

**THE CONTEMPT JUDGE**

Case No.: STL-14-05/PT/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 28 November 2014
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

Decision on Two Motions for Admission of Written Statements

***Amicus Curiae* Prosecutor:**
Mr Kenneth Scott

**Counsel for *Al Jadeed* [CO.] S.A.L./
NEW T.V. S.A.L. (N.T.V.) and
Ms Karma Khayat:**
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Maya Habli
Ms Shyamala Alagendra



INTRODUCTION

1. On 13 October 2014, the *Amicus Curiae* Prosecutor (“*Amicus*”) filed his “Motion for Admission of Written Statements Under Rule 155”, requesting admission of five witness statements, along with associated exhibits.¹ The Defence responded, opposing the *Amicus*’s requests and, alternatively, in the event I admit the statements under Rule 155 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), seeking the right to cross-examine each witness.²

2. Also on 13 October 2014, the *Amicus* filed his “Motion for Admission of Written Statements Under Rule 154, or, Alternatively, Under Rule 156”, requesting admission of two witnesses’ records of interview.³ The Defence responded, not opposing admission of the documents under Rule 154. With respect to the alternative relief sought (that is admission of the records of interview under Rule 156), the Defence opposes the admission of one of them under that Rule.⁴

3. In this decision, I am addressing both Motions together. I am granting the First Motion in part, finding that the statements are admissible under Rules 155 (for two witnesses) and 156 (with respect to the other three witnesses). However, the *Amicus* must present all witnesses for cross-examination. I am also granting the Second Motion, finding that the records of interview are admissible under Rule 154.

APPLICABLE LAW

4. Both Motions seek admission of evidence in written form. The following provisions of the Rules, which apply *mutatis mutandis*, are relevant to my determination.

5. As a general matter, pursuant to Rule 149 (C), the Contempt Judge may admit any relevant evidence which he deems to have probative value. Rule 154 empowers the Contempt

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0064, Motion for Admission of Written Statements Under Rule 155 of the Rules of Procedure and Evidence, Public with Confidential Annexes, 13 October 2014 (“First Motion”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0073, Defence Response to Motion for Admission of Written Statements Under Rule 155 of the Rules of Procedure and Evidence, Confidential, 23 October 2014 (“Response to First Motion”).

³ F0065, Motion for Admission of Written Statements Under Rule 154, or, Alternatively, Under Rule 156 of the Rules of Procedure and Evidence, Public with Confidential Annexes, 13 October 2014 (“Second Motion”).

⁴ F0072, Defence Response to Motion for Admission of Written Statements Under Rule 154, or, Alternatively, Under Rule 156 of the Rules of Procedure and Evidence, Confidential, 23 October 2014 (“Response to Second Motion”).

Judge to admit such evidence in the form of a document or other record, subject to Rules 155, 156 and 158, and consistent with Rule 149 (C) and (D).

6. Under Rule 155 (A), the Contempt Judge may admit, in lieu of oral testimony, the evidence of a witness in the form of a written statement that goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. The Rule provides a non-exhaustive list of factors in favour of admission, as well as factors against admission. Further, Rule 155 (B) and the Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court Under Rule 155 (“Practice Direction”)⁵ state technical requirements a witness statement must satisfy. Finally, pursuant to Rule 155 (C), the Contempt Judge, after hearing the parties, shall decide whether to require the witness to appear for cross-examination. The Contempt Judge may determine that the interests of justice and the demands of a fair and expeditious trial exceptionally warrant admission of the statement without cross-examination. However, if the Contempt Judge finds that the witness must appear for cross-examination, Rule 156 applies.

7. Under Rule 156, the Contempt Judge may admit, in lieu of examination in chief, the evidence of a witness in the form of a written statement that goes to proof of the acts and conduct of the accused as charged in the indictment, only if the following conditions are met: (1) the witness is present in court; (2) the witness is available for cross-examination and any questioning by the Contempt Judge; and (3) the witness attests that the written statement accurately reflects that witness’s declaration and what the witness would say if examined.

