat's acquittal on Count 1,<sup>9</sup> while the Defence appeals Ms Al Khayat's conviction on Count 2.<sup>10</sup> In addition, the *Amicus* appeals Ms Al Khayat's sentence regarding Count 2<sup>11</sup> under the Sentencing Judgment.<sup>12</sup>

4. For the reasons set out in this judgment, the Appeals Panel dismisses the *Amicus*' appeal against the acquittal of both Accused under Count 1 and against *Al Jadeed*'s acquittal under Count 2.<sup>13</sup> In addition, the Appeals Panel grants the Defence's appeal against Ms Al Khayat's conviction under Count 2.<sup>14</sup> As a result, the Appeals Panel reverses

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<sup>7</sup> Amended Order in Lieu of an Indictment, p. 3.

<sup>8</sup> Amended Order in Lieu of an Indictment, p. 3.

<sup>9</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0005, Corrected Version of "Prosecution's Appeal Brief" of 20 October 2015, Confidential, 18 November 2015 ("*Amicus* Appeal Brief on the Judgment"). A public redacted version was filed on the same day.

<sup>10</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0013, Karma Khayat's Appellant's Brief, Confidential, 5 November 2015 ("Defence Appeal Brief on the Judgment"). A public redacted version was filed on 4 December 2015.

<sup>11</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0012, Prosecution's Appeal Brief regarding Sentencing Judgement, Confidential 5 November 2015 ("*Amicus* Appeal Brief on the Sentencing Judgment"). A public redacted version was filed on 6 November 2015.

<sup>12</sup> Sentencing Judgment.

<sup>13</sup> See below paras 106, 107, 214.

<sup>14</sup> See below para. 172.

Ms Al Khayat's conviction under Count 2 and sets aside the fine of 10,000 Euros which was imposed by the Contempt Judge.<sup>15</sup>

## II. PROCEDURAL HISTORY

5. On 31 January 2014, Judge Baragwanath, as the initial Contempt Judge, issued the Decision in Proceedings for Contempt which contained the Order in Lieu of an Indictment against *Al Jadeed* and Ms Al Khayat, and recused himself from the case.<sup>16</sup> Judge Lettieri was subsequently designated as the Contempt Judge.<sup>17</sup>

6. On 13 May 2014, the Accused made their initial appearance, entering pleas of not guilty on both counts.<sup>18</sup>

7. On 24 July 2014, the Contempt Judge granted a Defence motion<sup>19</sup> challenging the Tribunal's jurisdiction over legal persons, ordered that the charges against *Al Jadeed* be dismissed, and certified this issue for appeal.<sup>20</sup> On 2 October 2014, the Appeals Panel granted by majority the *Amicus*' appeal<sup>21</sup> against the Contempt Judge's Jurisdiction Decision and reinstated the charges against *Al Jadeed*.<sup>22</sup> On 17 October 2014, at the *Amicus*' request,<sup>23</sup> the

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<sup>15</sup> See below para. 172, s. 215. Disposition.

<sup>16</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014 ("Decision in Proceedings for Contempt"), paras 30-49, 68-74 and p. 29; STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, Annex 1, 31 January 2014 ("Order in Lieu of an Indictment").

<sup>17</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/I/PRES, F0002, Order Designating Contempt Judge, 31 January 2014.

<sup>18</sup> Judgment, para. 17.

<sup>19</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0037, Defence Preliminary Motion Challenging [sic] Jurisdiction, 16 June 2014.

<sup>20</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al 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 ("Jurisdiction Decision").

<sup>21</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/AP/AR126.1, F0001, Interlocutory Appeal Against the Decision on Motion Challenging Jurisdiction, 31 July 2014.

<sup>22</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 ("Jurisdiction Appeal Decision").

<sup>23</sup> STL, *In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0032, Request for Leave to Amend Order in Lieu of an Indictment with Annexes, 12 June 2014.

Contempt Judge issued the Amended Order in Lieu of an Indictment to correct the name of the corporate Accused.<sup>24</sup>

8. The *Amicus* and the Defence presented their respective cases between 16 April and 14 May 2015, filed their Final Trial Briefs on 8 June 2015, and closing arguments were heard on 18 and 19 June 2015.<sup>25</sup> The Contempt Judge handed down his Judgment on 18 September 2015, finding *Al Jadeed* not guilty on both counts and finding Ms Al Khayat not guilty on Count 1 and guilty on Count 2.<sup>26</sup> On 28 September 2015, a sentencing hearing was held with respect to Ms Al Khayat's conviction, and the Contempt Judge sentenced her orally to a fine of 10,000 Euros;<sup>27</sup> written reasons for the Sentencing Judgment were issued on 6 October 2015.<sup>28</sup>

9. On 5 October 2015, the *Amicus* filed his Notice of Appeal on the Judgment,<sup>29</sup> followed on 20 October 2015 by his Appeal Brief on the Judgment.<sup>30</sup> The *Amicus* also filed, on 18 November 2015, a corrected version of his Appeal Brief on the Judgment.<sup>31</sup> On 21 October 2015, the Defence filed its Notice of Appeal on the Judgment,<sup>32</sup> and the *Amicus* filed his Notice of Appeal on the Sentencing Judgment.<sup>33</sup> On 30 October 2015, the Appeals Panel authorized the Defence to file a consolidated and extended response with respect to the *Amicus'* Appeal Brief on the Judgment, and extended the time limit for its filing.<sup>34</sup> On

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<sup>24</sup> Amended Order in Lieu of an Indictment.

<sup>25</sup> Judgment, paras 27-32. The Appeals Panel notes that the Judgment, at para. 30, incorrectly states that the "Defence closed its case on 15 May 2015". See Trial Hearing, T13, 14 May 2015. This and all further references to "T" followed by a number (e.g. here "T13"), are references to the transcript numbers of proceedings in this case which took place on the given date (e.g. here "14 May 2015").

<sup>26</sup> Judgment, paras 127, 149, 176, 190 and p. 53, Disposition.

<sup>27</sup> Sentencing Hearing, T17, 28 September 2015.

<sup>28</sup> Sentencing Judgment.

<sup>29</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0001, Prosecution's Notice of Appeal, 5 October 2015 ("Amicus Notice of Appeal on the Judgment").

<sup>30</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0005, Prosecution's Appeal Brief, Confidential, 20 October 2015. A public redacted version was filed on 22 October 2015.

<sup>31</sup> *Amicus* Appeal Brief on the Judgment.

<sup>32</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0007, Defence Notice of Appeal, 21 October 2015 ("Defence Notice of Appeal on the Judgment").

<sup>33</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0006, Prosecution's Notice of Appeal on Sentencing Judgement, 21 October 2015 ("Amicus Notice of Appeal on the Sentencing Judgment").

<sup>34</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0011, Decision on the Defence Request for Extension of Word and Time Limits, 30 October 2015.

5 November 2015, the Defence filed its Appeal Brief on the Judgment,<sup>35</sup> and the *Amicus* filed his Appeal Brief on the Sentencing Judgment.<sup>36</sup> On 9 November 2015, the Defence filed its Response on the Judgment,<sup>37</sup> and the *Amicus* filed his Reply on the Judgment on 13 November 2015.<sup>38</sup> On 18 November 2015, the *Amicus* filed his Response on the Judgment<sup>39</sup> and the Defence filed its Response on the Sentencing Judgment.<sup>40</sup> Finally, on 24 November 2015, the *Amicus* filed his Reply on the Sentencing Judgment<sup>41</sup> and the Defence filed its Reply on the Judgment.<sup>42</sup>

10. On 25 November 2015, after hearing from the parties, the Appeals Panel denied a request from the Committee to Protect Journalists for leave to submit *amicus curiae* observations in these proceedings.<sup>43</sup>

### III. STANDARD OF APPELLATE REVIEW

#### A. General

11. Pursuant to Rules 60 *bis* (H) and 176 of the Rules, a Party may appeal a judgment rendered by the Contempt Judge, under Rule 60 *bis* (M), on the grounds of an “error on a question of law invalidating the decision” or an “error of fact that has occasioned a

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<sup>35</sup> Defence Appeal Brief on the Judgment.

<sup>36</sup> *Amicus* Appeal Brief on the Sentencing Judgment.

<sup>37</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0014, Respondent’s Brief to “Prosecution’s Appeal Brief”, Confidential, 9 November 2015 (“Defence Response on the Judgment”). A public redacted version was filed on 5 December 2015.

<sup>38</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0016, Brief in Reply to the “Respondent’s Brief to ‘Prosecution’s Appeal Brief’”, Confidential, 13 November 2015 (“*Amicus* Reply on the Judgment”). A public redacted version was filed on 19 November 2015.

<sup>39</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0018, Brief in Response to “Karma Khayat’s Appellant’s Brief”, 18 November 2015 (“*Amicus* Response on the Judgment”).

<sup>40</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0019, Respondent’s Brief to “Prosecution’s Appeal Brief Regarding Sentencing Judgement”, Confidential, 18 November 2015 (“Defence Response on the Sentencing Judgment”). A public redacted version was filed on 4 December 2015.

<sup>41</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0021, Prosecution’s Brief in Reply to “Respondent’s Brief to ‘Prosecution’s Appeal Brief Regarding Sentencing Judgement’” of 18 November 2015, Confidential, 24 November 2015 (“*Amicus* Reply on the Sentencing Judgment”). A public redacted version was filed on 26 November 2015.

<sup>42</sup> STL, *In the case against Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0022, Brief in Reply to “Brief in Response to ‘Karma Khayat’s Appellant’s Brief’”, 24 November 2015 (“Defence Reply on the Judgment”).

<sup>43</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0023, Decision on Application for Leave to Submit *Amicus Curiae* Observations, 25 November 2015.

miscarriage of justice”. In this regard, the Appeals Panel is informed by this Tribunal’s relevant jurisprudence and the Practice Direction on Appeal Filings.<sup>44</sup>

### 1. Standard Applicable to Errors of Law

12. When a party alleges an error of law, it must identify the alleged error, provide arguments supporting the allegation and explain how the alleged error invalidates the decision.<sup>45</sup> In addition, when a party alleges an error of law on the basis of a lack of a reasoned opinion, the appellant must identify the specific issues, factual findings or arguments which the Contempt Judge is alleged to have omitted, and must explain why this omission invalidates the decision.<sup>46</sup>

13. The Appeals Panel may reject an alleged error of law which has no potential to invalidate the Contempt Judge’s decision.<sup>47</sup> However, in exceptional circumstances, the

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<sup>44</sup> STL, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Special Tribunal for Lebanon, STL/PD/2013/07/Rev.1, 13 June 2013 (“Practice Direction on Appeal Filings”); see e.g. Jurisdiction Appeal Decision; STL, *In the case against Akhbar Beirut S.A.L. and Ibrahim Al Amin*, STL-14-06/PT/AP/AR126.1, F0004, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015 (“*Al Akhbar* Jurisdiction Appeal Decision”); 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”); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012 (“*Ayyash et al.* Authority of Prosecutor Appeal Decision”). The Appeals Panel also notes the Parties’ submissions on the standard of appellate review, in particular their reliance on the jurisprudence of other international criminal courts and tribunals; see *Amicus* Appeal Brief on the Judgment, paras 13-16; Defence Appeal Brief on the Judgment, paras 24-27; *Amicus* Appeal Brief on the Sentencing Judgment, paras 10-14; Defence Response on the Judgment, paras 5-10; *Amicus* Response on the Judgment, paras 1-3; Defence Response on the Sentencing Judgment, paras 8-12.

<sup>45</sup> ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, 9 December 2015 (“*Stanišić and Simatović* Appeal Judgment”), para. 16; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015 (“*Nyiramasuhuko et al.* Appeal Judgment”), para. 30; MICT, *Prosecutor v. Ngirabatware*, MICT-12-29-A, Judgment, 18 December 2014 (“*Ngirabatware* Appeal Judgment”), para. 8; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Public Redacted Document - Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, 1 December 2014 (“*Lubanga* Appeal Judgment”), para. 31; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013 (“*Taylor* Appeal Judgment”), para. 25; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10; Jurisdiction Appeal Decision, para. 24.

<sup>46</sup> *Stanišić and Simatović* Appeal Judgment, para. 16; *Ngirabatware* Appeal Judgment, para. 8; *Taylor* Appeal Judgment, para. 25.

<sup>47</sup> *Stanišić and Simatović* Appeal Judgment, para. 16; *Ngirabatware* Appeal Judgment, para. 8; *Taylor* Appeal Judgment, para. 25; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10; Jurisdiction Appeal Decision, para. 24; see also ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12 A, Judgment on the Prosecutor’s Appeal Against the Decision of Trial Chamber II Entitled “Judgment Pursuant to Article 74 of the Statute”, 7 April 2015 (“*Ngudjolo* Appeal Judgment”), para. 20.

Appeals Panel may address legal issues that would not lead to the invalidation of the decision, but are nevertheless of general legal significance to the Tribunal's jurisprudence.<sup>48</sup>

14. The Appeals Panel reviews the Contempt Judge's findings of law to determine whether or not they are correct.<sup>49</sup> Where the Appeals Panel finds that the Contempt Judge made an error of law arising from the application of an incorrect legal standard, the Appeals Panel sets out the correct legal standard and reviews the Contempt Judge's relevant factual findings accordingly.<sup>50</sup> As a result and when necessary, the Appeals Panel applies the correct legal standard to the evidence contained in the trial record, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant, before that finding may be confirmed on appeal.<sup>51</sup> However, the Appeals Panel does not review the entire trial record *de novo*, but, in principle, only takes into account evidence referred to by the Contempt Judge in the Judgment, and evidence contained in the trial record and referred to by the parties.<sup>52</sup>

## **2. Standard Applicable to Errors of Fact**

15. When reviewing alleged errors of fact, the Appeals Panel will apply a standard of reasonableness.<sup>53</sup> The Appeals Panel will therefore only substitute its own findings for those of the Contempt Judge where it determines that no reasonable trier of fact could have made the impugned finding.<sup>54</sup> In carrying out this review, the Appeals Panel must give a margin of

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<sup>48</sup> *Stanišić and Simatović* Appeal Judgment, para. 15; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10.

<sup>49</sup> *Stanišić and Simatović* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31; *Ngirabatware* Appeal Judgment, para. 9; *Ngudjolo* Appeal Judgment, para. 21; *Ayyash et al.* Jurisdiction Appeal Decision, para. 10; Jurisdiction Appeal Decision, para. 24.

<sup>50</sup> *Stanišić and Simatović* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31; *Ngirabatware* Appeal Judgment, para. 9.

<sup>51</sup> *Stanišić and Simatović* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31; *Ngirabatware* Appeal Judgment, para. 9.

<sup>52</sup> *Stanišić and Simatović* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31; *see also Lubanga* Appeal Judgment, para. 26.

<sup>53</sup> *Stanišić and Simatović* Appeal Judgment, para. 18; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngirabatware* Appeal Judgment, para. 10; *Ngudjolo* Appeal Judgment, paras 22-24; *Taylor* Appeal Judgment, para. 26; *Ayyash et al.* Authority of Prosecutor Appeal Decision, para. 5.

<sup>54</sup> *Stanišić and Simatović* Appeal Judgment, para. 18; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngirabatware* Appeal Judgment, para. 10; *Ngudjolo* Appeal Judgment, paras 22-24; *Taylor* Appeal Judgment, para. 26; *Ayyash et al.* Authority of Prosecutor Appeal Decision, para. 5.

deference to, and will not lightly disturb, the Contempt Judge's findings of fact,<sup>55</sup> because it is primarily his task to hear, assess and weigh the evidence presented at trial.<sup>56</sup> Furthermore, the Appeals Panel will only revoke or revise an erroneous factual finding which has occasioned a miscarriage of justice.<sup>57</sup>

16. The Appeals Panel applies the same standard of reasonableness irrespective of whether the impugned factual finding was based on direct or circumstantial evidence,<sup>58</sup> and irrespective of which party is appealing the finding.<sup>59</sup> However, in light of the fact that the *Amicus* bears the burden of proving at trial the guilt of the Accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is different, in some respects, for the *Amicus*' appeal against an acquittal than for the Defence's appeal against a conviction.<sup>60</sup> Consequently, the convicted person must show that the Contempt Judge's factual errors created reasonable doubt as to his or her guilt, while the *Amicus* must show that, taking into account the Contempt Judge's factual errors, all reasonable doubt of the Accused's guilt has been eliminated.<sup>61</sup>

### **3. Summary Dismissal**

17. To enable the Appeals Panel to assess its arguments, a party must present its case clearly, logically and exhaustively.<sup>62</sup> Furthermore, the appealing party is required to provide precise references to relevant paragraphs in the impugned judgment, or transcript pages, to

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<sup>55</sup> *Stanišić and Simatović* Appeal Judgment, para. 19; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngirabatware* Appeal Judgment, para. 10; *Ngudjolo* Appeal Judgment, paras 23-24; *Taylor* Appeal Judgment, para. 26; *Ayyash et al.* Authority of Prosecutor Appeal Decision, para. 5.

<sup>56</sup> *Stanišić and Simatović* Appeal Judgment, para. 19; *Ngudjolo* Appeal Judgment, para. 23; *Taylor* Appeal Judgment, para. 26; *see also Nyiramasuhuko et al.* Appeal Judgment, para. 32.

<sup>57</sup> *Stanišić and Simatović* Appeal Judgment, para. 18; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngirabatware* Appeal Judgment, para. 10; *Ngudjolo* Appeal Judgment, para. 24; *Taylor* Appeal Judgment, para. 27; *Ayyash et al.* Authority of Prosecutor Appeal Decision, para. 5.

<sup>58</sup> *Stanišić and Simatović* Appeal Judgment, para. 18; *Ngirabatware* Appeal Judgment, para. 10; *Taylor* Appeal Judgment, para. 26.

<sup>59</sup> *Stanišić and Simatović* Appeal Judgment, para. 20; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Taylor* Appeal Judgment, para. 26.

<sup>60</sup> *Stanišić and Simatović* Appeal Judgment, para. 20; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngudjolo* Appeal Judgment, paras 25-26; *Taylor* Appeal Judgment, para. 26, fn. 48.

<sup>61</sup> *Stanišić and Simatović* Appeal Judgment, para. 20; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Ngudjolo* Appeal Judgment, paras 25-26; *Taylor* Appeal Judgment, para. 26, fn. 48.

<sup>62</sup> *Stanišić and Simatović* Appeal Judgment, para. 21.

which a challenge is being made.<sup>63</sup> Moreover, the Appeals Panel will not consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.<sup>64</sup> Finally, a party cannot merely repeat, on appeal, arguments that did not succeed at trial, without showing that the Contempt Judge erred in rejecting those arguments.<sup>65</sup>

18. The Appeals Panel has the inherent discretion to select which submissions merit detailed reasoned opinion in writing, and may dismiss, without providing detailed reasoning, arguments which are evidently unfounded.<sup>66</sup> Furthermore, the Appeals Panel may immediately dismiss, without consideration on the merits, arguments lacking the potential to result in the revision or reversal of the impugned decision.<sup>67</sup>

19. The Appeals Panel may dismiss, without detailed analysis:<sup>68</sup>

(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial chamber; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on the trial record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.<sup>69</sup>

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<sup>63</sup> *Stanišić and Simatović* Appeal Judgment, para. 21; *Nyiramasuhuko et al.* Appeal Judgment, para. 35; *Ngirabatware* Appeal Judgment, para. 12.

<sup>64</sup> *Stanišić and Simatović* Appeal Judgment, para. 21; *Nyiramasuhuko et al.* Appeal Judgment, para. 35; *Ngirabatware* Appeal Judgment, para. 12; *Taylor* Appeal Judgment, para. 31.

<sup>65</sup> *Nyiramasuhuko et al.* Appeal Judgment, para. 34; *Ngirabatware* Appeal Judgment, para. 11; *Lubanga* Appeal Judgment, paras 31, 33.

<sup>66</sup> *Stanišić and Simatović* Appeal Judgment, para. 21; *Nyiramasuhuko et al.* Appeal Judgment, para. 35; *Ngirabatware* Appeal Judgment, para. 12; *Taylor* Appeal Judgment, para. 31; *see also* *Lubanga* Appeal Judgment, para. 30.

<sup>67</sup> *Nyiramasuhuko et al.* Appeal Judgment, para. 34; *Ngirabatware* Appeal Judgment, para. 11; *Lubanga* Appeal Judgment, para. 30.

<sup>68</sup> *Stanišić and Simatović* Appeal Judgment, para. 22.

<sup>69</sup> *Stanišić and Simatović* Appeal Judgment, para. 22.

20. However, if a ground of appeal has been presented as an error of law but in substance only challenges the Contempt Judge's factual findings, or *vice versa*, the Appeals Panel will not summarily dismiss the ground of appeal and will consider it on its merits, against the appropriate standard of review, unless that ground is subject to summary dismissal for other reasons.<sup>70</sup>

## **B. Sentencing**

21. Since Ms Al Khayat's conviction under Count 2 is reversed by the Appeals Panel in this judgment, the latter need not address any grounds of appeal with respect to the Sentencing Judgment. Accordingly, the Appeals Panel need not set out the standard of review applicable to these appeals.

## **IV. APPEAL OF JUDGMENT**

### **A. Count 1**

22. Under Count 1, the Accused are charged with knowingly and wilfully interfering with the administration of justice by broadcasting and/or publishing information on purported confidential witnesses in the *Ayyash et al.* case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about or provided by witnesses or potential witnesses.<sup>71</sup>

#### **1. Ms Al Khayat**

##### **a. Alleged Errors of Law Relating to the *Actus Reus* Standard (*Amicus* Grounds 1, 2 and 3)**

23. The Contempt Judge defined the *actus reus* of Count 1 as follows:

the conduct must, when it occurred, have been of sufficient gravity to create, objectively, the likelihood of undermining the public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. Such likelihood cannot be proved in subjective terms (for example, on the basis of the personal feelings of a small number of people). Under the required objective test, likelihood can only

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<sup>70</sup> ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015 ("*Tolimir* Appeal Judgment"), para. 15; *Lubanga* Appeal Judgment, para. 34.

<sup>71</sup> Judgment, para. 37.

be proved through ascertainable facts. Whether or not the Accused's conduct in fact caused harm can be relevant to, but is not dispositive of, the existence or degree of objective likelihood at the relevant time.<sup>72</sup>

24. The Contempt Judge found Ms Al Khayat and *Al Jadeed* not guilty under Count 1<sup>73</sup> since, in his view, the *actus reus* of the offence had not been proven beyond reasonable doubt.<sup>74</sup>

i. Alleged Error of Law Relating to the Legal Standard of Objective Likelihood Applied to the *Actus Reus* (*Amicus* Ground 1)

(a) *Submissions*

25. The *Amicus* argues that the Contempt Judge erred in law by incorrectly defining the standard applicable to the *actus reus* of contempt under Count 1.<sup>75</sup> The *Amicus* submits that it was an error to require proof through “ascertainable facts” that an accused's conduct was of such “gravity” so as to “create an objective likelihood” that public confidence would be undermined and that, in so doing, the Contempt Judge departed from established international jurisprudence by requiring proof of actual harm.<sup>76</sup> The *Amicus* states that the proper standard requires proof of conduct which creates “a real risk” that public confidence would be undermined, and not proof of actual harm.<sup>77</sup> While recognising that the Contempt Judge explicitly stated that proof of actual harmful effects was not required, the *Amicus* argues that the “objective likelihood test”, which can only be proven by “ascertainable facts”, as set out in the Judgment, imposes a higher threshold than the “real risk” standard recognized in international jurisprudence.<sup>78</sup>

26. The Defence considers this ground to be without merit, arguing that the *Amicus* is restating an argument made at trial, namely that the Contempt Judge should view the

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<sup>72</sup> Judgment, para. 46.

<sup>73</sup> Judgment, p. 53.

<sup>74</sup> Judgment, paras 120-127.

<sup>75</sup> *Amicus* Appeal Brief on the Judgment, paras 25-33.

<sup>76</sup> *Amicus* Appeal Brief on the Judgment, paras 25-26.

<sup>77</sup> *Amicus* Appeal Brief on the Judgment, paras 27-29, citing ICTY, *Prosecutor v. Margetić*, IT-95-14-R77.6, Judgment on Allegations of Contempt, 7 February 2007 (“*Margetić* Trial Judgment”), paras 64-70.

<sup>78</sup> *Amicus* Appeal Brief on the Judgment, para. 28; *Amicus* Reply on the Judgment, paras 6-7, 9, referring to STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, F0012, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011; 10 August 2012 Order.

evidence with a common sense approach.<sup>79</sup> The Defence adds that the *Amicus* had the burden of proving a likelihood that public confidence was undermined, which he failed to do at trial, and that the appeal stage does not give him an opportunity to reiterate his previous position that, under Count 1, proving the underlying conduct should automatically lead to a finding that the administration of justice was interfered with.<sup>80</sup> In addition, the Defence considers that both the statement of the law and its application to the facts by the Contempt Judge demonstrate that actual harmful effects were not required.<sup>81</sup> Rather, the Defence asserts that the Contempt Judge held that the occurrence of harm “can be relevant” to the existence of an objective likelihood of undermining public confidence, while stressing that its existence was not required to prove the *actus reus*.<sup>82</sup> With respect to ascertainable facts, the Defence considers that the Contempt Judge was correct in holding that they could not be proved solely “on the basis of the personal feelings of a small number of people”.<sup>83</sup>

(b) *Analysis*

27. The Appeals Panel recalls that the Contempt Judge defined the legal standard for the *actus reus* of Count 1, under the *chapeau* of Rule 60 bis (A), as being one of objective likelihood.<sup>84</sup> The Appeals Panel understands the objective likelihood standard as requiring proof beyond reasonable doubt that a reasonable member of the public would have had his confidence in the Tribunal’s ability to protect confidential witness information undermined as a result of the Episodes.<sup>85</sup>

28. Moreover, the Appeals Panel understands *Amicus* ground 1 as arguing that the legal standard for the *actus reus* of an offence defined under the *chapeau* of Rule 60 bis (A),

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<sup>79</sup> Defence Response on the Judgment, para. 17.

<sup>80</sup> Defence Response on the Judgment, paras 11-13, 19, citing the *Margetić* Trial Judgment.

<sup>81</sup> Defence Response on the Judgment, para. 16.

<sup>82</sup> Defence Response on the Judgment, para. 16.

<sup>83</sup> Defence Response on the Judgment, para. 16.

<sup>84</sup> Judgment, paras 44-46.

<sup>85</sup> The Appeals Panel recalls that, as a matter of legal terminology, an “objective” test is one based on a reasonable person. See ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 504, citing ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, para. 56: [in the context of determining the *actus reus* of outrages upon personal dignity] “[...] an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged”. See also ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, Decision Concerning Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orić, 22 January 2014, p. 3, citing ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189; ECCC, *Prosecutor v. Nuon et al.*, 002/19-09-2007/ECCC/TC, Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 33.

requires proof of conduct (in this case, the Episodes) which creates a real risk that the public's confidence in the Tribunal's ability to maintain the confidentiality of witness information may be undermined. The Appeals Panel also understands the *Amicus*' argument to be that satisfying the real risk standard does not require proof that the undermining of public confidence has actually occurred; instead, proof of a real risk of undermining public confidence could be based on the features of the conduct itself (in this case, the Episodes), rather than having to be proven on an entirely separate evidentiary basis.<sup>86</sup>

29. The *Amicus* cites various judgments in support of his argument that a real risk standard should apply.<sup>87</sup> However, the Appeals Panel notes that three of these judgments do not support the *Amicus*' position, namely: the *Marijačić and Rebić* Trial Judgment, the *Hartmann* Trial Judgment and the *Haxhiu* Trial Judgment. These judgments set out the real risk standard, and how it can be proven, merely in relation to establishing the gravity of the offence for the purposes of sentencing, and not in the course of defining the *actus reus* of the offence itself.<sup>88</sup> Although the *Hartmann* Trial Judgment also discusses the real risk created by the accused's conduct in another context, it does so only when looking at the interaction between the offence of contempt and the freedom of the press, in terms of policy and human rights.<sup>89</sup> Therefore, this judgment cannot assist the Appeals Panel in the present instance. In addition, the Appeals Panel notes that another judgment cited by the *Amicus*, the *Worm*

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<sup>86</sup> The Appeals Panel notes that the *Amicus* also argued that Count 1 was not a novel charge in that it was: (i) not the first charge to deal with interferences with the administration of justice involving the disclosure of alleged confidential witness information; and (ii) not the first national or international case concerning media disclosures of purported protected information and the recognition of lawful limitations on the freedom of expression; see *Amicus* Appeal Brief on the Judgment, para. 27. The Appeals Panel understands this argument as suggesting that there is relevant jurisprudence available which could have assisted the Contempt Judge in determining the applicable test for the *actus reus* of Count 1. However, in and of itself, this argument does not add anything of substance to the *Amicus*' submissions under ground 1 and will therefore not be considered in any further detail by the Appeals Panel.

<sup>87</sup> *Amicus* Appeal Brief on the Judgment, paras 27-33, citing ICTY, *Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2, Judgement, 10 March 2006 ("*Marijačić and Rebić* Trial Judgment"), para. 50; ICTY, *In the case against Florence Hartmann*, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 ("*Hartmann* Trial Judgment"), para. 80; ICTY, *Prosecutor v. Haxhiu*, IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008 ("*Haxhiu* Trial Judgment"), para. 34 (the Appeals Panel notes that the *Amicus* incorrectly referred to para. 44 of this judgment, which in fact does not exist); ECtHR, *Worm v. Austria*, 83/1996/702/894, Judgment, 29 August 1997 ("*Worm* Judgment"), paras 48-54; ICTY, *In the matter of Vojislav Šešelj*, IT-03-67-R77.4, Public Redacted Version of Judgement Issued on 28 June 2012, 28 June 2012 ("*Third Šešelj* Trial Judgment"), para. 40; *Margetić* Trial Judgment, para. 15.

<sup>88</sup> *Marijačić and Rebić* Trial Judgment, para. 50; *Hartmann* Trial Judgment, para. 80; *Haxhiu* Trial Judgment, para. 34.

<sup>89</sup> *Hartmann* Trial Judgment, para. 74.

Judgment,<sup>90</sup> does not support the *Amicus*' argument because it merely restates the findings of the Vienna Court of Appeal, which applied a standard of objective capability pursuant to relevant domestic law,<sup>91</sup> but does not comment on whether this *actus reus* standard was the correct one to be applied in cases akin to Count 1.<sup>92</sup> As such, the assertions made in the *Worm* Judgment are inapposite in determining whether a real risk standard should apply to the *actus reus* of Count 1.

30. The remaining two judgments cited by the *Amicus* may appear to be on point.<sup>93</sup> The Third *Šešelj* Trial Judgment and the *Margetić* Trial Judgment state that the *actus reus* of the crime of interfering with the administration of justice, pursuant to ICTY Rule 77 (A),<sup>94</sup> includes “[a]ny deliberate conduct which creates a real risk that confidence in the Tribunal’s ability to grant effective protective measures would be undermined”.<sup>95</sup> However, the Appeals Panel notes that both the Third *Šešelj* Trial Judgment and the *Margetić* Trial Judgment quote a section of the *Marijačić and Rebić* Trial Judgment which, as the Appeals Panel has already noted above,<sup>96</sup> did not define the *actus reus* under the *chapeau* of ICTY Rule 77 (A), but was only used in the context of establishing the gravity of the offence for the purposes of sentencing.

31. As such, the Appeals Panel considers that it is not informed by the Third *Šešelj* Trial Judgment and the *Margetić* Trial Judgment with respect to the real risk standard being applicable to the *actus reus* of Count 1 since: (i) the conclusions drawn in those cases are not supported by the jurisprudence on which they relied (namely the *Marijačić and Rebić* Trial Judgment); and (ii) the *Amicus* failed to explain why the formulation of a real risk standard in a sentencing context – as in the *Marijačić and Rebić* Trial Judgment – can and should be

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<sup>90</sup> *Worm* Judgment, paras 48-54.

<sup>91</sup> *Worm* Judgment, paras 48-54.

<sup>92</sup> The Appeals Panel also notes that the *Worm* Judgment discusses the relevant domestic law test merely for the purposes of determining whether Austria’s interference with the freedom of expression was necessary in a democratic society and fell within its margin of appreciation; see *Worm* Judgment, paras 48-58.

