

PROSECUTING JOURNALISTS AT THE SPECIAL TRIBUNAL FOR LEBANON: A CHALLENGE TO FREEDOM OF SPEECH?

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ABSTRACT

Unexpectedly, the Special Tribunal for Lebanon (hereinafter STL) has charged two Lebanese media companies, and two of its employees, with contempt of court. They are prosecuted for broadcasting information on purported confidential witnesses, and failing to comply with a court order to remove this information from the internet, thereby undermining public confidence in the Tribunal. These cases have revived the debate about the limitations to freedom of expression. This Brief examines whether the contempt proceedings at the STL constitute a legitimate limitation to the media's freedom of expression. This is done by applying an analysis of international law on freedom of expression (as prescribed by the ICCPR and the ECHR, and applicable case law) to the first contempt case at the STL, the *Al Jadeed and Al Khayat* case. This Brief will show that both the legality issues arising from the prosecution of a corporate entity, and the lack of proof of the alleged threat of undermining the public's confidence, weaken the legitimacy of the infringement of freedom of expression.

Keywords: STL, Freedom of Expression, Contempt of Court, International Criminal Law

I. INTRODUCTION

Since its inception, the Special Tribunal for Lebanon (hereinafter STL) has been exploring the boundaries of international law: the emergence of the crime of terrorism, trials in absentia, and lately two media companies have been charged with corporate criminal liability. These developments may have caused unease among academics and practitioners, and the STL has even been named "a very special Tribunal".¹ In addition, the contempt cases at the STL have revived the debate about the limitations to freedom of expression, especially among journalists and within Lebanese society. This Brief provides a legal analysis to this debate, encouraging further academic and public discussion.

Two separate contempt cases have been brought before the STL. The first case is against Lebanese television company Al Jadeed TV, and its deputy head of news Ms. Khayat, who were both charged with two counts: broadcasting and/or publishing information on purported confidential witnesses in the *Ayyash et al.* case; and failing to comply with an order of the court to remove this information from their website and YouTube channel.² According to the order in lieu of an indictment, through these acts the accused undermined public confidence in the STL's ability to

¹ David Tolbert, 'A Very Special Tribunal', in: Alamuddin et al., *The Special Tribunal for Lebanon* (2014: Oxford University Press), p. 1.

² [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/PT/CJ, Amended order in lieu of an indictment, 17 October 2014, Annex, p. 3.](#)

protect the confidentiality of information about, or provided by, (potential) witnesses, and thus knowingly and wilfully interfered with the Tribunal's administration of justice.³ In its judgment of 18 September 2015, the Contempt Judge found Al Jadeed not guilty of both charges and Ms. Khayat not guilty of count one but guilty of count two⁴ for which Ms. Khayat has been sentenced to pay a fine of 10,000 euro.⁵ In the second contempt case, similar charges have been brought against Lebanese newspaper Akhbar Beirut and its editor-in-chief Mr. Al Amin,⁶ with trial proceedings scheduled to start in January 2016.⁷ Several media associations have claimed that these cases are an attempt to prevent journalists from criticising the malfunctioning of the Tribunal.⁸ It has also been suggested that the prosecution is an attempt to silence journalists and an attack against freedom of expression.⁹ At the same time most people will agree that protection is needed for witnesses who are under threat.

In his opening statement in the *Al Jadeed and Al Khayat* case, the Amicus Curiae Prosecutor remarked that the Tribunal's contempt power is an acceptable limit on the freedom of the media to report on the Tribunal.¹⁰ However, legality issues may impair a fair balance between the media's freedom of expression and the good administration of justice. The purpose of this Brief is to examine whether the contempt proceedings at the STL constitute a legitimate limitation to the media's freedom of expression. This question is answered by applying an analysis of international law on contempt of court and freedom of expression – including case law from various other international courts – to the *Al Jadeed and Al Khayat* case.

³ *Ibid.*

⁴ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of Judgment, 18 September 2015.](#)

⁵ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Khayat, Transcript 28 September 2015, p. 45.](#) See also [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Khayat, Case No. STL-14-05/S/CJ, Reasons for Sentencing Judgment, 6 October 2015.](#)

⁶ [STL, Contempt Judge, Prosecutor v. Akhbar Beirut and Al Amin, Case No. STL-14-06/PT/CJ, Redacted version of decision in proceedings for contempt with orders in lieu of an indictment, 31 January 2014, Annex, p. 3.](#)

⁷ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Akhbar Beirut and Al Amin, Case No. STL-14-6/PT/CJ, Scheduling Order, 14 October 2015.](#)

⁸ See, for example, [Kareem Shaheen, 'Summonses provoke debate on STL's authority over press', in: *The Daily Star*, 30 April 2014;](#) [Ibrahim Al Amin, 'Through our solidarity, we will confront the STL', in: *Al Akhbar English*, 28 April 2014;](#) and ['Information Minister Voices Solidarity with Lebanese Journalists Summoned by STL', in: *Naharnet*, 28 April 2014.](#)

⁹ See for example, [Owen Bowcott, 'Trial of Lebanese broadcaster charged with contempt of court opens in Hague', in: *The Guardian*, 16 April 2015;](#) [Ahmed Aboulenein and Estelle Shirbon, 'Press freedom at stake in Lebanon tribunal case, says accused', *Reuters*, 17 March 2015;](#) [Adam Taylor, 'The U.N.'s tribunal in Lebanon has cost millions and made no arrests. Now the journalists are on trial', in: *The Washington Post*, 7 April 2015.](#)

¹⁰ [STL, Prosecutor's opening statement, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Transcript 16 April 2015, p. 17.](#)

