

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-05/PT/CJ

Before: Judge Nicola Lettieri, Contempt Judge

Registrar: Mr Daryl Mundis, Registrar

Date: 30 January 2015

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

**PUBLIC REDACTED VERSION OF DECISION ON DEFENCE APPLICATION FOR
DISCLOSURE OF THE STATEMENT OF A FORMER PROSECUTION WITNESS**

***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 Shyamala Alagendra



INTRODUCTION

1. On 11 June 2014, pursuant to Rule 115 (A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the *Amicus Curiae* Prosecutor ("*Amicus*") sought interim non-disclosure *vis-à-vis* the Defence of the identity and witness statement of Protected Witness 3 ("PW3"), *inter alia*, on the basis that "disclosure [...] would expose victims, witnesses and/or their families to risk of serious harm, harassment and intimidation".¹ The *Amicus* proposed instead to provide a written summary of PW3's statement to the Defence, with further disclosures to be made closer to trial upon implementation of other protective measures.² On the same day, by way of letter, the *Amicus* gave a summary of PW3's statement to the Defence, which read:

[REDACTED].³

2. On 20 June 2014, I granted the Interim Non-Disclosure Application.⁴ I found that "exceptional circumstances exist[ed]" and that interim non-disclosure was "warranted until appropriate protective measures [were] implemented".⁵ I noted the *Amicus*'s commitment to make further disclosures and provide the Defence a summary of PW3's statement.⁶

3. On 1 September 2014, the *Amicus* filed his Pre-Trial Brief.⁷ PW3 was listed as a witness.⁸ According to the *Amicus*, PW3's testimony would be relevant to "element 2 of Count 1" in the Decision in Proceedings for Contempt with Orders in Lieu of an Indictment ("Order in Lieu of an Indictment").⁹

4. On 13 October 2014, the *Amicus* filed his Amended Pre-Trial Brief.¹⁰ PW3 was no longer included as a witness.¹¹

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0031, Redacted Version of "Application for Protective Measures and Non-Disclosure with Annexes", Dated 11 June 2014, 30 June 2014 ("Interim Non-Disclosure Application"), paras 6, 14, 16. All further references to filings and decisions refer to this case number unless otherwise stated.

² *Id.* at para. 15.

³ F0091, Defence Application for Disclosure of the Statement of a Former Prosecution Witness, Confidential with Confidential Annexes, 8 December 2014 ("Application"), Annex A.

⁴ F0045, Decision on *Amicus Curiae* Prosecutor's Application for Protective Measures and Non-Disclosure, 20 June 2014 ("Interim Non-Disclosure Decision").

⁵ *Id.* at para. 7.

⁶ *Ibid.*

⁷ F0057, Prosecution Pre-Trial Brief, Confidential, 1 September 2014.

⁸ *Id.* at Annex A, Confidential.

⁹ *Ibid.*

¹⁰ F0066, Amended Prosecution Pre-Trial Brief, Confidential, 13 October 2014 ("Amended PTB").

¹¹ *Id.* at Annex A, Confidential.

5. On 22 October 2014, the Defence sought disclosure of PW3's statement directly from the *Amicus* pursuant to Rule 110 (B).¹² The *Amicus* refused this request.¹³ Consequently, the Defence filed the present Application for disclosure of PW3's statement, which the *Amicus* opposes.¹⁴

APPLICABLE LAW

6. The Defence seeks disclosure of the witness statement of a person formerly listed as a prosecution witness, whom the *Amicus* no longer intends to call as a witness. Both the identity and statement of this person have been subject to an interim non-disclosure order *vis-à-vis* the Defence. The following provisions of the Rules, which apply *mutatis mutandis* in these proceedings,¹⁵ bear on my determination.

7. Rule 110 (B) states, in relevant part:

The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence [...].

8. With respect to interim non-disclosure of identity, Rule 115 provides, in relevant part:

(A) In exceptional circumstances, the Prosecutor may apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until appropriate protective measures have been implemented.