<sup>93</sup> Third *Šešelj* Trial Judgment, para. 40, citing *Marijačić and Rebić* Trial Judgment, para. 50; *Margetić* Trial Judgment, para. 15, citing *Marijačić and Rebić* Trial Judgment, para. 50.

<sup>94</sup> The Appeals Panel recalls that these cases concerned Rule 77 (A) ICTY RPE, which is equivalent to Rule 60 *bis* (A) STL RPE.

<sup>95</sup> Third *Šešelj* Trial Judgment, para. 40, citing *Marijačić and Rebić* Trial Judgment, para. 50; *Margetić* Trial Judgment, para. 15, citing *Marijačić and Rebić* Trial Judgment, para. 50.

<sup>96</sup> See above para. 29.

applied to define the *actus reus* of contempt under the *chapeau* of ICTY Rule 77 (A).<sup>97</sup> Consequently, the Appeals Panel finds that the *Amicus* has not substantiated his contention that the objective likelihood standard adopted by the Contempt Judge was erroneous and that a real risk standard should be applied in lieu. Therefore, the Appeals Panel dismisses this argument.

32. The second aspect of the *Amicus*' argument pursuant to ground 1 is that the real risk or, in light of the above finding, the objective likelihood of undermining public confidence in the Tribunal, need not be proven on a distinct evidentiary basis, but rather can be ascertained from the features of the conduct itself (in this case, the Episodes). In this regard, the Appeals Panel notes that the *Amicus* has failed to point to any findings in the Judgment where actual harm or effects were *de facto* required by the Contempt Judge, particularly via the requirement of "ascertainable facts".<sup>98</sup> The Appeals Panel therefore summarily dismisses this aspect of the *Amicus*' argument.

33. The remaining question is whether, even though proof of actual harm or effects was not required, the objective likelihood of undermining public confidence was nonetheless incorrectly required to be proven on a distinct evidentiary basis, rather than based on the nature and content of the Episodes themselves. The Appeals Panel considers that the jurisprudence relied on by the *Amicus* does not support his argument, because none of it refers specifically to the question of whether the undermining of public confidence, be it under a real risk or an objective likelihood standard, needs to be proven on a separate evidentiary basis or whether it can be proven based on the features of the conduct itself (in this case, the Episodes).<sup>99</sup> In addition, the *Amicus* has failed to explain why this case law,

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<sup>97</sup> The Appeals Panel notes that the *Amicus* has also failed to explain why the "real risk" standard, which originated in the jurisprudence relating to the gravity of an offence for the purpose of sentencing, can and should be applied to the *actus reus* of contempt under the *chapeau* of Rule 60 *bis* (A) STL RPE.

<sup>98</sup> *Amicus* Appeal Brief on the Judgment, paras 26, 28.

<sup>99</sup> Specifically, the Appeals Panel notes that the *Amicus* relies on ICTY, *Prosecutor v. Jović*, IT-95-14 & 14/2-R77, Decision to Deny the Accused Josip Jović's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, 21 December 2005, para. 28 and *Margetić* Trial Judgment, paras 77-79 (*Amicus* Appeal Brief on the Judgment, para. 28). However, these cases merely state that the *actus reus* for contempt under the *chapeau* of Rule 77 (A) ICTY RPE is necessarily proven if the Prosecution has already proven the *actus reus* of contempt under Rule 77 (A) (ii) and (iv) ICTY RPE, which are "non-exhaustive examples" of the *actus reus* of contempt under Rule 77 (A) ICTY RPE. In addition, the *Amicus* relies on the *Margetić* Trial Judgment, paras 64-70 (*Amicus* Appeal Brief on the Judgment, para. 29), which only states that there is no need to separately prove that actual witness interference took place as a result of conduct charged under Rule 77 (A) (iv) ICTY RPE. Finally, the *Amicus* relies on the *Worm* Judgment,

which does not directly support his argument, can and should nevertheless be applied by analogy to the offence under Count 1. The Appeals Panel therefore dismisses the *Amicus*' arguments in this regard.

34. The *Amicus* has therefore failed to substantiate his contention that the Contempt Judge erred in requiring proof of an objective likelihood that the public's confidence in the Tribunal had been undermined, distinct from proof of the existence and features of the Episodes themselves. Consequently, the Appeals Panel dismisses *Amicus* ground 1.

ii. Alleged Error of Law in Requiring Proof of Actual Harm (*Amicus* Ground 2)

(a) *Submissions*

35. The *Amicus* submits that the Contempt Judge erred in adopting an "objective likelihood" test which requires proof of objective effects linked to the contemptuous conduct.<sup>100</sup> He asserts that this departs from the rationale of contempt proceedings, which is to deter certain types of conduct, and argues that, in contrast, the Contempt Judge's approach would only punish the prohibited conduct after the harm had occurred.<sup>101</sup> The *Amicus* contends that the correct approach focuses on deterring the Accused's conduct by objectively examining it.<sup>102</sup> The *Amicus* furthermore argues that, by requiring proof of harm, the Contempt Judge made the existence of the crime dependent upon the effects of the Accused's prohibited conduct and not upon the conduct itself.<sup>103</sup>

36. The Defence reiterates its submissions in response to *Amicus* ground 1 and considers the present ground to also be without merit.<sup>104</sup> The Defence argues that, while harm or effects may be relevant to and probative of the charges, it notes that the Contempt Judge reasoned that, in order to prove the existence of an objective likelihood of undermining the public confidence, ascertainable facts must establish that the conduct was of sufficient gravity.<sup>105</sup>

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paras 48-54 (*Amicus* Appeal Brief on the Judgment, para. 32), which refers to the findings of the Vienna Court of Appeal (in applying a domestic law which itself did not require proof of effects), and discusses this merely in the context of determining whether Austria's interference with freedom of expression fell within its margin of appreciation and was necessary in a democratic society.

<sup>100</sup> *Amicus* Appeal Brief on the Judgment, para. 34.

<sup>101</sup> *Amicus* Appeal Brief on the Judgment, paras 34-35.

<sup>102</sup> *Amicus* Appeal Brief on the Judgment, paras 35-37.

<sup>103</sup> *Amicus* Appeal Brief on the Judgment, para. 35.

<sup>104</sup> Defence Response on the Judgment, paras 27-28.

<sup>105</sup> Defence Response on the Judgment, paras 27-28, 30.

The Defence asserts that this is consistent with relevant case law and that the *Amicus* failed to bring sufficient evidence to prove the charges according to this standard.<sup>106</sup>

37. In reply, the *Amicus* contends that the Contempt Judge erred in failing to consider the Episodes' stated intention to reveal the identities of purported confidential witnesses, which was sufficient to prove that the Accused's conduct created a serious risk of undermining the public's confidence.<sup>107</sup> The *Amicus* concedes that the Contempt Judge did not explicitly state that proof of a particular result was required under Count 1.<sup>108</sup> However, he submits that, in focusing on the effects of the Accused's conduct, namely whether the individuals featured in the Episodes actually received threats or were harmed, or actually lost confidence in the Tribunal, the Contempt Judge did in practice require proof of actual effects, or at the very least, gave it undue weight and importance.<sup>109</sup>

(b) *Analysis*

38. The Appeals Panel notes at the outset that the error alleged under this ground is a mixture of law and fact, as it necessarily involves a review of not only the legal test itself, but also a review of how the Contempt Judge applied this legal test. The Appeals Panel will therefore consider the legal aspects of this alleged error under this ground, and notes that the *Amicus*' arguments pertaining to the Contempt Judge's application of the test are duplicated under grounds 4 in part, 5 in part and 8, and will be dealt with at that juncture.<sup>110</sup>

39. The Appeals Panel notes that the Contempt Judge held that, while proof of harm arising from the Episodes was not required, it could be relevant to, but not determinative of, the existence of an objective likelihood of the public's confidence being undermined.<sup>111</sup> The Appeals Panel understands this to mean that, even if actual harm was proven, it may not by itself be enough to prove this element of the *actus reus* of Count 1. As such, the Appeals Panel considers that this passage of the Judgment clearly retains the possibility that evidence which does not show actual harm – either because it is entirely unrelated to the issue of the effects of the Episodes or because it demonstrates effects which did not rise to the level of

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<sup>106</sup> Defence Response on the Judgment, paras 28-31.

<sup>107</sup> *Amicus* Reply on the Judgment, para. 8.

<sup>108</sup> *Amicus* Reply on the Judgment, para. 7.

<sup>109</sup> *Amicus* Reply on the Judgment, para. 7.

<sup>110</sup> See below para. 96.

<sup>111</sup> Judgment, para. 46.

actual harm – may also be relevant to establishing the objective likelihood of the public confidence in the Tribunal being undermined. The Appeals Panel therefore finds that the legal test set out by the Contempt Judge did not *de facto* require actual harm in proving the *actus reus* of Count 1 and, accordingly, dismisses *Amicus* ground 2.

iii. Alleged Error of Law in Requiring that the Individuals Featured in the Episodes be Reasonably Identifiable (*Amicus* Ground 3)

(a) *Submissions*

40. The *Amicus* states that the Contempt Judge erred in requiring that the information concerning purported confidential witnesses contained in the Episodes, must have been significant enough to make the relevant individuals reasonably identifiable.<sup>112</sup> The *Amicus* argues that, where a broadcast leads the public to believe that protected witnesses have been identified despite the existence of protective measures for them, the potential impact of this purported disclosure on both the witnesses and the administration of justice is the same regardless of whether the Episodes permitted the identification of these individuals.<sup>113</sup>

41. The Defence submits that this ground of appeal should be summarily dismissed as the *Amicus* has failed to establish how the alleged error invalidates the Judgment.<sup>114</sup>

(b) *Analysis*

42. The Appeals Panel notes that the *Amicus* has indeed not stated how this alleged error invalidates the Contempt Judge's finding regarding the *actus reus* of Count 1, since the Contempt Judge determined that the Episodes did allow for the identification of three individuals,<sup>115</sup> and thus that this element of the legal test was satisfied.<sup>116</sup> Consequently, the *Amicus*' argument that this element of the legal test should be removed lacks the potential to affect the Contempt Judge's finding regarding this aspect of the *actus reus* of Count 1. Therefore, the Appeals Panel summarily dismisses this ground of appeal.

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<sup>112</sup> *Amicus* Appeal Brief on the Judgment, para. 38.

<sup>113</sup> *Amicus* Appeal Brief on the Judgment, para. 38.

<sup>114</sup> Defence Response on the Judgment, para. 32.

<sup>115</sup> Judgment, paras 80, 84, 87.

<sup>116</sup> See Judgment, para. 46, setting out the legal standard for proving the *actus reus* of Count 1.

**b. Alleged Errors of Law and Fact Relating to the Review of the *Actus Reus* Evidence (*Amicus* Grounds 4 in Part, 5 in Part and 6-12)**

43. Regarding the *actus reus* of Count 1, the Contempt Judge held that the expert evidence of Dr Anne-Marie de Brouwer had insufficient probative value with respect to the alleged impact of the disclosures of purported confidential information in this case because: (i) her expertise had no direct connection to Lebanon; (ii) her examination of the impacts of disclosures of purported confidential information at other international tribunals was not sufficiently comprehensive to allow for general conclusions to be drawn and applied to the present case; and (iii) she testified that the impact of such disclosures depended on multiple case-specific factors, including the local circumstances, yet her evidence did not address, directly or through her general findings from international practice, the effects of disclosures in Lebanon or the region.<sup>117</sup>

44. The Contempt Judge further stated that the various news articles and media reports submitted by the *Amicus* to demonstrate the effects of the Accused's conduct,<sup>118</sup> lacked probative value since they: (i) were not presented to any witness in court who may have testified to the truth of their content; (ii) did not provide any information on the individuals featured in the Episodes; (iii) did not cite any sources of information; and (iv) were not corroborated by any other evidence on the record.<sup>119</sup> In particular, the Contempt Judge held that Exhibit P00151, a complaint submitted to the Tribunal following another disclosure of purported confidential information,<sup>120</sup> had no probative value with respect to the impact of disclosures on the public's confidence in the Tribunal in this case, as the concerns expressed therein were "based on conjectures formulated by third persons".<sup>121</sup>

45. Furthermore, the Contempt Judge found that: (i) of the 11 purported confidential witnesses featured in the Episodes, only four testified in this case and, of those four, only AP11, AP12 and AP13 were reasonably identifiable;<sup>122</sup> (ii) the testimony of Mr Afif Choab,

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<sup>117</sup> Judgment, paras 106-109.

<sup>118</sup> Judgment, para. 110.

<sup>119</sup> Judgment, para. 117.

<sup>120</sup> Exhibit P00151 (confidential).

<sup>121</sup> Judgment, paras 118-119.

<sup>122</sup> Judgment, paras 80, 84, 87, 89, 91.

the fourth purported confidential witness featured in the Episodes, was unreliable;<sup>123</sup> and (iii) because the remaining seven purported confidential witnesses featured in the Episodes did not testify in this case, there was no evidence on the record that their identities were disclosed through the Episodes.<sup>124</sup>

46. Furthermore, the Contempt Judge relied on the hearsay testimony of Mr John Comeau, [REDACTED],<sup>125</sup> [REDACTED]

.<sup>126</sup> The Contempt Judge found Mr Comeau's testimony reliable because it was corroborated by [REDACTED]

.<sup>127</sup> However, the Contempt Judge found that the concerns raised by the individuals featured in the Episodes were not based on ascertainable facts that could be objectively linked to the Episodes.<sup>128</sup> Consequently, the Contempt Judge was unable to conclude that the individuals featured in the Episodes suffered any harm as a result.<sup>129</sup> Moreover, the Contempt Judge indicated that he could draw no conclusion as to whether the Episodes had any impact on the relevant individuals' confidence in the Tribunal's ability to protect confidential information.<sup>130</sup> As a result, the Contempt Judge could not infer from their testimony that the Episodes created the likelihood of undermining public confidence in the Tribunal.<sup>131</sup>

47. Therefore, as the Contempt Judge had also found that he could not rely on the documentary evidence or on Dr de Brouwer's expert evidence,<sup>132</sup> he concluded that there was no evidence on the record on the effects of the Episodes on the public in general.<sup>133</sup> The Contempt Judge therefore held that the *Amicus* had not proven beyond reasonable doubt the second element of the *actus reus* of Count 1, namely the existence of an objective likelihood

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<sup>123</sup> Judgment, para. 122.

<sup>124</sup> Judgment, para. 90.

<sup>125</sup> Comeau, T6, 16 April 2015, p. 30 (private session) ; Comeau, T7, 17 April 2015, pp. 60-61 (private session).

<sup>126</sup> Judgment, para. 122.

<sup>127</sup> Judgment, para. 122.

<sup>128</sup> Judgment, para. 123.

<sup>129</sup> Judgment, para. 121.

<sup>130</sup> Judgment, para. 124.

<sup>131</sup> Judgment, para. 125.

<sup>132</sup> Judgment, paras 109, 117, 126.

<sup>133</sup> Judgment, para. 126.

of the Episodes undermining the public's confidence in the Tribunal's ability to protect confidential information.<sup>134</sup>

i. Alleged Error of Fact Relating to the Review of the Evidence of Expert Witness Dr de Brouwer (*Amicus* Grounds 4 in Part, 5 in Part and 9)

48. *Amicus* grounds 4, 5 and 9 put forward a number of arguments pertaining to the Contempt Judge's review of the expert evidence of Dr de Brouwer and her expert report. Since these grounds address the same pieces of evidence and contain a number of inter-related issues, the Appeals Panel will discuss them together. In addition, the *Amicus* makes a number of general submissions under grounds 4 and 5 on the holistic approach to evidence review. While specific submissions pertaining to the holistic assessment of evidence under Count 1 are also raised in relation to the review of the documentary exhibits and the witness testimonies, the Appeals Panel will deal with his general arguments at this juncture, as it is the first instance in which the holistic approach is discussed.

(a) *Submissions*

49. With respect to the holistic approach to evidence review,<sup>135</sup> the *Amicus* submits that triers of fact must not assess the weight of each piece of evidence individually and in isolation from other relevant evidence; rather they must look at the totality of the evidence and consider whether the various pieces corroborate and add to each other's reliability and weight.<sup>136</sup> The *Amicus* argues that the Contempt Judge erred by failing to follow this approach and by repeatedly rejecting individual pieces of evidence because they involved hearsay, circumstantial or secondary evidence, without considering whether they supported or corroborated each other.<sup>137</sup> Similarly, the *Amicus* contends that the Contempt Judge erred in

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<sup>134</sup> Judgment, para. 127.

<sup>135</sup> *Amicus* Appeal Brief on the Judgment, para. 46; *Amicus* Reply on the Judgment, para. 11.

<sup>136</sup> *Amicus* Appeal Brief on the Judgment, paras 46-50.

<sup>137</sup> *Amicus* Appeal Brief on the Judgment, para. 50; *Amicus* Reply on the Judgment, para. 11. The *Amicus* Reply on the Judgment also adds that the Defence Appeal Brief on the Judgment itself argues that the Contempt Judge erred in failing to draw a "reasonable" inference from the totality of the evidence, and in failing to consider the contrary or corroborative effect that the various pieces of evidence may have on one another; see *Amicus* Reply on the Judgment, para. 11.

evaluating individual pieces of evidence to see whether a particular piece, by itself or in very restricted relation to other evidence, proved a fact at issue.<sup>138</sup>

50. The *Amicus* submits that the Contempt Judge erred in disregarding Dr de Brouwer's expert evidence on the basis that she was unable to discuss in depth the cases cited in her expert report.<sup>139</sup> The *Amicus* contends that Dr de Brouwer's evidence was tendered to provide an insight, based on her experience, into issues of witness and victim protection encountered by various international criminal tribunals and the impact on the administration of justice of disclosures of purported confidential witness information.<sup>140</sup> The *Amicus* furthermore argues that she did not testify as an expert on Lebanon as such; rather, her role was to provide a contextual framework, from the experience of other international criminal tribunals, based on which the Contempt Judge could assess the risks posed by the Episodes.<sup>141</sup> He submits that the Contempt Judge erred in finding that Dr de Brouwer's evidence had no probative value after reviewing her evidence in a vacuum, without reference to the supporting evidence of AP11, AP12, AP13 and Mr Comeau.<sup>142</sup> The *Amicus* contends that the Contempt Judge should have reviewed her evidence in light of common sense and his Tribunal experience in the *Ayyash et al.* case.<sup>143</sup>

51. The Defence responds that *Amicus* grounds 4 and 5 do not show any errors.<sup>144</sup> First, it argues that, in claiming that the Contempt Judge failed to apply a holistic approach, the *Amicus* is disputing the Contempt Judge's findings on all of the evidence and that this is therefore not a valid ground of appeal.<sup>145</sup> The Defence also submits that, in any event, the Appeals Panel must lend credibility to the Contempt Judge's findings of fact regardless of the approach he used in assessing the evidence, and only consider whether his method was erroneous if it led to an unreasonable assessment of the facts.<sup>146</sup> Consequently, the Defence contends that the Contempt Judge's refusal to find that various "defective" pieces of the

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<sup>138</sup> *Amicus* Appeal Brief on the Judgment, para. 51; *Amicus* Reply on the Judgment, para. 11.

<sup>139</sup> Exhibit P00001.

<sup>140</sup> *Amicus* Appeal Brief on the Judgment, paras 70-71.

<sup>141</sup> *Amicus* Appeal Brief on the Judgment, para. 53.

<sup>142</sup> *Amicus* Appeal Brief on the Judgment, para. 75.

<sup>143</sup> *Amicus* Appeal Brief on the Judgment, para. 73.

<sup>144</sup> Defence Response on the Judgment, paras 35, 40, 43.

<sup>145</sup> Defence Response on the Judgment, para. 40.

<sup>146</sup> Defence Response on the Judgment, para. 41.

*Amicus*' evidence corroborated one another, did not amount to an unreasonable assessment of the totality of the evidence.<sup>147</sup>

52. The Defence submits that the *Amicus* has not proven how ground 9 invalidates the Judgment or occasions a miscarriage of justice, and that this ground sets out mere disagreement with the Contempt Judge's findings.<sup>148</sup> The Defence argues that the Contempt Judge alerted the *Amicus* to the fact that the potential probative value of Dr de Brouwer's expert evidence, keeping in mind that her expertise had no connection to Lebanon, would be dependent on the application of her expertise to the specific facts of the present case and to the Lebanese context.<sup>149</sup> The Defence contends that despite this notice, Dr de Brouwer's evidence did not discuss the effects of the Episodes in Lebanon or in the region.<sup>150</sup> The Defence submits that the Contempt Judge's finding was reasonable because Dr de Brouwer's evidence was not sufficiently comprehensive and was partly based on case law which did not in fact support the views expressed in her expert report.<sup>151</sup> Moreover, the Defence argues that it would be unreasonable for the Contempt Judge to use "common sense" and his experience at the Tribunal to apply Dr de Brouwer's generalized knowledge to the situation in Lebanon.<sup>152</sup>

*(b) Analysis*

53. The Appeals Panel recalls that, under Count 1, the *Amicus* was required to prove the existence of an objective likelihood of the public's confidence in the Tribunal's ability to protect confidential information being undermined.<sup>153</sup> The Appeals Panel notes that, when the Contempt Judge considered Dr de Brouwer's expert evidence on the effects of disclosures of purported confidential witness information from other international criminal tribunals,<sup>154</sup> he found that it was an insufficient basis from which to draw general conclusions about such effects in the present case.<sup>155</sup> The Appeals Panel recalls that a trier of fact has the discretion

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<sup>147</sup> Defence Response on the Judgment, para. 41.

<sup>148</sup> Defence Response on the Judgment, paras 54, 57.

<sup>149</sup> Defence Response on the Judgment, para. 37.

<sup>150</sup> Defence Response on the Judgment, paras 37, 55.

<sup>151</sup> Defence Response on the Judgment, paras 55-56.

<sup>152</sup> Defence Response on the Judgment, paras 55-57.

<sup>153</sup> Judgment, para. 46. *See above* para. 34.

<sup>154</sup> Exhibit P00001; de Brouwer, T10, 22 April 2015.

<sup>155</sup> Judgment, paras 92, 106-109, 126.

to decide if, and under which circumstances, to permit the admission of expert testimony, and to assess its reliability and probative value.<sup>156</sup>

54. The Appeals Panel notes that Dr de Brouwer's expert report focused on the issues relating to the disclosure of purported confidential witnesses information,<sup>157</sup> and concluded that a number of considerations play a role in determining the effects of such disclosures, including geographical considerations, political circumstances, and the ethnic and religious circumstances of the relevant state.<sup>158</sup> However, Dr de Brouwer testified that she had not done any work on Lebanon, had she never been to Lebanon, and had not [REDACTED]

.<sup>159</sup> Furthermore, Dr de Brouwer testified that, in her report, she did not apply her findings from other international criminal tribunals to the Tribunal's circumstances.<sup>160</sup> In addition, when questioned on the specifics of the international cases and judgments identified in her expert report concerning witnesses and victims giving evidence in public, Dr de Brouwer lacked a comprehensive understanding of them and some of her interpretations of the findings of the judgments were misconstrued;<sup>161</sup> this has an impact on her overall credibility as an expert witness.

55. Concerning the *Amicus*' assertion that Dr de Brouwer did touch upon the disclosures of purported confidential Tribunal witnesses in her report, the Appeals Panel notes that her report merely reiterated the content of various media reports on the subject, without applying her specialized knowledge to these articles or forming an opinion as to their content or probative value.<sup>162</sup> The Appeals Panel further notes that Dr de Brouwer's expert report and testimony did not focus on the issue of undermining public confidence in the absence of a court order,<sup>163</sup> which is the charge under Count 1, and finds that the Contempt Judge was

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<sup>156</sup> ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Decision on Expert Witness for the Defence – Rules 54, 73, 89 and 94bis of the Rules of Procedure and Evidence, 11 November 2003, para. 8; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 199.

<sup>157</sup> Exhibit P00001, p. 1; de Brouwer, T10, 22 April 2015, pp. 22-23.

<sup>158</sup> de Brouwer, T10, 22 April 2015, pp. 28-29.

<sup>159</sup> de Brouwer, T10, 22 April 2015, pp. 25-26, 28, 36.

<sup>160</sup> de Brouwer, T10, 22 April 2015, pp. 78-79.

<sup>161</sup> de Brouwer, T10, 22 April 2015, pp. 35-36, 44-49, 61-62, 65-74, 90-93.

<sup>162</sup> Exhibit P00001, pp. 14-15.

<sup>163</sup> Dr de Brouwer's expert report has two references to public confidence; see Exhibit P00001, pp. 9, 19, where she cites an American journal article which aims to assist police to reduce the harm caused by specific crime and disorder problems and notes the findings of ICTY Trial Chambers, in the *Margetić* and in the *Marijačić and Rebić* cases, that public confidence in court orders is vital to the successful functioning of the tribunal. However,

reasonable in holding that, on its own, her testimony lacked credibility and probative value.<sup>164</sup>

56. Regarding the *Amicus*' contention that the Contempt Judge erred in viewing Dr de Brouwer's evidence in a vacuum because he failed to apply a holistic approach to his assessment of the evidence,<sup>165</sup> the Appeals Panel notes that a trier of fact is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.<sup>166</sup> This holistic approach is necessary because the apparent quality of an individual piece of evidence, when viewed in isolation, may be augmented or undermined when considered in the context of other relevant pieces of evidence, depending on whether it is corroborated<sup>167</sup> or contradicted by this other evidence.<sup>168</sup>

57. The Appeals Panel notes that the Contempt Judge is silent on whether he assessed the corroborating effects of other evidence on the record on Dr de Brouwer's evidence. The Appeals Panel also notes that, although a trier of fact is required to give a reasoned opinion on his assessment of the evidence,<sup>169</sup> it need not set out in detail all the reasons for which it

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Dr de Brouwer does not state how these crimes, which involved breaches of court orders, are relevant to the circumstances under Count 1 which does not involve allegations that such court orders were violated.

<sup>164</sup> Judgment, para. 109.

<sup>165</sup> *Amicus* Appeal Brief on the Judgment, para. 75.

<sup>166</sup> ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgment"), para. 217; ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgment"), para. 153; ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgment"), para. 174; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgment"), paras 125, 128; ICTR, *Musema v Prosecutor*, ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgment"), para. 134; ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Trial Judgment"), para. 92; *Lubanga* Conviction Appeal Judgment, para. 22.

<sup>167</sup> The Appeals Panel recalls that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts; see *Nyiramasuhuko et al.* Appeal Judgment, para. 619, fn. 1393; see also ICTR, *Karera v. Prosecutor*, ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgment"), para. 590, fn. 1336. However, corroboration is neither a condition for nor a guarantee of the reliability of a single piece of evidence; it is merely an element that a reasonable trier of fact may consider in assessing the evidence; see *Limaj et al.* Appeal Judgment, para. 203. A judge therefore has the discretion to decide, in light of the circumstances of each case, whether corroboration is necessary and to rely on uncorroborated, but otherwise credible, witness testimony; see *Nyiramasuhuko et al.* Appeal Judgment, para. 619, fn. 1393; see also *Karera* Appeal Judgment, para. 45.

<sup>168</sup> *Vujin* Trial Judgment, para. 93; *Musema* Appeal Judgment, para. 134; *Halilović* Appeal Judgment, para. 125; *Ntagerura et al.* Appeal Judgment, para. 174.

<sup>169</sup> *Mrkšić and Šljivančanin* Appeal Judgment, para. 217; see also *Halilović* Appeal Judgment, para. 128. However, a trier of fact need not refer to the testimony of every witness or every piece of evidence on the trial record as there is a presumption that a trier of fact has evaluated all the evidence presented to it, as long as there is no indication that the trier of fact completely disregarded any particular piece of evidence; see *Halilović*

rejected a certain piece of evidence.<sup>170</sup> As the Appeals Panel has already noted, Dr de Brouwer's expert evidence was unreliable for a variety of important reasons.<sup>171</sup> Therefore, the Appeals Panel finds that a reasonable trier of fact may have found that her expert evidence was so lacking in probative value that it could not be re-imbued with reliability by partial corroboration from other evidence.<sup>172</sup>

58. On this basis, the Appeals Panel finds that it was not unreasonable for the Contempt Judge to conclude that Dr de Brouwer's testimony had no probative value in this case because she: (i) lacked expertise on the Lebanese context; (ii) lacked a comprehensive understanding of the relevant jurisprudence from other international criminal tribunals; and (iii) did not apply her specialized knowledge to, or formed an opinion on, the documentary evidence tendered by the *Amicus*. Consequently, the Appeals Panel dismisses the *Amicus*' grounds 4 in part, 5 in part and 9 on the matter of the assessment of Dr de Brouwer's expert evidence.

ii. Alleged Error of Fact Relating to the Review of Documentary Evidence (*Amicus* Grounds 4 in Part, 5 in Part and 10)

59. *Amicus* grounds 4, 5 and 10 present a number of arguments pertaining to the Contempt Judge's review of the documentary evidence tendered by the *Amicus* as proof of the objective likelihood of the public's confidence in the Tribunal being undermined. Since these grounds address the same pieces of evidence and contain a number of inter-related issues, the Appeals Panel will discuss them together.<sup>173</sup>

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Appeal Judgment, para. 121. Even if a trier of fact states that it has examined all the evidence on the record in reaching its decision, this does not establish an irrebuttable presumption that all of the evidence has indeed been considered by it; see *Halilović* Appeal Judgment, para. 123.

<sup>170</sup> A trier of fact is not required to set out in detail why it accepted or rejected a witness's testimony, or justify its evaluation of testimony in cases where there are discrepancies in the evidence; see *Ngudjolo* Appeal Judgment, para. 182; see also *Halilović* Appeal Judgment, para. 121; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 23; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 498.

<sup>171</sup> See above paras 54-55.

<sup>172</sup> While a trier of fact may rely on certain aspects of a witness' evidence and consider other aspects unreliable, there may be a witness whose credibility is impugned to such an extent that he cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony; in such cases, partial corroboration by other evidence would not "re-imbue" a witness' credibility or the reliability of his or her evidence; see *Ngudjolo* Appeal Judgment, paras 168, 170.

<sup>173</sup> The submissions and analysis of the other parts of grounds 4 and 5 are included in the examination of the *Amicus*' appeal grounds 7-9 and 13-14; see above paras 53-58; see below paras 93-104, 133-151.

(a) *Submissions*

60. The *Amicus* submits that the Contempt Judge committed a number of factual errors in rejecting documentary evidence for lack of probative value, on the basis that they provided no information on the individuals concerned and did not cite any sources of information.<sup>174</sup> The *Amicus* argues that the documentary evidence is physical evidence of the contemporaneous public discourse concerning the disclosure of purported confidential information, and that therefore the Contempt Judge erred in treating it as being akin to a witness statement by examining the truth of its contents.<sup>175</sup> In addition, he submits that the Contempt Judge erred by assessing the documentary exhibits in isolation, without having regard to: (i) other documentary exhibits and how they corroborate one another; or (ii) how the documentary evidence collectively fits in with other evidence in the case, such as the stated intent of the Episodes or the testimony of the individuals featured in them.<sup>176</sup> The *Amicus* adds that these documentary exhibits are themselves proof of what was being discussed at the time, which is relevant to the circumstances and context of the Accused's acts.<sup>177</sup>

61. The Defence responds that the *Amicus*' submissions concerning the documentary evidence should be dismissed, as the Contempt Judge did not make any error resulting in a miscarriage of justice or that invalidates the Judgment.<sup>178</sup> The Defence argues that the *Amicus*' suggestion that the documentary evidence is akin to physical evidence is misguided, and it would be an error to rely on this evidence without further explanation or an assessment of its reliability.<sup>179</sup> Further, the Defence submits that, although it notified the *Amicus* prior to trial of the deficiencies in his documentary evidence, the *Amicus* took no steps to rectify this.<sup>180</sup>

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<sup>174</sup> Judgment, para. 126; *Amicus* Appeal Brief on the Judgment, para. 77.

<sup>175</sup> *Amicus* Appeal Brief on the Judgment, para. 78.

<sup>176</sup> *Amicus* Appeal Brief on the Judgment, paras 54, 79.

<sup>177</sup> *Amicus* Reply on the Judgment, para. 19.