II. FREEDOM OF EXPRESSION

2.1 Introduction and legal framework

Article 19 of the United Nations Universal Declaration of Human Rights (hereinafter UDHR), adopted by the UN General Assembly in 1948, provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹¹ Although the UDHR as such is not a binding source of law, it has been very influential in the development of international human rights standards and it can be argued that a majority of the provisions have become legally binding through customary international law.¹² Further, the norms applied by the different (regional) human rights institutions find their roots in the UDHR.¹³ Both the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the European Convention on Human Rights (hereinafter ECHR), show a firm commitment to the UDHR¹⁴ and contain similar definitions on freedom of expression.¹⁵

The binding nature of the ICCPR has been recognised by various international criminal tribunals. The Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) in the case of the *Prosecutor v. Hartmann* confirmed that in relation to freedom of expression, the ICCPR and its commentaries are among the most persuasive sources.¹⁶ Regional human rights treaties, such as the ECHR, and the jurisprudence developed thereunder, are not binding of their own accord on the Tribunal, but of assistance in applying and interpreting the Tribunal’s applicable law and authoritative as evidence of international custom.¹⁷ The STL has also referred to both the

¹¹ [Article 19, United Nations Universal Declaration of Human Rights, 10 December 1948.](#)

¹² Javaid Rehman, *International Human Right Law*, Pearson Education Limited: 2010, pp. 25, 77 & 80; Jochen von Bernstorff, ‘The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law’, in: *European Journal of International Law* 2008, Vol. 19, p. 913; Stefaan Smis et al., *Handboek Mensenrechten. De internationale bescherming van de rechten van de mens*, Intersentia: 2011, pp. 33, 98-99; and Tarlach McGonagle, ‘The development of freedom of expression and information within the UN: leaps and bounds or fits and starts?’, in: *The United Nations and Freedom of Expression and Information*, edited by Tarlach McGonagle and Yvonne Donders, Cambridge University Press 2015, p. 8.

¹³ Marjan Ajevski, ‘Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation’, in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski (Norwegian Centre for Human Rights: 2015), p. 32.

¹⁴ *Ibid.*, p. 33 and footnote 9; [Preamble of the ICCPR](#); and [Preamble of the ECHR](#).

¹⁵ [Article 19, ICCPR](#) states: “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

[Article 10 ECHR](#) states: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...).”

¹⁶ [ICTY, Appeals Chamber, Prosecutor v. Hartmann, Case No. IT-02-54-R77.5-A, Judgment, 19 July 2011, para. 160 and footnote 316](#); [ICTR, Appeals Chamber, Prosecutor v. Jean-Bosco Barayagwiza, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, para. 40](#) (finding that the ICCPR “is part of general international law and is applied on that basis.”)

¹⁷ [ICTR, Appeals Chamber, Prosecutor v. Jean-Bosco Barayagwiza, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, para. 40](#); [ICTY, Appeals Chamber, Prosecutor v. Hartmann, Case No. IT-02-54-R77.5-A,](#)

ICCPR and the ECHR (and its jurisprudence) in the application and interpretation of international human right norms.¹⁸ Although evidently the STL is not a party to these treaties, their application and interpretation constitute persuasive evidence of international custom, with the ICCPR, having 167 state parties, being close to universal application.¹⁹ As the jurisprudence of the ECHR provides more detail and variety on some of the relevant issues in the current analysis, both the ICCPR and the ECHR and its jurisprudence will be discussed below, however keeping in mind the potential difference in their legal status in international criminal proceedings.

2.2 Freedom of expression and its restrictions

The Human Rights Committee in its [General Comment No. 34](#) on article 19,²⁰ explains that freedom of expression has a broad scope of application, encompasses the media, and includes the right to personal data and information.²¹ The Human Rights Committee also holds that freedom of expression (and opinion) “constitute the foundation stone for every free and democratic society”.²² In its landmark decision in the case of *Handyside v. The UK*, the European Court of Human Rights stipulated that “[f]reedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man. [...] Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.”²³

Freedom of expression is not an absolute right and may be subject to certain restrictions.²⁴ The Human Rights Committee allows for a restriction of freedom of expression if it meets the following conditions: it must be provided for by law, it must address one of the aims of article 19(3) and it must be necessary to achieve a legitimate purpose (respect of the rights or reputations of others, protection of national security or public order or of public health or morals).²⁵ The Human Rights Committee further specifies that “prescribed by law” means that the norm must be of sufficient

[Judgment, 19 July 2011, para. 159 and footnotes 314 and 316](#); see also Carsten Stahn and Larissa van den Herik, ‘Fragmentation’, Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box?, in: *The Diversification and Fragmentation of International Criminal Law*, edited by Larissa van den Herik and Carsten Stahn, Martinus Nijhof Publishers 2012, pp. 53-54.

¹⁸ [STL, Trial Chamber, Decision to hold Trial in Absentia, Case No. STL-11-01/I/TC, 1 February 2012, para 32.](#)

¹⁹ [ICTY, Appeals Chamber, Prosecutor v. Hartmann, Case No. IT-02-54-R77.5-A, Judgment, 19 July 2011, para. 160 and footnote 316.](#)

²⁰ These General Comments by the Human Rights Committee constitute an authoritative legal analysis of the provisions of the treaty, except to the extent that the text might indicate otherwise (Michael O’Flaherty, ‘International Covenant on Civil and Political Rights: interpreting freedom of expression and information standards for the present future’, in: *The United Nations and Freedom of Expression and Information*, edited by Tarlach McGonagle and Yvonne Donders, Cambridge University Press 2015, p. 73).

²¹ [Human Right Committee, General Comment No. 34, 12 September 2011, paras. 11-12.](#) See also, Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press 2013, p. 360.