[...]

(C) Subject to Rule 133, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

9. In regards to permanent non-disclosure, Rule 116 reads, in relevant part:

(A) Where information in the possession of the Prosecutor is not obtained under or otherwise subject to Rule 118, and its disclosure would ordinarily be required under

¹² Application, Annex B, Confidential.

¹³ *Id.* at Annex C, Confidential.

¹⁴ *Ibid.*; F0094, Response to the "Defence Application for Disclosure of the Statement of a Former Prosecution Witness" Dated 8 December 2014, Confidential, 19 December 2014 ("Response").

¹⁵ Rule 60 *bis* (H) STL RPE.

Rule 110 or 113, but such disclosure (i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties, the Prosecutor may apply *ex parte* to the Trial Chamber sitting *in camera* to be relieved in whole or in part of an obligation under the Rules to disclose that material.

DISCUSSION

A. The position of the Accused

10. The Defence seeks an order, pursuant to Rule 110 (B), requiring the *Amicus* to disclose the identity and statement of PW3.¹⁶ It submits that a statement made by a person who was to provide evidence relevant to a legal element of the charges against the Accused *prima facie* satisfies the Rule's materiality test.¹⁷ The Defence further asserts that PW3's statement is material to its preparation for witnesses AP05, AP06 and AP07, and, more broadly, to the alleged repercussions of the disclosure of purported Tribunal witnesses.¹⁸ Relying on the *Amicus*'s summary of PW3's statement, the Defence argues that PW3's statement is presumably not limited to the personal effects of disclosure of PW3's own identifying information, in contrast to the statements of AP05 and AP06.¹⁹ The Defence also avers that PW3's statement appears to contain relevant analysis of the Lebanese context, about which AP07—the *Amicus*'s proposed expert on the effects of disclosure—supposedly has no special knowledge or expertise.²⁰ This contextual analysis is allegedly relevant to defence preparation in regards to AP05 and AP07 as well.²¹

11. Moreover, the Defence contends that the *Amicus*'s summary of PW3's statement does not satisfy the *Amicus*'s Rule 110 (B) disclosure obligations,²² taking into account that my Interim Non-Disclosure Decision is supposedly void in light of the *Amicus*'s decision to remove PW3 from his witness list.²³ The Defence also argues that there is no basis for permanent non-disclosure.²⁴

¹⁶ Application, para. 1.

¹⁷ *Id.* at para. 22.

¹⁸ *Id.* at paras 23-24.

¹⁹ *Id.* at para. 23.

²⁰ *Id.* at para. 24.

²¹ *Ibid.*

²² Application, para. 28.

²³ *Id.* at paras 19-20.

²⁴ *Id.* at paras 25-27.

12. If, however, the *Amicus* requests and I grant permanent protective measures in regards to PW3, the Defence submits that the only appropriate counterbalancing measure would be disclosure of a redacted version of PW3's statement.²⁵ It asserts that, in the context of a person who will not be called as a prosecution witness, once a document is deemed material, the entire document must ordinarily be disclosed.²⁶ At a minimum, it contends, the Defence should receive "sufficient information on the specific basis and reasoning underlying any conclusions reached by [PW3] in his statement, as well as the particular details of any examples of alleged disclosure of identifying information of purported Tribunal witnesses contained in the witness' statement".²⁷

B. The position of the Amicus

13. The *Amicus* opposes the Application on the basis that, in regards to PW3's statement, the Defence has not made a *prima facie* showing of materiality.²⁸ He argues that the Defence request constitutes a fishing expedition²⁹ and that

[t]he only bases asserted for materiality, with no specificity or support whatsoever, is that "the prosecution [had previously] decided to call [Protected Witness 3] to provide evidence relevant to a legal element of a count against the two accused" and that Protected Witness 3's statement is material in that the latter's testimony was expected to relate to the same element as other witnesses.³⁰

He further submits that the statement "related to the evidence of other witnesses only in the sense that it incriminated the accused" and that, where this is the case, and "where that witness is no longer being called and therefore that evidence is no longer being offered against the accused, there is, absent something exculpatory, no basis for disclosure".³¹

14. The *Amicus* also rejects the Defence argument that the protective measures in place for PW3 are void in light of the witness's removal from the witness list.³² The *Amicus* principally avers that, because there are no grounds for disclosure, there is no reason to consider the status of

²⁵ Application, para. 28.