<sup>178</sup> Defence Response on the Judgment, para. 58.

<sup>179</sup> Defence Response on the Judgment, para. 60.

<sup>180</sup> Defence Response on the Judgment, para. 38.

(b) Analysis

62. The Appeals Panel recalls that the Contempt Judge reviewed the documentary evidence,<sup>181</sup> and rejected certain documents<sup>182</sup> because they did not refer to the effects of the purported disclosures – which were unrelated to the Episodes – on potential witnesses or on the public’s perception of the Tribunal.<sup>183</sup> He then found that the remaining documents<sup>184</sup> had no probative value because they: (i) did not provide any information on the “individuals concerned”; (ii) did not quote any sources for the information they contained; (iii) were not presented to a witness who might have testified as to the truth of their content; and (iv) their content was not corroborated by other evidence on the record.<sup>185</sup>

63. The Appeals Panel understands the *Amicus*’ submission as alleging that the Contempt Judge made three factual errors in his review of the documentary evidence, namely that: (i) his assessment of the evidence was inconsistent with the purpose for which the documentary evidence was admitted; (ii) he erroneously reviewed the documents as if they were witness statements and required *de facto* proof of the truth of the documents’ contents and of actual harm stemming from the Episodes; and (iii) he erred in analysing the evidence in isolation, without considering the corroborating effects of the documentary evidence on one another or how the documentary evidence fitted in with other evidence on the record.<sup>186</sup>

64. The Appeals Panel recalls that, when the *Amicus* submitted these documentary exhibits, he explained that “[t]he effects of the disclosure of identifying information about alleged confidential witnesses of the Tribunal are relevant to demonstrate the effects of *Al Jadeed* TV’s episodes of 6 to 10 August 2012.”<sup>187</sup> The Appeals Panel further recalls that

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<sup>181</sup> Exhibits P00082 (confidential); P00083 (confidential); P00084 (confidential); P00085 (confidential); P00086 (confidential); P00087 (confidential); P00088 (confidential); P00089 (confidential); P00090 (confidential); P00091 (confidential); P00092 (confidential); P00093 (confidential); P00094 (confidential); P00100 (confidential); P00101 (confidential); P00104 (confidential); P00109 (confidential); P00112 (confidential); P00150 (confidential).

<sup>182</sup> Exhibits P00083 (confidential); P00084 (confidential); P00087 (confidential); P00089 (confidential); P00091 (confidential); P00092 (confidential); P00093 (confidential); P00094 (confidential); P00100 (confidential); P00109 (confidential); P00112 (confidential); P00150 (confidential).

<sup>183</sup> Judgment, para. 111.

<sup>184</sup> Exhibits P00082 (confidential); P00085 (confidential); P00086 (confidential); P00088 (confidential); P00090 (confidential); P00101 (confidential); P00104 (confidential).

<sup>185</sup> Judgment, para. 117.

<sup>186</sup> *Amicus* Appeal Brief on the Judgment, paras 77-80.

<sup>187</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0099, Addendum to “Motion for Admission of Evidence pursuant to Rule 154” dated 16 February 2015, Confidential, 23 February 2015, Confidential Annex A.

the Contempt Judge admitted them into evidence because “the effects of other disclosures in Lebanon are relevant to evaluating the effects, if any, of the disclosures at issue in this case”.<sup>188</sup> The Contempt Judge explicitly stated, at the admission stage as well as in the Judgment, that evidence of the effects of other similar purported disclosures – unrelated to the Episodes – was relevant to determining the likely effects of the Episodes in this case.<sup>189</sup>

65. Regarding the *Amicus*' general argument that the Contempt Judge erred in failing to treat the documentary exhibits as being akin to physical evidence, the Appeals Panel notes that the *Amicus* has not presented any jurisprudence which suggests that documentary evidence – in this case media articles – should be treated as physical evidence. Moreover, the Appeals Panel notes that, when the documents were admitted into evidence pursuant to Rule 154,<sup>190</sup> the *Amicus* did not suggest that they were being tendered as being akin to physical evidence. Similarly, the *Amicus* did not seek to rely on the documentary exhibits as physical evidence at trial.<sup>191</sup> Consequently, he cannot now seek to do so for the first time on appeal. For these reasons, the Appeals Panel dismisses this argument.

66. Regarding the documents which were rejected by the Contempt Judge because they did not pertain to the effects of any purported disclosures,<sup>192</sup> the Appeals Panel notes that the Contempt Judge, in the first part of his review of the documentary evidence in the Judgment, referred to the stated purpose of their admission: the impact of purported disclosures on the public's perception of the Tribunal.<sup>193</sup> The Contempt Judge was therefore not unreasonable in dismissing those documentary exhibits which did not mention the effect of any purported disclosures.<sup>194</sup> The Appeals Panel therefore dismisses the *Amicus*' arguments with respect to these exhibits.

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<sup>188</sup> STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0120, Decision on *Amicus Curiae* Prosecutor's Motion for Admission of Evidence Pursuant to Rule 154, 9 April 2015 (“Decision on *Amicus* Bar Table Motion”), paras 19, 24.

<sup>189</sup> Judgment, para. 110; Decision on *Amicus* Bar Table Motion, paras 19, 24.

<sup>190</sup> Decision on *Amicus* Bar Table Motion, paras 18-19.

<sup>191</sup> *Amicus* Final Trial Brief, para. 35, fn. 121, citing Exhibit P00150 (confidential), para. 36, fn. 130, citing Exhibit P00151 (confidential), para. 40, fn. 150, citing Exhibit P00082 (confidential).

<sup>192</sup> Exhibits P00083 (confidential); P00084 (confidential); P00087 (confidential); P00089 (confidential); P00091 (confidential); P00092 (confidential); P00093 (confidential); P00094 (confidential); P00100 (confidential); P00109 (confidential); P00112 (confidential); P00150 (confidential).

<sup>193</sup> Judgment, para. 111.

<sup>194</sup> Judgment, para. 111

67. Next, the Appeals Panel recalls the *Amicus*' arguments that the Contempt Judge, in evaluating the reliability of each of the remaining pieces of evidence,<sup>195</sup> in fact required proof of actual effects resulting from the Episodes.<sup>196</sup> The Appeals Panel summarily dismisses this argument, as the *Amicus* has failed to explain how requiring proof of the truth of the documents' contents, which discuss purported disclosures which are unrelated to the Episodes, amounts to requiring proof of actual harm or effects resulting from the Episodes themselves.

68. The Appeals Panel considers that an assessment of the reliability of the documentary evidence is a reasonable and necessary part of assessing its probative value. However, considering the purpose for which the documents were admitted,<sup>197</sup> the Appeals Panel holds that the assessment of reliability in this case should have focused on determining whether the documents were genuine articles originating from media outlets at certain dates. Indeed, because the documents were not tendered for the proof of the truth of their content, the reliability of their content is irrelevant in this instance. The Appeals Panel further notes that, when discussing the documents, the Contempt Judge did not raise any issue as to the authenticity of the exhibits as genuine media articles.

69. The Appeals Panel therefore finds that the very existence of negative public discourse surrounding purported disclosures unrelated to the Episodes, as evidenced by the relevant documentary exhibits, whether based in truth or not, could be relevant to determining if there was an objective likelihood of the public's confidence in the Tribunal being undermined as a result of the purported disclosures in the Episodes. Therefore, the Appeals Panel finds that no reasonable trier of fact could have rejected these pieces of evidence due to a lack of sources for the information they contained or witness testimony about the truth of their contents.<sup>198</sup> Such requirements would be inconsistent with the stated purpose for which the documentary evidence was tendered and admitted.<sup>199</sup> Consequently, the Contempt Judge erred in this regard.

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<sup>195</sup> Exhibits P00082 (confidential); P00085 (confidential); P00086 (confidential); P00088 (confidential); P00090 (confidential); P00101 (confidential); P00104 (confidential).

<sup>196</sup> *Amicus* Appeal Brief on the Judgment, para. 80.

<sup>197</sup> See above para. 64.

<sup>198</sup> Judgment, paras 112-116.

<sup>199</sup> See above para. 64.

70. As the Appeals Panel has found that the Contempt Judge erroneously analysed the truth of the documents’<sup>200</sup> contents when determining their probative value, it will now assess their probative value in light of the purpose for which they were admitted. In this regard, the Appeals Panel recalls that the probative value of a document may be assessed differently, depending on the circumstances of the case.<sup>201</sup>

71. The Appeals Panel recalls that, as the documents were not admitted for the truth of their contents,<sup>202</sup> the assessment of their reliability is focused on whether the documents are faithful copies of media articles which appeared online at a given date. The Appeals Panel notes that a number of factors have been considered by other chambers when assessing the authenticity of documentary evidence, including the form and purported use of the document, and the positions of the parties thereon.<sup>203</sup> The Appeals Panel notes that while the documentary exhibits bear Uniform Resource Locators (“URLs”),<sup>204</sup> there is no other evidence on the record as to their provenance. The Appeals Panel considers that, in these circumstances, it cannot determine the documentary exhibits’ authenticity and therefore finds that their reliability has not been established.

72. The *Amicus* also argues that the Contempt Judge erred in failing to find that these documentary exhibits were corroborated, either by other documentary exhibits or by other evidence on the record.<sup>205</sup> The Appeals Panel considers that, in light of its earlier finding that the documents’ reliability was not proven, the Contempt Judge did not err in finding that these documentary exhibits could not be re-imbued with reliability through partial

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<sup>200</sup> Exhibits P00082 (confidential); P00085 (confidential); P00086 (confidential); P00088 (confidential); P00090 (confidential); P00101 (confidential); P00104 (confidential).

<sup>201</sup> ICTR, *Prosecutor v. Simba*, ICTR-01-76-A Judgement, 27 November 2007 para. 132. *See* ICTR, *Bizimungu v. Prosecutor*, ICTR-00-56B-A, Judgement, 30 June 2014, para. 210. The Appeals Panel recalls that the means by which credibility is assessed differs according to the form and nature of the evidence before the trier of fact; *see* ICTR, *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000 (“*Musema* Trial Judgment”), para. 60. The Appeals Panel recalls that the source of the documents may be relevant to the assessment of credibility; *see Musema* Trial Judgment, para. 63; *see also Musema* Appeal Judgment, para. 50.

<sup>202</sup> Decision on *Amicus* Bar Table Motion, para. 19.

<sup>203</sup> *Musema* Trial Judgment, para. 66.

<sup>204</sup> The following exhibits bear the dates on which the *Amicus* appears to have printed the articles from their online sources and the URLs of the relevant webpages: Exhibits P00082 (confidential); P00085 (confidential); P00086 (confidential); P00088 (confidential); P00090 (confidential); P00101 (confidential); P00104 (confidential).

<sup>205</sup> *Amicus* Appeal Brief on the Judgment, paras 52, 54, 65-69, 76-79.

corroboration by other evidence on the record (be this other documentary exhibits or other forms of evidence altogether).<sup>206</sup>

73. In conclusion, the Appeals Panel finds that the Contempt Judge erred in his analysis of the documentary evidence, as it was inconsistent with the stated purpose for which the documentary evidence was tendered and admitted, which led to an erroneous assessment of the documents' reliability and therefore their probative value. However, since there is in any event insufficient evidence on the record pertaining to the documents' reliability, the Appeals Panel finds that the Contempt Judge did not err in finding that the documentary evidence lacked probative value regarding the existence of an objective likelihood of the public's confidence in the Tribunal being undermined as a result of the Episodes. For this reason, the Appeals Panel dismisses *Amicus* grounds 4 in part, 5 in part and ground 10.

iii. Alleged Error of Fact Relating to the Review of Certain Pieces of Documentary Evidence (*Amicus* Ground 11)

(a) *Submissions*

74. The *Amicus* argues that the Contempt Judge erred in not properly considering four documents (Exhibits P00091, P00109, P00112 and P00150), notwithstanding the fact that they were cited in a footnote of the Judgment.<sup>207</sup> Furthermore, contrary to the Contempt Judge's finding, the *Amicus* avers that Exhibit P00150 does include information pertaining to [REDACTED] and to the source of the information contained in the exhibit.<sup>208</sup>

75. The Defence submits that *Amicus* ground 11 should be dismissed as the Contempt Judge did not make any errors resulting in a miscarriage of justice or that invalidate the Judgment.<sup>209</sup> The Defence avers that the Contempt Judge did consider Exhibits P00091, P00109, P00112, and P00150, as demonstrated by them being referenced in a footnote in the

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<sup>206</sup> See above fn. 172.

<sup>207</sup> *Amicus* Appeal Brief on the Judgment, para. 82. In reply, the *Amicus* submits that the Contempt Judge was not obliged to refer to and comment on Exhibits P00091, P00109, P00112 and P00150, but that he went further in actually omitting to consider these four exhibits; see *Amicus* Reply on the Judgment, para. 21.

<sup>208</sup> *Amicus* Appeal Brief on the Judgment, para. 82; *Amicus* Reply on the Judgment, para. 21.

<sup>209</sup> Defence Response on the Judgment, para. 58.

Judgment.<sup>210</sup> In any event, the Defence argues that, in light of the practice of other international criminal tribunals, a trier of fact is not required to discuss each individual piece of evidence in reaching its decision.<sup>211</sup>

*(b) Analysis*

76. The Appeals Panel recalls that a trier of fact is indeed not required to refer to every piece of evidence on the trial record in coming to its factual determinations, and that there is a presumption that a trier of fact has evaluated all the evidence presented to it, provided that there is no indication that it completely disregarded any particular piece of evidence.<sup>212</sup>

77. Turning first to the *Amicus*' assertion that the Contempt Judge erred in failing to consider Exhibits P00091, P00109, P00112 and P00150,<sup>213</sup> the Appeals Panel notes that the Contempt Judge did indeed cite these four exhibits.<sup>214</sup> In addition, since the *Amicus* has made no further specific submissions with respect to Exhibits P00091, P00109 and P00112, the Appeals Panel summarily dismisses the *Amicus*' arguments regarding these three exhibits.<sup>215</sup>

78. Regarding Exhibit P00150, the Appeals Panel notes that it does not refer to a specific purported disclosure<sup>216</sup> and does not address the issue of how such a purported disclosure has or could affect the public's perception of the Tribunal's ability to protect confidential witness information, keeping in mind that this was the purpose for which it was admitted into evidence.<sup>217</sup> As such, the Appeals Panel finds that the Contempt Judge did not err in declining to rely on it. The Appeals Panel therefore dismisses *Amicus* ground 11.

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<sup>210</sup> Defence Response on the Judgment, para. 64.

<sup>211</sup> Defence Response on the Judgment, para. 64, citing ICTR, *Rukundo v. Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010, para. 217.

<sup>212</sup> See above fn. 170.

<sup>213</sup> *Amicus* Appeal Brief on the Judgment, para. 82.

<sup>214</sup> Judgment, paras 110-111, fns 226-227.

<sup>215</sup> *Tolimir* Appeal Judgment, para. 14.

<sup>216</sup> Exhibit P00150 (confidential) p. 1; Comeau, T6, 16 April 2015, p. 11 lines 6-10 (private session); Comeau, T7, 17 April 2015, p. 61, lines 16-19 (private session).

<sup>217</sup> See above para. 66.

iv. Alleged Error of Fact Relating to the Review of Exhibit P00151 (*Amicus* Ground 12)

(a) *Submissions*

79. The *Amicus* contends that the Contempt Judge erred in rejecting Exhibit P00151, a complaint submitted to the Tribunal which concerns the purported disclosure of confidential information unrelated to the Episodes,<sup>218</sup> since: (i) it is akin to physical evidence; (ii) it relates to the disclosure of purported confidential witness information; and (iii) it highlights the risks created by disclosures such as those made in the Episodes.<sup>219</sup>

80. The Defence submits that *Amicus* ground 12 should be dismissed as the Contempt Judge did not make any errors resulting in a miscarriage of justice or that invalidate the Judgment.<sup>220</sup> The Defence submits that the Contempt Judge did not err in requiring verification of the truth of Exhibit P00151's contents.<sup>221</sup> It adds that it is undeniable that Exhibit P00151 was based on conjectures formulated by third parties and was unrelated to the Episodes.<sup>222</sup>

81. In reply, the *Amicus* submits that the fact that Exhibit P00151 did not specifically arise as a result of the Episodes does not make it irrelevant to demonstrating the real risk created by purported disclosures of information pertaining to alleged or potential witnesses.<sup>223</sup>

(b) *Analysis*

82. The Appeals Panel notes that the complaint found in Exhibit P00151 is linked to a disclosure of purported confidential witness information that is unrelated to the Episodes. However, it was not the disclosure alone which prompted the complaint, but rather comments made by third parties on these purported disclosures; this is consistent with the Contempt Judge's reasoning regarding Exhibit P00151.<sup>224</sup> As such, the comments made by the third parties broke the causal link between the purported disclosures and the complaint, such that a

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<sup>218</sup> *Amicus* Appeal Brief on the Judgment, para. 81.

<sup>219</sup> *Amicus* Appeal Brief on the Judgment, para. 81.

<sup>220</sup> Defence Response on the Judgment, para. 58.

<sup>221</sup> Defence Response on the Judgment, para. 63.

<sup>222</sup> Defence Response on the Judgment, para. 63.

<sup>223</sup> *Amicus* Reply on the Judgment, para. 20.

<sup>224</sup> Judgment, para. 119.

reasonable trier of fact could not ascertain with a sufficient degree of certainty whether the complaint would have been made as a result of the purported disclosures themselves, even if the third party commentary had not taken place. The Appeals Panel therefore finds that the Contempt Judge did not err in finding that Exhibit P00151 had no probative value, and accordingly dismisses *Amicus* ground 12.

v. Alleged Error of Fact Relating to the Identifiability of Those Featured in the Episodes (*Amicus* Ground 6)

83. The *Amicus* raises ground 6 as an alternative to ground 3, which alleges that the Contempt Judge erred in law in requiring that the individuals featured in the Episodes be “reasonably identifiable”.<sup>225</sup> In ground 6, he argues that the Contempt Judge committed a factual error in holding that, of the 11 purported confidential witnesses featured in the Episodes, only AP11, AP12 and AP13 were reasonably identifiable.<sup>226</sup>

84. The Appeals Panel finds that this ground of appeal does not have the potential to invalidate the Contempt Judge’s finding that the legal standard of reasonable identifiability was satisfied, even if this finding only involved three of the purported confidential witnesses featured in the Episodes. The Appeals Panel notes that once the Contempt Judge found that at least one purported confidential witness was reasonably identifiable as a result of the Episodes, the question of how many purported confidential witnesses were reasonably identifiable as a result of the Episodes became superfluous to proving the *actus reus* of Count 1; instead, this quantitative assessment would merely be relevant to ascertaining the gravity of the offence for the purposes of sentencing. Therefore, in light of the Appeals Panels’ conclusion below that a reasonable trier of fact could have found that there was insufficient evidence to prove beyond a reasonable doubt an objective likelihood of the public’s confidence in the Tribunal being undermined,<sup>227</sup> the question of how many alleged confidential witnesses were reasonably identifiable as a result of the Episodes is rendered moot. *Amicus* ground 6 is therefore summarily dismissed.

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<sup>225</sup> *Amicus* Appeal Brief on the Judgment, para. 38; *see also* above para. 42; Judgment para. 43.

<sup>226</sup> *Amicus* Appeal Brief on the Judgment, paras 59-62.

<sup>227</sup> *See* below para. 104.

vi. Alleged Error of Fact Relating to the Review of the *Actus Reus* Evidence Concerning the Effects of the Episodes’ (*Amicus* Grounds 4 in Part, 5 in Part, 7 and 8)

85. Since *Amicus* grounds 4 in part, 5 in part, 7 and 8 all pertain to the review of the testimonial evidence on the effects of the Episodes, the Appeals Panel will consider them together.<sup>228</sup>

(a) *Submissions*

86. The *Amicus* contends that the Contempt Judge erred in giving little weight to Mr Comeau’s testimony, which was supported by [REDACTED], Dr de Brouwer, and by documentary evidence.<sup>229</sup> The *Amicus* argues that, if viewed holistically, the various pieces of evidence corroborate each other and show the effects of the Accused’s conduct on the individuals featured in the Episodes and the public’s reaction to the purported disclosures.<sup>230</sup>

87. The *Amicus* furthermore submits that the Contempt Judge erred in rejecting the important role played by “common sense”, either explicitly or implicitly, in international criminal law,<sup>231</sup> and argues that drawing inferences from circumstantial evidence is generally a matter of common sense.<sup>232</sup> He considers that the Contempt Judge himself applied a common sense approach in certain parts of the Judgment, albeit not explicitly.<sup>233</sup>

88. Moreover, the *Amicus* argues that, in reviewing the “ascertainable facts” in support of the *actus reus*, the Contempt Judge erred in incorrectly focusing on whether the individuals featured in the Episodes suffered actual harm or threats as a result.<sup>234</sup> He contends that protective measures are intended to address a broad range of possible threats, which cannot

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<sup>228</sup> The submissions and analysis of the other parts of grounds 4 and 5 are included in the examination of *Amicus* grounds 9-10 and Count 2; see above paras 53-58, 62-73; see below paras 133-151.

<sup>229</sup> *Amicus* Appeal Brief on the Judgment, para. 64.

<sup>230</sup> *Amicus* Appeal Brief on the Judgment, paras 50, 52-56, 64, 65.

<sup>231</sup> *Amicus* Appeal Brief on the Judgment, para. 40, citing Judgment, para. 45: “I cannot find that public confidence has been undermined just on the basis of ‘common sense’, uncorroborated by evidentiary proof [...] ‘common sense’ reasoning and generalized conjectures have no place in criminal proceedings, which require proof beyond reasonable doubt”. See also *Amicus* Appeal Brief on the Judgment, paras 41-42.

<sup>232</sup> *Amicus* Appeal Brief of the Judgment, para. 41.

<sup>233</sup> *Amicus* Appeal Brief on the Judgment, paras 44-45, citing Judgment, para. 40, wherein the Contempt Judge concluded that it is essential for the proper functioning of courts and their ability to administer justice that the public’s confidence in their authority be maintained.

<sup>234</sup> *Amicus* Appeal Brief on the Judgment, paras 50-51, 65.

be simply linked to one source.<sup>235</sup> The *Amicus* also posits that the Contempt Judge erred in failing to link the pieces of evidence on the record concerning the risks which may occur as a result of the Episodes,<sup>236</sup> and was unreasonable in finding that AP11, AP12 and AP13 suffered no harm as a direct result of the Episodes, despite the fact that they testified about their concerns and experiences following the Episodes.<sup>237</sup> This link between the various pieces of evidence, he asserts, would have enabled the Contempt Judge to draw reasonable inferences concerning the undermining of the public's confidence in the Tribunal.<sup>238</sup> He asserts that AP11, AP12 and AP13 made it clear that the fear of being portrayed as a Tribunal witness may discourage potential or future witnesses from testifying.<sup>239</sup>

89. The Defence responds that the *Amicus* has failed to substantiate how the errors alleged in *Amicus* grounds 7 and 8 invalidate the Judgment or occasion a miscarriage of justice.<sup>240</sup> Concerning Mr Comeau's testimony, the Defence argues that the Contempt Judge was reasonable in considering the weight and probative value attached to it, despite the instances of confusion in his testimony and the limited information Mr Comeau provided on [REDACTED]<sup>241</sup>

90. The Defence also submits that *Amicus* grounds 4 and 5, on this point, amount to mere disagreement with the Contempt Judge's evaluation of the evidence, and should be dismissed as the *Amicus* has failed to demonstrate how these alleged errors invalidate the Judgment.<sup>242</sup> The Defence contends that the *Amicus*' arguments are based on a misconception that the Contempt Judge should have filled in the evidentiary gaps in the *Amicus*' case.<sup>243</sup>

91. Moreover, the Defence contends that the Contempt Judge noted that, on their own, "common sense reasoning" and "generalized conjectures" would be insufficient to form the basis of a conviction, which requires proof beyond reasonable doubt.<sup>244</sup> The Defence further submits that the Contempt Judge's finding that the *Amicus*' "defective" evidence did not

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<sup>235</sup> *Amicus* Appeal Brief on the Judgment, para. 65.

<sup>236</sup> *Amicus* Appeal Brief on the Judgment, paras 65-66.

<sup>237</sup> *Amicus* Appeal Brief on the Judgment, para. 69.

<sup>238</sup> *Amicus* Appeal Brief on the Judgment, paras 66-68.

<sup>239</sup> *Amicus* Appeal Brief on the Judgment, paras 65-66.

<sup>240</sup> Defence Response on the Judgment, para. 47.

<sup>241</sup> Defence Response on the Judgment, paras 49-50.

<sup>242</sup> Defence Response on the Judgment, paras 35, 40.

<sup>243</sup> Defence Response on the Judgment, paras 35-36.

<sup>244</sup> Defence Response on the Judgment, para. 39.

corroborate the *Amicus*' other "similarly defective" evidence does not render his assessment of the evidence unreasonable.<sup>245</sup>

92. The Defence also asserts that the *Amicus* failed to adduce evidence of ascertainable facts that the concerns raised by AP12 and AP13 could be "objectively linked" to their portrayal as potential Tribunal witnesses or that they suffered harm as a result of the Episodes.<sup>246</sup> The Defence argues that, unlike cases where [REDACTED]

<sup>247</sup> The Defence contends that AP12 testified that he received no threats and was not scared by the purported disclosures, and that Mr Comeau's sparse uncorroborated evidence [REDACTED] was challenged by the Defence.<sup>248</sup> In light of the evidence, the Defence argues that the Contempt Judge's factual finding on the harm suffered by those featured in the Episodes was reasonable.<sup>249</sup>

*(b) Analysis*

93. With respect to the assessment of Mr Comeau's evidence, the Appeals Panel recalls that the Contempt Judge found Mr Comeau's testimony, [REDACTED], to be reliable as it was corroborated by [REDACTED].<sup>250</sup> Since Mr Comeau could only comment on [REDACTED],<sup>251</sup> the Appeals Panel considers that the Contempt Judge did not err in finding that his testimony was of limited value to determining the *actus reus* of Count 1, and therefore did not err in limiting the weight attached to it. The Appeals Panel therefore dismisses the *Amicus*' arguments on this point in grounds 4, 5 and dismisses ground 7 in its entirety.

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<sup>245</sup> Defence Response on the Judgment, para. 41.

<sup>246</sup> Defence Response on the Judgment, paras 50-51.

<sup>247</sup> Defence Response on the Judgment, para. 53.

<sup>248</sup> Defence Response on the Judgment, para. 53.

<sup>249</sup> Defence Response on the Judgment, paras 50-51, 53.

<sup>250</sup> Judgment, para. 122. See Comeau, T6, 16 April 2015, p. 42 (private session); Comeau, T7, 17 April 2015, p. 61 (private session).

<sup>251</sup> Comeau, T6, 16 April 2015, p. 30 (private session); Comeau, T7, 17 April 2015, pp. 60-61 (private session).

94. The Appeals Panel recalls the *Amicus*' submissions, in the relevant parts of grounds 4, 5 and 8, concerning the use of "common sense" in reviewing the evidence.<sup>252</sup> The Appeals Panel considers that the *Amicus* has misconstrued the Contempt Judge's findings, as common sense was not rejected as such, the Contempt Judge merely held that common sense cannot be the sole basis for a criminal conviction.<sup>253</sup> Specifically, the Contempt Judge found that he could not conclude that the public's confidence in the Tribunal had been undermined solely on the basis of a common sense inference uncorroborated by evidentiary proof.<sup>254</sup>

95. The Appeals Panel considers that this approach is not erroneous given that the charge under Count 1 explicitly includes the undermining of public confidence in the Tribunal as a distinct element of the offence. Indeed, the Appeals Panel is of the view that this distinct element of the offence serves as a link between the Accused's acts and the interference with the administration of justice. This differs from cases where disclosures are made in breach of a court order; in such cases, it is the very breach of the court order which provides the link between an accused's disclosure and the interference with the administration of justice.<sup>255</sup> Thus, under Count 1, because the breach of a court order is not an element of the offence, the Amended Order in Lieu of an Indictment links the purported disclosures with an interference with the administration of justice by alleging that the public's confidence has been undermined. Therefore, in this case, the Contempt Judge was not unreasonable in requiring

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<sup>252</sup> The Appeals Panel understands the *Amicus*' arguments to be that the Contempt Judge committed two factual errors (i) in finding that the negative consequences recounted by the witnesses were not linked to their portrayal as Tribunal witnesses in the Episodes; and (ii) in reviewing the evidence too strictly with no regard to common sense, focusing incorrectly on whether the individuals suffered threats or harm and failing to draw inferences from the evidence on the record concerning the undermining effect on public confidence; see *Amicus* Appeal Brief on the Judgment, paras 66, 68-69; *Amicus* Reply on the Judgment, para. 15.

<sup>253</sup> Judgment, para. 45. The Appeals Panel recalls that common sense has a role to play in reviewing evidence and in drawing inferences, as common sense is an inherent part of reasonableness; see ICTY, *Prosecutor v. D. Tadić*, T-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6, wherein the Chamber noted that common sense ought to be honoured both when weighing the facts and when surveying the law, thereby ensuring that the proper rule is selected. See also ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Dissenting Opinion of Judge Eboe-Osuji, Decision on the "Defence Application for Leave to Appeal the 'Decision on the Defence Request for a Temporary Stay of Proceedings'", 13 December 2012, p. 1, "[t]he most compelling legal reasoning is one that unites common sense and logic in the explanation of outcome". Common sense inferences can be drawn from an accused's silence. See ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 782.

<sup>254</sup> This is consistent with the jurisprudence cited by the *Amicus* on this point; see *Ngudjolo* Appeal Judgment, para. 109, citing ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 488: "The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence".

<sup>255</sup> *Hartmann* Trial Judgment, para. 21; ICTY, *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77-A, Judgement, 15 March 2007, para. 30.

the *Amicus* to prove, as a distinct element of the offence, the objective likelihood of the public's confidence being undermined, in line with the formulation of the charge in the Amended Order in Lieu of an Indictment.

96. Moreover, the Appeals Panel recalls the *Amicus*' argument that the Contempt Judge used the requirement of "ascertainable facts" to, in fact, require proof of actual harm and effects flowing from the Episodes.<sup>256</sup> The Appeals Panel notes that the Contempt Judge did not define this term, did not cite jurisprudence as to what constitutes "ascertainable facts",<sup>257</sup> and did not appear to give special meaning to this phrase when it was utilised in the Judgment.<sup>258</sup> In viewing this term, in light of the way in which it appears and was used in the Judgment, the Appeals Panel is not persuaded that the Contempt Judge ascribed any meaning to "ascertainable facts" which went beyond the general criminal law requirement of proving material elements of an offence beyond reasonable doubt.<sup>259</sup> Therefore, the Appeals Panel is not persuaded that the Contempt Judge used this term to narrow the test of objective likelihood such that he *de facto* required proof of actual harm or effects,<sup>260</sup> and consequently dismisses the *Amicus*' arguments in this regard.

97. Next, the Appeals Panel recalls the *Amicus*' contention that the Contempt Judge committed a factual error in finding that the consequences suffered by the individuals<sup>261</sup> were not exclusively linked to their portrayal as Tribunal witnesses in the Episodes and in failing to link the testimonies to other evidence on the record in order to draw inferences concerning the effects of the Episodes on the public's confidence.<sup>262</sup> The Appeals Panel finds that the Contempt Judge did not err in considering whether the individuals concerned<sup>263</sup> received threats or suffered actual harm as a result of the Episodes, as he had already clarified that

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<sup>256</sup> *Amicus* Appeal Brief on the Judgment, para. 65.

<sup>257</sup> Judgment, para. 46.

<sup>258</sup> Judgment, paras 46, 123.

<sup>259</sup> *Mrkšić and Šljivančanin* Appeal Judgment, para. 217; *Limaj et al.* Appeal Judgment, para. 153; *Ntagerura et al.* Appeal Judgment, para. 174; *Halilović* Appeal Judgment, paras 125, 128; *Musema* Appeal Judgment, para. 134; *Vujin* Trial Judgment, para. 92.

<sup>260</sup> The Appeals Panel recalls that the Contempt Judge stated that harm was relevant to, but not dispositive of the existence or degree of objective likelihood at the relevant time; *see above* para. 39.

<sup>261</sup> Judgment, paras 121-124.