²² [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 2.](#)

²³ [European Court of Human Rights, Handyside v. The UK, 7 December 1976, para. 49.](#)

²⁴ [Article 19\(3\) ICCPR](#) and [article 10\(2\) ECHR](#). See also [articles 29 and 30 ICCPR](#) for a general limitations clause.

²⁵ [Human Rights Committee, Sohn v. Republic of Korea, Communication 518/1992, 3 August 1995, para. 10.4; Article 19\(3\) ICCPR.](#)

precision to enable an individual to ascertain what kinds of expression are properly restricted and what kinds are not.²⁶ Law may include laws of contempt of court.²⁷

Restrictions to freedom of expression can only be applied for the purposes for which they are prescribed and must be directly related to the specific need on which they are predicated.²⁸ The Human Rights Committee has strict guidelines on the connection between the legitimate aim pursued and the restriction.²⁹ As the Human Rights Committee has consistently found, the state invoking a legitimate ground for restriction must demonstrate “in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, *in particular by establishing a direct and immediate connection between the expression and the threat.*”³⁰ Contempt of court proceedings may be tested against the public order ground.³¹

A restriction violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression, and proportionality includes the aim, the chosen instrument (including, if applicable, the penalty) and the interests to be protected.³² For example, in *Dissanayake v. Sri Lanka*, the Human Rights Committee found that two years of imprisonment for contempt of court - for a public statement rejecting any disgraceful decision of the Supreme Court - was disproportionate and a violation of article 19.³³ More generally, the restrictions themselves must be compatible with the provisions, aims and objectives of the ICCPR.³⁴

In a similar fashion to the Human Rights Committee, the European Court of Human Rights has set out that article 10(2) ECHR requires three conditions to be met in order to allow for limitations to freedom of expression: the limitation is prescribed by law, aims to achieve a legitimate objective, and is necessary in a democratic society. The European Court has been consistent in asserting that interference with this right should be interpreted narrowly.³⁵

²⁶ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 25.](#)

²⁷ [Ibid., para. 24; Human Rights Committee, Dissanayake v. Sri Lanka, Communication No. 1373/2005, 4 August 2008, para. 8.2.](#)

²⁸ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 22.](#)

²⁹ Marjan Ajevski, 'Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation', in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski, Norwegian Centre for Human Rights 2015, p. 40.

³⁰ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 35 \(emphasis added\); Human Rights Committee, Shin v. Republic of Korea, Communication No. 926/2000, 19 March 2004, para. 7.3.](#)

³¹ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 31.](#)

³² [Ibid., paras. 33-34. See also Jacobs, White & Ovey, The European Convention on Human Rights, Oxford University Press 2014, pp. 437-438.](#)

³³ [Human Rights Committee, Dissanayake v. Sri Lanka, Communication No. 1373/2005, 4 August 2008, paras. 8.3-8.4.](#)

³⁴ [Ibid., para. 26.](#)

³⁵ D.J. Harris et al., *Law of the European Convention on Human Rights*, Oxford University Press 2014, p. 613; [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 42.](#)

According to the European Court's well-established case-law, the main requirements of "prescribed by law" are accessibility and foreseeability, thus enabling the citizen to regulate his conduct.³⁶ However, according to the European Court, laws are inevitably couched in vague terms whose interpretation and application are questions of practice,³⁷ and the level of precision required "depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."³⁸ In the case of *Sunday Times v. The UK*, the European Court found that the law on contempt of court in the United Kingdom at that time was "prescribed by law" within the meaning of article 10.³⁹ In another case, the European Court found that, although the criminal law provision (on proselytism) was vague, the existing body of case law enabled the applicant to regulate his conduct in the matter.⁴⁰ On the issue of foreseeability, the European Court has decided that a law can still be foreseeable if the person concerned has to take appropriate legal advice to assess the consequences of a given action, especially in case of persons carrying on a professional activity.⁴¹

Compared to article 19(3) ICCPR, article 10(2) ECHR provides a longer list of legitimate grounds on the basis of which the right to freedom of expression can be restricted, and includes "preventing the disclosure of information received in confidence" and "maintaining the authority and impartiality of the judiciary".⁴² In general, the European Court does not require a very strict connection between the state action and the legitimate aim pursued.⁴³ Therefore, in most cases a legitimate aim can be established without much further discussion.⁴⁴

Subsequently, the European Court has to establish whether the interference is "necessary in a democratic society", with the adjective "necessary" implying the existence of a pressing social need. The state parties have a certain margin of appreciation – which has often created unpredictable jurisprudence and the criticism that it is used to shield away from a proper legal analysis of the

³⁶ See for example, [European Court of Human Rights, Goodwin v. The UK, 27 March 1996, para. 31](#); [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 34](#); [European Court of Human Rights, Sunday Times v. The UK, 26 April 1979, para. 49](#).

³⁷ [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 34](#); [European Court of Human Rights, Sunday Times v. The UK, 26 April 1979, para. 49](#).

³⁸ [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 34](#); [European Court of Human Rights, Vogt v. Germany, 26 September 1995, para. 48](#).

³⁹ [European Court of Human Rights, Sunday Times v. The UK, 26 April 1979, paras. 46-53](#).

⁴⁰ [European Court of Human Rights, Kokkinakis v. Greece, 25 May 1993, para. 40](#).

⁴¹ [European Court of Human Rights, Cantoni v. France, 11 November 1996, para. 35](#).

⁴² [Article 10\(2\) ECHR](#).

⁴³ Marjan Ajevski, 'Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation', in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski, Norwegian Centre for Human Rights 2015, p. 40.