DISCUSSION

I. First Motion for Admission of Written Statements

A. The position of the Amicus

8. The *Amicus* requests that the statements of five witnesses—AP03, AP04, AP05, AP06 and AP10⁶—be admitted into evidence pursuant to Rules 149 and 155, along with associated exhibits that he characterizes as “documents and other evidentiary material that accompany a

⁵ 15 January 2010, STL-PD-2010-02.

⁶ First Motion, Annex A, Confidential; F0066, Amended Prosecution Pre-Trial Brief, Confidential, 13 October 2014 (“Amended Prosecution PTB”), Annex A.

witness statement and [...] form an inseparable and indispensable part of the testimony, such that the statement would be of lesser probative value without them”.⁷

9. The *Amicus* contends that the proposed evidence is relevant, reliable and has probative value, as required by Rule 149.⁸ He also submits that the statements were prepared in compliance with Rule 155 (B) and the relevant Practice Direction.⁹

10. With respect to Rule 155 (A), he asserts that none of the proposed evidence goes to the acts and conduct of the Accused; rather it relates to the following three matters: (1) the impact and negative effects of the publication or disclosure of witness information on actual, potential or alleged witnesses; (2) service of the Pre-Trial Judge’s 10 August 2012 Order; and (3) confirmation of the continuing availability of *Al Jadeed* broadcasts on Al Jadeed TV’s website.¹⁰ Further, in regards to the factors supporting admission of a written statement, the *Amicus* argues that “some of the evidence can be said to concern the ‘impact of crimes upon victims’” and that “the witnesses should not be unnecessarily burdened by travelling to the Tribunal, when their statements are sufficient and there is no significant reason to believe that the evidence is unreliable”.¹¹ Moreover, he proposes that some of the evidence is corroborative or cumulative in nature.¹²

11. As for Rule 155 (C), the *Amicus* avers that any need for cross-examination is outweighed by the interests in an efficient and expeditious trial and reducing the burden on witnesses.¹³

12. Finally, the *Amicus* notes that two of the witness statements are, as of the filing date for this Motion, subject to interim non-disclosure and are at issue in a pending request for protective measures. Accordingly, he requests that the material contained in the two statements remain confidential pending a decision on protective measures and, if such measures are denied, time to consult with the two witnesses.¹⁴

⁷ First Motion, paras 1, 10, 13.

⁸ *Id.* at para. 6.

⁹ *Id.*

¹⁰ *Id.* at para. 5.

¹¹ *Id.* at para. 7.

¹² *Id.* at para. 8.

¹³ *Id.* at para. 9.

¹⁴ *Id.* at para. 11.

B. The position of the Accused

13. The Defence opposes admission of the witness statements under Rule 155 because, it argues, the statements either go to the acts and conduct of the Accused or fail the balancing test for admission under the Rule.¹⁵ However, if I admit the statements, the Defence objects to the *Amicus* request that the witnesses not be made available for cross-examination.¹⁶ It contends that to deny cross-examination of witnesses whose testimony will be relied on to prove key elements of the alleged crimes would be highly prejudicial.¹⁷

14. Regarding the statements of Witnesses AP03 and AP04, the Defence argues that the proposed evidence goes to the acts and conduct of the Accused and is not peripheral or background evidence.¹⁸ Specifically, the Defence asserts that, according to the *Amicus*, the evidence is intended to prove element 3 of Count 2, namely the Accused's knowledge of the 10 August 2012 Order.¹⁹ Alternatively, for the above-stated reason,²⁰ if these statements are admitted under Rule 155, the Defence requests to be able to cross-examine the witnesses.²¹ Finally, the Defence submits that the "Report of Service" related to the statements should not be admitted into evidence before the Defence has an opportunity to cross-examine the witness on it.²²

15. As for the statement of Witness AP10, the Defence again avers that the proposed evidence goes to the acts and conduct of the Accused, namely their supposed responsibility for publishing purportedly confidential witness information, particularly on the internet.²³ However, if the statement is admitted under Rule 155, the Defence argues that, given its brevity and lack of detail, cross-examination of the witness must be permitted.²⁴

16. Finally, with respect to the statements of Witnesses AP05 and AP06, the Defence submits that, due to the state of relevant disclosure at the time this response was filed, it is not in a

¹⁵ Response to First Motion, para. 1.