<sup>262</sup> *Amicus* Appeal Brief on the Judgment, paras 68-69; *Amicus* Reply on the Judgment, para. 15.

<sup>263</sup> The Appeals Panel recalls that the Contempt Judge found Mr Choib to be unreliable; *see* Judgment, paras 96, 99, 122. The Appeals Panel notes that the Contempt Judge was reasonable with respect to his conclusion that the testimony of Mr Choib was inconsistent and unreliable. *See* Choib, T13, 14 May 2015, pp. 35, 44, 47-48, 70-71, 76-79. As a result, the Appeals Panel considers that the Contempt Judge did not err in finding that Mr Choib was unreliable.

such harm was relevant to establishing the objective likelihood of the public's confidence in the Tribunal being undermined.<sup>264</sup> Furthermore, the Appeals Panel considers that the Contempt Judge did not err in concluding that there was insufficient evidence on the record to prove that the individuals featured in the Episodes received threats or suffered actual harm as a result of being portrayed as Tribunal witnesses in the Episodes, in particular because none of them testified that they had received threats or were harmed as a result of the Episodes.<sup>265</sup>

98. The Contempt Judge reasoned that the negative consequences which did not amount to threats or actual harm had no probative value because they could not be linked to the individuals' portrayal as Tribunal witnesses in the Episodes.<sup>266</sup> The *Amicus* contests this finding.<sup>267</sup> Looking first at the Contempt Judge's findings regarding AP11, the Appeals Panel considers that the Contempt Judge did not err in concluding that the negative consequences suffered by AP11 did not flow from his portrayal as a Tribunal witness in the Episodes, but rather, according to his own testimony,<sup>268</sup> from [REDACTED].<sup>269</sup> The Appeals Panel finds that it was reasonable for a trier of fact to conclude that the supervening event of [REDACTED] broke the causal link between AP11's portrayal as a Tribunal witness and the negative consequences he suffered, such that it is impossible to establish with the requisite level of certainty that the negative consequences would have still occurred had [REDACTED].

99. Furthermore, in relation to AP12 and AP13's testimony,<sup>270</sup> the Contempt Judge found that, although they were both reasonably identifiable from the Episodes<sup>271</sup> and testified that they suffered some negative consequences,<sup>272</sup> there was no link between these concerns and their portrayal as Tribunal witnesses in the Episodes.<sup>273</sup> The Appeals Panel finds that no reasonable trier of fact could have reached this conclusion in relation to AP13, as his

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<sup>264</sup> See above para. 39.

<sup>265</sup> Judgment, para. 122.

<sup>266</sup> Judgment, paras 122-123.

<sup>267</sup> *Amicus* Appeal Brief on the Judgment, para. 69.

<sup>268</sup> AP11, T9, 21 April 2015, p. 91 (closed session).

<sup>269</sup> Judgment, para. 122; see also AP11, T9, 21 April 2015, pp. 81, 90-91, 92-93 (closed session), 96, 161 (closed session).

<sup>270</sup> Judgment, paras 121-123.

<sup>271</sup> Judgment, paras 80, 84.

<sup>272</sup> Judgment, para. 122.

<sup>273</sup> Judgment, para. 123.

testimony was consistent in stating that he suffered negative consequences because of his portrayal as a Tribunal witness in the Episodes.<sup>274</sup> Moreover, the Appeals Panel finds that the Contempt Judge was also unreasonable in finding that none of the negative consequences AP12 suffered could be linked to his portrayal as a Tribunal witness in the Episodes. AP12 testified that he suffered a variety of negative consequences as a result of the Episodes; he clearly attributed some of these to his portrayal as a Tribunal witness in the Episodes, although he was unable to say whether the rest of the negative consequences he suffered were also linked to the Episodes.<sup>275</sup> Consequently, the Appeals Panel finds that AP12 was able to attribute at least some of the negative consequences he suffered to the Episodes. Therefore, the Appeals Panel finds that the Contempt Judge erred in giving no weight to the concerns and negative consequences recounted by AP12 and AP13 as flowing from their portrayal as Tribunal witnesses in the Episodes.

100. In light of its findings in relation to AP12 and AP13, the Appeals Panel will now consider whether the Contempt Judge erred in finding that he could not conclude that AP12 and AP13's confidence in the Tribunal had been undermined and that he could therefore not conclude that there was an objective likelihood of the public's confidence in the Tribunal being undermined.<sup>276</sup>

101. The Appeals Panel considers that the Contempt Judge did not err in finding that AP12 and AP13 did not explicitly state that their confidence in the Tribunal had been undermined.<sup>277</sup> However, in light of the Appeals Panel's finding that some of the concerns reported by AP12 and AP13 were linked to the Episodes, it is necessary to determine whether a reasonable trier of fact would have considered this evidence of negative consequences as proof that AP12 and AP13's confidence in the Tribunal had been undermined as a result of their portrayal as Tribunal witnesses in the Episodes. In this regard, the Appeals Panel finds that no reasonable trier of fact, having found that some of AP12<sup>278</sup> and AP13's<sup>279</sup> concerns

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<sup>274</sup> AP13, T8, 20 April 2015, pp. 66 (closed session), 72-73 (closed session), 74-75 (closed session), 77 (closed session), 79 (closed session), 87 (closed session), 99 (closed session), 112 (closed session), 115 (closed session), 116 (closed session), 131 (closed session).

<sup>275</sup> Judgment, paras 82, 122; *see* AP12, T9, 21 April 2015, pp. 15 (closed session), 23-27 (closed session), 34 (closed session), 38-41 (closed session), 64-65 (closed session), 69-70 (closed session).

<sup>276</sup> Judgment, para. 46.

<sup>277</sup> Judgment, para. 124.

<sup>278</sup> AP12, T9, 21 April 2015, pp. 23-27 (closed session), 34 (closed session), 38-41 (closed session).

and fears were linked to their portrayal as Tribunal witnesses in the Episodes, could have considered that they had no probative value in establishing that these individuals' confidence in the Tribunal had been undermined as a result of the Episodes.<sup>280</sup> This is notwithstanding the fact that these individuals did not explicitly state that their confidence in the Tribunal had been undermined. Consequently, the Appeals Panel finds that the Contempt Judge erred in reaching this conclusion.

102. Therefore, the Appeals Panel notes that the evidence given by AP12 and AP13, which is corroborated in part by Mr Comeau,<sup>281</sup> is relevant to determining the existence of an objective likelihood of the public's confidence in the Tribunal being undermined, but cannot suffice, on its own, to prove the *actus reus* of Count 1. This is because, even after having found that AP12 and AP13's confidence in the Tribunal was undermined, this merely amounts to a small number of subjective accounts of individuals' confidence in the Tribunal being undermined, which on its own cannot prove, beyond reasonable doubt, the objective likelihood of the wider public's confidence in the Tribunal being undermined.<sup>282</sup> However, if corroborated and supported by other evidence on the record, this evidence may form the basis for finding an objective likelihood of the public's confidence in the Tribunal being undermined.

103. In this regard, the Appeals Panel first recalls that Dr de Brouwer's expert evidence and the documentary evidence were found to lack probative value.<sup>283</sup> Therefore, the reliable evidence on this element of the *actus reus* of Count 1 consists of Mr Comeau's hearsay testimony regarding the concerns [REDACTED],<sup>284</sup> and the testimony of AP12 and AP13 from which a trier of fact can infer that their confidence in the Tribunal was likely undermined as a result of the Episodes.<sup>285</sup> In order to find that the *Amicus* has proven

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<sup>279</sup> AP13, T8, 20 April 2015, pp. 66 (closed session), 72-75, (closed session), 77 (closed session), 79 (closed session), 87 (closed session), 99 (closed session), 112 (closed session), 115-116 (closed session), 131 (closed session).

<sup>280</sup> AP12, T9, 21 April 2015, pp. 23-27 (closed session); AP13, T8, 20 April 2015, p. 77 (closed session); AP11, T9, 21 April 2015, p. 79 (closed session).

<sup>281</sup> The Appeals Panel recalls that Mr Comeau's evidence [REDACTED]

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Appeals Panel's finding on Mr Comeau's evidence, *see* above para. 93.

<sup>282</sup> Judgment, para. 46.

<sup>283</sup> *See* above paras 58, 73.

<sup>284</sup> *See* above para. 93.

<sup>285</sup> *See* above para. 102.

the *actus reus* of Count 1, a trier of fact would have to infer from the evidence of AP12, AP13 and Mr Comeau that it is objectively likely that the public's confidence in the Tribunal was undermined.

104. The Appeals Panel recalls the well-established principle that, when the prosecution relies upon circumstantial evidence to prove the facts constituting the elements of an offence by inference,<sup>286</sup> that inference must be the only reasonable conclusion available from the evidence.<sup>287</sup> The Appeals Panel finds that the existence of an objective likelihood that the public's confidence in the Tribunal was undermined as a result of the Episodes is not the only reasonable inference which can be drawn from the available evidence. Consequently, the Appeals Panel affirms the Contempt Judge's finding that there was insufficient evidence to prove an objective likelihood of the public's confidence in the Tribunal being undermined as result of the Episodes.<sup>288</sup>

vii. Conclusion on the Alleged Errors of Law and Fact Relating to the Review of the Evidence in Support of the *Actus Reus*

105. The Appeals Panel concludes that, in relation to grounds 4 to 12 of the *Amicus* Appeal Brief on the Judgment (insofar as grounds 4 and 5 pertain to Count 1): grounds 4, 5 and 8 are granted in part while grounds 6, 7, 9, 10, 11 and 12 are dismissed.

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<sup>286</sup> Circumstantial evidence is evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred. Circumstantial evidence does not have less value than direct evidence. See ICTY, *Prosecutor v. Martić*, IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Annex A, 19 January 2006 ("*Martić* Guidelines Annex"), para. 10, citing ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgment"), para. 67; ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, Annex, 29 October 2008, para. 39, citing ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 303, and citing *Krnojelac* Trial Judgment, para. 67.

<sup>287</sup> *Martić* Guidelines Annex, para. 10, citing *Krnojelac* Trial Judgment, para. 67: "If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion cannot be drawn"; ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 41, citing ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 121.

<sup>288</sup> Judgment, para. 127.

**c. Alleged Errors of Law Concerning the *Mens Rea* Standard (*Amicus* Ground 15 in Part)**

106. The Appeals Panel notes that, since it has confirmed the Contempt Judge's conclusion that the *actus reus* of Count 1 was not proven beyond reasonable doubt,<sup>289</sup> the *Amicus*' arguments related to the *mens rea* of Count 1 are rendered moot and will not be addressed by the Appeals Panel. Accordingly, *Amicus* ground 15 is dismissed in part, insofar as it relates to Count 1. The Appeals Panel therefore upholds Ms Al Khayat's acquittal on Count 1.

**2. *Al Jadeed* (*Amicus* Grounds 16 in Part, 17 in Part, 18 in Part, 19 in Part, 20 in Part, 21 in Part and 22 in Part)**

107. The Appeals Panel also notes that, since it has confirmed the Contempt Judge's finding that the *actus reus* of Count 1 was not proven beyond reasonable doubt,<sup>290</sup> the *Amicus*' arguments relating to *Al Jadeed*'s criminal responsibility under Count 1 are rendered moot. Accordingly, *Amicus* grounds 16 in part, 17 in part, 18 in part, 19 in part, 20 in part, 21 in part and 22 in part are dismissed insofar as they relate to Count 1. The Appeals Panel therefore upholds *Al Jadeed*'s acquittal under Count 1.

**B. Count 2**

108. Under Count 2, pursuant to Rule 60 *bis* (A) (iii), the Accused are charged with knowingly and wilfully interfering with the administration of justice by failing to remove from *Al Jadeed* TV's website and YouTube channel, information on purported confidential witnesses in the *Ayyash et al.* case in violation of the 10 August 2012 Order.<sup>291</sup> The Contempt Judge found that: (i) the Episodes were available on *Al Jadeed* TV's website until 2 October 2013;<sup>292</sup> (ii) Ms Al Khayat had the ability to remove them from this platform but failed to do so until that date;<sup>293</sup> (iii) she received the 10 August 2012 Order in her email

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<sup>289</sup> See above para. 104.

<sup>290</sup> See above para. 104.

<sup>291</sup> Judgment, para. 51.

<sup>292</sup> Judgment, para. 142.

<sup>293</sup> Judgment, para. 148.

inbox;<sup>294</sup> (iv) she was wilfully blind to it;<sup>295</sup> and (v) the criminal conduct charged under Count 2 could not be attributed to *Al Jadeed*.<sup>296</sup>

### **1. Ms Al Khayat**

109. The Defence appeals Ms Al Khayat's conviction under this count by focusing on two findings: (i) the Episodes were available online beyond 10 August 2012;<sup>297</sup> and (ii) Ms Al Khayat had the requisite *mens rea* for this offence.<sup>298</sup> The Appeals Panel will address these matters in turn. In doing so, the Appeals Panel will also consider the parts of the *Amicus*' appeal submissions which are related to these findings.<sup>299</sup>

#### **a. Alleged Errors of Law and Fact Relating to the Online Availability of the Episodes in Violation of the 10 August 2012 Order (Defence Ground 1, *Amicus* Grounds 4 in Part, 5 in Part, 13 and 14)**

110. Concerning the *actus reus* of Count 2, the Contempt Judge found that the Episodes were available on *Al Jadeed* TV's website until at least 2 October 2013.<sup>300</sup> He based this finding on the 2 October 2013 suspect interview of Mr Rami Al Amin, an *Al Jadeed* TV reporter who was involved in the production of the Episodes,<sup>301</sup> as well as on the fact that Mr Al Amin's evidence corroborated in part the testimony of Mr Comeau on this point.<sup>302</sup> The Contempt Judge previously found Mr Comeau's testimony on the Episodes' online availability<sup>303</sup> to be insufficiently reliable, "where not corroborated by other evidence on the record".<sup>304</sup>

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<sup>294</sup> Judgment, para. 172.

<sup>295</sup> Judgment, para. 175.

<sup>296</sup> Judgment, para. 190.

<sup>297</sup> Judgment, para. 142; Defence Appeal Brief on the Judgment, paras 28-36.

<sup>298</sup> Judgment, para. 175; Defence Appeal Brief on the Judgment, paras 37-54.

<sup>299</sup> *Amicus* Appeal Brief on the Judgment, paras 46-58, 83-94.

<sup>300</sup> Judgment, para. 142.

<sup>301</sup> Judgment, para. 141.

<sup>302</sup> Judgment, para. 142.

<sup>303</sup> The Contempt Judge referred to Mr Comeau's evidence regarding the Episodes' availability on *Al Jadeed* TV's website until 25 April 2013, on its Facebook page until 26 September 2012 and on its YouTube channel until 26 September 2013; Judgment, paras 135-136; see Comeau, T6, 16 April 2015, pp. 44, 48-49, 52, 79; Comeau, T7, 17 April 2015, pp. 56-58, 79.

<sup>304</sup> Judgment, paras 135-136.

111. Furthermore, the Contempt Judge found that Mr Comeau's testimony regarding a telephone conversation with Mr Bertrand Gagnon, a former *Amicus* investigator, indicating that the Episodes were available on *Al Jadeed* TV's YouTube channel until 15 January 2014, amounted to hearsay and lacked sufficient reliability "absent further corroborating evidence".<sup>305</sup> Consequently, the Contempt Judge concluded that the *Amicus* had not proven the Episodes' availability on *Al Jadeed* TV's YouTube channel after 10 August 2012.<sup>306</sup>

112. Regarding the Episodes' availability on *Al Jadeed* TV's Facebook page, the Contempt Judge did not consider Mr Comeau's testimony regarding a set of screenshots of *Al Jadeed* TV's Facebook page ("screenshots") to be probative, as Mr Comeau was not personally involved in the monitoring process which produced them.<sup>307</sup> Finally, the Contempt Judge declined to rely on the Registrar's Letter of 28 August 2012, which stated that the Episodes were available on *Al Jadeed* TV's online platforms on 27 August 2012, because it was uncorroborated hearsay evidence and no information had been provided regarding the foundation for the assertions made therein.<sup>308</sup>

i. Submissions

(a) *Defence Ground 1*

113. The Defence submits that the Contempt Judge erroneously found that the Episodes remained available on *Al Jadeed* TV's website after the 10 August 2012 Order until at least 2 October 2013, solely on the basis of Mr Al Amin's suspect interview.<sup>309</sup> The Defence considers that the Contempt Judge erred in relying on and giving determinative weight to this suspect interview.<sup>310</sup> Since the Episodes' online availability is an essential element of

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<sup>305</sup> Judgment, paras 138-139.

<sup>306</sup> Judgment, para. 139.

<sup>307</sup> Judgment, para. 140.

<sup>308</sup> Judgment, para. 137.

<sup>309</sup> Defence Appeal Brief on the Judgment, paras 28-36, citing, at para. 28, Judgment, paras 141-142. In reply to the *Amicus* Response on the Judgment, the Defence submitted that, irrespective of the Contempt Judge's finding that Mr Comeau's evidence was in part corroborated by Mr Al Amin's evidence on this point, Mr Al Amin's evidence was nonetheless decisive for the Contempt Judge's finding on an essential element of the offence; see Defence Reply on the Judgment, para. 6.

<sup>310</sup> Defence Appeal Brief on the Judgment, para. 29.

Count 2, the Defence contends that the Contempt Judge's error invalidates the Judgment and/or occasions a miscarriage of justice.<sup>311</sup>

114. The Defence argues that it is unreasonable and contrary to the fair trial rights of an accused to base a conviction solely or decisively on hearsay evidence that was not subject to cross-examination.<sup>312</sup> It adds that: (i) Mr Al Amin was not called as a witness and that the transcript of his suspect interview was admitted into evidence as a document under Rule 154, and not in lieu of his testimony;<sup>313</sup> (ii) the *Amicus* did not give notice to the Defence that it would rely on this evidence to prove the dates of the Episodes' online availability;<sup>314</sup> (iii) Mr Al Amin had no responsibility for and minimal understanding of *Al Jadeed* TV's website management;<sup>315</sup> (iv) Mr Al Amin did not confirm that he had checked the online availability of the Episodes at certain dates;<sup>316</sup> and (v) Mr Al Amin's answers regarding availability were based on his general understanding of *Al Jadeed* TV's online policy and not on his specific knowledge of whether the Episodes were actually online on 2 October 2013, the date of his interview.<sup>317</sup> The Defence therefore submits that the Contempt Judge failed to examine the reliability of Mr Al Amin's assertions or the context in which they were made,<sup>318</sup> and that, even if it partially corroborated Mr Comeau's evidence on this point, Mr Al Amin's evidence could not have been properly and safely relied upon to find beyond reasonable doubt that the Episodes were online.<sup>319</sup> The Defence also alleges that the Contempt Judge failed to give any consideration and weight to other relevant evidence and points to the *Amicus*' failure to question Mr Ibrahim Dsouki, *Al Jadeed* TV's online manager, about the Episodes' online availability.<sup>320</sup>

115. The *Amicus* responds that the Contempt Judge did not rely solely on Mr Al Amin's interview, since the Contempt Judge found that Mr Al Amin's evidence corroborated, in part, Mr Comeau's evidence on the Episodes' availability on *Al Jadeed* TV's website.<sup>321</sup> He adds

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<sup>311</sup> Defence Appeal Brief on the Judgment, para. 36.

<sup>312</sup> Defence Appeal Brief on the Judgment, para. 31.

<sup>313</sup> Defence Appeal Brief on the Judgment, para. 31.

<sup>314</sup> Defence Appeal Brief on the Judgment, para. 31.

<sup>315</sup> Defence Appeal Brief on the Judgment, para. 33.

<sup>316</sup> Defence Appeal Brief on the Judgment, para. 33.

<sup>317</sup> Defence Appeal Brief on the Judgment, para. 33; Defence Reply on the Judgment, para. 8.

<sup>318</sup> Defence Appeal Brief on the Judgment, para. 35.

<sup>319</sup> Defence Appeal Brief on the Judgment, para. 32; Defence Reply on the Judgment, para. 8.

<sup>320</sup> Defence Appeal Brief on the Judgment, para. 34; Defence Reply on the Judgment, para. 8.

<sup>321</sup> *Amicus* Response on the Judgment, para. 4.

that Mr Al Amin's evidence regarding *Al Jadeed* TV's online policy is fully probative of the Episodes being online and that other evidence clearly corroborates this fact and establishes the Episodes' online availability, namely: (i) the Table of Agreed Facts states that the Episodes were placed on *Al Jadeed* TV's public platforms as a matter of general practice and were available at certain times or up to a certain time; (ii) Mr Dsouki confirmed *Al Jadeed* TV's online policy; and (iii) Mr Comeau's testimony established the dates on which the Episodes remained available.<sup>322</sup>

(b) *Amicus Grounds 4 in Part and 5 in Part*

116. The *Amicus* submits that there was no reason for the Contempt Judge to reject Mr Comeau's evidence on the Episodes' online availability given the well-established acceptance of hearsay, summary and secondary evidence in international jurisprudence.<sup>323</sup> In this regard, the *Amicus* argues that the OTP's monitoring of *Al Jadeed* TV's online platforms to confirm the Episodes' online availability on certain dates was not novel, was explained by Mr Comeau's evidence and there was no indication that Mr Comeau's information was incorrect or falsified.<sup>324</sup>

117. The *Amicus* also posits that Mr Comeau was personally informed by Mr Gagnon about the Episodes' availability on *Al Jadeed* TV's YouTube channel on 15 January 2014, and that the Defence did not dispute these dates and indeed agreed, in the Table of Agreed Facts, that the Episodes were available online "at certain times" or "up to a certain time".<sup>325</sup> Consequently, the *Amicus* argues that the Contempt Judge erred in failing to take into account that some facts were agreed between the parties and that others were not genuinely contested.<sup>326</sup>

118. The Defence asserts that it was not unreasonable for the Contempt Judge to require the *Amicus* to present at trial the testimony of a person with direct knowledge of the origin, creation and content of the *Amicus*' proposed documentary evidence on the Episodes' online availability, given that the reliability of these documents was contested.<sup>327</sup> The Defence

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<sup>322</sup> *Amicus* Response on the Judgment, para. 6.

<sup>323</sup> *Amicus* Appeal Brief on the Judgment, para. 57.

<sup>324</sup> *Amicus* Appeal Brief on the Judgment, para. 57.

<sup>325</sup> *Amicus* Appeal Brief on the Judgment, para. 57.

<sup>326</sup> *Amicus* Appeal Brief on the Judgment, para. 58.

<sup>327</sup> Defence Response on the Judgment, paras 36-37, 42 (c).

further submits that the *Amicus* chose to rely solely on Mr Comeau's evidence on this point, and failed to call Mr Gagnon to testify.<sup>328</sup> Consequently, the Defence contends that it was reasonable for the Contempt Judge not to rely on Mr Comeau's hearsay testimony on this point.<sup>329</sup> Finally, the Defence contests the *Amicus*' submission that the Defence had agreed or accepted that the Episodes were available online beyond 10 August 2012.<sup>330</sup>

119. In reply, the *Amicus* submits that the Contempt Judge failed to evaluate the corroborative effects, on one another, of Mr Comeau's evidence and the Registrar's Letter of 28 August 2012 regarding the Episodes' online availability, and that the Contempt Judge erroneously rejected both pieces of evidence for lack of corroboration or reliability.<sup>331</sup>

(c) *Amicus Grounds 13 and 14*

120. The *Amicus* submits that the Contempt Judge erred in rejecting Mr Comeau's evidence concerning the Episodes' availability on *Al Jadeed* TV's website, YouTube channel and Facebook page presented in the table recording the monitoring of *Al Jadeed* TV's online platforms by an OTP language assistant ("Table of Episodes' Availability").<sup>332</sup> He reiterates that hearsay, summary and secondary evidence is widely admitted in international criminal litigation, even when not corroborated, and that this should especially apply to this evidence which largely consists of agreed facts and was not contradicted by the Defence.<sup>333</sup> The *Amicus* asserts that in the Decision in Proceedings for Contempt of 31 January 2014, the initial Contempt Judge stated that the videos were still available on *Al Jadeed* TV's YouTube channel at that time.<sup>334</sup> In addition, the *Amicus* submits that the Contempt Judge found that Mr Comeau's evidence partly corroborated Mr Al Amin's evidence, and he therefore argues that Mr Al Amin's evidence also partly corroborated Mr Comeau's evidence.<sup>335</sup>

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<sup>328</sup> Defence Response on the Judgment, para. 37.

<sup>329</sup> Defence Response on the Judgment, para. 42 (c).

<sup>330</sup> Defence Response on the Judgment, para. 42 (c).

<sup>331</sup> *Amicus* Reply on the Judgment, para. 12.

<sup>332</sup> *Amicus* Appeal Brief on the Judgment, para. 83, referring to Exhibit P00159 (confidential with public redacted version).

<sup>333</sup> *Amicus* Appeal Brief on the Judgment, para. 85.

<sup>334</sup> *Amicus* Appeal Brief on the Judgment, para. 85, referring to Decision in Proceedings for Contempt, para. 3(i).

<sup>335</sup> *Amicus* Appeal Brief on the Judgment, para. 85.

121. The *Amicus* further submits that Mr Comeau's evidence is in fact corroborated by: (i) the Registrar's Letter of 28 August 2012;<sup>336</sup> (ii) Mr Al Amin's and Ms Al Khayat's acknowledgment of the Episodes' online availability;<sup>337</sup> (iii) the fact that Ms Al Bassam and Ms Habli did not dispute the Episodes' continued online availability;<sup>338</sup> and (iv) an *Al Jadeed* TV broadcast of 29 April 2014.<sup>339</sup> Additionally, the *Amicus* submits that the Contempt Judge erred by failing to take into consideration the Table of Agreed Facts, which stated that the broadcasts were available on *Al Jadeed* TV's website, YouTube channel and Facebook page "at certain times" and "up to a certain time".<sup>340</sup> The *Amicus* contends that the Contempt Judge also erred in finding that the Episodes were available on *Al Jadeed* TV's website but not on its YouTube channel, given that the Table of Agreed Facts states that the Episodes were made available on *Al Jadeed* TV's website by embedding the videos from its YouTube channel ("Agreed Fact 21").<sup>341</sup> Finally, the *Amicus* argues that the Contempt Judge erred in not giving probative value to: (i) Mr Comeau's evidence on the Episodes' online availability, including the information he obtained from Mr Gagnon;<sup>342</sup> and (ii) the screenshots of *Al Jadeed* TV's Facebook page.<sup>343</sup>

122. The Defence submits that *Amicus* grounds 13 and 14 should be summarily dismissed because the *Amicus* failed to demonstrate how these alleged errors constituted a miscarriage of justice and/or invalidated the judgment regarding *Al Jadeed*'s acquittal on both counts or Ms Al Khayat's acquittal on Count 1.<sup>344</sup> In the alternative, the Defence asserts that it was not unreasonable for the Contempt Judge not to rely on Mr Comeau's testimony, since he could not testify with sufficient authority on the reliability and accuracy of the evidence resulting from the OTP's monitoring of the Episodes' online availability.<sup>345</sup> In addition, the Defence argues that, given the *Amicus*' failure to call Mr Gagnon or another person to give evidence on this matter, it was not unreasonable for the Contempt Judge to find that there was

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<sup>336</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86).

<sup>337</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86).

<sup>338</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86).

<sup>339</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86), referring to P00108 (confidential).

<sup>340</sup> *Amicus* Appeal Brief on the Judgment, para. 86.

<sup>341</sup> *Amicus* Appeal Brief on the Judgment, para. 86.

<sup>342</sup> *Amicus* Appeal Brief on the Judgment, para. 87.

<sup>343</sup> *Amicus* Appeal Brief on the Judgment, para. 88.

<sup>344</sup> Defence Response on the Judgment, paras 67-68.

<sup>345</sup> Defence Response on the Judgment, para. 69.

insufficient reliable evidence on this point.<sup>346</sup> Furthermore, with reference to international jurisprudence, the Defence submits that: (i) the Contempt Judge had the discretion to cautiously consider hearsay evidence and to determine whether it required corroboration in the circumstances of this case; and (ii) the weight and probative value of hearsay evidence will usually be less than that of tested oral testimony.<sup>347</sup>

123. The Defence refutes all of the *Amicus*' factual arguments regarding other evidence that seeks to prove the Episodes' online availability.<sup>348</sup> It asserts that: (i) the Decision in Proceedings for Contempt is not evidence and cannot be relied on;<sup>349</sup> (ii) irrespective of whether Mr Al Amin's evidence regarding online availability corroborated Mr Comeau's evidence on this point, or *vice versa*, the Contempt Judge properly exercised his discretion in determining that Mr Comeau's evidence required corroboration and that the Registrar's Letter of 28 August 2012 did not constitute such corroboration;<sup>350</sup> (iii) Ms Al Khayat did not confirm, with actual knowledge, the Episodes' online availability in her suspect interview;<sup>351</sup> (iv) Ms Habli's brief communications with Mr Stéphane Bourgon, the former *Amicus*, solely sought to obtain a copy of the 10 August 2012 Order from him, the existence and contents of which were not known to either of the Accused at that time;<sup>352</sup> (v) *Al Jadeed* TV's 29 April 2014 broadcast was not a formal response to the Tribunal as to the Episodes' alleged specific online availability;<sup>353</sup> (vi) the *Amicus* bears the burden of proving the Episodes' online availability, and the Defence is entitled to put the *Amicus* to strict proof on the matter and may remain silent with no adverse inference being permitted to be drawn;<sup>354</sup> (vii) the Defence never agreed that the Episodes were available online and accessible to the public after 10, 11 or 14 August 2012;<sup>355</sup> (viii) the *Amicus* has not shown that any alleged error on the Episodes' online availability constituted a miscarriage of justice;<sup>356</sup> and (ix) the Contempt

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<sup>346</sup> Defence Response on the Judgment, para. 69.

<sup>347</sup> Defence Response on the Judgment, para. 70, referring to *Karera* Appeal Judgment, para. 45.

<sup>348</sup> Defence Response on the Judgment, para. 71.

<sup>349</sup> Defence Response on the Judgment, para. 71 (a).

<sup>350</sup> Defence Response on the Judgment, para. 71 (b).

<sup>351</sup> Defence Response on the Judgment, para. 71 (c).

<sup>352</sup> Defence Response on the Judgment, para. 71 (d).

<sup>353</sup> Defence Response on the Judgment, para. 71 (e).

<sup>354</sup> Defence Response on the Judgment, para. 71 (f).

<sup>355</sup> Defence Response on the Judgment, para. 71 (g).

<sup>356</sup> Defence Response on the Judgment, para. 71 (h).

Judge was not unreasonable in not relying on Mr Comeau's hearsay evidence regarding his conversation with Mr Gagnon.<sup>357</sup>

ii. Analysis

124. The Contempt Judge's findings on the Episodes' online availability are as follows:

- a) the Episodes were available on *AlJadeed* TV's website until at least 2 October 2013;<sup>358</sup>
- b) the *Amicus* has not proven that the Episodes were available on *AlJadeed* TV's YouTube channel beyond 10 August 2012;<sup>359</sup> and
- c) the *Amicus* has not proven that the Episodes were available on *AlJadeed* TV's Facebook page beyond 10 August 2012.<sup>360</sup>

125. The Appeals Panel will deal in turn with the Parties' submissions regarding each of these three online platforms.

126. Before doing so, the Appeals Panel notes that, in line with consistent international criminal jurisprudence, the criminal standard of "beyond reasonable doubt" must be applied to the facts forming the elements of an offence, but not to individual pieces of evidence in isolation from other relevant evidence on the record.<sup>361</sup> Consequently, as stated above, a trier of fact is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.<sup>362</sup>

127. The Appeals Panel further notes that, when an alleged error potentially affects every finding in a judgment, the appellant is required to refer to specific paragraphs and explain how the alleged error invalidates a decision in practice.<sup>363</sup> It is not enough to point to a general deficiency throughout the judgment and request the review of unspecified factual

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<sup>357</sup> Defence Response on the Judgment, para. 71 (i).

<sup>358</sup> Judgment, para. 142.

<sup>359</sup> Judgment, para. 139.

<sup>360</sup> Judgment, para. 140.

<sup>361</sup> *Mrkšić and Šljivančanin* Appeal Judgment, para. 217; *Ntagerura et al.* Appeal Judgment, para. 174.