⁴⁴ Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press 2014, p. 614. See for example [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 26](#).

issues at stake⁴⁵ or even restrict freedom of expression.⁴⁶ The European Court is looking at the interference

in the light of the case as a whole and [has to] determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.⁴⁷

Factors that are significant in balancing freedom of expression against other interests include the nature and severity of the restriction, its duration, and the nature of the publication in issue, in particular its tone, balance, factual accuracy and relevance to public debate.⁴⁸

The Human Rights Committee has explicitly stated that the scope of freedom of expression is not to be assessed by reference to a “margin of appreciation”.⁴⁹ Further, article 19 ICCPR does not include the term “necessary in a democratic society”, whilst articles 21 and 22 ICCPR (freedom of assembly and association, respectively) do include this term. However, in its case law the Human Rights Committee has read-in the qualifier,⁵⁰ referring to “the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media” when establishing whether the measure restricting the freedom of speech was proportionate to the legitimate aim.⁵¹

2.3 Freedom of expression and the media

Journalists play an essential role in a democratic society, where they are the ones that report on issues of relevance to the wider public. The Human Rights Committee has stated that a free,

⁴⁵ Marjan Ajevski, ‘Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation’, in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski, Norwegian Centre for Human Rights 2015, p. 42.

⁴⁶ Javaid Rehman, *International Human Right Law*, Pearson Education Limited 2010, p. 213; Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press 2013, p. 361.

⁴⁷ [European Court of Human Rights, Vogt v. Germany, 26 September 1995, para. 52](#); [European Court of Human Rights, Rekvényi v. Hungary, 20 May 1999, para. 42](#). See also [European Court of Human Rights, Goodwin v. The UK, 27 March 1996, para. 40](#); [European Court of Human Rights, Zana v. Turkey, 25 November 1997, para. 51](#).

⁴⁸ Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, Sweet & Maxwell 2011, p. 465.

⁴⁹ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 35](#). See also [Human Rights Committee, Lämsman et al. v. Finland, Communication 511/1992, 8 November 1994, para. 9.4](#).

⁵⁰ Marjan Ajevski, ‘Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation’, in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski, Norwegian Centre for Human Rights 2015, p. 34; and Michael O’Flaherty, ‘International Covenant on Civil and Political Rights: interpreting freedom of expression and information standards for the present future’, in: *The United Nations and Freedom of Expression and Information*, edited by Tarlach McGonagle and Yvonne Donders, Cambridge University Press 2015, p. 67.

⁵¹ [Human Rights Committee, Marques v. Angola, Communication No. 1128/2002, 18 April 2005, para. 6.8](#). See also [Human Rights Committee, Velichkin v. Belarus, Communication No. 1022/2001, 23 November 2005, para. 7.3](#).

uncensored and unhindered media is essential to ensure freedom of opinion and expression.⁵² Further, the Human Rights Committee found that the public has a right to receive information as a corollary of the specific function of a journalist to impart information.⁵³

The European Court has recognised the role of the media as a watchdog in a democratic society, and in practice there is a strong presumption towards the necessity of the media to contribute to public debate.⁵⁴ According to well-established case law of the European Court

[t]he press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.⁵⁵

The European Court gives a higher level of protection to the right of freedom of expression if it concerns publications (or speech) which contribute to social and political debate, criticism and information.⁵⁶ In view of the interests of democratic society in ensuring a free press, the national margin of appreciation shall be limited in relation to a journalist fulfilling his duty to impart information and ideas on matters of public concern.⁵⁷ More generally, in relation to journalists and the media, the European Court acknowledges the narrowness of the “margin of appreciation”⁵⁸ and therefore the differences between the interpretations offered by the European Court and the Human Rights Committee might be smaller than expected from the general analysis.

For example, in the case of *Giniewski v. France*, the European Court found that in matters concerning the public interest in a democratic society, such as the applicant’s article discussing the reasons behind the Holocaust, restrictions on freedom of expression are to be strictly construed. In that case, the European Court found that the public defamation charge conviction did not meet a “pressing social need”.⁵⁹ Further, in the case of *Sunday Times v. The UK*, the applicant, a

⁵² [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 13; Human Rights Committee, Marques v. Angola, Communication No. 1128/2002, 18 April 2005, para. 6.8.](#)

⁵³ [Human Rights Committee, Mavlonov and Sa'di v. Uzbekistan, Communication No. 1334/2004, 29 April 2009, para. 8.4.](#)

⁵⁴ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell 2011, pp. 464-465; [Jacobs, White & Ovey, The European Convention on Human Rights, Oxford University Press 2014, p. 444.](#)

⁵⁵ [European Court of Human Rights, Du Roy and Malaurie v. France, 3 October 2000, para. 27.](#)

⁵⁶ [Jacobs, White & Ovey, The European Convention on Human Rights, Oxford University Press 2014, p. 438.](#)

⁵⁷ *Ibid.*, p. 444; [European Court of Human Rights, Goodwin v. The UK, 27 March 1996, para. 40; European Court of Human Rights, Castells v. Spain, 23 April 1992, para. 43; European Court of Human Rights, Du Roy and Malaurie v. France, 3 October 2000, para. 27; European Court of Human Rights, Sunday Times v. The UK, 26 April 1979, para. 59.](#)

⁵⁸ Marjan Ajevski, ‘Freedom of Speech as Related to Journalists in the European Court of Human Rights, IACtHR and the Human Rights Committee – a Study of Fragmentation’, in: *Fragmentation in International Human Rights Law*, edited by Marjan Ajevski, Norwegian Centre for Human Rights 2015, p. 44.