¹⁶ *Id.* at para. 2.

¹⁷ *Id.*

¹⁸ *Id.* at para. 7.

¹⁹ *Id.* at paras 8-10.

²⁰ *See above* para. 13.

²¹ Response to First Motion, para. 12.

²² *Id.* at para. 13.

²³ *Id.* at paras 15-16.

²⁴ *Id.* at para. 17.

position to properly assess a Rule 155 motion and thus should be granted additional time.²⁵ In the event I disagree, the Defence, while conceding that the proposed evidence does not go to the acts and conduct of the Accused, nonetheless objects to admission on the ground that the statements are the *Amicus*'s only direct evidence for element 1 of Count 1, namely the impact suffered by individuals in Lebanon due to the alleged disclosure of their identities as Tribunal witnesses.²⁶ However, if the statements are admitted under Rule 155, the Defence contends that it must be allowed to cross-examine the witnesses because the proposed evidence is not peripheral or background evidence and may be unreliable.²⁷

C. Discussion

1. Compliance with Rule 155 (B) and the Practice Direction

17. Statements of witnesses submitted under Rule 155 must comply with the provisions of Rule 155 (B) and the relevant Practice Direction. Here, the proffered statements of the witnesses substantially meet the applicable requirements. I note that, while certain of the statements contain minor errors in this regard,²⁸ it is within my discretion to depart from strict application where it could result in injustice or prejudice to a Party.²⁹ I am satisfied that these statements adequately comply with the applicable rules.

2. Witnesses AP03 and AP04

18. The statements of Witnesses AP03 and AP04 pertain to the service of the Pre-Trial Judge's 10 August 2012 Order.³⁰

19. The proposed evidence is relevant and satisfies Rule 149 (C), as it concerns element 3 of Count 2—the Accused's knowledge of the Pre-Trial Judge's Order.³¹ Consequently, contrary to

²⁵ Response to First Motion, para. 19.

²⁶ *Id.* at paras 18, 21.

²⁷ *Id.* at paras 20-23.

²⁸ I note that the name of the interviewer is missing on the witness information page for the witness statement of Witness AP10. However I consider that this is a minor and inconsequential breach, as the signature of the interviewer is on the bottom of the page. In addition, the name of the interviewer is listed on the interviewer's certificate.

²⁹ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements Under Rule 155, 30 May 2013, para. 20.

³⁰ See First Motion, Annex B, Confidential.

³¹ STL, *In the Case Against New T.V. S.A.L. and Khayat*, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, Amended Order in Lieu of an Indictment, 31 January 2014 ("Indictment Decision"), para. 45.

the *Amicus*'s assertion, such material also goes to proof of the acts and conduct of the Accused, namely the Accused's awareness of the Order. I accept that the awareness of the employee alleged to have personally received the Order from Witnesses AP03 and AP04 could possibly, as the Defence argues, be attributed as a matter of law to the corporate Accused in this case.³² Therefore these statements are not admissible under Rule 155. However, they are admissible under Rule 156 if certain conditions are met, which guarantee the Defence an opportunity to cross-examine the witnesses.

20. With respect to the submitted "Report of Service", I first note that documents or other evidentiary material that accompany a witness statement and which form an inseparable and indispensable part of the testimony may be admitted into evidence.³³ Such may be the case when the document in question is discussed by the witness in the statement.³⁴ Here, both witnesses make detailed reference to the "Report of Service" in their statements. I thus consider the Report intrinsically linked to the witness statements and therefore relevant. It is also of probative value. I therefore find that the Report is admissible.

3. Witness AP10

21. Witness AP10's statement pertains to the alleged availability of the *Al Jadeed* TV broadcasts at issue on *Al Jadeed* TV's website on certain dates.³⁵

22. The proposed evidence is relevant and satisfies Rule 149 (C), as it plainly concerns element 1 of both Counts.³⁶ However, again contrary to the *Amicus*'s submission, the proposed evidence does go to proof of the acts and conduct of the Accused—publishing the broadcasts online and failing to remove them—and therefore the statement is not admissible under Rule 155. But, as above, it may still properly be admitted under Rule 156 if certain conditions are met. Such admission permits cross-examination as sought by the Defence.