<sup>362</sup> *Lubanga* Appeal Judgment, para. 22; *see also Ntagerura et al.* Appeal Judgment, para. 174; *Halilović* Appeal Judgment, paras 125, 128. *See also* above para. 56.

<sup>363</sup> *Halilović* Appeal Judgment, para. 126.

findings.<sup>364</sup> Where the appellant only identifies certain examples of the alleged error in a judgment, the Appeals Panel will only consider these specific errors as being properly raised and will analyse the merits of the appellant's arguments relating to them.<sup>365</sup> Accordingly, the Appeals Panel will not review *de novo* the entirety of the evidence on the record in light of the alleged error, and therefore declines to consider the following general alleged errors, insofar as it is not directed by the *Amicus* to specific examples thereof: (i) the Contempt Judge's alleged error in rejecting individual pieces of evidence because they involved hearsay, circumstantial or secondary evidence, without considering whether these pieces of evidence supported or corroborated each other;<sup>366</sup> (ii) the Contempt Judge's alleged error in evaluating individual pieces of evidence to see whether a particular piece, by itself or in very restricted relation to other evidence, proved something that was required;<sup>367</sup> and (iii) the Contempt Judge's alleged error in failing to take into account that some facts were agreed between the parties and that others were not genuinely contested.<sup>368</sup>

*(a) Alleged Error of Law and Fact Relating to the Episodes' Availability on Al Jadeed TV's Website (Defence Ground 1, Amicus Grounds 4 in Part, 5 in Part, 13, 14)*

128. At the outset, the Appeals Panel summarily dismisses *Amicus* grounds 4, 5, 13 and 14 insofar as they challenge the Contempt Judge's finding regarding the Episodes' availability on *Al Jadeed TV's* website.<sup>369</sup> Indeed, the Appeals Panel recalls that the Contempt Judge found that the Episodes were available on this platform for a period of time beyond 10 August 2012 based on Mr Al Amin and Mr Comeau's evidence.<sup>370</sup> As a result, the *Amicus'* arguments, which merely put forward additional evidence in support of this existing finding, have no prospect of invalidating the Contempt Judge's existing finding regarding this platform.<sup>371</sup>

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<sup>364</sup> *Halilović* Appeal Judgment, para. 126.

<sup>365</sup> *Halilović* Appeal Judgment, paras 126, 131.

<sup>366</sup> *Amicus* Appeal Brief on the Judgment, para. 50; *Amicus* Reply on the Judgment, para. 11.

<sup>367</sup> *Amicus* Appeal Brief on the Judgment, para. 51; *Amicus* Reply on the Judgment, para. 11.

<sup>368</sup> *Amicus* Appeal Brief on the Judgment, para. 58.

<sup>369</sup> See *Amicus* Appeal Brief on the Judgment, paras 46-58, 83-88.

<sup>370</sup> Judgment, para. 142.

<sup>371</sup> See above para. 18.

129. The Appeals Panel recalls that the Contempt Judge, in the exercise of his discretion, admitted into evidence Mr Al Amin's suspect interview under Rule 154,<sup>372</sup> and relied on its contents as proof of the Episodes' availability on *Al Jadeed* TV's website until at least 2 October 2013.<sup>373</sup> The Appeals Panel notes that Mr Al Amin's suspect interview therefore amounts to untested hearsay evidence in relation to this alleged fact.<sup>374</sup> In addition to this evidence, the Contempt Judge relied on the corroboration provided by Mr Comeau's hearsay evidence on this point,<sup>375</sup> which indicates that the Episodes were available on *Al Jadeed* TV's website until 25 April 2013 only.<sup>376</sup> Therefore, the Appeals Panel understands the Contempt Judge's reasoning regarding the Episodes' availability on *Al Jadeed* TV's website as follows:

- a) the Contempt Judge based his finding of availability until 25 April 2013 on Mr Al Amin's untested hearsay evidence, as corroborated by Mr Comeau's hearsay evidence ("First Interval"); and
- b) the Contempt Judge based his finding of availability between 25 April and 2 October 2013 solely on Mr Al Amin's untested hearsay evidence, as Mr Comeau's evidence did not provide any corroboration for this period of time ("Second Interval").

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<sup>372</sup> See STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0090, Decision on Two Motions for Admission of Written Statements, 28 November 2014, paras 25-27; Decision on *Amicus* Bar Table Motion, paras 27, 31; Rule 154 STL RPE.

<sup>373</sup> Judgment, para. 142.

<sup>374</sup> The relevant parts of the transcript and video recording of the suspect interview amount to hearsay because they are statements made outside of the relevant trial proceedings which are being put forward in those proceedings for the purpose of establishing the truth of the statements' contents; see ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR-73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Admissibility Appeal Decision"), para. 14. The evidence is untested because the Defence did not cross-examine Mr Al Amin. Regarding the weight to be given to hearsay testimony, the Appeals Panel notes that, as a matter of law, it is permissible to cautiously rely on hearsay evidence as the basis for a conviction; see *Karera* Appeal Judgment, para. 39. The weight and probative value given to hearsay evidence will depend on the circumstances surrounding it; see *Karera* Appeal Judgment, para. 39; see also *Tolimir* Appeal Judgment, para. 126. Consequently, the mere fact that the evidence regarding a specific alleged fact is hearsay evidence does not in itself suffice to render the evidence not credible or unreliable; see *Karera* Appeal Judgment, para. 39. In assessing the weight or probative value of hearsay evidence, relevant factors include the source of the information, the precise character of the information, and whether other evidence corroborates the hearsay evidence; *Karera* Appeal Judgment, para. 39.

<sup>375</sup> Judgment, para. 142. The Appeals Panel notes that the part of Mr Comeau's testimony regarding the Table of Episodes' Availability amounts to hearsay because the dates recorded therein are statements made by an OTP language assistant, outside the relevant trial proceedings, which are being put forward by the *Amicus*, through Mr Comeau, for the purpose of establishing the truth of their contents, namely that the Episodes were available online on the stated dates; see Comeau, T6, 16 April 2015, pp. 44, 48, 52 (private session); see also *Aleksovski* Admissibility Appeal Decision, para. 14.

<sup>376</sup> Judgment, para. 142; P00159 (confidential); Comeau, T6, 16 April 2015, p. 49.

130. Regarding the First Interval, the Appeals Panel recalls that Defence ground 1 raises the question of whether the Contempt Judge was unreasonable in finding that Mr Comeau's testimony provided sufficient corroboration for Mr Al Amin's suspect interview to form the basis of a finding of the Episodes' availability on *Al Jadeed* TV's website until 25 April 2013. The Appeals Panel notes that the assessment of whether a piece of evidence requires corroboration, and whether other pieces of evidence provide sufficient corroboration, is within the Contempt Judge's wide discretion as the trier of fact, to which the Appeals Panel must show the requisite deference.<sup>377</sup> In the present case, the Appeals Panel finds that the Defence has failed to show that the Contempt Judge exercised this discretion unreasonably in finding that Mr Al Amin's untested hearsay evidence was sufficiently corroborated by Mr Comeau's hearsay evidence and consequently that they could form the basis for finding that the Episodes were available on *Al Jadeed* TV's website until 25 April 2013.<sup>378</sup> Consequently, the Appeals Panel confirms, in part, the Contempt Judge's finding of the Episodes' availability on *Al Jadeed* TV's website until 25 April 2013.<sup>379</sup>

131. However, regarding the Second Interval, the Appeals Panel finds that the Contempt Judge was unreasonable and therefore erred in basing his finding of the Episodes' availability

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<sup>377</sup> *Nyiramasuhuko et al.* Appeal Judgment, para. 619, fn. 1393; see also *Karera* Appeal Judgment, para. 45. Consequently, a judge may accept, without the need for corroboration, the testimony of a single witness even as proof of a material fact; see *Nyiramasuhuko et al.* Appeal Judgment, para. 2063; see also *Karera* Appeal Judgment, para. 45. Therefore, an accused may be convicted on the basis of evidence from a single witness if the judge is convinced beyond reasonable doubt of the accused's guilt, although he must assess such evidence with appropriate caution; see ICTR, *Prosecutor v. Nchamihigo*, ICTR-01-63-T, Judgement and Sentence, 12 November 2008, para. 14; *Karera* Appeal Judgment, para. 45. As a corollary, an appeal based on a lack of corroborating evidence must necessarily be concerned with the weight that a judge attaches to that evidence; see *Karera* Appeal Judgment, para. 45. See also above para. 15.

<sup>378</sup> The Appeals Panel notes that it is well established that it would be contrary to the fair trial rights of an accused for his conviction to be based solely, or decisively, on insufficiently corroborated untested evidence; see ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 53; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 33.

<sup>379</sup> The Appeals Panel summarily dismisses, in part, the *Amicus*' submissions made in response to Defence ground 1, namely the arguments which suggest that Mr Comeau's evidence was corroborated by other pieces of evidence; see *Amicus* Response on the Judgment, para. 6. The Appeals Panel finds these arguments are poorly explained, and therefore obscure (see above para. 17), and that they go beyond the ambit of responding to Defence ground 1. While Defence ground 1 poses the question of whether the Contempt Judge erred in relying decisively on Mr Al Amin's evidence as corroborated in part by Mr Comeau's evidence, the *Amicus*' response argues that Mr Al Amin's evidence was also corroborated, as to the posting of the Episodes online, by the Table of Agreed Facts and by Mr Dsouki's suspect interview (Exhibit P00131, confidential) – two pieces of evidence on which the Contempt Judge did not rely in making his finding of online availability; see Judgment, para. 135. Therefore, in addition to being obscure, any potentially comprehensible parts of the *Amicus*' arguments go beyond responding to Defence ground 1 and are therefore not properly raised; see above para. 17; Practice Direction on Appeal Filings, Article 5 (2).

on *Al Jadeed* TV's website for this period solely on Mr Al Amin's untested hearsay evidence, without any corroboration. Although the Contempt Judge has a wide discretion in his assessment of the evidence,<sup>380</sup> it is well established that untested hearsay evidence cannot form the sole or decisive basis for a conviction, or an element thereof, without the requisite corroboration.<sup>381</sup> Therefore, because the Contempt Judge did not rely on any corroborating evidence for the Second Interval, it follows that his finding of availability for this period, based solely on untested hearsay evidence, was unreasonable. Consequently, the Appeals Panel reverses, in part, the Contempt Judge's finding on the Episodes' availability on *Al Jadeed* TV's website, namely between 25 April and 2 October 2013.

132. In summary, the Appeals Panel grants Defence ground 1 in part and finds that the Contempt Judge did not err in finding that the *Amicus* had proven, beyond reasonable doubt, the Episodes' availability on *Al Jadeed* TV's website until 25 April 2013.

*(b) Alleged Error of Law and Fact Relating to the Episodes' Availability on Al Jadeed TV's YouTube Channel (Amicus Grounds 4 in Part, 5 in Part, 13 and 14)*

133. In considering the Episodes' availability on *Al Jadeed* TV's YouTube channel, the Appeals Panel turns first to the *Amicus*' argument that a finding of availability on *Al Jadeed* TV's website must necessarily lead to a finding of availability on its YouTube channel because, according to Agreed Fact 21,<sup>382</sup> the Episodes were made available on *Al Jadeed* TV's website by embedding the videos from its YouTube channel.<sup>383</sup> The *Amicus* argues that the Contempt Judge failed to consider the Table of Agreed Facts in this regard.<sup>384</sup>

134. The Appeals Panel recalls that the Contempt Judge's finding that the Episodes were available on *Al Jadeed* TV's website until 25 April 2013 is undisturbed.<sup>385</sup> The Appeals Panel considers that the fact that the Contempt Judge did not mention the Table of Agreed

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<sup>380</sup> See above fn. 377.

<sup>381</sup> See above fn. 378.

<sup>382</sup> Table of Agreed Facts, p. 3, Fact 21.

<sup>383</sup> *Amicus* Appeal Brief on the Judgment, para. 86.

<sup>384</sup> *Amicus* Appeal Brief on the Judgment, para. 86. The Appeals Panel dismisses the *Amicus*' arguments which suggest that the Contempt Judge erred in failing to consider the Table of Agreed Facts as proof of the Episodes being made available on *Al Jadeed* TV's YouTube channel at certain times (*see Amicus* Appeal Brief on the Judgment, paras 57, 86), because this evidence, even if given probative value, does not show that the Episodes were available on this platform beyond 10 August 2012, in violation of the 10 August 2012 Order.

<sup>385</sup> See above para. 132.

Facts at any point when discussing online availability in the Judgment<sup>386</sup> might be an indication that he failed to consider it.<sup>387</sup> Moreover, the Appeals Panel finds that a number of factors reinforce this indication and lead to the conclusion that the Contempt Judge failed to actually consider Agreed Fact 21. First, when the Table of Agreed Facts was filed, the Contempt Judge was silent as to whether he accepted Agreed Fact 21, and did not seek further evidence on this point at trial.<sup>388</sup> Second, Agreed Fact 21 is relevant to the Contempt Judge's findings on online availability and the *Amicus* referred to it in this context in his Final Trial Brief.<sup>389</sup> Third, the Contempt Judge failed to explain: (i) whether he considered Agreed Fact 21 as proven for the purposes of the Judgment; (ii) whether he attached any probative value to Agreed Fact 21; or (iii) why Agreed Fact 21 was not relied upon in determining the Episodes' online availability.<sup>390</sup> In light of the foregoing reasons, the Appeals Panel finds that no reasonable trier of fact could have found Agreed Fact 21 to be so lacking in relevance and

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<sup>386</sup> Judgment, paras 135-142.

<sup>387</sup> *Halilović* Appeal Judgment, para. 124.

<sup>388</sup> The Appeals Panel notes that the legal basis for the Table of Agreed Facts appears to be Rule 122 STL RPE, rather than Rule 89 (D) STL RPE. Consequently, the jurisprudence and practice of the ICC is most informative to the Appeals Panel in this regard, since Rule 69 ICC RPE is analogous to Rule 122 STL PRE, while the ICTY RPE and MICT RPE contain rules which are analogous to Rule 89 (D) STL RPE instead; *see* Rule 65 *ter* (H) ICTY RPE; Rule 70 (N) MICT RPE. In addition, the ICTR RPE and SCSL RPE contain provisions which allow a trial chamber to order the prosecution to file, *inter alia*, "admissions by the parties and a statement of other matters not in dispute", in anticipation of a pre-trial conference; *see* Rule 73 *bis* (B) (ii) ICTR RPE; Rule 73 *bis* (B) (ii) SCSL RPE. The Appeals Panel notes that the practice at the ICC regarding agreed facts has been for the trier of fact to note the parties' agreed facts once submitted and state explicitly whether it accepts that the parties will not submit any further evidence on those alleged facts; *see* ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Decision on Agreements as to Evidence, 3 February 2011, para. 5; ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision on the Joint Submissions Regarding the Contested Issues and the Agreed Facts, 28 September 2011 ("*Banda and Jerbo* Agreed Facts Decision"), paras 8, 45, 46 (ii); *see also* ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Prosecution and Defence Joint Submission on Agreed Facts, 22 June 2015, para. 5.

<sup>389</sup> *Amicus* Final Trial Brief, paras 29, 49; *see also* p. 6, Fact 33.

<sup>390</sup> Regarding the evidential weight to be given to parties' agreed facts, the Appeals Panel notes that a trier of fact has the discretion to: (i) consider the contents of the parties' agreed facts as being proven, without additional evidence, for the purposes of the judgment; and (ii) require additional evidence on any of the agreed facts, in the interests of justice; *see* Rule 122 STL RPE; *Banda and Jerbo* Agreed Facts Decision, paras 23-24; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1479, Decision on Agreed Facts under Rule 122, 2 April 2014 ("*Ayyash et al.* Agreed Facts Decision"), para. 8; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 73; ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute, 18 December 2012, para. 39; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on "Prosecution Response to Karadžić's Submission of Agreed Facts and Motion for Reconsideration", 26 August 2010, para. 9; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Agreed Facts, 14 February 2013, para. 5; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Judgement Volume I of II, 30 May 2013, para. 17; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Decision on Motion for Admission of Agreed Facts, 12 January 2010, p. 1.

probative value that it need not have been considered in the context of the Episodes' availability on *Al Jadeed* TV's YouTube channel.<sup>391</sup>

135. The Contempt Judge's failure to consider Agreed Fact 21 in this context led to the unreasonable and erroneous finding that the Episodes were only available on *Al Jadeed* TV's website (for a certain period), but not on its YouTube channel (for that same period), even though this would have been impossible according to Agreed Fact 21. Accordingly, the Appeals Panel finds that the Episodes' availability on *Al Jadeed* TV's website therefore coincided with their availability on its YouTube channel.<sup>392</sup> As a result, and in light of its earlier finding that the Episodes were available on *Al Jadeed* TV's website until 25 April 2013,<sup>393</sup> the Appeals Panel is satisfied, beyond reasonable doubt, that the only reasonable conclusion is that the Episodes were also available on *Al Jadeed* TV's YouTube channel until 25 April 2013.

136. The remaining question is whether the evidence put forward by the *Amicus* can support a finding of availability on *Al Jadeed* TV's YouTube channel beyond 25 April 2013. Looking first at Mr Al Amin's suspect interview, the Appeals Panel notes that his evidence is limited to the Episodes' availability on *Al Jadeed* TV's website.<sup>394</sup> In principle, if viewed in conjunction with Agreed Fact 21, Mr Al Amin's evidence can support a finding that the Episodes were available on *Al Jadeed* TV's YouTube channel by virtue of the embedding process.<sup>395</sup> However, for the reasons explained above, Mr Al Amin's evidence cannot form the basis for a finding of availability on *Al Jadeed* TV's YouTube channel beyond the already

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<sup>391</sup> *Ngudjolo* Appeal Judgment, paras 168, 170.

<sup>392</sup> The Appeals Panel notes that the converse is not true in this case (i.e. that availability on *Al Jadeed* TV's YouTube channel coincided with availability on its website). This is because, according to the embedding process set out in Agreed Fact 21, the Episodes could have been available on the YouTube channel without also being available on the website. In other words, availability on the YouTube channel was a prerequisite for availability on the website, but not *vice versa*; see Table of Agreed Facts, p. 3, Fact 21.

<sup>393</sup> See above para. 132.

<sup>394</sup> The Appeals Panel notes that Mr Al Amin was asked a question about the Episodes' availability on *Al Jadeed* TV's YouTube channel as well as its website; see Exhibit P00126 (confidential), p. 73, lines 28-29. However, due to some confusion about the translation of the question posed, and subsequent reformulations and re-translations of this question (see Exhibit P00126 (confidential), pp. 73-75), ultimately Mr Al Amin answered a question which refers exclusively to availability on *Al Jadeed* TV's website; see Exhibit P00126 (confidential), p. 75, lines 6-12.

<sup>395</sup> See above para. 135.

established date of 25 April 2013.<sup>396</sup> Any further consideration of his evidence in this context is therefore rendered moot.

137. The Appeals Panel also finds that the Contempt Judge did not err in declining to attach any weight to *Al Jadeed* TV's broadcast of 29 April 2014,<sup>397</sup> because: (i) it is untested hearsay evidence;<sup>398</sup> (ii) the *Amicus* did not seek to rely on it as proof of the Episodes' availability on *Al Jadeed* TV's YouTube channel;<sup>399</sup> (iii) it makes assertions in the past tense about the Episodes' online availability,<sup>400</sup> and therefore provides no information as to the dates until which the Episodes were still available on *Al Jadeed* TV's YouTube channel; and (iv) it claims that multiple outlets placed information about alleged confidential witnesses online,<sup>401</sup> and it is therefore impossible to ascertain whether its assertion that such information remained online<sup>402</sup> referred to one of *Al Jadeed* TV's online platforms rather than one of the other outlets mentioned.

138. Moreover, the Appeals Panel finds that the Contempt Judge did not err in declining to attach any weight to Ms Al Bassam and Ms Habli's alleged failure to deny that the Episodes were available online, in particular on *Al Jadeed* TV's YouTube channel, at various dates.<sup>403</sup> First, the *Amicus*' submissions do not refer to any pieces of evidence pertaining to Ms Al Bassam.<sup>404</sup> Second, regarding Ms Habli, the Appeals Panel notes that a persons' failure to deny an alleged fact, in the circumstances where that person was not asked any direct questions on this point and was not an interviewee at any stage of the investigation,<sup>405</sup>

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<sup>396</sup> See above para. 132.

<sup>397</sup> Exhibit P00108 (confidential). The Appeals Panel notes that, although the Contempt Judge's failure to make any mention of this piece of evidence in the Judgment might be an indication that he failed to consider it, it cannot discount the possibility that the Contempt Judge did in fact consider this piece of evidence but declined to give it any weight due to its various deficiencies and since it was not directly relevant; *Halilović* Appeal Judgment, para. 124.

<sup>398</sup> The relevant parts of this piece of evidence amount to hearsay because they are statements made by the authors of the broadcast, outside the relevant trial proceedings, which are being put forward by the *Amicus* for the purpose of establishing the truth of their contents, namely that the Episodes were available on the stated dates; see *Aleksovski* Admissibility Appeal Decision, para. 14. This piece of evidence is untested because the Defence did not cross examine its authors.

<sup>399</sup> See *Amicus* Final Trial Brief.

<sup>400</sup> Exhibit P00108 (confidential), p. 1, lines 10-12.

<sup>401</sup> Exhibit P00108 (confidential), p. 1, lines 8-10.

<sup>402</sup> Exhibit P00108 (confidential), p. 1, lines 10-12.

<sup>403</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86).

<sup>404</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86), fn. 133.

<sup>405</sup> Ms Habli acted as the suspects' attorney; see Exhibits P00127 (confidential), P00133 (confidential), P00157 (confidential), P00175 (confidential).

does not constitute proof of the fact in question. Consequently, the Contempt Judge did not err in declining to rely on the pieces of evidence highlighted in the *Amicus*' arguments,<sup>406</sup> as they provided no relevant evidence on the Episodes' availability on *Al Jadeed* TV's YouTube channel.

139. Furthermore, the Appeals Panel summarily dismisses the *Amicus*' arguments in relation to the initial Contempt Judge's Decision in Proceedings for Contempt,<sup>407</sup> as this is not a piece of evidence on the record.<sup>408</sup>

140. Regarding the Registrar's Letter of 28 August 2012,<sup>409</sup> the Appeals Panel finds that the assertions therein could only support a finding of availability on *Al Jadeed* TV's YouTube channel until 27 August 2012.<sup>410</sup> Given that the Appeals Panel is already satisfied beyond reasonable doubt that the Episodes were available on *Al Jadeed* TV's YouTube channel until the later date of 25 April 2013,<sup>411</sup> the evidentiary value of this exhibit is rendered moot. Consequently, the Appeals Panel need not consider whether the Contempt Judge erred in refusing to rely on this piece of evidence in his finding on the Episodes' availability on *Al Jadeed* TV's YouTube channel.

141. Turning to the *Amicus*' arguments regarding Ms Al Khayat's suspect interview,<sup>412</sup> the Appeals Panel notes that the Contempt Judge did not rely on this piece of evidence in reaching his decision on the Episodes' online availability,<sup>413</sup> which might be an indication that he failed to consider it.<sup>414</sup> However, the Appeals Panel notes that this suspect interview constitutes hearsay evidence<sup>415</sup> and that, in any event, the *Amicus* had not sought to rely on it

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<sup>406</sup> Exhibits D00053 (confidential), D00054 (confidential). The Appeals Panel notes that the *Amicus* also seeks to rely on Exhibits "P000158-59" in support of his argument, which the Appeals Panel understands as a reference to Exhibits P00158 (confidential with public redacted version) and P00159 (confidential with public redacted version) that are not relevant to this argument because they are the screenshots and Table of Episodes' Availability respectively, which relate to Mr Comeau's testimony of the Episodes' availability online. As such, the Appeals Panel finds that this reference is irrelevant to the *Amicus*' argument regarding Ms Al Bassam and Ms Habli and is therefore summarily dismissed.

<sup>407</sup> *Amicus* Appeal Brief on the Judgment, para. 85.

<sup>408</sup> See above para. 19.

<sup>409</sup> Exhibit P00063 (confidential).

<sup>410</sup> Exhibit P00063 (confidential), p. 1.

<sup>411</sup> See above para. 135.

<sup>412</sup> *Amicus* Appeal Brief on the Judgment, unnumbered paragraph (between paras 85 and 86); P00173.

<sup>413</sup> Judgment, paras 135-144.

<sup>414</sup> See above fn. 387.

<sup>415</sup> The relevant parts of Ms Al Khayat's suspect interview amount to hearsay evidence because they are statements made outside the relevant trial proceedings which are being put forward by the *Amicus* on appeal for

at trial as proof of the Episodes' availability on *Al Jadeed* TV's YouTube channel.<sup>416</sup> Therefore, the *Amicus* has not shown that the Contempt Judge was unreasonable in not relying on Ms Al Khayat's evidence on the Episodes' availability on *Al Jadeed* TV's YouTube channel.

142. Turning lastly to Mr Comeau's evidence with respect to the Table of Episodes' Availability,<sup>417</sup> the Appeals Panel notes that this evidence indicates that the Episodes were available on *Al Jadeed* TV's YouTube channel until 26 September 2013, which is beyond the already established date of availability of 25 April 2013.<sup>418</sup> Therefore, the assessment of this exhibit is relevant to the finding of the Episodes' availability on *Al Jadeed* TV's YouTube channel beyond 25 April 2013. Similarly, Mr Comeau's evidence concerning his conversation with Mr Gagnon<sup>419</sup> indicates that the Episodes were available on *Al Jadeed* TV's YouTube channel until 15 January 2014, thereby also rendering the assessment of this piece of evidence relevant to the finding of the Episodes' availability on this online platform beyond 25 April 2013.

143. In this regard, the Appeals Panel notes that, contrary to the *Amicus*' submissions,<sup>420</sup> the Contempt Judge did not decline to rely on Mr Comeau's evidence on these two points merely because it was hearsay. Rather, the Contempt Judge used his discretion reasonably to require that Mr Comeau's hearsay evidence be corroborated before he would rely on it;<sup>421</sup> he therefore committed no error in this regard. In assessing the next question, namely whether

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the purpose of establishing the truth of their contents, namely that the Episodes were available online on the stated dates; see *Aleksovski* Admissibility Appeal Decision, para. 14.

<sup>416</sup> *Amicus* Final Trial Brief, paras 49-51. The Appeals Panel notes that, similarly, the *Amicus* had not sought to rely on Mr Al Amin's evidence in support of the Episodes' availability on *Al Jadeed* TV's website; see *Amicus* Final Trial Brief. Nevertheless, in that instance, the Contempt Judge did rely on Mr Al Amin's evidence as proof of the Episodes' availability on *Al Jadeed* TV's website; see Judgment, para. 142. It would therefore appear, *prima facie*, that the Contempt Judge was inconsistent in his approach to Ms Al Khayat's evidence and Mr Al Amin's evidence regarding the Episodes' online availability. However, the Appeals Panel notes that, while it is within the Contempt Judge's discretion to rely on a piece of evidence in support of an alleged fact even when not requested to do so by a Party, this does not mean that the Contempt Judge erred in declining to rely on other pieces of evidence which had also not been relied on by the *Amicus* in support of a particular fact, such as Ms Al Khayat's suspect interview.

<sup>417</sup> Comeau, T6, 16 April 2015, pp. 44-52 (p. 52, lines 16-19, private session); Comeau, T7, 17 April 2015, pp. 55-58 (p. 55 and p. 56, line 1, private session), 78-79.

<sup>418</sup> See above para. 135.

<sup>419</sup> Comeau, T6, 16 April 2015, pp. 49, 60-69 (p. 60 and p. 61, lines 1-18, private session), 75-79; Comeau, T7, 17 April 2015, pp. 65-74 (p. 65, lines 17-25 and p. 66, lines 1-7, private session).

<sup>420</sup> *Amicus* Appeal Brief on the Judgment, paras 50, 57, 83-85; *Amicus* Reply on the Judgment, para. 11.

<sup>421</sup> Judgment, paras 136, 139; see above fn. 373.

the Contempt Judge erred in finding that there was no evidence on the record which corroborated Mr Comeau's evidence on these two points, the Appeals Panel recalls that it will only consider this alleged error with regard to a finding of availability beyond 25 April 2013, since it is already satisfied that the Episodes were available on *Al Jadeed* TV's YouTube channel until that date. For the reasons set out above in relation to each piece of evidence put forward by the *Amicus* in his grounds of appeal,<sup>422</sup> the Appeals Panel finds that the *Amicus* has not established that the Contempt Judge was unreasonable in finding that there was no evidence on the record corroborating Mr Comeau's evidence on the Episodes' availability on *Al Jadeed* TV's YouTube channel beyond 25 April 2013.

144. In summary, the Appeals Panel finds that the Contempt Judge erred in finding that the *Amicus* had not proven that the Episodes were available on *Al Jadeed* TV's YouTube channel until 25 April 2013. Consequently, the Appeals Panel grants, in part, *Amicus* grounds 4, 5, 13 and 14.

*(c) Alleged Error of Law and Fact Relating to the Episodes' Availability on Al Jadeed TV's Facebook Page (Amicus Grounds 4 in Part, 5 in Part, 13 and 14)*

145. The Appeals Panel now turns to consider whether the Contempt Judge erred in declining to find that the Episodes were available on *Al Jadeed* TV's Facebook page after the 10 August 2012 Order. The Appeals Panel notes that, in relation to this online platform, the Contempt Judge considered Mr Comeau's evidence on: (i) the Table of Episodes' Availability, which indicates availability until 26 September 2012;<sup>423</sup> and (ii) the screenshots of, *inter alia*, *Al Jadeed* TV's Facebook page.<sup>424</sup> On appeal, the *Amicus* seeks to rely on a number of other pieces of evidence, arguing that the Contempt Judge was unreasonable in failing to rely on them in the Judgment: (i) Mr Al Amin's suspect interview; (ii) Ms Al Khayat's suspect interview; (iii) Ms Al Bassam and Ms Habli's alleged failure to deny the Episodes' online availability; (iv) *Al Jadeed* TV's broadcast of 29 April 2014; and (v) the Table of Agreed Facts.<sup>425</sup>

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<sup>422</sup> See above paras 136-142.

<sup>423</sup> Comeau, T6, 16 April 2015, pp. 50-52 (p. 52, lines 16-19, private session).

<sup>424</sup> Exhibit P00158 (public redacted version); Judgment, paras 135-136, 140.

<sup>425</sup> *Amicus* Appeal Brief on the Judgment, paras 85- 90.

146. Considering each of these in turn, the Appeals Panel first recalls its finding that the Contempt Judge did not err in declining to rely on Ms Al Khayat's suspect interview, Ms Al Bassam and Ms Habli's alleged failure to deny the Episodes' availability, and *Al Jadeed* TV's broadcast of 29 April 2014, as proof of the Episodes' availability on *Al Jadeed* TV's YouTube channel.<sup>426</sup> The Appeals Panel finds that, for the same reasons, the Contempt Judge did not err in declining to rely on these three pieces of evidence as proof of the Episodes' availability on *Al Jadeed* TV's Facebook page.

147. Concerning the screenshots, the Appeals Panel recalls that the Contempt Judge attached no probative value to them, reasoning that Mr Comeau was not the appropriate witness to explain the content of the screenshots or the circumstances in which they were obtained, because he was not personally involved in the OTP's monitoring of *Al Jadeed* TV's online platforms at the time.<sup>427</sup> In reviewing the reasonableness of this finding, the Appeals Panel notes that there is no evidence on the record pertaining to the provenance of the screenshots.<sup>428</sup> Mr Comeau, through whom the *Amicus* sought the admission of the screenshots into evidence,<sup>429</sup> was not questioned on their provenance and therefore did not provide any information thereon.<sup>430</sup> This inadequacy is such that a reasonable trier of fact could have found that the screenshots were inherently unreliable and therefore that any potential corroboration of their contents would not have remedied this lack of reliability.<sup>431</sup> Consequently, the Appeals Panel finds that the Contempt Judge did not err in declining to rely on the screenshots. The Appeals Panel notes that its reason for finding that the Contempt

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<sup>426</sup> See above paras 137, 138, 141.