⁵⁹ [European Court of Human Rights, Giniewski v. France, 31 April 2006, paras. 51, 53.](#)

newspaper, had received an injunction to refrain from publishing on issues relating to a pending case, thus potentially engaging in contempt of court. The Court found that the injunction was disproportionate to the legitimate aim pursued, especially in view of the high public interest of the matters reported and the absence of certainty whether this presented a threat to the “authority of the judiciary.”⁶⁰ It also noted that “whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.”⁶¹

III. CONTEMPT PROCEEDINGS AT THE STL

3.1 Legal basis of contempt proceedings

In common law, contempt of court violations refer to conduct that interferes with the good administration of justice by threatening the integrity of the proceedings.⁶² It envisages protecting the public interest in the proper administration of judicial functions and promoting respect for the rule of law in general.⁶³ The offence of contempt of court may take different forms; examples include yelling in the courtroom, criticising judges, the refusal to comply with a court order or publishing of documents that damage the course of the proceedings.

Contempt of court was an unforeseen problem at the ad hoc international criminal tribunals, but despite the fact that rules on this issue were initially omitted from the Statutes and the Rules of Procedure and Evidence at the ICTY and the International Criminal Tribunal for Rwanda (hereinafter ICTR), jurisdiction for this crime has always been assumed by the various chambers.⁶⁴ To fill this legality gap, the ICTY justified prosecution on the basis of the “doctrine of inherent powers”, for the first time formulated by the Appeals Chamber in the case of the *Prosecutor v. Tadic*.⁶⁵ Subsequently, the “doctrine of inherent powers” has been applied in other circumstances - including the question of contempt powers - within the realm of the ICTY Statute.⁶⁶ Rule 77 of the Rules of Procedure and Evidence at the ICTY - and similarly at the ICTR and Special Court for

⁶⁰ [European Court of Human Rights, Sunday Times v. The UK, 26 April 1979, paras. 65-67.](#)

⁶¹ [Ibid., para. 65.](#)

⁶² Silvia D’Ascoli, ‘Sentencing Contempt of Justice in International Criminal Justice. An Unforeseen Problem Concerning Sentencing and Penalties’, in: *Journal of International Criminal Justice* 5 (2007), p. 736, footnote 2, referring to *Att.-Gen. v. Butterworth* (1963) 1 Q.B. 696.

⁶³ *Ibid.*, p. 736.

⁶⁴ *Ibid.*

⁶⁵ [ICTY, Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel Milan Vujin, 31 January 2000, para. 18;](#) Gregory P. Lombardi, ‘Legitimacy and the Expanding Power of the ICTY’, in: *New England Law Review* 37 (2002), p. 891; and [Gwendolyn Stamper, ‘Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, in: Michigan Law Review 109/8 \(2011\), p. 1561.](#)

⁶⁶ [Ibid., pp.1561-1562.](#) See for example, [ICTY, Prosecutor v. Delalic, Case No. IT-96-21-A, Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999.](#)

Sierra Leone - was adapted by the judges at a later stage to criminalise various specified forms of contempt of court. Furthermore, at the International Criminal Court (hereinafter ICC) article 70 of the Rome Statute does define several forms of obstruction of justice.⁶⁷

At the STL, contempt of court or obstruction of justice is an offence regulated in rule 60*bis* of the Rules of Procedure and Evidence. This provision stipulates that the Tribunal is empowered to hold in contempt those who knowingly and wilfully interfere with the task of the Tribunal to administrate justice. This includes giving false evidence to the Tribunal, disclosure of information in violation of a court order, failure to comply with a court order, and threatening, intimidating, or bribing witnesses, judges or other officers of the Tribunal.

Whilst in many instances prosecution for contempt of court is necessary to protect the integrity of international tribunals and their proceedings, one must also be vigilant that prosecuting journalists for contempt of court can result in intimidation of genuine journalism. Thierry Cruvellier, a war crimes reporter who has been subject to contempt of court proceedings, explained that the restraints put on journalists through, among others, these type of proceedings, seriously decrease public access to what happens at the UN tribunals.⁶⁸

3.2 Contempt proceedings against journalists at international criminal tribunals

Over the last decade, the Prosecution at international criminal tribunals has instigated a number of contempt cases against journalists.

In the case of the *Prosecutor v. Jovic*, the ICTY Prosecutor charged the accused, editor-in-chief of a Croatian daily newspaper, with contempt of court over publication of closed session witness testimony in a Croatian newspaper in spite of an order issued by the Trial Chamber. The Appeals Chamber held that the *mens rea* is established by an accused's knowledge both of the order and of his or her conduct in breach of it.⁶⁹ From this case, and also from *Prosecutor v. Marjic & Rebic*, it can be concluded that, in order to convict of this specific form of contempt at the ICTY, it suffices to prove beyond reasonable doubt that the accused carried out the physical act of releasing confidential information relating to the Tribunal proceedings (*actus reus*), and the actual knowledge of publishing information in violation of a court order (*mens rea*).⁷⁰ This was later confirmed in the

⁶⁷ Furthermore, rule 51(3) of the Rome Statute provides for a much stricter framework for judicial law making.

⁶⁸ [Thierry Cruvellier, Journalisme & tribunaux, 4 October 2011](#). The Prosecutor at the ICTR attempted to prosecute Mr. Thierry Cruvellier and the newspaper *Diplomatie Juridiciaire* for revealing the identity of a potentially key prosecution witness in the *Bagosora* case, but the Chamber dealing with the matter rejected the Prosecutor's request. Whilst public information on this case is scarce, Cruvellier himself wrote a commentary.

⁶⁹ [ICTY, Appeals Chamber, Prosecutor v. Jovic, Case No. IT-95-14&14/2-R77-A, Judgement, 15 March 2007, para. 25.](#)

⁷⁰ [ICTY, Trial Chamber, Prosecutor v. Marjic & Rebic, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 18;](#)

Prosecutor v. Hartmann case.⁷¹ These cases, however, differ from the contempt of court proceedings at the STL, as the accused in *Al Jadeed and Al Khayat* have been prosecuted for publishing information on purported confidential witnesses and violating a court order to remove that information, which does not require actual proof of releasing confidential information (see further below).