²⁶ *Id.* at paras 29-30.

²⁷ *Id.* at para. 31.

²⁸ Response, paras 9-10, 15.

²⁹ *Id.* at para. 15.

³⁰ *Id.* at para. 10.

³¹ *Id.* at paras 11-12.

³² *Id.* at para. 13.

protective measures.³³ He adds that the Defence has made no showing that the security situation with respect to PW3 has changed.³⁴

C. Discussion

1. Disclosure under Rule 110 (B)

15. I conclude that the *Amicus* must permit the Defence to inspect PW3's statement. Under Rule 110 (B), upon request, the Defence is entitled to inspect the statement if it is material to the Defence's preparation. The Appeals Chamber of this Tribunal has held, in light of the terms of the Rule and the apposite case-law of other international criminal courts and tribunals, that the (1) Defence must "demonstrate *prima facie* that what is requested is 'material to the preparation of the defence'; and (2) the test for 'materiality' under Rule 110 (B) is whether the books, documents, photographs or tangible objects are *relevant* to the preparation of the defence case".³⁵ The Appeals Chamber further recognized that preparation is a broad concept.³⁶ Here, the Defence has *prima facie* demonstrated that PW3's statement is material to its preparation.

16. In addition to the more general Defence argument recited by the *Amicus*, the Defence makes specific assertions of materiality with respect to its preparations for three prosecution witnesses—AP05, AP06 and AP07.³⁷ These witnesses are all expected to testify to the repercussions of disclosure, which, according to the *Amicus*, goes to proving "element 2 of Count 1"—that the acts of the Accused interfered with the administration of justice by undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.³⁸ AP05 and AP06 are currently the only witnesses testifying who allegedly suffered personal repercussions from the disclosure of purportedly confidential information and AP07 is to provide expert testimony on

³³ Response, paras 13-14.

³⁴ *Id.* at para. 13.

³⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, para. 21.

³⁶ *Id.* at para. 22. The Appeals Chamber also noted that relevance, in this context, is not necessarily directly linked to exonerating or incriminating evidence, limited to material relevant in countering prosecution evidence, related to the prosecution's case-in-chief or confined by the temporal scope of an indictment. Indeed the Appeals Chamber has specifically cited, as potentially material, items that could assist the defence in developing cross-examination strategy. *Ibid.*

³⁷ Application, paras 23-24.

³⁸ *Ibid.*; Amended PTB, Annex A, Confidential; STL, *In the case against New TV S.A.L. and 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, para. 37.

the impacts of disclosure.³⁹ Based on the representations made by the *Amicus* in his summary of PW3's statement, [REDACTED], the Defence claims that the statement could contain information on the actual effects of disclosure not provided by AP05 and AP06, as well as Lebanon-specific context in regards to the repercussions of disclosure.⁴⁰ With respect to AP07, the Defence submits that the witness, though a supposed expert, has no specialized knowledge related to "Lebanon, the wider-region [...], or actual issues related to victims and witnesses that have arisen during the Tribunal's proceedings" and that PW3's statement seems "to the contrary, [...] to provide Lebanon-specific analysis and examples that would clearly be relevant [...] to the preparation of the Defence".⁴¹

17. In light of the Order in Lieu of an Indictment and the *Amicus*'s own description of PW3's statement, the Defence claims are persuasive. The Defence has demonstrated that PW3's statement may contain information relevant to challenging the assertions of AP05, AP06 and AP07 concerning the effects of disclosure, which are at the centre of this case. Mindful that preparation is a broad concept and satisfied that the Defence has made a *prima facie* showing that PW3's statement is material to the preparation of the defence, I find that the *Amicus* must permit the Defence to inspect PW3's statement pursuant to Rule 110 (B).