<sup>427</sup> Judgment, para. 140. The Appeals Panel notes that the Contempt Judge relied on substantially the same reasoning, namely that "Mr Comeau did not have close knowledge of the process of recording the availability of the Episodes on *Al Jadeed* TV's platforms", when finding that Mr Comeau's evidence regarding the Table of Episodes' Availability constituted hearsay and therefore required corroboration before being sufficiently reliable; see Judgment, para. 136. However, this finding is different in substance from the finding of the screenshots' provenance because, based on the trial record, the provenance of the screenshots could not be ascertained at all due to a complete lack of information, whereas the provenance of the Table of Episodes' Availability was ascertained from Mr Comeau's testimony, even if its provenance ultimately led to the Contempt Judge's finding that Mr Comeau's evidence thereon constituted hearsay.

<sup>428</sup> While the record does contain some information on the provenance of the screenshots, none provides direct evidence on the matter; see STL, *In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, F0099, Motion for Admission of Evidence Pursuant to Rule 154, Annex A, Confidential, 16 February 2015; Decision on *Amicus* Bar Table Motion, para. 39; Comeau, T7, 17 April 2015, p. 56, lines 8-10.

<sup>429</sup> Comeau, T6, 16 April 2015, pp. 51-53 (p. 52, lines 16-19, private session).

<sup>430</sup> Comeau, T6, 16 April 2015, pp. 51-53 (p. 52, lines 16-19, private session); Comeau, T7, 17 April 2015, p. 56, lines 8-10.

<sup>431</sup> *Ngudjolo* Appeal Judgment, paras 168, 170.

Judge did not err in refusing to rely on the screenshots is not the fact that Mr Comeau was not, as such, the appropriate witness to speak to their provenance. Rather the Appeals Panel finds that the Contempt Judge did not err in declining to rely on the screenshots because, in any event, there was no evidence on the record, from Mr Comeau or otherwise, pertaining to their provenance. This is therefore different from the question of whether sufficient provenance information was provided for the Table of Episodes' Availability through Mr Comeau's testimony, because the latter was in fact asked numerous questions about the provenance of the Table of Episodes' Availability and provided information thereon.<sup>432</sup>

148. The Appeals Panel furthermore notes that the *Amicus* argues that the Contempt Judge erred in failing to consider the Table of Agreed Facts as corroboration for Mr Comeau's evidence regarding the Table of Episodes' Availability, as the latter indicates that the Episodes were available on *Al Jadeed* TV's Facebook page beyond 10 August 2012.<sup>433</sup> However, the *Amicus* has failed to explain how the Table of Agreed Facts is relevant to determining whether the Episodes were available on *Al Jadeed* TV's Facebook page beyond 10 August 2012, given that none of the agreed facts address this issue.<sup>434</sup> For this reason, the *Amicus*' arguments in this regard are summarily dismissed.<sup>435</sup>

149. With respect to Mr Al Amin's suspect interview, the Appeals Panel notes that *Al Jadeed* TV's Facebook page is only discussed once therein, and the discussion pertains to *Al Jadeed* TV's general policy of automatically posting its television broadcasts to Facebook and other social media platforms.<sup>436</sup> Therefore, this provides no evidence of the actual Episodes being posted on *Al Jadeed* TV's Facebook page. In any event, even if Mr Al Amin's assertions in this regard were considered as circumstantial evidence in support of the Episodes being made available on *Al Jadeed* TV's Facebook page at a certain time,<sup>437</sup>

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<sup>432</sup> Comeau, T6, 16 April 2015, pp. 44-49, 52 (lines 16-19, private session); Comeau, T7, 17 April 2015, pp. 55-58 (p. 55 and p. 56, line 1, private session), 78-79.

<sup>433</sup> *Amicus* Appeal Brief on the Judgment, paras 84-85.

<sup>434</sup> The Appeals Panel notes that only one of the agreed facts concerns *Al Jadeed* TV's Facebook page in any way (see Table of Agreed Facts, p. 3, Fact 22), but it merely states that links to the Episodes were available on this Facebook page "up to a certain time", which does not indicate that they were available on that platform beyond 10 August 2012.

<sup>435</sup> See above para. 17.

<sup>436</sup> Exhibit P00126 (confidential), p. 59, lines 10-25.

<sup>437</sup> The Appeals Panel notes that the relevant parts of Mr Al Amin's suspect interview may constitute circumstantial evidence of the Episodes being made available online, because a finding that the Episodes were made available on *Al Jadeed* TV's Facebook page would necessarily only be an inference from Mr Al Amin's

this is insufficient to show that they were available on this platform beyond 10 August 2012, in violation of the 10 August 2012 Order. The Appeals Panel also notes that the fact that Mr Al Amin's suspect interview is capable, if corroborated, to constitute proof of the Episodes' availability on *Al Jadeed* TV's website is not relevant to a finding of their availability on *Al Jadeed* TV's Facebook page. This is because, although availability on *Al Jadeed* TV's Facebook page is dependent on availability on its website and/or YouTube channel, the converse is not true – the Episodes could have been available on *Al Jadeed* TV's website and/or YouTube channel without also being available on *Al Jadeed* TV's Facebook page.<sup>438</sup> For these reasons, the Appeals Panel finds that the Contempt Judge did not err in declining to rely on this piece of evidence as proof of the Episodes' availability on *Al Jadeed* TV's Facebook page.

150. Therefore, the sole remaining evidence in support of the Episodes' availability on *Al Jadeed* TV's Facebook page is Mr Comeau's evidence regarding the Table of Episodes' Availability. According to the same reasoning as set out above,<sup>439</sup> the Contempt Judge did not err in requiring that Mr Comeau's hearsay evidence on the Table of Episodes' Availability be corroborated by other evidence on the record before he could rely on it to make a finding of the Episodes' availability on *Al Jadeed* TV's Facebook page. Therefore, given that no such corroborating evidence is present on the record,<sup>440</sup> the Appeals Panel finds that the Contempt Judge did not err in concluding that the *Amicus* had not proven, beyond reasonable doubt, that the Episodes were available on *Al Jadeed* TV's Facebook page beyond 10 August 2012. The Appeals Panel therefore confirms the Contempt Judge's finding in this regard.

151. In summary, the Appeals Panel finds that the Contempt Judge did not err in finding that the *Amicus* has not proven that the Episodes were available on *Al Jadeed* TV's Facebook page beyond 10 August 2012, and therefore dismisses, in part, *Amicus* grounds 4, 5, 13 and 14.

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assertion that *Al Jadeed* TV's broadcasts are all automatically posted on its Facebook page; see above fns 286-287.

<sup>438</sup> Table of Agreed Facts, p. 3, Fact 22.

<sup>439</sup> See above para. 143.

<sup>440</sup> See above paras 146-149.

iii. Conclusion

152. In summary, having granted, in part, Defence ground 1 and *Amicus* grounds 4, 5, 13 and 14, and dismissed the remaining parts of Defence ground 1 and *Amicus* grounds 4 (insofar as they relate to Count 2), 5 (insofar as they relate to Count 2), 13 and 14, the Appeals Panel finds that:

- a) the Episodes were available on *Al Jadeed* TV's website until 25 April 2013;
- b) the Episodes were available on *Al Jadeed* TV's YouTube channel until 25 April 2013;
- c) the *Amicus* has not proven that the Episodes were available on *Al Jadeed* TV's Facebook page beyond 10 August 2012.

153. The Appeals Panel will address the impact, if any, of these findings in the relevant sections below.

**b. Alleged Errors of Law and Fact Relating to Ms Al Khayat's *Mens Rea* (*Amicus* Ground 15 in Part, Defence Grounds 2, 3, 4 and 5)**

154. The Contempt Judge defined the *mens rea* of Count 2 as requiring the *Amicus* to prove that the Accused either had knowledge of the existence of the 10 August 2012 Order or was wilfully blind to its existence and deliberately failed to remove the Episodes from *Al Jadeed* TV's online platforms.<sup>441</sup>

155. In his finding related to Ms Al Khayat's knowledge of, or wilful blindness to, the 10 August 2012 Order, in the absence of direct evidence on the record, the Contempt Judge relied on circumstantial evidence to conclude that, on 11 August 2012, Ms Al Khayat received an email from Mr Anthony Lodge, Head of Registry and Resident Representative at the Tribunal's Beirut Office, forwarding the 10 August 2012 Order.<sup>442</sup> The Contempt Judge also took into account the fact that Mr Lodge's email of 11 August 2012 was sent to the same email address which had previously been used by Ms Al Khayat to correspond with the

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<sup>441</sup> Judgment, para. 150.

<sup>442</sup> Judgment, paras 170-172; Lodge, T8, 20 April 2015, pp. 12-14, 41 (lines 16-25, private session); Exhibit P00160 (confidential).

Tribunal's spokesperson, including on 7 and 9 August 2012.<sup>443</sup> While the Contempt Judge acknowledged that there was no evidence on the record proving that Ms Al Khayat actually read Mr Lodge's email or the attached 10 August 2012 Order, he inferred from a variety of circumstantial evidence<sup>444</sup> that she deliberately chose to ignore the email in order to be able to deny knowledge of its existence.<sup>445</sup> On this basis, the Contempt Judge concluded that Ms Al Khayat was at least wilfully blind to the 10 August 2012 Order.<sup>446</sup>

i. Alleged Error of Law Relating to the *Mens Rea* Standard (*Amicus* Ground 15 in Part)

156. The Appeals Panel recalls that the *Amicus* raises, in ground 15, the issue of the correct *mens rea* standard for Count 2.<sup>447</sup> He submits that the Contempt Judge erred in rejecting the position that reckless indifference can amount to "knowing and wilful" conduct pursuant to Rule 60 *bis* (A).<sup>448</sup> The Appeals Panel considers that this ground of appeal is not properly raised by the *Amicus* as the Contempt Judge found that Ms Al Khayat did have the requisite *mens rea* for Count 2, even according to the comparatively more stringent wilful blindness test.<sup>449</sup> Consequently, because this ground of appeal lacks the potential to invalidate the Contempt Judge's finding that Ms Al Khayat had the requisite *mens rea* for Count 2, the Appeals Panel summarily dismisses this part of *Amicus* ground 15.<sup>450</sup>

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<sup>443</sup> Judgment, para. 170. On 7 August 2012, the STL Registrar addressed a Notice of Cease and Desist ("Cease-and-Desist Letter") to Mr Tahsin Al Khayat with copies to Ms Karma Al Khayat, Ms Mariam Al Bassam and Mr Rami Al Amin. The spokesperson of the STL, Mr Marten Youssef, sent the Cease-and-Desist Letter by email to Ms Al Khayat on 7 August 2012 (Exhibit P00057, confidential). Ms Al Khayat replied to Mr Youssef on 9 August 2012 (Exhibit P00042, confidential).

<sup>444</sup> Judgment, paras 168-174, where the Contempt Judge noted that: (i) Ms Al Khayat was not in Lebanon at the time of the service of the 10 August 2012 Order; (ii) Ms Khayat had responded to emails from the Tribunal's spokesperson on 7 and 9 August concerning the Cease-and-Desist Letter; (iii) Mr Lodge addressed his email to the same email address which the Tribunal Spokesperson had used to correspond to Ms Al Khayat; (iv) Mr Lodge received no failed delivery notification after emailing Ms Al Khayat; and (v) Ms Al Khayat had knowledge of the Cease-and-Desist Letter and therefore had every reason to suspect that the email she received from Mr Lodge pertained to the Episodes.

<sup>445</sup> Judgment, para. 173.

<sup>446</sup> Judgment, para. 175.

<sup>447</sup> *Amicus* Appeal Brief on the Judgment, paras 92-94.

<sup>448</sup> *Amicus* Appeal Brief on the Judgment, paras 92-93.

<sup>449</sup> Judgment, paras 175-176.

<sup>450</sup> See above para. 18.

ii. Alleged Errors of Fact Relating to Ms Al Khayat's Mens Rea (Defence Grounds 2, 3, 4 and 5)

(a) *Submissions*

157. The Defence submits in grounds 2 and 3 that the Contempt Judge erred by reversing the burden of proof in finding that Ms Al Khayat must have received the email that enclosed the 10 August 2012 Order, not on the basis of any direct evidence, but rather on the basis of an inference drawn from his findings that: (i) there was no evidence of a failed delivery notification of the email; (ii) Ms Al Khayat exchanged emails with the Tribunal's spokesperson on a number of occasions during that period; and (iii) nothing on the record indicated that *Al Jadeed* TV's server or Ms Al Khayat's email inbox were not functioning on that date.<sup>451</sup>

158. The Defence asserts that when a trier of fact relies on circumstantial evidence to draw an inference in favour of an accused's guilt, there must be no other conclusion that could also reasonably be drawn from that evidence.<sup>452</sup> It submits that the evidence put forward by the *Amicus* equally leads to the reasonable inference that Mr Lodge's email was not received by Ms Al Khayat or that it might have entered a "spam filter".<sup>453</sup> The Defence argues that the *Amicus* presented no evidence of: (i) the use of an email delivery or "read receipt" function by Mr Lodge; (ii) a follow-up phone call or email to Ms Al Khayat to confirm receipt of the email; (iii) a confirmation by Ms Al Khayat that she received Mr Lodge's email, even though she was specifically requested in the email to do so, and despite the fact that she did so during her previous email exchanges with the Tribunal spokesperson; or (iv) any attempt by the Registry or the Lebanese authorities to serve the 10 August 2012 Order on Ms Al Khayat.<sup>454</sup>

159. In grounds 4 and 5, the Defence submits that the Contempt Judge erred by reversing the burden of proof in finding that Ms Al Khayat "deliberately chose to ignore [the email] in order to be able to deny knowledge of its existence"<sup>455</sup> and by failing to take into account other relevant and probative evidence on the record, for instance Ms Al Khayat's suspect interview, that in its view demonstrates that she had no knowledge of and no intention to

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<sup>451</sup> Defence Appeal Brief on the Judgment, para. 37.

<sup>452</sup> Defence Reply on the Judgment, para. 11.

<sup>453</sup> Defence Appeal Brief on the Judgment, paras 41-42; Defence Reply on the Judgment, para. 15.

<sup>454</sup> Defence Appeal Brief on the Judgment, paras 41-43.

<sup>455</sup> Defence Appeal Brief on the Judgment, para. 45, referring to Judgment, para. 173.

violate the 10 August 2012 Order.<sup>456</sup> The Defence also posits that the Contempt Judge was unreasonable in relying on the Cease-and-Desist Letter and on *Al Jadeed* TV's response to it, to conclude that Ms Al Khayat had every reason to suspect that the email she received from Mr Lodge concerned the Episodes.<sup>457</sup>

160. The *Amicus* responds that the Defence conflates the drawing of inferences from circumstantial evidence, which is well-established in international criminal law, with reversing the burden of proof.<sup>458</sup> Concerning the receipt of Mr Lodge's email, the *Amicus* submits that the issue is whether no reasonable judge could have come to the same conclusion.<sup>459</sup> The *Amicus* considers that, based on the totality of the evidence, the Contempt Judge was entitled to find that the email was received, reasoning that it is akin to inferring that a letter which is properly posted is received as addressed, absent evidence to the contrary.<sup>460</sup>

161. Concerning the Contempt Judge's finding of Ms Al Khayat's wilful blindness, the *Amicus* submits that, as a senior *Al Jadeed* TV manager who "controlled" the Episodes, it was incumbent on her to be diligent in her communication and to keep *Al Jadeed* TV's management fully informed.<sup>461</sup> The *Amicus* further argues that, assuming that Ms Al Khayat did not actually read the email or the 10 August 2012 Order, the circumstances nevertheless support the Contempt Judge's conclusion that she deliberately chose to ignore the email.<sup>462</sup>

162. As for the probative value of Ms Al Khayat's denial of knowledge of the 10 August 2012 Order during her suspect interview, the *Amicus* submits that, contrary to the Defence's assertion, the Contempt Judge did consider this evidence but found it unreliable.<sup>463</sup> In particular, the *Amicus* notes that the Contempt Judge found that the complaint filed by Ms Habli alleging forgery of Ms Al Bassam's signature on the Lebanese Judicial Police report of service of the 10 August 2012 Order was later withdrawn.<sup>464</sup> Therefore, according to the *Amicus*, Ms Al Khayat's statement during the interview – claiming that

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<sup>456</sup> Defence Appeal Brief on the Judgment, paras 49-52.

<sup>457</sup> Defence Appeal Brief on the Judgment, para. 52, referring to Judgment, para. 173.

<sup>458</sup> *Amicus* Response on the Judgment, para. 7.

<sup>459</sup> *Amicus* Response on the Judgment, para. 8.

<sup>460</sup> *Amicus* Response on the Judgment, para. 8.

<sup>461</sup> *Amicus* Response on the Judgment, para. 12.

<sup>462</sup> *Amicus* Response on the Judgment, para. 12.

<sup>463</sup> *Amicus* Response on the Judgment, para. 14.

<sup>464</sup> *Amicus* Response on the Judgment, para. 15.

Ms Al Bassam's signature was a forgery – was false and shows that she did have knowledge of the 10 August 2012 Order but was simply denying it.<sup>465</sup>

163. The *Amicus* also raises additional arguments related to Ms Al Khayat's *mens rea* in a section entitled "Karma Khayat's knowledge of the 10 August 2012 Order".<sup>466</sup> The Defence responds that this ground should be summarily dismissed for lack of notice,<sup>467</sup> and the *Amicus* replies that notice of these arguments was given in the request for relief for grounds 4 to 14 of the *Amicus* Notice of Appeal on the Judgment.<sup>468</sup>

(b) *Analysis*

164. At the outset, the Appeals Panel notes that the arguments raised by the *Amicus* in the section entitled "Karma Khayat's knowledge of the 10 August 2012 Order"<sup>469</sup> are not properly raised because: (i) they were not put forward as a separate ground of appeal in the *Amicus* Notice of Appeal on the Judgment, as noted by the Defence;<sup>470</sup> (ii) contrary to the *Amicus*' contention,<sup>471</sup> they were not specifically contained in or identified under grounds 4 or 5 of the *Amicus* Notice of Appeal on the Judgment; and (iii) the *Amicus* did not seek leave to amend the *Amicus* Notice of Appeal on the Judgment, pursuant to Rule 177 (C), to include them as a separate ground of appeal. The Appeals Panel finds that, contrary to the *Amicus*' submissions, it is not enough that the issue of Ms Al Khayat's *mens rea* was identified as part of the request for relief in the *Amicus* Notice of Appeal on the Judgment.<sup>472</sup> Accordingly, the Appeals Panel summarily dismisses the arguments raised in this section of the *Amicus* Appeal Brief on the Judgment.

165. With respect to the Contempt Judge's analysis of Ms Al Khayat's *mens rea* for Count 2, the Appeals Panel notes that it is twofold: the Contempt Judge first established that Ms Al Khayat received Mr Lodge's 11 August 2012 email attaching the 10 August 2012 Order in her email inbox,<sup>473</sup> before finding that she was at least wilfully blind to the

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<sup>465</sup> *Amicus* Response on the Judgment, para. 15.

<sup>466</sup> *Amicus* Appeal Brief on the Judgment, paras 89-91.

<sup>467</sup> Defence Response on the Judgment, paras 72-75.

<sup>468</sup> *Amicus* Reply on the Judgment, para. 25.

<sup>469</sup> *Amicus* Appeal Brief on the Judgment, paras 89-91.

<sup>470</sup> Defence Response on the Judgment, para. 72.

<sup>471</sup> *Amicus* Reply on the Judgment, para. 25.

<sup>472</sup> *Amicus* Reply on the Judgment, para. 25.

<sup>473</sup> Judgment, para. 172.

10 August 2012 Order.<sup>474</sup> The Appeals Panel will start by examining the alleged factual errors related to the receipt by Ms Al Khayat of Mr Lodge's email.

166. After finding that there was no direct evidence on the record proving Ms Al Khayat's knowledge of the 10 August 2012 Order,<sup>475</sup> the Contempt Judge relied on the following evidence to infer Ms Al Khayat's receipt of Mr Lodge's email and subsequently her *mens rea*: (i) Mr Lodge transmitted the 10 August 2012 Order to the same email address used by Ms Al Khayat in her prior communication with Mr Marten Youssef, the Tribunal's spokesperson, including those on 7 and 9 August 2012 concerning the Cease-and-Desist Letter;<sup>476</sup> (ii) Mr Lodge testified that he received no failed delivery notification of his email;<sup>477</sup> and (iii) nothing on the record indicates that *Al Jadeed* TV's server or Ms Al Khayat's email inbox were not functioning on 11 August 2012.<sup>478</sup> Based on this circumstantial evidence, the Contempt Judge concluded that the only reasonable inference was that Ms Al Khayat received Mr Lodge's email in her inbox on 11 August 2012.<sup>479</sup>

167. As stated above, the Appeals Panel accords deference to the Contempt Judge's factual findings and applies a standard of reasonableness in reviewing them.<sup>480</sup> The Appeals Panel recalls the well-established principle that when the prosecution relies on circumstantial evidence to prove the facts constituting the elements of an offence (here the *mens rea*) by inference,<sup>481</sup> that inference must be the only reasonable conclusion available from the evidence.<sup>482</sup>

168. Regarding the evidence on which the Contempt Judge relied to infer that Ms Al Khayat received, in her inbox, Mr Lodge's email and the attached 10 August 2012 Order, the Appeals Panel finds that the Contempt Judge erred in failing to consider the existence of other reasonable inferences which could have been drawn from the totality of the

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<sup>474</sup> Judgment, para. 175.

<sup>475</sup> Judgment, para. 168.

<sup>476</sup> Judgment, para. 170.

<sup>477</sup> Judgment, para. 171.

<sup>478</sup> Judgment, para. 171.

<sup>479</sup> Judgment, paras 168-172.

<sup>480</sup> See above para. 15.

<sup>481</sup> See above fn. 286.

<sup>482</sup> See above fn. 287.

circumstantial evidence on the record.<sup>483</sup> The Appeals Panel considers that other reasonable inferences available from the circumstantial evidence were, *inter alia*, that: (i) Mr Lodge's email, although successfully sent from the latter's email box, did not reach Ms Al Khayat's email, without this triggering any notification for the sender; or (ii) Mr Lodge's email reached an electronic folder in Ms Al Khayat's email other than her inbox, such as the "Junk Email" folder, making it possible that the email was not brought to her attention irrespective of whether she accessed her email inbox for the purposes of responding to other emails in the period immediately surrounding the sending of Mr Lodge's email.

169. As such, the Contempt Judge erred in finding that the only reasonable conclusion flowing from the totality of the circumstantial evidence was that Ms Al Khayat received the email, and the attached 10 August 2012 Order, in her email inbox. This error violates the principle of *in dubio pro reo* and the requirement that all material facts have to be proven beyond reasonable doubt – if another reasonable inference could have been drawn from the totality of the available circumstantial evidence, it necessarily follows that the fact in question was not proven beyond reasonable doubt.

170. In light of the above, the Appeals Panel finds that the Contempt Judge erred in finding that the *Amicus* proved beyond reasonable doubt Ms Al Khayat's receipt of Mr Lodge's email containing the 10 August 2012 Order on the basis of the evidence on the record. Accordingly, the Appeals Panel grants Defence grounds 2 and 3.

171. Since Defence grounds 4 and 5 were put forward as alternative arguments to grounds 2 and 3, in the event that the Appeals Panel were to confirm the Contempt Judge's finding that Ms Al Khayat had received Mr Lodge's email, the Appeals Panel finds that grounds 4 and 5 have been rendered moot.

172. In sum, the Appeals Panel finds that, since the receipt of Mr Lodge's email was a prerequisite for the Contempt Judge's finding that Ms Al Khayat had the requisite *mens rea*

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<sup>483</sup> For a summary of the circumstantial evidence relied on by the Contempt Judge, *see* above para. 166. In addition, the Appeals Panel notes that the Contempt Judge's reliance on the absence of evidence on the record indicating that *Al Jadeed* TV's server or Ms Al Khayat's email inbox were not functioning amounted to a *de facto* reversal of the burden of proof regarding Ms Al Khayat's *mens rea*, as the *Amicus* bears the burden of proving all material facts, including the receipt of the email by Ms Al Khayat. The Defence was therefore under no obligation to bring any evidence to contradict an alleged fact (that *Al Jadeed* TV's server and Ms Al Khayat's email inbox were working properly at the relevant time) in circumstances when the *Amicus* had failed to bring any technical evidence to prove this alleged fact.

for Count 2, and in the absence of other evidence on the record showing Ms Al Khayat's knowledge of the 10 August 2012 Order before 25 April 2013 (the date until which the *Amicus* has proven that the Episodes were available online),<sup>484</sup> the Appeals Panel finds that the *Amicus* has failed to prove beyond reasonable doubt that Ms Al Khayat had the requisite *mens rea* for Count 2.

173. Therefore, having reversed the Contempt Judge's finding that Ms Al Khayat had the requisite *mens rea* for this offence, the Appeals Panel reverses Ms Al Khayat's conviction on Count 2 and sets aside the fine of 10,000 Euros imposed by the Contempt Judge.

## **2. Al Jadeed**

174. The Appeals Panel recalls that the Contempt Judge acquitted *Al Jadeed* on Count 2.<sup>485</sup> This was, in part, independent of his findings concerning Ms Al Khayat on this count, since he also considered Ms Al Bassam's conduct regarding the Episodes as being potentially attributable to *Al Jadeed*.<sup>486</sup> Consequently, the *Amicus*' grounds of appeal which challenge *Al Jadeed*'s acquittal will be addressed below.

### **a. Alleged Errors of Law Relating to Elements of Criminal Liability of Legal Persons (*Amicus* Grounds 16 in Part, 17 in Part)**

175. The Contempt Judge held that, for the corporate Accused to be held criminally responsible for Count 2, the *Amicus* must:

(1) establish the criminal responsibility of a specific natural person; (2) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and (3) prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.<sup>487</sup>

176. In the process of formulating this legal test, the Contempt Judge found that the Appeals Panel's Jurisdiction Decision, whilst settling the issue of the Tribunal's jurisdiction over legal persons in contempt proceedings, did not provide clear guidance as to the material

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<sup>484</sup> See above para. 152.

<sup>485</sup> Judgment, para. 190.

<sup>486</sup> Judgment, paras. 179-181.

<sup>487</sup> Judgment, para. 72.

elements necessary to attribute criminal liability to legal persons.<sup>488</sup> He similarly observed that Articles 1-3 of the Tribunal's Statute did not provide an answer and that Rule 60 *bis* was silent on this issue but must nevertheless be read as implicitly including the material elements for attributing liability to legal persons.<sup>489</sup> The Contempt Judge found that, while Rule 3 was relevant to the interpretation of Rule 60 *bis*, he could not rely solely on it because he was not asked to interpret a word or provision in the conventional sense, but to articulate substantive – not procedural – criminal law.<sup>490</sup> He thus found it necessary to look beyond the Tribunal's governing documents, whilst noting that there was no international convention, custom or general principles on which he could rely.<sup>491</sup>

177. In articulating the material elements of attribution, the Contempt Judge rejected the *Amicus*' reliance on principles or legal trends relating to corporate criminal liability, reasoning that the state practice was varied and inconsistent.<sup>492</sup> He added that, even if identifiable trends existed, "the complexities within and the diversity among states" prevented the distillation of common material elements and that any synthesizing attempt would be selective, simplistic and not reasonably foreseeable to the Accused at the time of the alleged acts and conduct.<sup>493</sup>

178. Consequently, and taking into account the principle of *iura novit curia* ("the court knows the law"),<sup>494</sup> the Contempt Judge found it most appropriate to look to the Lebanese law on corporate criminal liability.<sup>495</sup> Relying on the Appeals Panel jurisprudence, he considered that this approach would not violate the rights of the Accused, particularly in the absence of contrary provisions in the Tribunal's Statute or Rules.<sup>496</sup> Additionally, the Contempt Judge noted that it is appropriate to look to the Lebanese law on corporate criminal liability because Lebanon, being the domicile of the corporate Accused, is also where the

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<sup>488</sup> Judgment, para. 55.

<sup>489</sup> Judgment, paras 59-60.

<sup>490</sup> Judgment, para. 60.

<sup>491</sup> Judgment, para. 61.

<sup>492</sup> Judgment, paras 62-65.

<sup>493</sup> Judgment, para. 66.

<sup>494</sup> Judgment, para. 58.

<sup>495</sup> Judgment, para. 67.

<sup>496</sup> Judgment, paras 67-68.

alleged acts and conduct in this case occurred and more broadly lies at the heart of the Tribunal's mandate.<sup>497</sup>

179. In this respect, the Contempt Judge relied on the second paragraph of Article 210 of the Lebanese Criminal Code ("LCC"), which states that "legal persons shall be criminally responsible for the activities of their directors, members of the administration, representatives and employees[/workers] when such activities are undertaken on behalf of or using the means of such legal persons".<sup>498</sup> The Contempt Judge also relied on the Lebanese Court of Cassation's interpretation of the words "employees/workers", namely "the person who acts in its [the legal body's] name based on the relevant powers granted him by this body".<sup>499</sup> Additionally, the Contempt Judge relied upon the Lebanese Court of Cassation's finding that Article 210 of the LCC "cannot mean that, in assigning responsibility to the legal body, it places a mere employee in the position of those who are qualified to represent it, such as its director, its board of directors, and representatives who have been authorized by the legal person to act in its name".<sup>500</sup> The Contempt Judge also cited a Lebanese Court of Cassation holding which stated that, in order to attribute responsibility to a legal person, a specific natural person must be identified and their criminal responsibility established.<sup>501</sup>

i. Alleged Error of Law in Relying on the Lebanese Criminal Code (*Amicus* Ground 16 in Part)

(a) *Submissions*

180. The *Amicus* submits that the Contempt Judge erred by not taking into account the sources of interpretation stipulated in Rule 3 in the process of: (i) determining that the lack of consensus across national legal systems regarding attribution of criminal responsibility to legal persons prevented him from relying on other sources of international law; and (ii) giving the LCC improper priority in defining the elements of the liability of legal

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<sup>497</sup> Judgment, para. 68.

<sup>498</sup> Judgment, para. 69.

<sup>499</sup> Judgment, para. 70.

<sup>500</sup> Judgment, para. 70, citing Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 60/2010, 9 March 2010; Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 157/2004, 3 June 2004.

<sup>501</sup> Judgment, para. 71, citing Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 4/2007, 11 January 2007; Lebanon, Court of Cassation, Criminal Chamber 3, Decision No. 163/2004, 19 May 2004.

persons.<sup>502</sup> The *Amicus* then proceeds to address each of the sources of interpretation contained in Rule 3.<sup>503</sup>

181. With respect to the customary law principles codified in the Vienna Convention on the Law of Treaties (1969) (“Vienna Convention”), as per Rule 3 (A) (i), the *Amicus* asserts that the purpose of Rule 60 *bis* is to safeguard the Tribunal’s proceedings and that the elements of corporate criminal liability should not: (i) create gaps of impunity which affect different legal persons in different ways; or (ii) render the Tribunal’s contempt powers ineffective.<sup>504</sup> He points out that the Appeals Panel has previously recognized a movement towards corporate accountability in international human rights and that, in making that finding, the Appeals Panel did not consider it necessary for all States to adhere to the same model or use the exact same terminology, but only that they reach a similar result.<sup>505</sup>

182. Concerning international standards on human rights, as per Rule 3 (A) (ii), the *Amicus* points to the discussions of a United Nations Human Rights Council Working Group, where concerns arose that a proposed treaty aimed at regulating the conduct of transnational corporations and other business enterprises may not address all such entities and may create loopholes that allow them to escape liability.<sup>506</sup>

183. Concerning general principles of international criminal law and procedure, as per Rule 3 (A) (iii), the *Amicus* notes that the Appeals Panel previously stated that “corporate liability for serious harms is a feature of most of the world’s legal systems and therefore qualifies as a general principle of law”.<sup>507</sup> As an example of this, the *Amicus* relies on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“Malabo Protocol”) which does not require the identification of a natural person as an element of corporate criminal liability and permits an offence’s *mens rea* to be divided among and satisfied by a number of the legal person’s members.<sup>508</sup>

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<sup>502</sup> *Amicus* Appeal Brief on the Judgment, para. 95.

<sup>503</sup> *Amicus* Appeal Brief on the Judgment, paras 96-101.