In a contempt case before the Special Court for Sierra Leone (although not against a journalist but against Defence counsel for Charles Taylor), the Single Judge considered that mere knowledge of the order is insufficient, but that it must be established that the disclosure was deliberate.⁷² According to the Single Judge, the case differed from the *Prosecutor v. Hartmann*, where the publication in question had been aimed at the wider public, whilst the Defence Trial Brief had been primarily intended to be put before the Chamber, although it was publicly available. The Single Judge was unable to conclude from the circumstantial evidence that this had been a deliberate action on the part of Defence counsel.⁷³

Further, in the case of the *Prosecutor v. Margetic* case, another contempt case against a journalist in relation to revealing confidential witness information, the ICTY Trial Chamber considered that in respect of several witnesses whose identity had been disclosed, they would potentially suffer from personal and psychological consequences. Moreover, in respect of three particular witnesses, it actually found that such personal and psychological consequences had been proven. The Chamber concluded that the accused's actions had in fact undermined the Tribunal's ability to safeguard the evidence of protected witnesses.⁷⁴

In the most controversial of contempt cases at the international tribunals, journalist and former spokesperson for the ICTY's Office of the Prosecutor, Florence Hartmann, was prosecuted. Ms. Hartmann was accused, and in the end convicted, of having disclosed confidential information from the *Milosevic* case at the ICTY. The case was severely criticised from different angles, mainly given the allegation that the confidential nature of the information that Hartmann allegedly disclosed had already been widely disseminated in the public domain, prior to Hartmann's publications.⁷⁵ The Appeals Chamber in *Prosecutor v. Hartmann* however concluded that both the article and the book

⁷¹ [ICTY, Appeals Chamber, Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 3](#); see further below.

⁷² [Special Court for Sierra Leone, Single Judge, In the Matter of Contempt Proceedings Arising from the Case of the Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-12-01-T, Judgment in Contempt Proceedings, 19 October 2012, para. 40.](#)

⁷³ [Ibid.](#), para. 43.

⁷⁴ [ICTY, Trial Chamber, Prosecutor v. Margetic, Case No. IT-95-14-R77.6, Judgement on allegations of contempt, 7 February 2007, paras. 86-87.](#)

⁷⁵ See for example [Ruth Wedgwood, 'The Strange Case of Florence Hartmann', in: *The American Interest*, Vol. 4, No. 6](#). This argument parallels the judgment of the European Court in *Observer and Guardian v. The UK*, finding that once the book was published in another country with no ban on importation, the interest of the state in maintaining confidentiality ceased to exist; see [European Court of Human Rights, Observer and Guardian v. The UK, 26 November 1991.](#)

authored by Hartmann violated the confidential nature of the two orders,⁷⁶ and that this disclosure of confidential information “decreased the likelihood that states would cooperate with the Tribunal in the future, thereby undermining its ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law.”⁷⁷

3.3 Contempt proceedings at the STL

In the *Al Jadeed and Al Khayat* contempt case before the STL,⁷⁸ the accused, Al Jadeed TV corporation and its deputy head of news Ms. Khayat, were charged with contempt of court for broadcasting and/or publishing information on purported confidential witnesses in the main case “thereby undermining the public confidence in the Tribunal’s ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses” (count one) and also for non-compliance with a court order to remove that particular information from its website and YouTube channel (count two).⁷⁹

With respect to count one, the Defence argued that no names of individuals were released, that their faces had been pixelated in the broadcasts and that the aim of the broadcasts was to call into question the functioning of the Court, given that this information had been leaked from within the Court.⁸⁰ The Amicus Curiae Prosecutor argued that the information released included the individuals’ initials, voices, professions, work places, towns or other geographic location, as well as the backgrounds visible in the broadcasts, and that this could easily lead to identification of the individuals.⁸¹

The case was adjudicated by the Contempt Judge on 18 September 2015, whereby the natural person, Ms. Khayat, was found guilty of the second count of contempt of court - namely her failure to remove the confidential information from their website and YouTube channel following a court order to do so - but was acquitted for the first count of undermining the public confidence in the Tribunal’s ability to protect the confidentiality of information. The corporate accused, Al Jadeed TV,

⁷⁶ [ICTY, Appeals Chamber, Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 3.](#)

⁷⁶ [Ibid., para. 162 \(footnotes omitted\).](#)

⁷⁷ [Ibid.](#)

⁷⁸ It is unfortunate that it has been problematic to scrutinise the Tribunal’s decision and other aspects of the case in detail, because of the fact that part of the *Al Jadeed & Al Khayat* case took place in closed session and a seemingly large portion of the evidence has been kept from the public.

⁷⁹ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/I/CJ, Redacted version of decision in proceedings for contempt with orders in lieu of an indictment, 31 January 2014, paras. 36-37.](#)

⁸⁰ [STL, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/PT/CJ, Public redacted version of “Defence final trial brief”, 16 June 2015, para. 27 under \(a\).](#)

⁸¹ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015, para. 74.](#)

was acquitted of all charges.⁸² The Amicus Curiae Prosecutor has filed a notice of appeal against the judgment.⁸³

In the contempt judgment, the Judge held that in principle the disclosure of information on purported witnesses can undermine public confidence in the Tribunal's ability to protect the confidentiality of information about or from (potential) witnesses, and as such interfere with the administration of justice.⁸⁴ He added that the disclosure of this type of information does not automatically constitute contempt,⁸⁵ but that the conduct "must have been of sufficient gravity to create, objectively, the likelihood of undermining the public confidence in the Tribunal's ability to protect" its witnesses.⁸⁶ However, the Contempt Judge held that, whilst identifying information had been disclosed by Ms. Khayat, the Prosecution had not substantiated that the persons concerned suffered any harm from these disclosures,⁸⁷ neither could he conclude that the disclosure of the information had had any impact on the witnesses' confidence in the Tribunal's ability to protect information.⁸⁸ The *actus reus* of the alleged crime in count one had thus not been proved by the Prosecutor.⁸⁹