³² Response to First Motion, para. 10.

³³ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, para. 13.

³⁴ See, e.g., ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-31/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 Ter, 9 July 2008, para. 15.

³⁵ See First Motion, Annex B, Confidential.

³⁶ Indictment Decision, paras 36, 44.

4. Witnesses AP05 and AP06

23. The statements of Witnesses AP05 and AP06's pertain to "the [putative] impact and negative effects of the publication or disclosure of witness information concerning actual, potential or alleged witnesses".³⁷

24. I consider that the proposed evidence is relevant and satisfies Rule 149 (C), as it concerns element 2 of Count 1.³⁸ Additionally, as the Defence acknowledges, the proposed evidence does not go to the acts and conduct of the Accused. Rather, it concerns the impact of the alleged crimes. Moreover, while the Defence will soon receive versions of the statements with some remaining redactions,³⁹ in my view nothing withheld militates against admission. The statements are therefore appropriately admissible under Rule 155. However, with respect to Rule 155 (C), and particularly in light of the Defence concerns, I am not persuaded that these statements should be admitted without the possibility of cross-examination. The statements relate to the *Amicus*'s anticipated evidence regarding the impact of the Accused's alleged conduct. Although this is not *per se* an element of the crime charged, such impact appears at this stage of the proceedings central to the charges contained in Count 1. There is thus good reason why the Defence should have an opportunity for cross-examination. Accordingly, pursuant to Rule 155 (C), the conditions provided in Rule 156 apply.

II. Second Motion for Admission of Written Statements

A. *The position of the Amicus*

25. The *Amicus* requests that the records of interview of two witnesses—AP11 and AP12⁴⁰—be admitted into evidence pursuant to Rule 154.⁴¹ In a confidential annex he explains why these documents are relevant and probative.⁴² In the alternative, he requests admission under Rule 156.⁴³

³⁷ See First Motion, para. 3; First Motion, Annex B, Confidential.

³⁸ Indictment Decision, para. 37.

³⁹ F0088, Decision on *Amicus Curiae* Prosecutor's Request for Reconsideration of Decision of 14 November 2014, 28 November 2014 (a public redacted version was filed the same day).

⁴⁰ See Second Motion, Annex B, Confidential; Amended PTB, Annex A.

⁴¹ Second Motion, para. 6.

⁴² Second Motion, Annex A, Confidential.

⁴³ Second Motion, para. 6.

B. The position of the Defence

26. The Defence does not object to the admission of this evidence under Rule 154. However, it opposes the alternative relief to admit the records of interview under Rule 156 with respect to Witness AP11.⁴⁴

C. Discussion

27. I note that the Defence does not object to the admission into evidence of the two records of interview of Witnesses AP11 and AP12. Given the content of those documents, I find them relevant and therefore admissible. There is no need for me decide the alternative relief requested by the *Amicus*.

III. Impact on scheduling of the trial

28. In light of this decision, I order the *Amicus* to inform me, after consulting with the Defence and my Legal Officers, of the proposed time he requires to present his case-in-chief. This will facilitate my decision on the scheduling of the trial. The *Amicus* must file his submissions within seven days of this decision.

IV. Confidentiality

29. I render this decision publicly as it does not reveal any confidential information, such as the identity of protected witnesses.

⁴⁴ Response to Second Motion, para. 12.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rules 60 *bis* (H), 149 (C), 154, 155 and 156;

I

GRANT the *Amicus*'s First Motion, in part;

DECIDE that the statements and associated exhibits, as applicable, are admissible, as set out above;

REQUIRE the *Amicus* to make available for cross-examination either in Leidschendam or via video-conference link—Witnesses AP03, AP04, AP05, AP06 and AP10;

DENY the First Motion in all other respects;

GRANT the *Amicus*'s Second Motion;

DECIDE that the two records of interview are admissible, as set out above;

ORDER the *Amicus* to file within seven days of this decision, and after consulting with the Defence and my Legal Officers, submissions on the proposed time he requires for his case-in-chief.

Done in Arabic, English and French, the English version being authoritative.

Dated 28 November 2014

Leidschendam, the Netherlands

Judge Nicola Lettieri
Contempt Judge