<sup>504</sup> *Amicus* Appeal Brief on the Judgment, paras 96-97.

<sup>505</sup> *Amicus* Appeal Brief on the Judgment, para. 98.

<sup>506</sup> *Amicus* Appeal Brief on the Judgment, para. 99, citing United Nations General Assembly, Draft Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Human Rights Council Thirty-second session, 10 July 2015, paras 12-16.

<sup>507</sup> *Amicus* Appeal Brief on the Judgment, para. 100, citing Jurisdiction Appeal Decision, para. 67.

<sup>508</sup> *Amicus* Appeal Brief on the Judgment, para. 100, referring to the Malabo Protocol, Article 46 (C).

184. Finally, with respect to the LCC, the last source of interpretation as per Rule 3 (A) (iv), the *Amicus* argues that Article 210 of the LCC is not consonant with the spirit of the Statute and the inherent power of contempt, and that the Contempt Judge erred in exclusively relying on it.<sup>509</sup> He submits that the inherent contempt power of international courts requires a more expansive and flexible interpretation in order to achieve its purpose.<sup>510</sup>

185. The Defence responds that the *Amicus* has failed to identify any discernable error in the Contempt Judge's application of Rule 3 in determining the law applicable to a Lebanese corporation whose alleged conduct took place in Lebanon, in light of the fact that the Appeals Panel in these proceedings has previously specifically relied on Lebanese law.<sup>511</sup> It considers the *Amicus*' reliance on the interpretative rules set out in the Vienna Convention to be misplaced, since there is no provision in the Statute or Rules regarding the substantive elements of corporate criminal liability and thus there are no "words" to interpret.<sup>512</sup>

186. In addition, the Defence submits that the *Amicus* has demonstrated no error in the Contempt Judge's finding that there was no relevant and identifiable international convention, custom or general principle of law on the elements of corporate liability which he could apply and that, in these circumstances, he was entitled to rely on Lebanese law.<sup>513</sup> Finally, the Defence avers that the *Amicus*' inability to discharge his burden of proof under Article 210 of the LCC is not a valid reason to challenge the Contempt Judge's approach.<sup>514</sup>

187. The *Amicus* replies that the core legal issue is whether Lebanese law is the correct law.<sup>515</sup> Since Rule 60 *bis* emanates from international law and the Tribunal's inherent contempt power, and international law has been repeatedly considered when interpreting the elements of contempt before other Tribunals, the *Amicus* contends that international law should be applied, as it is the most consonant with the Tribunal's Statute, and that the Contempt Judge erred in disregarding it.<sup>516</sup>

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<sup>509</sup> *Amicus* Appeal Brief on the Judgment, para. 101.

<sup>510</sup> *Amicus* Appeal Brief on the Judgment, para. 101.

<sup>511</sup> Defence Response on the Judgment, paras 88-89.

<sup>512</sup> Defence Response on the Judgment, para. 90.

<sup>513</sup> Defence Response on the Judgment, paras 92-94.

<sup>514</sup> Defence Response on the Judgment, para. 95.

<sup>515</sup> *Amicus* Reply on the Judgment, para. 28.

<sup>516</sup> *Amicus* Reply on the Judgment, paras 29-30.

*(b) Analysis*

188. At the outset, the Appeals Panel notes that the following discussion represents the majority's view. Judge Akoum appends a separate opinion with respect to this ground.<sup>517</sup>

189. The Appeals Panel recalls that Rule 3 (A), on the interpretation of the Rules, provides that:

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>518</sup>

Furthermore, pursuant to Rule 3 (B), any ambiguity which has not been resolved by using the methods laid out in Rule 3 (A) shall be resolved by adopting an interpretation which is most favourable to the accused.<sup>519</sup>

190. The Appeals Panel notes that Rule 3 is clear in stating that the Rules "shall" be interpreted in the manner stipulated therein. In the circumstances of this case, guided by Rule 3, and taking into account that this judgment addresses and defines how a legal person is to be held criminally responsible, the Appeals Panel concurs with the result reached by the Contempt Judge. However, it would have been preferable for the Contempt Judge to have first considered the various sources of interpretation identified in Rule 3 before resorting to other sources.

191. The Appeals Panel notes that the various interpretative sources contained in Rule 3 (A) (i)-(iii) are ill-suited, in the present case, to address the precise question of how the acts and conduct of natural persons are to be attributed to legal persons. Indeed, the Appeals Panel cannot distil from the sources contained in Rule 3 (A) (i)-(iii), and from among the varied domestic, regional and international practice which have previously been identified when determining the Tribunal's jurisdiction over legal persons,<sup>520</sup> the clarity that is required in a criminal case. In this context, the Appeals Panel agrees with the Contempt Judge that "there is no relevant international convention with respect to the elements of

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<sup>517</sup> See below s. IX. Separate Opinion of Judge Walid Akoum Concurring in Result.

<sup>518</sup> Rule 3 (A) (i)-(iv) STL RPE.

<sup>519</sup> Rule 3 (B) STL RPE.

<sup>520</sup> See Jurisdiction Appeal Decision, paras 45-67.

corporate liability, nor international custom or general principles of law” upon which to rely.<sup>521</sup>

192. Consequently, the Appeals Panel turns to the fourth and final method of interpretation, found in Rule 3 (A) (iv), which directs the Appeals Panel to the Lebanese Code of Criminal Procedure. At this juncture, the Appeals Panel recalls its earlier finding that:

in this particular context, 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>522</sup>

193. Thus, the Appeals Panel will consider the relevant provisions of the LCC in determining the requisite elements of attributing the acts and conduct of a natural person to a legal person. In this respect, the second paragraph of Article 210 of the LCC provides that legal persons can be held responsible for the criminal conduct of natural persons in the following circumstances:

Legal persons shall be criminally responsible for the actions of their directors, management staff, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal person.

194. The Appeals Panel recalls that the Tribunal is “guided by Lebanese law in carrying out its judicial work”, that there is a “unique link between that body of law and this Tribunal”<sup>523</sup> and that, in this case, *Al Jadeed* is a legal person registered and operating in Lebanon.<sup>524</sup> In addition, the Appeals Panel has previously held 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>525</sup> In light of these factors, the Appeals Panel finds that, in this case, the elements for the attribution of criminal liability to legal persons are to be found in Lebanese law under Article 210 of the LCC and were foreseeable to *Al Jadeed*.

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<sup>521</sup> Judgment, para. 61. *See also* Jurisdiction Appeal Decision, para. 59: “international law has not evolved to the stage where the subjection of a corporate person to criminal liability has become imperative on States”.

<sup>522</sup> Jurisdiction Appeal Decision, para. 68.

<sup>523</sup> *Al Akhbar* Jurisdiction Appeal Decision, para. 59.

<sup>524</sup> Table of Agreed Facts, p. 1, Fact 1.

<sup>525</sup> Jurisdiction Appeal Decision, para. 71. *See also* *Al Akhbar* Jurisdiction Appeal Decision, para. 58: “under Lebanese law, a legal person can be criminally liable for its own actions as well as the actions of its agents and employees acting on its behalf or using its means”.

195. The Appeals Panel has considered the *Amicus*' submissions that (i) Article 210 of the LCC is incompatible with the spirit of the Statute and the Tribunal' inherent power of contempt, and that (ii) a more flexible approach is required, as the Appeals Panel had previously stated that "[r]eference must not be made to one national legal system only".<sup>526</sup> However, the Appeals Panel finds that these submissions lack sufficient clarity and that the *Amicus* has failed to adequately explain why and how the definition of the elements of attribution under Lebanese law is incompatible with the spirit of the Statute or the Tribunal's inherent power of contempt. The Appeals Panel therefore summarily dismisses these arguments.

196. Consequently, the majority of the Appeals Panel considers that the Contempt Judge did not err in finding that the applicable law in relation to the elements of attributing criminal liability to legal persons, in this case, is Lebanese law.<sup>527</sup> This part of ground 16 is therefore dismissed, insofar as it pertains to Count 2.

ii. Alleged Error of Law in Requiring the Identification of a Natural Person  
(*Amicus* Ground 17 in Part)

(a) *Submissions*

197. The *Amicus* contends that the Contempt Judge erred in holding that: (i) a single natural person must have committed the crime sought to be attributed to a legal person; and (ii) this person must be identified.<sup>528</sup> In the alternative, the *Amicus* submits that the commission of the *actus reus* and the possession of the *mens rea* of an offence can be shared among more than one identified person within a corporation.<sup>529</sup> The *Amicus* argues that, when the Appeals Chamber considered the definition of terrorism under Lebanese law, it adopted a broader interpretation than the Lebanese courts as it considered that this was more consonant with international law and would better address contemporary forms of

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<sup>526</sup> *Amicus* Appeal Brief on the Judgment, para. 101, citing STL, *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 Decision"), para. 91.

<sup>527</sup> Since Rule 3 (A) (iv) STL RPE has not resulted in any unresolved ambiguities, there is no need to resort to Rule 3 (B) STL RPE.

<sup>528</sup> *Amicus* Appeal Brief on the Judgment, para. 103.

<sup>529</sup> *Amicus* Appeal Brief on the Judgment, paras 111, 113; *Amicus* Reply on the Judgment, para. 33.

terrorism.<sup>530</sup> The *Amicus* therefore submits that a similar interpretative approach should be adopted with respect to Lebanese law on the attribution of criminal liability to legal persons.<sup>531</sup>

198. The *Amicus* argues that the Contempt Judge's restrictive interpretation of Lebanese law was erroneous and results in small corporations being held accountable while permitting large complex corporations to generally remain immune.<sup>532</sup> Lastly, the *Amicus* submits that the principle of effectiveness should be considered when articulating the elements of corporate liability, in the interests of justice and in light of the fight against impunity, and that a broader approach to identification is necessary where, as is the case here, a strict interpretation of the identification requirement would render Rule 60 *bis* ineffective.<sup>533</sup>

199. The Defence responds that the *Amicus* failed to substantiate how the alleged error invalidates the Judgment, given that the *Amicus* did identify two persons – Ms Al Khayat and Ms Al Bassam – and the Contempt Judge did consider both of their positions.<sup>534</sup> The Defence reiterates that: (i) the Contempt Judge correctly identified Lebanese law as the most appropriate body of law to apply in this case; (ii) the principle of effectiveness was considered by the Appeals Panel in determining its jurisdiction, but not in determining the substantive elements of corporate criminal liability; and (iii) in any event, the principle of effectiveness should not give license to fundamentally alter existing law which is clear and unambiguous.<sup>535</sup>

200. The Defence posits that the *Amicus* cannot rely on the Appeals Chamber's approach to the interpretation of terrorism under Lebanese law as the factors present in that case were absent from this case.<sup>536</sup> Finally, the Defence takes issue with the *Amicus*' assertion that only small, but not large and complex, corporations could be held accountable under the Contempt Judge's application of Article 210 of the LCC; in its view, nothing in the Contempt Judge's

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<sup>530</sup> *Amicus* Appeal Brief on the Judgment, paras 104-106.

<sup>531</sup> *Amicus* Appeal Brief on the Judgment, para. 106.

<sup>532</sup> *Amicus* Appeal Brief on the Judgment, para. 107.

<sup>533</sup> *Amicus* Appeal Brief on the Judgment, paras 108-112; *Amicus* Reply on the Judgment, para. 33.

<sup>534</sup> Defence Response on the Judgment, para. 99.

<sup>535</sup> Defence Response on the Judgment, paras 100-101.

<sup>536</sup> Defence Response on the Judgment, paras 102-103.

reasoning permits such an extreme result and but it does permit the position of different persons to be considered, as was the case with Ms Al Khayat and Ms Al Bassam.<sup>537</sup>

201. The *Amicus* replies that the issue in this case is whether the Contempt Judge's finding that corporate liability requires the identification of one natural person is the correct law for the Tribunal to apply in this case, and that the Defence did not offer jurisprudence in support of its view.<sup>538</sup> The *Amicus* adds that he is not proposing to alter existing Lebanese law, but rather he is arguing that it is erroneous to import Article 210 of the LCC into this case "without applying it to a tribunal of international law and to Rule 60bis".<sup>539</sup> Lastly, he argues that the fact that the present case deals with contempt, and not with the Tribunal's substantive offences, justifies the need to rely on international legal sources to define the elements of corporate liability in a way which is consonant with the Statute.<sup>540</sup>

(b) *Analysis*

202. The Appeals Panel notes that the following discussion represents the majority's view. Judge Akoum appends a separate opinion with respect to this ground.<sup>541</sup> The Appeals Panel understands the *Amicus*' arguments under this ground as follows: first, the *Amicus* contends that the Contempt Judge erred in requiring the identification of a single natural person who committed the relevant criminal offence;<sup>542</sup> in the alternative, the *Amicus* submits that the commission of the *actus reus* and the possession of the *mens rea* of an offence can be shared among more than one identified person within a corporation.<sup>543</sup>

203. Regarding the first argument, the Appeals Panel notes that the Contempt Judge, in applying his legal test for attribution to legal persons,<sup>544</sup> did identify Ms Al Khayat as a natural person who had committed the relevant criminal conduct;<sup>545</sup> however, he subsequently found that her conduct could not be attributed to *Al Jadeed* because she lacked

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<sup>537</sup> Defence Response on the Judgment, para. 105.

<sup>538</sup> *Amicus* Reply on the Judgment, para. 32.

<sup>539</sup> *Amicus* Reply on the Judgment, para. 34.

<sup>540</sup> *Amicus* Reply on the Judgment, para. 35.

<sup>541</sup> See below s. IX. Separate Opinion of Judge Walid Akoum Concurring in Result.

<sup>542</sup> *Amicus* Appeal Brief on the Judgment, para. 103.

<sup>543</sup> *Amicus* Appeal Brief on the Judgment, paras 111, 113; *Amicus* Reply on the Judgment, para. 33.

<sup>544</sup> See Judgment, para. 72.

<sup>545</sup> Judgment, para. 176.

the authority to act on its behalf.<sup>546</sup> Consequently, *Al Jadeed*'s acquittal on this count did not rest on an inability to identify a single natural person who committed the offence (which is the part of the test being challenged by the *Amicus* in this ground of appeal), but rather on the subsequent part of the test which requires that this identified natural person had the authority to act on the legal person's behalf (a part of the test which the *Amicus* does not challenge).<sup>547</sup> As such, the *Amicus* fails to show how this alleged legal error, in requiring the identification of a single natural person who committed the criminal conduct, invalidates the Contempt Judge's finding that there was nonetheless insufficient evidence to show that this criminal conduct was committed on *Al Jadeed*'s behalf.<sup>548</sup> The Appeals Panel therefore summarily dismisses this argument.<sup>549</sup>

204. Regarding the *Amicus*' alternative argument, that the *actus reus* and *mens rea* of an offence can be aggregated from more than one identified person within the legal person, the Appeals Panel finds that the *Amicus* has failed to explain: (i) who these natural persons were in this case and how they shared the *actus reus* and *mens rea* of Count 2; or (ii) how the remaining elements of Article 210 of the LCC, regarding the persons' authority to act on behalf of the legal person, were satisfied among various natural persons in this case. As such, the *Amicus* fails to show that, but for the alleged error, the Contempt Judge would have made a different finding on *Al Jadeed*'s criminal responsibility.<sup>550</sup> Therefore, the Appeals Panel finds that the *Amicus*' argument lacks the potential to invalidate the Contempt Judge's decision on *Al Jadeed*'s criminal liability under Count 2 and consequently summarily dismisses this argument.<sup>551</sup>

205. The Appeals Panel therefore summarily dismisses this part of *Amicus* ground 17 in its entirety, insofar as it pertains to Count 2.

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<sup>546</sup> Judgment, para. 189.

<sup>547</sup> *Amicus* Appeal Brief on the Judgment, para. 113.

<sup>548</sup> See above para. 12.

<sup>549</sup> See above para. 18.

<sup>550</sup> See above para. 12.

<sup>551</sup> See above para. 18.

**b. Alleged Errors of Law and Fact in Failing to Attribute the Conduct of Natural Persons to *Al Jadeed* (*Amicus* Grounds 18 in Part, 19 in Part, 20 in Part, 21 in Part and 22 in Part)**

i. Alleged Errors of Law and Fact Relating to the Attribution of Ms Al Khayat's Conduct to *Al Jadeed* (*Amicus* Grounds 18 in Part, 21 in Part, 22 in Part)

206. The Appeals Panel dismisses *Amicus* grounds 18 in part, 21 in part and 22 in part, insofar as they pertain to Count 2, as they have been rendered moot. The majority reasons that these grounds are moot because the Appeals Panel has found above that the *Amicus* failed to prove that Ms Al Khayat had the requisite *mens rea* for Count 2.<sup>552</sup> Judge Akoum finds that these grounds are moot by virtue of his reasoning on *Amicus* ground 16.<sup>553</sup>

ii. Alleged Errors of Law and Fact Relating to the Attribution of Ms Al Bassam's Conduct to *Al Jadeed* (*Amicus* Grounds 18 in Part, 19 in Part and 20 in Part)

207. The Contempt Judge found that he could not conclude that Ms Al Bassam violated the 10 August 2012 Order since he could not conclude beyond reasonable doubt that Ms Al Bassam, whom he accepted was part of the management of *Al Jadeed* TV's news department, had the ability to remove the Episodes from *Al Jadeed* TV's online platforms.<sup>554</sup>

208. In the context of the *Amicus*' appeal against *Al Jadeed*'s acquittal, and recalling that the Appeals Panel has overturned the Contempt Judge's finding that Ms Al Khayat had the requisite *mens rea* for Count 2,<sup>555</sup> the Appeals Panel examines the *Amicus*' contention, under the relevant parts of ground 20, that the Contempt Judge erred in finding that Ms Al Bassam did not violate the 10 August 2012 Order.<sup>556</sup>

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<sup>552</sup> See above para. 172.

<sup>553</sup> See below s. IX. Separate Opinion of Judge Walid Akoum Concurring in Result.

<sup>554</sup> See Judgment, para. 181: "I am satisfied that Ms Al Bassam was part of the management of the news department [of *Al Jadeed* TV]. However, Mr Dsouki does not provide further information on Ms Al Bassam's exclusive responsibilities. The evidence only shows that the production and broadcasting of the Episodes were the responsibility of Ms Al Khayat. Consequently, I cannot conclude beyond reasonable doubt that Ms Al Bassam had the ability to remove the Episodes from *Al Jadeed* TV's platforms in compliance with the 10 August 2012 Order. Therefore, I cannot conclude that Ms Al Bassam violated the 10 August 2012 Order".

<sup>555</sup> See above para. 172.

<sup>556</sup> *Amicus* Appeal Brief on the Judgment, paras 132-138.

(a) *Submissions*

209. The *Amicus* submits that the Contempt Judge erred in law by narrowly interpreting Article 210 of the LCC with respect to the categories of persons whose conduct could be attributed to *Al Jadeed*.<sup>557</sup> Furthermore, the *Amicus* submits that the Contempt Judge erred in law and fact in finding that Ms Al Bassam's position and conduct did not trigger *Al Jadeed*'s criminal responsibility.<sup>558</sup> In support, the *Amicus* relies on the following: (i) the fact that Ms Al Bassam is not a mere employee but a "director" and senior manager at *Al Jadeed*, which satisfies Article 210 of the LCC and engages the criminal responsibility of the legal person;<sup>559</sup> (ii) a letter sent to the Tribunal by Ms Habli, *Al Jadeed*'s lawyer, in response to the Cease-and-Desist Letter, that describes Ms Al Bassam as "the director of the company according to the Lebanese laws";<sup>560</sup> (iii) the suspect interviews of Ms Al Khayat, Mr Dsouki and Mr Al Amin describing Ms Al Bassam's functions;<sup>561</sup> (iv) the fact that, on 9 August 2012, *Al Jadeed* responded to the Cease-and-Desist Letter during the news bulletin for which Ms Al Bassam was responsible;<sup>562</sup> (v) the fact that Ms Al Bassam signed the report of service of the 10 August 2012 Order on *Al Jadeed*'s behalf;<sup>563</sup> and (vi) the fact that various Lebanese court decisions show that Ms Al Bassam can and has represented *Al Jadeed* in judicial proceedings.<sup>564</sup>

210. Furthermore, the *Amicus* submits that the Contempt Judge erred in finding that Ms Al Bassam did not have the authority or ability to remove the Episodes from *Al Jadeed* TV's online platforms, even though she was responsible for what was placed on *Al Jadeed* TV's online platforms.<sup>565</sup> The *Amicus* argues that, in her capacity as director, Ms Al Bassam supervised the employees who could "physically remove" the Episodes from *Al Jadeed* TV's online platforms.<sup>566</sup> The *Amicus* further contends that it is illogical to find that Ms Al Khayat, "as Deputy Head of News and Political Programs", had the ability and

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<sup>557</sup> *Amicus* Appeal Brief on the Judgment, para. 114.

<sup>558</sup> *Amicus* Appeal Brief on the Judgment, para. 121.

<sup>559</sup> *Amicus* Appeal Brief on the Judgment, paras 116, 121.

<sup>560</sup> *Amicus* Appeal Brief on the Judgment, para. 121 (emphasis omitted).

<sup>561</sup> *Amicus* Appeal Brief on the Judgment, para. 121.

<sup>562</sup> *Amicus* Appeal Brief on the Judgment, para. 124.

<sup>563</sup> *Amicus* Appeal Brief on the Judgment, para. 125, referring to Exhibit P00080.

<sup>564</sup> *Amicus* Appeal Brief on the Judgment, para. 128, referring to Exhibits D00134 (confidential) and D00136 (confidential).

<sup>565</sup> *Amicus* Appeal Brief on the Judgment, paras 132-133.

<sup>566</sup> *Amicus* Reply on the Judgment, para. 41.

authority to remove the Episodes, while Ms Al Bassam, as her superior and the company's "director" and Head of News and Political Programs, did not have this same authority and ability.<sup>567</sup>

211. The *Amicus* contends that, despite her knowledge of the 10 August 2012 Order and despite being the "director" and the Head of News and Political Programs, Ms Al Bassam took no steps to remove the Episodes from *Al Jadeed* TV's online platforms.<sup>568</sup> The *Amicus* asserts that the Contempt Judge's error in finding that she did not have the ability or authority to remove these Episodes led to a miscarriage of justice since this precluded Ms Al Bassam's conduct from being attributable to *Al Jadeed*.<sup>569</sup>

212. The Defence responds that the core issue underlying the application of Article 210 of the LCC is whether the natural person(s) allegedly responsible for the criminal conduct had: (i) the legal authority "to act in the name of" the legal person; (ii) the capacity to represent the legal person; or (iii) the function and competence to represent the legal person.<sup>570</sup> It further submits that the *Amicus* failed to identify any discernible errors committed by the Contempt Judge, and that none of the evidence put forward by the *Amicus* contradicts the Contempt Judge's finding.<sup>571</sup>

213. Concerning Ms Al Bassam's ability to engage the criminal liability of *Al Jadeed*, the Defence argues that a "director" or "Head of News and Political Programs" is not a member of the board of directors, and is not necessarily empowered to represent or act on behalf of a corporation in the manner required by Article 210 of the LCC.<sup>572</sup> As for the Lebanese court decisions, the Defence contends that these cases show that Ms Al Bassam appeared in court in her personal capacity as "director" while *Al Jadeed* was represented by its Chairman of the Board.<sup>573</sup>

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<sup>567</sup> *Amicus* Appeal Brief on the Judgment, paras 134-135.

<sup>568</sup> *Amicus* Appeal Brief on the Judgment, para. 127.

<sup>569</sup> *Amicus* Appeal Brief on the Judgment, para. 130.

<sup>570</sup> Defence Response on the Judgment, para. 108.

<sup>571</sup> Defence Response on the Judgment, para. 117.

<sup>572</sup> Defence Response on the Judgment, para. 118.

<sup>573</sup> Defence Response on the Judgment, para. 119, referring to Exhibit D00134 (confidential).

(b) *Analysis*

214. For the reasons set out in Judge Hrdličková and Judge Akoum's respective separate opinions,<sup>574</sup> the majority of the Appeals Panel dismisses the relevant parts of *Amicus* ground 20 (insofar as it pertains to Count 2), declares the relevant parts of *Amicus* grounds 18 and 19 moot (insofar as they pertain to Count 2), and confirms *Al Jadeed's* acquittal on Count 2. Judge Nosworthy dissents for the reasons set out in her opinion.<sup>575</sup>

**V. AMICUS' APPEAL OF MS AL KHAYAT'S SENTENCE**

215. Since the Appeals Panel has reversed Ms Al Khayat's conviction under Count 2,<sup>576</sup> any grounds of appeal related to the sentence imposed by the Contempt Judge are thereby rendered moot. Accordingly, grounds 1 to 11 of the *Amicus* Appeal Brief on the Sentencing Judgment are dismissed.

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<sup>574</sup> See below s. VII. Separate Opinion of Judge Ivana Hrdličková Concurring in Result and s. IX. Separate Opinion of Judge Walid Akoum Concurring in Result.

<sup>575</sup> See below s. VIII. Partially Dissenting Opinion of Judge Janet Nosworthy.

<sup>576</sup> See above para. 172.

**VI. DISPOSITION**

**FOR THESE REASONS,**

**PURSUANT TO** Rules 60 *bis* (M) and 188 of the Rules,

**THE APPEALS PANEL**

**GRANTS** Defence grounds 1 in part, 2 and 3;

**REVERSES** Ms Al Khayat's conviction under Count 2 for knowingly and wilfully interfering with the administration of justice by failing to remove from *Al Jadeed* TV's website and *Al Jadeed* TV's YouTube channel information on purported confidential witnesses in the *Ayyash et al.* case, thereby violating the 10 August 2012 Order;

**SETS ASIDE** the sentence of Ms Al Khayat of a fine of 10,000 Euros;

**DISMISSES** the Defence appeal in all other respects;

**DISMISSES** the *Amicus*' appeal of the Sentencing Judgment in its entirety;

**GRANTS** *Amicus* grounds 4 in part, 5 in part, 8 in part, 13 in part and 14 in part of the *Amicus*' appeal of the Judgment;

**AFFIRMS** Ms Al Khayat's acquittal under Count 1 and *Al Jadeed*'s acquittal under both counts;

**DISMISSES** the *Amicus* appeal of the Judgment in all other respects, Judge Nosworthy dissenting with respect to *Amicus* grounds 18 in part, 19 in part and 20 in part .

Judge Hrdličková appends a separate opinion concurring in result;

Judge Nosworthy appends a partially dissenting opinion;

Judge Akoum appends a separate opinion concurring in result.

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

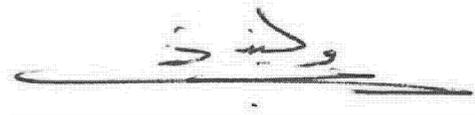
Leidschendam, 8 March 2016



Ivana Hrdličková, Presiding Judge



Janet Nosworthy, Judge



Walid Akoum, Judge

## VII. SEPARATE OPINION OF JUDGE IVANA HRDLIČKOVÁ CONCURRING IN RESULT

1. I fully agree with the outcome of the Appeals Panel's judgment. I write separately to explain why I support dismissing *Amicus* ground 20 with respect to the acquittal of *Al Jadeed* under Count 2 and declaring moot *Amicus* grounds 18 in part and 19 in part as a result. I note that while Judge Nosworthy dissents from this decision, Judge Akoum supports it, but for different reasons.<sup>1</sup> Hence the need for my separate opinion.

2. Regarding *Amicus* ground 20, I recall that the Contempt Judge found that: (i) he could not conclude beyond reasonable doubt that Ms Al Bassam, who was "part of the management of the news department", had the ability to remove the Episodes from *Al Jadeed* TV's online platforms; and (ii) consequently, he could not find that Ms Al Bassam had violated the 10 August 2012 Order.<sup>2</sup>

3. I also recall that the *Amicus*, in ground 20, asks the Appeals Panel to find that the Contempt Judge erred in reaching this conclusion.<sup>3</sup> In support of his contention that Ms Al Bassam did have the ability to remove the Episodes from *Al Jadeed* TV's online platforms, the *Amicus* relies on: (i) the agreed fact that Ms Al Bassam was *Al Jadeed* TV's Head of News and Political Programs;<sup>4</sup> (ii) "common sense";<sup>5</sup> and (iii) untested hearsay evidence, in particular Mr Dsouki's suspect interview, *Al Jadeed* TV's online manager, wherein he stated that he received orders from both Ms Al Khayat and Ms Al Bassam.<sup>6</sup> I also recall that the Contempt Judge has a wide discretion in reviewing the reliability and probative value of the evidence put before him at trial.<sup>7</sup>

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<sup>1</sup> See below s. VIII. Partially Dissenting Opinion of Judge Janet Nosworthy, IX. Separate Opinion of Judge Walid Akoum Concurring in Result.

<sup>2</sup> See Judgment, para. 181: "I am satisfied that Ms Al Bassam was part of the management of the news department [of *Al Jadeed* TV]. However, Mr Dsouki does not provide further information on Ms Al Bassam's exclusive responsibilities. The evidence only shows that the production and broadcasting of the Episodes were the responsibility of Ms Al Khayat. Consequently, I cannot conclude beyond reasonable doubt that Ms Al Bassam had the ability to remove the Episodes from *Al Jadeed* TV's platforms in compliance with the 10 August 2012 Order. Therefore, I cannot conclude that Ms Al Bassam violated the 10 August 2012 Order".

<sup>3</sup> See above paras 210-213, for a summary of the Parties' submissions on *Amicus* ground 20.

<sup>4</sup> *Amicus* Appeal Brief on the Judgment, para. 133; *Amicus* Reply on the Judgment, para. 41.

<sup>5</sup> *Amicus* Appeal Brief on the Judgment, para. 135; *Amicus* Reply on the Judgment, para. 44.

<sup>6</sup> *Amicus* Appeal Brief on the Judgment, para. 136.

<sup>7</sup> See above para. 15.

4. Having looked at the totality of this evidence, I consider that the *Amicus* has failed to show that the Contempt Judge was unreasonable in finding that he could not conclude, beyond reasonable doubt, that Ms Al Bassam had the ability to remove the Episodes from *Al Jadeed* TV's online platforms. In particular, I note that, although the *Amicus* bore the burden of proving beyond reasonable doubt this element of the offence, no witness was called to testify at trial about Ms Al Bassam's role at *Al Jadeed* TV and, crucially, whether this role gave her the ability to remove the Episodes from *Al Jadeed* TV's online platforms. Ms Al Bassam's specific ability to remove the Episodes is not synonymous with, and cannot be inferred solely from, the fact that she was responsible of the news bulletin. Indeed, a reasonable trier of fact may rightly decline to infer, to the requisite criminal standard, the precise content and scope of a person's duties and responsibilities from the mere fact that she holds a specific title.

5. Having found that the Contempt Judge did not err in concluding that Ms Al Bassam did not violate the 10 August 2012 Order, as alleged under *Amicus* ground 20, I consider that the issue of whether her conduct could engage the criminal liability of *Al Jadeed*, under the relevant parts of *Amicus* grounds 18 and 19, becomes moot.<sup>8</sup> It is for these reasons that I support the dismissal of this part of *Amicus* ground 20, the declaration that *Amicus* grounds 18 in part and 19 in part are moot, and the confirmation of *Al Jadeed*'s acquittal on Count 2.

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

Leidschendam, 8 March 2016



Ivana Hrdličková, Judge

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<sup>8</sup> I note that this issue becomes moot because Ms Al Bassam's ability to commit the *actus reus* of the offence (failing to remove the Episodes from *Al Jadeed* TV's online platforms, which in my view was not proven by the *Amicus*) is a prerequisite to considering whether her conduct could be attributed to *Al Jadeed*.