The second count relates to the allegation that the defendants had failed to remove from their website and YouTube channel several episodes that gave information on purported confidential witnesses. On 10 August 2012, the Chamber had issued an order to immediately remove the episodes from the websites.⁹⁰ Referring to the case of the *Prosecutor v. Hartmann* at the ICTY, the Contempt Judge indicated that it is sufficient for the Prosecution to establish that the act was deliberate and not accidental for a finding that the accused intended to violate the court order.⁹¹ Whilst it was at issue whether or not defendant Ms. Khayat had received this order, the Contempt Judge concluded that she had either seen the order, or deliberately chose to ignore it.⁹² Given that Ms. Khayat's behaviour or that of her colleague Ms. Bassam, could not be attributed to Al Jadeed TV, the Contempt Judge found that the corporate entity could not be found guilty of count two.⁹³

⁸² [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015.](#)

⁸³ [STL, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/A/AP, Prosecution's Notice of Appeal, 5 October 2015.](#)

⁸⁴ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, 18 September 2015, Public redacted version of judgment, para. 40.](#)

⁸⁵ [Ibid., para. 45.](#)

⁸⁶ [Ibid., para. 46.](#)

⁸⁷ [STL, Pre-Trial Judge, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/PTJ, Order for Immediate Removal of Disseminated Material and Cessation of Dissemination, 10 August 2012, para. 122.](#)

⁸⁸ [Ibid., para. 124.](#)

⁸⁹ [Ibid., para. 127.](#)

⁹⁰ [STL, Pre-Trial Judge, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/PTJ, Order for Immediate Removal of Disseminated Material and Cessation of Dissemination, 10 August 2012.](#)

⁹¹ [Ibid., para. 54.](#)

⁹² [Ibid., paras. 172-173.](#)

⁹³ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015, para. 190.](#)

On 6 October 2015, the Contempt Judge issued the Reasons for Sentencing Judgment, in which he found that the knowing violation of a court order is a serious offence since it defies the Tribunal's authority.⁹⁴ The Contempt Judge held that the fact that the publication of the episodes did not undermine the public's confidence in the Tribunal was a mitigating circumstance.⁹⁵ The Contempt Judge imposed a fine of 10,000 Euros.⁹⁶

IV. CONCLUDING REMARKS: FREEDOM OF EXPRESSION IN THE CONTEXT OF CONTEMPT OF COURT

In the *Al Jadeed and Al Khayat* contempt case, the Chamber's order to remove the episodes from the websites as well as the contempt of court proceedings against the media company and its deputy head of news are undeniably interferences with the exercise of the right to freedom of expression. The next, and more interesting, question is whether this interference is in accordance with the human rights standards as laid down by the ICCPR and, in the second place, the ECHR, including the interpretation of the Human Rights Committee and the European Court for Human Rights.

One of the main objections to the law of contempt of court has been its uncertainty as the law is mostly judge made. The same applies to a certain extent to the law on contempt of court before the international criminal tribunals, although over time this law has been crystallised through a number of contempt cases. The Contempt Judge at the STL also relied on the jurisprudence of the ICTY.⁹⁷ Whilst contempt of court as such has been laid down in the STL's Rules of Procedure and Evidence, legality issues arose with the prosecution of a corporate entity, Lebanese television company Al Jadeed TV, under international criminal law. The STL Appeals Chamber read into the word "persons" in rule 60*bis* on contempt of court another interpretation of the same word "persons" in article 1 of the STL Statute. This latter article provides jurisdiction for the common international crimes and is limited to natural persons. However, where it concerns contempt of court, the Appeals Chamber has expanded the STL's jurisdiction to include legal persons.⁹⁸ The reasoning that led the Contempt Judge to conclude that the addition of "legal" to "person" cannot be read into the text where it is not explicitly included - which was rejected by the

⁹⁴ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Reasons for Sentencing Judgment, 6 October 2015, para. 17.](#)

⁹⁵ [Ibid., para. 18.](#)

⁹⁶ [Ibid., para. 22.](#)

⁹⁷ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, 18 September 2015, Public redacted version of judgment, para. 54, and footnotes 54, 57, 69, 71-72, 78, 81-86, 89-91, and 96-103.](#)

⁹⁸ [STL, Appeals Chamber, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, 24 July 2014.](#)

Appeals Chamber - warrants merit.⁹⁹ The Contempt Judge in the contempt trial judgment analysed the existence of a possible customary norm in respect of corporate liability, and stated that “state practice varies significantly”,¹⁰⁰ and rightly concluded that no such norm exists. The prosecution of corporate entities without an explicit basis in the law, whilst at the same time restricting their right to freedom of speech, is thus not in accordance with the requirement “prescribed by law”.