2. Security Concerns

18. The Defence further contends that the Interim Non-Disclosure Decision is void given that PW3 has been removed from the *Amicus*'s witness list.⁴² The *Amicus* emphasizes that "there is no reason to debate protective measures where there is no basis for disclosure", but alternatively argues that the Defence "made no showing that the security situation concerning [PW3] has changed".⁴³ As I have decided that there is in fact a basis for disclosure, I must now consider the status of the interim measures I ordered on 20 June 2014.

19. Pursuant to Rule 115 (A), I granted interim non-disclosure *vis-à-vis* the Defence of the identities, and thus also the statements, of PW3 and two other witnesses.⁴⁴ Such non-disclosure can be granted to a "victim or witness who may be in danger or at risk until appropriate

³⁹ Amended PTB, Annex A, Confidential.

⁴⁰ Application, paras 23-24.

⁴¹ *Id.* at para. 24.

⁴² *Id.* at para. 20.

⁴³ Response, para. 13.

⁴⁴ Interim Non-Disclosure Decision.

protective measures have been implemented”.⁴⁵ In issuing my decision, I stated that the “*Amicus* has committed to further disclosures ‘when the case is closer to trial’” and reminded the *Amicus* “that I expect to be advised well in advance of the steps he intends to undertake to avoid undue prejudice to the Defence”.⁴⁶ The above-mentioned interim measures contemplated that the Defence would, at a later date, learn the identity and receive the statement of PW3; they were, by definition, intended to be temporary. Indeed, for the two witnesses who remain on the witness list, the *Amicus* eventually sought and recently was granted appropriate protective measures under Rule 116.⁴⁷ Conversely, the *Amicus* did not request such measures for PW3, presumably because he no longer intends to call PW3 as a witness at trial.

20. Thus, in light of the changed circumstances, I find that the interim protective measures ordered on 20 June 2014 are no longer applicable and that, as a result, PW3’s identity and statement are not currently subject to protective measures. If, as a consequence of this Decision, the *Amicus* seeks non-disclosure of PW3’s identity and statement to the Defence, or any other protective measures, he must bring an application under Rule 116.

D. Confidentiality

21. The submissions in this matter were filed confidentially. The Appeals Chamber has affirmed, in light of the principle of publicity, that confidential submissions and decisions “should be kept to a minimum and can only be justified for exceptional reasons, which may include the protection of victims and witnesses and the safeguarding of a continuing investigation [...]”.⁴⁸ The Appeals Chamber highlighted an important difference between maintaining the confidentiality of content contained within a document and keeping confidential the related litigation itself.⁴⁹ Though there is indeed information in both filings that should remain confidential, both, with appropriate redactions, should be made public. I therefore order the Parties to file public redacted versions of their submissions. A public redacted version of this Decision will also be issued.

⁴⁵ Rule 115 (A) STL RPE.

⁴⁶ Interim Non-Disclosure Decision, para. 7.

⁴⁷ F0084, Redacted Version of Decision on *Amicus Curiae* Prosecutor’s Application for Non-Disclosure and Request for Protective Measures with Annexes, 14 November 2014.

⁴⁸ STL, *In the Matter of El Sayed*, CH/AC/2013/01, F0005, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013, Dated 28 March 2013, 28 March 2013, para. 9.

⁴⁹ *Ibid.*

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rules 60 *bis* (H), 110 (B) and 115 (A) of the Rules;

I

ORDER the *Amicus* to permit the Defence to inspect the witness statement of PW3; and

ORDER the Parties to file public redacted versions of their submissions related to this Decision;
and

DISMISS the Motion in all other respects.

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

Dated 30 January 2015

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