### VIII. PARTIALLY DISSENTING OPINION OF JUDGE JANET NOSWORTHY

1. I pen this partial dissent on two principal bases, confined to Count 2 on the issue of the acquittal of *Al Jadeed*, as a legal person. First, I disagree with the outcome reached by the majority of the Appeals Panel concerning the relevant part of *Amicus* ground 20, and consequently the rendering moot of *Amicus* grounds 18 in part and 19 in part.<sup>1</sup> I am of the opinion that the Contempt Judge was unreasonable in his determination that Ms Al Bassam did not have the ability to remove the Episodes from *Al Jadeed* TV's online platforms. Consequently, Ms Al Bassam violated the 10 August 2012 Order in that: (i) she had knowledge of it; (ii) she had the ability to remove the Episodes; and (iii) she failed to do so. Second, I disagree, in part, with the application and interpretation of Article 210 of the LCC by the Contempt Judge in so far as it is to be applied to the attribution of the acts and conduct of Ms Al Bassam to *Al Jadeed*. Rather, upon application of the requisite standard pertaining to Article 210, as per *Amicus* grounds 18 in part and 19 in part, I consider that a record of conviction should have been entered for *Al Jadeed* on Count 2 on the basis of the acts and conduct of Ms Al Bassam.

#### **A. Whether Ms Al Bassam had the Ability to Remove the Episodes from *Al Jadeed* TV's Online Platforms (*Amicus* Ground 20 in Part)**

2. In this case, the Contempt Judge held that Ms Al Bassam did not violate the 10 August 2012 Order. This conclusion was arrived at on the basis that it had not been proven, beyond reasonable doubt, that Ms Al Bassam had the ability to remove the Episodes from *Al Jadeed* TV's online platforms.<sup>2</sup>

3. As a first consideration, it should be recalled that it is an agreed fact between the parties that Ms Al Bassam was at all relevant times the Head of News and Political Programs at *Al Jadeed* TV,<sup>3</sup> with Ms Al Khayat being her deputy.<sup>4</sup> It is further uncontested by the

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<sup>1</sup> See above para. 214.

<sup>2</sup> Judgment, para. 181.

<sup>3</sup> The Arabic title of Ms Al Bassam's position is: *مديرة الأخبار والبرامج السياسية*, which is accurately translated into English either as Head of News and Political Programs, or Director of News and Political Programs.

<sup>4</sup> Table of Agreed Facts (Fact 6); see also Judgment, para. 179. As the Appeals Panel has stated, "a trier of fact has the discretion to [...] consider the contents of the parties' agreed facts as being proven, without additional evidence, for the purposes of the judgment"; see above fn. 390.

parties that Ms Al Bassam was duly notified of the 10 August 2012 Order; indeed the evidence shows that she signed the report of service on 14 August 2012.<sup>5</sup> In this respect, I note in passing that, while Ms Al Bassam filed a complaint on 8 October 2013 for the forgery of her signature on the report of service, this was withdrawn on 23 October 2013.<sup>6</sup> Thus, Ms Al Bassam had actual knowledge, or alternatively was wilfully blind, to the existence of the 10 August 2012 Order and its contents. Furthermore, Mr Dsouki, *Al Jadeed* TV's online manager, stated clearly in his witness interview that he took his instructions from both Ms Al Bassam and Ms Al Khayat, who shared responsibility for the news.<sup>7</sup>

4. Given the evidence on the record, it is patently clear that no reasonable trier of fact could have concluded that Ms Al Bassam lacked the ability or authority to remove the Episodes from *Al Jadeed* TV's online platforms. While the Contempt Judge held that the Episodes were Ms Al Khayat's responsibility,<sup>8</sup> it was wholly unreasonable to absolve Ms Al Bassam of all responsibility, particularly the Episodes' removal from *Al Jadeed* TV's online platforms, despite the uncontested fact that she was Ms Al Khayat's direct superior officer and had the power and authority to give directions and instructions to Ms Al Khayat. As the Head of News and Political Programs, as agreed by the parties, Ms Al Bassam was clearly the controlling officer in relation to news at *Al Jadeed* TV, and the Episodes were aired as part of the *Al Jadeed* TV's news bulletins.<sup>9</sup>

5. Consequently, even if Ms Al Khayat had *de facto* responsibility for producing and broadcasting the Episodes,<sup>10</sup> it was ultimately Ms Al Bassam who was in charge of the news bulletin as a whole at *Al Jadeed* TV. I therefore wholeheartedly agree with the *Amicus* when he submits that it defies logic to find that Ms Al Khayat had the ability to remove the Episodes, while her direct superior, Ms Al Bassam, did not have this same authority and ability.<sup>11</sup>

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<sup>5</sup> Judgment, para. 164, referring to Exhibit P00080.

<sup>6</sup> Judgment, para. 165.

<sup>7</sup> Exhibit P00131, p. 12 (confidential) (second transcript).

<sup>8</sup> Judgment, paras 147-148.

<sup>9</sup> Exhibits P00050 (confidential), P00051 (confidential).

<sup>10</sup> Judgment, para. 148.

<sup>11</sup> *Amicus* Appeal Brief on the Judgment, para. 135.

6. Furthermore, the *Amicus* has rightly pointed to the fact that following the Cease-and-Desist Letter, it was Ms Al Bassam, accompanied by *Al Jadeed*'s lawyer Ms Habli, who met with the Head of Lebanon's National Audio-Visual Council to discuss the broadcast of the Episodes.<sup>12</sup> This is clear evidence that Ms Al Bassam was dealing with this matter as the person at *Al Jadeed* TV who had responsibility for the continuation, or not, of the broadcast of the Episodes.

7. When the evidence is viewed in its totality, it provides compelling proof, beyond reasonable doubt, that Ms Al Bassam had the requisite authority and effective control over the material disseminated within her sphere of authority, namely the news broadcasts of *Al Jadeed* TV. Since the Episodes were broadcast and disseminated as part of the news bulletin of *Al Jadeed* TV, it was unreasonable to conclude that the Head of News and Political Programs – Ms Al Bassam – had no authority to ensure that any breach of the 10 August 2012 Order was curtailed, including the capacity to instruct the online department to remove the Episodes from *Al Jadeed* TV's online platforms. Indeed, she neglected to do so.

8. Consequently, Ms Al Bassam, who had knowledge of, or was wilfully blind to, the 10 August 2012 Order, through her acts and/or omissions did not comply with the order to remove the Episodes from *Al Jadeed* TV's online platforms. Furthermore, the evidence shows that the Episodes remained online for several months after she had signed the report of service of the 10 August 2012 Order on 14 August 2012.<sup>13</sup> Based on the evidence led by the *Amicus*, it was unreasonable for the Contempt Judge to conclude to the contrary. In short, this part of *Amicus* ground 20 should have been granted by the Appeals Panel.

9. These factors, viewed in their totality, establish the *mens rea* and *acts reus* for the offence under Count 2. However, I have taken note that Ms Al Bassam has not been charged in relation to Count 2. It is not apparent to me why that course of action was not undertaken. Nevertheless, *Al Jadeed* has been charged as a legal person in this case under Count 2. Thus, having found that Ms Al Bassam violated the 10 August 2012 Order, I would now turn to

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<sup>12</sup> *Amicus* Appeal Brief on the Judgment, para. 123.

<sup>13</sup> See above para. 152.

assess whether her conduct could engage the criminal liability of *Al Jadeed* pursuant to the standard set out by the Contempt Judge.

**B. Whether Ms Al Bassam's Conduct is Attributable to *Al Jadeed* (*Amicus* Grounds 18 in Part and 19 in Part)**

10. At the outset, I must stress that I do not disagree *per se* with the Contempt Judge's conclusion, upheld by the Appeals Panel, that Lebanese law is applicable in determining the standard that ought to be applied in this case for the attribution of the acts and conduct of natural persons to *Al Jadeed*, albeit that this conclusion should have been reached in the manner directed by the Appeals Panel.<sup>14</sup> Thus, in my view, the Contempt Judge rightly identified Article 210 of the LCC as the applicable law; however, I disagree on its application to the facts of this case.

11. The relevant part of Article 210 stipulates that:

Legal persons shall be criminally responsible for the actions of their directors, members of the administration, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal persons.

12. In the case at hand, I find that there is an abundance of evidence establishing that the acts or omissions attributable to Ms Al Bassam directly triggered *Al Jadeed*'s criminal responsibility pursuant to Article 210, as per the approach of the Contempt Judge.

13. First, I find that Ms Al Bassam's position at *Al Jadeed* TV was that of a "director" within the meaning of Article 210. This is evidenced in a letter addressed to the STL Registrar dated 9 August 2012, wherein *Al Jadeed*'s lawyer states in the most clearest of terms that Ms Al Bassam "is the Director of [*Al Jadeed* TV] according to Lebanese laws".<sup>15</sup> Further, her title, as well as her responsibilities indicate that she was part of the news management of *Al Jadeed* TV, as rightly found by the Contempt Judge.<sup>16</sup> Additionally, I am of the view that there is no doubt that Ms Al Bassam acted on behalf of *Al Jadeed*. Indeed, it is uncontested that, when she signed the report of service of the 10 August 2012 Order on 14 August 2012 on behalf of *Al Jadeed*, she was acting within the limits of the powers and

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<sup>14</sup> See above para. 190.

<sup>15</sup> Exhibit P00074, p. 1 (confidential).

<sup>16</sup> Judgment, paras 179, 181.

authority conferred to her. It is also relevant to note that, when the Lebanese authorities served the 10 August 2012 Order on *Al Jadeed* TV, they served it on Ms Al Bassam,<sup>17</sup> in her capacity as the Director of the News. In other words, the Lebanese authorities elected to serve the documents on a natural person who had the authority to sign on behalf of *Al Jadeed*, namely, Ms Al Bassam.

14. Further and in the alternative, the conduct of Ms Al Bassam can nonetheless be attributed to *Al Jadeed* in her capacity as an “employee” of *Al Jadeed* TV within the meaning of Article 210 of the LCC. In this case, I consider that her violation of the 10 August 2012 Order, acting within the limits of her duties and using the means provided to her by *Al Jadeed* TV, a television company, can be attributed to her employer.

15. I note, however, that when determining the meaning of “employees”, the Contempt Judge relied upon jurisprudence from the Lebanese Court of Cassation to the effect that employees require explicit authorization from the relevant legal person to act on its behalf in order to attract its criminal liability.<sup>18</sup> However, a thorough examination of pertinent Lebanese case law discloses that Lebanese Courts have, on a number of occasions, upheld an application of Article 210 that sits in contrast to the strict approach adopted by the Contempt Judge in this case.

16. I note that, in Decision No. 217/2011, the Court of Cassation upheld a lower court’s conviction of a hospital, as a legal person, for the conduct of its doctors who were not part of the management board of the hospital nor had express authorization to act on behalf of the hospital. It was sufficient in this case for the doctors to have carried out their routine functions at the hospital (albeit negligently) whilst utilising the hospital’s devices and equipment, for criminal liability to arise. The Court of Cassation held:

Dr [Arabic letter *aleph*] was responsible for the intensive care unit together with a medical team appointed by hospital management and that competence to treat patients admitted to the intensive care unit lies with a specialised team appointed by hospital management. According to the statement, Dr [Arabic letter *aleph*] and Dr [Arabic letter *ghain*] use the hospital's devices and equipment for their work. Article 210 stipulates, in its French version, that legal persons shall be held criminally responsible for the actions of their directors, representatives and those whom it authorises to carry out certain actions, [in French: *agents*], when such

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<sup>17</sup> Judgment, paras 164-165.

<sup>18</sup> Judgment, para. 70, fn. 136 (citing Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 60/2010, 9 March 2010 (published in *Al Marjaa-Cassandre*)).

actions are undertaken on behalf of or using the means provided by such legal persons. The impugned judgement concludes that, since the two aforementioned doctors had been working on behalf of the hospital and had been using its devices and equipment, the conditions of Article 210 were met and the hospital was therefore criminally responsible for the error of negligence in conducting accurate examinations and for delays in diagnosing medical conditions, giving rise to harm in the form of near-complete paralysis and crippling. The hospital must therefore be convicted under Articles 210/565 of the Criminal Code.<sup>19</sup>

17. In another telling example,<sup>20</sup> *Al Jadeed* itself, as a legal person, was found criminally liable for violating Lebanese electoral law following the broadcast of a program where an *Al Jadeed* TV journalist interviewed two persons and discussed the expected results of Lebanese parliamentary elections. This occurred less than ten days before the scheduled elections, which is prohibited under Lebanese law. In finding *Al Jadeed* criminally liable, the Court of Publications did not inquire whether the journalist had explicit authorization to act on behalf of *Al Jadeed* TV; it was enough that the interview was prepared by its employee and aired on *Al Jadeed*'s television network.

18. Therefore, in accordance with this jurisprudence, Lebanese courts have not always required proof of explicit authorization by a legal person for an employee to act on its behalf in order for that legal person's criminal liability to arise.<sup>21</sup> Rather, this can be considered on a case-by-case basis. In this case, it was not necessary to qualify or superimpose any further conditions on the term "employees", given the circumstances and the character of contempt proceedings. I therefore disagree with the Contempt Judge's interpretation of Article 210 in so far as the term "employees" is concerned.

19. I find it difficult to accept the highly restrictive approach to interpretation and the narrow selection of Lebanese case law adopted by the Contempt Judge, which did not adequately account for the purpose and intent of contempt proceedings under Rule 60 *bis* (A): to maintain the integrity of the Tribunal's judicial processes and to ensure that no harmful interference comes to its dispensation of justice in regards to the criminal cases concerning the attack of 14 February 2005 and other related attacks in Lebanon.<sup>22</sup> In my view, a

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<sup>19</sup> Lebanon, Court of Cassation, Criminal Chamber 7, Decision No. 217/2011, 7 June 2011.

<sup>20</sup> Lebanon, Beirut Appeals Chamber, Court of Publications Chamber 13, Decision No. 71, 7 August 2009 (Published in *Jaraiim Al Matbouaat - Crimes of Publications*, Sader, 2013, pp. 238-241). This decision has been upheld by the Court of Cassation: Lebanon, Court of Cassation, Chamber 9, Decision No. 17/2010, 24 June 2010.

<sup>21</sup> Judgment, para. 70.

<sup>22</sup> See Jurisdiction Appeal Decision, paras 42, 81.

purposive approach to the application of Article 210 and Lebanese jurisprudence should have been considered and adopted by the Contempt Judge, and upheld by the Appeals Panel. In this context, reference must be had to the requirement that the Tribunal's provision on contempt (Rule 60 *bis*) must be interpreted "in a manner consonant with the spirit of the Statute".<sup>23</sup> As the Appeals Panel has previously held:

A clear distinction is therefore drawn 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.<sup>24</sup>

20. I further recall and stress that, in the present proceedings, the Tribunal is exercising its inherent power to address contemptuous acts, a power and jurisdiction which arises from its character and function as a judicial institution. Consequently, "[i]ts substance and legitimacy is not derived from Rule 60 *bis per se* but rather Rule 60 *bis* is a manifestation of this power and not its source. Therefore, inherent jurisdiction over the crime of contempt[] [...] is outlined but not confined by Rule 60 *bis*".<sup>25</sup>

21. In this context, a teleological approach that is consistent with the position adopted by Lebanese courts is that explicit authorization by a legal person to a natural person to act on its behalf should not be a strict requirement. This is not only consistent with the Lebanese jurisprudence I have cited above and in the interests of justice, but also adequately accounts for the reality of corporate structures and operations. As the Appeals Panel has previously noted:

[T]here can exist circumstances where the Tribunal may be unable, due to the complexity of corporate structures, internal operating processes, and the aggregate effects of the actions of many individuals, to identify and apprehend the most responsible natural person within a corporation.<sup>26</sup>

22. In short, the Contempt Judge erred in this case by relying solely and exclusively on a particular line of Lebanese case law, which was inconsistent with the object of Rule 60 *bis* (A), to the exclusion of Lebanese case law which was more effective and consonant with the object of Rule 60 *bis* (A), as well as essential for the proper

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<sup>23</sup> Rule 3 (A) STL RPE.

<sup>24</sup> Jurisdiction Appeal Decision, para. 27.

<sup>25</sup> Jurisdiction Appeal Decision, paras 32 (footnote omitted), 79.

<sup>26</sup> Jurisdiction Appeal Decision, para. 83.

administration of justice in all the circumstances of the present case. This resulted in a test – particularly with respect to employees – that was overly narrow and contrary to the spirit of the Statute, the purpose and object of the court’s inherent power to punish contemptuous conduct and a purposive teleological approach to criminal law.

23. In my view, the case at hand is simple: the Episodes were prepared using the means of *Al Jadeed* TV, were broadcast during the news bulletin of *Al Jadeed* TV and then remained on *Al Jadeed* TV’s online platforms after 14 August 2012. This was despite the fact that the Head of News and Political Programs – Ms Al Bassam – had knowledge of, or was wilfully blind to, the 10 August 2012 Order directing *Al Jadeed* TV, its principals, employees, agents and affiliates to immediately remove any material related to purported confidential witnesses of the Tribunal from its websites and any other resources accessible to the public.

24. For the purposes of this case, and in line with the Lebanese jurisprudence I have previously outlined, the result is that the function and role of Ms Al Bassam, together with *Al Jadeed* TV’s provision of the means necessary to produce the Episodes, was sufficient to engage *Al Jadeed*’s criminal liability pursuant to Article 210 of the LCC.<sup>27</sup> I would therefore have granted *Amicus* grounds 18 in part, 19 in part and 20 in part.

### C. Conclusion

25. I conclude, on the evidence adduced by the *Amicus*, that a finding of contempt by way of an interference with the administration of justice through the violation of a court order, as contained in Count 2, is sustainable and is the only reasonable and justifiable finding that a trier of fact could make in this case with respect to *Al Jadeed*. On the evidence before the Contempt Judge, no reasonable trier of fact could have acquitted *Al Jadeed* on Count 2 due to a lack of evidence.

26. For these reasons, I find that no reasonable trier of fact could have concluded that Ms Al Bassam did not violate the 10 August 2012 Order and that her conduct did not trigger *Al Jadeed*’s criminal liability. As a result, the Contempt Judge committed errors leading to a miscarriage of justice, namely the acquittal of *Al Jadeed* for Count 2. Therefore, *Amicus* grounds 18 in part, 19 in part and 20 in part should have been granted. I consider that the

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<sup>27</sup> See above paras 11-23 of this Opinion.

appropriate result in this case was to have set aside the Contempt Judge's acquittal of *Al Jadeed* on Count 2 and entered, on appeal, a conviction pursuant to Rule 60 *bis* (A) (iii) and Article 210 of the LCC.

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

Leidschendam, 8 March 2016

A handwritten signature in cursive script, reading "Janet Nosworthy.", positioned above a horizontal line.

Janet Nosworthy, Judge

## **IX. SEPARATE OPINION OF JUDGE WALID AKOUM CONCURRING IN RESULT**

1. I fully concur with the outcome of the Appeals Panel’s judgment. I also agree with the reasons for acquitting Ms Al Khayat on both counts and *Al Jadeed* on Count 1.<sup>1</sup> However, I write separately to express my reasons for voting to affirm the Contempt Judge’s acquittal of *Al Jadeed*, the corporate Accused in this case, under Count 2. In particular, I disagree with the majority’s holding, in dismissing *Amicus* ground 16 in part, that “the applicable law in relation to the elements of attributing criminal liability to legal persons, in this case, is Lebanese law”.<sup>2</sup> Consequently, and even though Judge Hrdličková and myself concur in dismissing the *Amicus*’ appeal seeking *Al Jadeed*’s conviction under Count 2, we each do so for different reasons.<sup>3</sup> I consider that it is the absence of clear and unambiguous provisions setting out the elements of corporate responsibility which results in *Al Jadeed*’s acquittal.

2. There is no need here to restate my view that the Tribunal does not possess jurisdiction *ratione personae* over legal persons for contempt.<sup>4</sup> This judgment is not concerned with that question. Rather, the issue is whether the Contempt Judge was correct in resorting to Lebanese law when describing the elements of the crime of contempt as it pertains to legal persons. The majority concludes that the Contempt Judge did not err.<sup>5</sup> I respectfully differ from this holding.

3. I note that neither the Statute nor the Rules provide any guidance as to how legal liability may be attributed to a legal person. Rule 60 *bis* in particular does not explicitly specify the elements of the crime of contempt other than for natural persons. However, the principle of legality – a fundamental cornerstone of the application of criminal law – requires that these elements be clearly set out, before the occurrence of the alleged conduct, in order to make the criminal liability in question sufficiently foreseeable to the accused.<sup>6</sup> In the context of corporate criminal liability, and in light of the fact that a legal person cannot act other than

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<sup>1</sup> See above paras 106, 107, 172.

<sup>2</sup> See above para. 196.

<sup>3</sup> See s. VII. Separate Opinion of Judge Ivana Hrdličková Concurring in Result. I note that Judge Nosworthy dissents in this regard.

<sup>4</sup> Jurisdiction Appeal Decision – Dissenting Opinion of Judge Walid Akoum.

<sup>5</sup> See above para. 196.

<sup>6</sup> Jurisdiction Appeal Decision – Dissenting Opinion of Judge Walid Akoum, para. 9.

through a natural person, this must include a clear understanding of the relevant model of attribution, *i.e.* through which conduct and by which actor corporate criminal liability attaches. It is all the more vital for a corporate accused to possess such an understanding in light of the multitude of models of attribution in various legal systems throughout the world.

4. Here, the majority has accepted that it is impossible to distil, with respect to legal persons, “from among the varied domestic, regional and international practice [...], the clarity that is required in a criminal case”.<sup>7</sup> Instead, it turns to the Lebanese law on corporate criminal liability, specifically Article 210 of the LCC, which sets out the criminal responsibility of legal persons.<sup>8</sup> Respectfully, it is my view that this approach is flawed.

5. For one, I cannot agree with the majority’s reliance on Rule 3 (A) (iv) when interpreting Rule 60 *bis* in order to establish the elements of the crime of contempt for legal persons.<sup>9</sup> This sub-rule provides for Lebanese law as the last source of interpretation. More importantly, it only refers to the Lebanese Code of Criminal Procedure; that is, to procedural law but not to substantive criminal law like the LCC.

6. Second, the majority’s approach essentially requires a series of distinct steps: it relies on Rule 60 *bis* for determining that a legal corporation can be held criminally responsible for contempt; then turns to Lebanese law to determine the elements of such a crime; only to pivot back to Rule 60 *bis* for the determination of any sentence. This is not only artificial but fails to comply with the principle of legality, in that it separates the foreseeability of the crime – including its elements – and that of the potential sentence. Indeed, I note that under Lebanese law the maximum punishment for violations of similar laws is substantially lower than that provided for by Rule 60 *bis*.<sup>10</sup>

7. Therefore, given the lack of any provisions prescribing the elements of potential criminal conduct of legal persons for the crime of contempt, I cannot apply Lebanese law and consider – as Judge Hrdličková does – whether the Contempt Judge was unreasonable in

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<sup>7</sup> See above para. 191.

<sup>8</sup> See above paras 192-196.

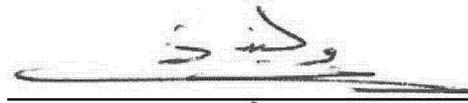
<sup>9</sup> *Ibid.*

<sup>10</sup> See Article 371 of the LCC, providing for a maximum sentence of one-year imprisonment for violating judicial orders and Article 12 of the Law on Publications, providing for a fine of up to 1,500,000 Lebanese Pounds (about 900 Euros) for disclosing confidential information (as amended by Law N. 239, dated 27 May 1993). The maximum penalty under Rule 60 *bis* is imprisonment not exceeding seven years and/or a fine not exceeding 100,000 Euros; see Rule 60 *bis* (J) STL RPE.

acquitting *Al Jadeed*. In contrast, my analysis begins and ends at determining that the elements of the crime have not been established in law. It follows that the relevant parts *Amicus* ground 16 must be dismissed. As a result, the relevant parts of *Amicus* grounds 17-22 are, in my view, rendered moot.

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

Leidschendam, 8 March 2016



Walid Akoum, Judge

## X. ABBREVIATIONS OF CITED MATERIALS AND DEFINED TERMS

### A. Glossary of Abbreviations

Abbreviation Used	Full Reference
Agreed Fact 21	STL, <i>In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/CJ, F0108, Table of Agreed Facts, 13 March 2015, p. 3, Fact 21.
<i>Al Jadeed</i>	<i>Al Jadeed</i> [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.)
<i>Amicus</i>	<i>Amicus Curiae</i> Prosecutor
Appeals Panel	Appeals Panel of the Special Tribunal for Lebanon, designated to hear appeals in the STL-14-05 case ( <i>see</i> STL, <i>In the case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/PRES/AR126.1, F0003, Order Designating Appeals Panel, 1 August 2014)
<i>Ayyash et al. case</i>	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01
Cease-and-Desist Letter	Notice of Cease and Desist from the Registrar to Mr Tahseen Al Khayat, Confidential, 7 August 2012 (Exhibit P00056)
Contempt Judge	Judge Nicola Lettieri ( <i>see</i> STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/I/PRES, F0002, Order Designating Contempt Judge, Confidential and <i>Ex Parte</i> , 31 January 2014)
corporate Accused	<i>Al Jadeed</i> [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.)
Episodes	Broadcast aired on <i>Al Jadeed</i> TV on 6, 7, 9 and 10 August 2012 titled “Witnesses of the International Tribunal”
ICC	International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court, amended on 27 November 2013
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, amended on 13 May 2015
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, amended on 8 July 2015

initial Contempt Judge	Judge David Baragwanath ( <i>see</i> STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014)
LCC	Lebanese Criminal Code
MICT	United Nations Mechanism for International Criminal Tribunals
MICT RPE	Rules of Procedure and Evidence of the United Nations Mechanism for International Criminal Tribunals, amended on 8 June 2012
OTP	Office of the Prosecutor of the Special Tribunal for Lebanon
Registrar's Letter of 28 August 2012	Letter from the Registrar to the Prosecutor General, Confidential, 28 August 2012 (Exhibit P00063)
Rules / STL RPE	Rules of Procedure and Evidence of the Special Tribunal for Lebanon, amended on 12 February 2015
SCSL	Special Court for Sierra Leone
SCSL RPE	Rules of Procedure and Evidence of the Special Court for Sierra Leone, amended on 31 May 2012
Statute	Statute of the Special Tribunal for Lebanon
STL / Tribunal	Special Tribunal for Lebanon
Table of Episodes' Availability	Exhibit P00159 (confidential with public redacted version)

**B. Abbreviated Titles of STL Filings and Other Documents**

<b>Abbreviation Used</b>	<b>Full Reference</b>
10 August 2012 Order	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/PT/PTJ, F0372, Order for Immediate Removal of Disseminated Material and Cessation of Dissemination, 10 August 2012.
Decision in Proceedings for Contempt	STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014.
Order in Lieu of an Indictment	STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, Annex 1, 31 January 2014.
Jurisdiction Appeal Decision	STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014.
Jurisdiction Decision	STL, <i>In the case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat</i> , 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.
Amended Order in Lieu of an Indictment	STL, <i>In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/CJ, F0068, Amended Order in Lieu of an Indictment, Annex, 17 October 2014.
Table of Agreed Facts	STL, <i>In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/CJ, F0108, Table of Agreed Facts, 13 March 2015.

Decision on <i>Amicus</i> Bar Table Motion	STL, <i>In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/PT/CJ, F0120, Decision on <i>Amicus Curiae</i> Prosecutor's Motion for Admission of Evidence Pursuant to Rule 154, 9 April 2015.
<i>Amicus</i> Final Trial Brief	STL, <i>In the case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/T/CJ, F0164, Corrected Version of "Amicus Final Trial Brief" dated 8 June 2015, Confidential, 10 June 2015.
Judgment	STL, <i>In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/T/CJ, F0176, Judgment, Confidential, 18 September 2015.
Sentencing Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/S/CJ, F0186, Reasons for Sentencing Judgment, 6 October 2015.
<i>Amicus</i> Notice of Appeal on the Judgment	STL, <i>In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0001, Prosecution's Notice of Appeal, 5 October 2015.
<i>Amicus</i> Appeal Brief on the Judgment	STL, <i>In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0005, Corrected Version of "Prosecution's Appeal Brief" of 20 October 2015, Confidential, 18 November 2015.
<i>Amicus</i> Notice of Appeal on the Sentencing Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0006, Prosecution's Notice of Appeal on Sentencing Judgement, 21 October 2015.
Defence Notice of Appeal on the Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0007, Defence Notice of Appeal, 21 October 2015.
<i>Amicus</i> Appeal Brief on the Sentencing Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0012, Prosecution's Appeal Brief Regarding Sentencing Judgment, Confidential 5 November 2015.
Defence Appeal Brief on the Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0013, Karma Khayat's Appellant's Brief, Confidential, 5 November 2015.

Defence Response on the Judgment	STL, <i>In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0014, Respondent's Brief to "Prosecution's Appeal Brief", Confidential, 9 November 2015.
<i>Amicus</i> Reply on the Judgment	STL, <i>In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0016, Brief in Reply to the "Respondent's Brief to 'Prosecution's Appeal Brief'", Confidential, 13 November 2015.
<i>Amicus</i> Response on the Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0018, Brief in Response to "Karma Khayat's Appellant's Brief", 18 November 2015.
Defence Response on the Sentencing Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0019, Respondent's Brief to "Prosecution's Appeal Brief Regarding Sentencing Judgment", Confidential, 18 November 2015.
<i>Amicus</i> Reply on the Sentencing Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0021, Prosecution's Brief in Reply to "Respondent's Brief to 'Prosecution's Appeal Brief Regarding Sentencing Judgement'" of 18 November 2015, Confidential, 24 November 2015.
Defence Reply on the Judgment	STL, <i>In the Case against Karma Mohamed Tahsin Al Khayat</i> , STL-14-05/A/AP, F0022, Brief in Reply to "Brief in Response to 'Karma Khayat's Appellant's Brief'", 24 November 2015.
<i>Al Akhbar</i> Jurisdiction Appeal Decision	STL, <i>In the case against Akhbar Beirut S.A.L. and Ibrahim Al Amin</i> , STL-14-06/PT/AP/AR126.1, F0004, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015.
Applicable Law Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

<i>Ayyash et al.</i> Jurisdiction Appeal Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , 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.
<i>Ayyash et al.</i> Authority of Prosecutor Appeal Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012.
<i>Ayyash et al.</i> Agreed Facts Decision	STL, <i>Prosecutor v. Ayyash et al.</i> , STL-11-01/T/TC, F1479, Decision on Agreed Facts under Rule 122, 2 April 2014.
Practice Direction on Appeal Filings	STL, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Special Tribunal for Lebanon, STL/PD/2013/07/Rev.1, 13 June 2013.

**C. Abbreviated Titles of Other Jurisprudence and Legal Sources Cited**

<b>Abbreviation Used</b>	<b>Full Reference</b>
<b>ECtHR</b>	
<i>Worm</i> Judgment	ECtHR, <i>Worm v. Austria</i> , 83/1996/702/894, Judgment, 29 August 1997.
<b>ICC</b>	
<i>Banda and Jerbo</i> Agreed Facts Decision	ICC, <i>Prosecutor v. Banda and Jerbo</i> , ICC-02/05-03/09, Decision on the Joint Submissions Regarding the Contested Issues and the Agreed Facts, 28 September 2011.
<i>Lubanga</i> Appeal Judgment	ICC, <i>Prosecutor v. Lubanga</i> , ICC-01/04-01/06 A 5, Public Redacted Document - Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, 1 December 2014.
<i>Ngudjolo</i> Appeal Judgment	ICC, <i>Prosecutor v. Ngudjolo</i> , ICC-01/04-02/12 A, Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute", 7 April 2015.
<b>ICTR</b>	
<i>Bizimungu</i> Appeal Judgment	ICTR, <i>Bizimungu v. Prosecutor</i> , ICTR-00-56B-A, Judgement, 30 June 2014.
<i>Karera</i> Appeal Judgment	ICTR, <i>Karera v. Prosecutor</i> , ICTR-01-74-A, Judgement, 2 February 2009.
<i>Ntagerura et al.</i> Appeal Judgment	ICTR, <i>Prosecutor v. Ntagerura et al.</i> , ICTR-99-46-A, Judgement, 7 July 2006.
<i>Musema</i> Trial Judgment	ICTR, <i>Prosecutor v. Musema</i> , ICTR-96-13-T, Judgement and Sentence, 27 January 2000.
<i>Musema</i> Appeal Judgment	ICTR, <i>Musema v. Prosecutor</i> , ICTR-96-13-A, Judgement, 16 November 2001.
<i>Nyiramasuhuko et al.</i> Appeal Judgment	ICTR, <i>Prosecutor v. Nyiramasuhuko et al.</i> , ICTR-98-42-A, Judgement, 14 December 2015.
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