As to the legitimate aim pursued, the Contempt Judge, in relation to count one, refers to “maintaining public confidence in courts’ authority and their ability to administer justice is essential to protecting their proper functioning.”¹⁰¹ Count two deals with the violation of a court order. The aim pursued by these contempt of court proceedings clearly is the good administration of justice, and should be tested against the public order ground of article 19(3) ICCPR. Interestingly, the Contempt Judge makes reference to the European Court case of *Worm v. Austria*, in which a journalist was convicted for having exercised prohibited influence on criminal proceedings by publishing an unfavourable article about the criminal trial (and the guilt) of a former Minister.¹⁰² By referring to this European Court case, the Contempt Judge is relying on “maintaining the authority and impartiality of the judiciary” as the legitimate aim pursued, an aim that is only contained in the ECHR and not in the ICCPR.¹⁰³

Further, in the case of *Worm v. Austria*, the European Court established that “the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice”.¹⁰⁴ Therefore, the European Court indeed allowed for the pursuance of a legitimate aim similar to the contempt cases before the STL. However, the European Court gave the Austrian state a wide margin of appreciation in permitting a law that infringes on the right to freedom of expression but does not require an actual result of influence on the proceedings.¹⁰⁵ It is unlikely that the Human Rights Committee, with its rejection of the margin of appreciation and requirement of a nexus between the threat and the expression, would have come to the same conclusion. It is therefore unclear why

⁹⁹ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/PT/CJ, Decision on motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, 24 July 2014, para. 72;](#) and [STL, Appeals Chamber, Amicus Curiae Prosecutor v. Al Jadeed and Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, 24 July 2014, para. 74.](#)

¹⁰⁰ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, 18 September 2015, Public redacted version of judgment, para. 62.](#)

¹⁰¹ [Ibid., para. 40.](#)

¹⁰² [European Court of Human Rights, Worm v. Austria, 29 August 1997;](#) [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015, para. 40 and footnote 63.](#)

¹⁰³ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, 18 September 2015, Public redacted version of judgment, para. 40 and footnote 63.](#)

¹⁰⁴ [European Court of Human Rights, Worm v. Austria, 29 August 1997, para. 50.](#)

¹⁰⁵ [Ibid., paras. 52-56.](#)

the Contempt Judge solely relied on this particular European Court case and without any reference to ICCPR, which clearly has a more authoritative status in international law.

The next question is whether the restrictions taken on the basis of this legitimate aim are directed against a specific threat, and are necessary and proportionate. In relation to count one, the Contempt Judge found that although the information provided in the broadcasts permitted the identification of purported confidential witnesses, the Prosecutor had not proven beyond reasonable doubt that this disclosure was objectively likely to undermine public confidence in the Tribunal's ability to protect the confidentiality of information. This conclusion was based on the absence of proof that the individuals suffered any harm of the disclosures and of proof that the broadcasts had any impact on the witnesses' or general public's confidence in the Tribunal.¹⁰⁶ This is exactly what the Human Rights Committee is referring to when stressing that the precise nature of the threat needs to be demonstrated in a specific and individualised fashion, in particular by establishing a direct and immediate connection between the expression and the threat.¹⁰⁷ The Contempt Judge consequently concluded that the connection between the broadcasting of the episodes and the threat of undermining the public's confidence could not be established (a similar test was applied in the case of the *Prosecutor v. Margetic* at the ICTY, in which the connection between the accused's actions and the Tribunal's ability to safeguard evidence of protected witnesses had been proven beyond reasonable doubt¹⁰⁸).

The fact that this connection between the broadcasts and the alleged threat of undermining the public's confidence has not been proven, creates a paradoxical situation in relation to the conviction on the basis of the second count. The Contempt Judge found that the disclosure of the information itself did not amount to contempt of court, but convicted the accused Ms. Khayat for violating an order to remove this information. The Contempt Judge acknowledged in relation to count one the need to weigh the integrity of the proceedings against the freedom of expression, but refrained from applying this test in view of the acquittal of the accused for this count.¹⁰⁹ However, and on this the Contempt Judge remained silent, the ICCPR standard on restrictions to freedom of expression, part of general international law, also applies to the second count, as this also involves an infringement of freedom of expression. The ICTY has found that a court order, if authorised by law and necessary for maintaining a legitimate aim, constitutes a valid limitation to the freedom of expression.¹¹⁰ Now that it has not been proven that the conduct underlying the order of 10 August

¹⁰⁶ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015, paras. 78-91, 120-127.](#)

¹⁰⁷ [Human Rights Committee, General Comment No. 34, 12 September 2011, para. 35.](#)

¹⁰⁸ See also above in section 3.3, and [ICTY, Trial Chamber, Prosecutor v. Margetic, Case No. IT-95-14-R77.6, Judgement on allegations of contempt, 7 February 2007, paras. 86-87.](#)

¹⁰⁹ [STL, Contempt Judge, Amicus Curiae Prosecutor v. Al Jadeed & Al Khayat, Case No. STL-14-05/T/CJ, Public redacted version of judgment, 18 September 2015, para. 41.](#)

¹¹⁰ [ICTY, Trial Chamber, Prosecutor v. Jovic, Case No. IT-95-14&IT-95-14/2-R77, Judgement, 30 August 2006, para. 23; ICTY, Trial Chamber, Prosecutor v. Marijadic & Rebic, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 39.](#)

2012 is criminal and amounts to contempt of court, it can be questioned whether the order was necessary as both the precise nature of the threat, and the direct and immediate connection between the expression and the threat have not been demonstrated.

Therefore, instead of fighting the contempt allegations, the accused could have attempted to challenge the order of 10 August 2012 on the basis of violation of their freedom of expression. However, given that Ms. Khayat has always denied receipt of the order, she is not in a position to challenge the legality of the order itself. Another relevant question in this regard is whether Ms. Khayat and Al Jadeed would have had standing in front of the STL, had they wanted to appeal from the order, as they were not yet a party to any STL proceedings at that point in time.

Conclusively, so far the contempt proceedings at the STL have not been unproblematic, centring on the Contempt Judge's disagreement with the appeals panel on the legality of prosecuting corporate entities for this crime. Whilst the appeals proceedings against the contempt judgment have not yet started, and the second contempt case against Mr. Al Amin and newspaper Akhbar Beirut will commence in early 2016, at this stage the jurisprudence is not yet very convincing. Freedom of expression is a fundamental international human rights norm, especially where it concerns journalists, and warrants a more carefully formulated test for legitimate interference with that norm.