

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE CONTEMPT JUDGE**

**Case No.:** STL-14-05/T/CJ  
**Before:** Judge Nicola Lettieri, Contempt Judge  
**Registrar:** Mr Daryl Mundis, Registrar  
**Date:** 8 May 2015  
**Original language:** English  
**Classification:** Confidential

**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 WITNESS RANA SABBAGH**

***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 7 October 2014, I ordered the Parties to disclose any expert statements by 13 October 2014.<sup>1</sup>
2. On 23 April 2015, after the *Amicus Curiae* Prosecutor (“*Amicus*”) closed his case-in-chief, the Defence provided the *Amicus* with the witness statement of Defence witness Ms Rana Sabbagh, along with accompanying material.<sup>2</sup> The Defence disclosed Ms Sabbagh’s *curriculum vitae* on 28 April 2015.<sup>3</sup>
3. On 29 April 2015, the Defence submitted that Ms Sabbagh will be called as a mixed fact-expert witness.<sup>4</sup> In his subsequent notice pursuant to Rule 161 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), the *Amicus* opposed classifying Ms Sabbagh as an expert and allowing her to give expert evidence.<sup>5</sup> The Defence responded, asserting that Ms Sabbagh should be permitted to testify as a mixed fact-expert witness.<sup>6</sup>
4. For the reasons provided below, I do not admit any part of Ms Sabbagh’s witness statement as an expert statement and find that she cannot testify as an expert. Ms Sabbagh can testify as a fact witness.

## **APPLICABLE LAW**

5. Rule 154 states that “[s]ubject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149(C) and (D)”.
6. Rule 149 (C) and (D) provide that “[a] Chamber may admit any relevant evidence which it deems to have probative value. [...] [It] may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

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<sup>1</sup> STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0061, Decision on *Amicus Curiae* Prosecutor’s Request for Leave to Amend Order in Lieu of an Indictment and Scheduling Order, 7 October 2014 (“Order”), p. 6. All further references to filings and decisions refer to this case number unless otherwise stated.

<sup>2</sup> F0136, Submission of Defence List of Witnesses and List of Evidence, Public with Confidential Annexes, 29 April 2015 (“Submission”), para. 3.

<sup>3</sup> *Id.* at para. 3.

<sup>4</sup> *Id.* at para. 2.

<sup>5</sup> F0138, Submissions on Defence Expert, Confidential, 30 April 2015 (“Notice”), para. 22.

<sup>6</sup> F0145, Defence Response to Submissions on Defence Expert, Confidential with Confidential Annexes, 6 May 2015 (“Response”), para. 23.

7. Rule 161 on Testimony of Expert Witnesses reads as follows:

(A) The full statement of any expert witness to be called by a Party shall be disclosed to the opposing Party and to the victims participating in the proceedings within the time-limit prescribed by the Pre-Trial Judge or Trial Chamber.

(B) Within thirty days of disclosure of the statement of the expert witness, or such other time prescribed by the Pre-Trial Judge or the Trial Chamber, the opposing Party shall file a notice indicating whether:

(i) it accepts the expert witness statement;

(ii) it wishes to cross-examine the expert witness; or

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report and, if so, which parts.

(C) If the opposing Party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

8. The Trial Chamber has applied the following guiding principles established in the practice of international courts and tribunals to the admission of expert reports: 1) the author of the report must be classified as an expert; 2) the report must meet the minimum standard of reliability, be relevant and of probative value; and 3) the content of the report must fall within the witness's area of expertise. To determine whether a person is an expert, a chamber should consider past and current professional experience and training, publications and other relevant information, as described in the *curriculum vitae* or other pertinent documents accompanying the report. The term "expert" means "a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute".<sup>7</sup> I agree with these principles.<sup>8</sup>

## DISCUSSION

### **I. The position of the *Amicus***

9. The *Amicus* opposes classification of Ms Sabbagh as an expert and admission of any of her evidence as expert evidence.<sup>9</sup> He presents both procedural and substantive reasons.

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<sup>7</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/TC/T, F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014, paras 4, 6.

<sup>8</sup> See F0114, Decision on Expert Witness Anne-Marie De Brouwer, 27 March 2015, para. 9.

<sup>9</sup> Notice, para. 22.

10. The *Amicus* argues that the Defence failed to comply with my Order that the Parties disclose expert statements by 13 October 2014.<sup>10</sup> He contends that there is no good reason for the delay in notifying the *Amicus* about the Defence's intention to call an expert. Moreover, the Defence did not give adequate notice or information.<sup>11</sup>

11. The *Amicus* declares that Ms Sabbagh's statement is not an "expert report". He states that no such report was requested or produced in connection with this case and that he only recently received Ms Sabbagh's *curriculum vitae*.<sup>12</sup>

12. The *Amicus* next asserts that Ms Sabbagh is not an expert.<sup>13</sup> He claims that, in view of her *curriculum vitae*, she is a journalist with no specific qualifications or peer-reviewed publications on the topics addressed in her statement that would make her a "leader in her field able to speak about well-established and objective standards of journalism".<sup>14</sup> Moreover, the *Amicus* avers that Ms Sabbagh and the Accused have a close professional and personal relationship, demonstrated by Ms Sabbagh's statement and her third-party *amicus curiae* submission on the Tribunal's jurisdiction.<sup>15</sup> Consequently, Ms Sabbagh does not have the necessary impartiality and reliability to qualify as an expert.<sup>16</sup>

13. The *Amicus* also submits that Ms Sabbagh's statement, insofar as it purports to provide expert evidence, is not reliable, relevant or of probative value.<sup>17</sup> The statement does not refer to the specific area the expert was asked to cover or the methodology used, nor does it include sources or support. Accordingly, the *Amicus* cannot challenge the basis for any expert conclusions.<sup>18</sup> In regard to the standards of investigative journalism discussed in the statement, the lack of reference to a specific area in the field of investigative journalism or to methodological criteria prevents the *Amicus* from determining whether such standards are valid or relevant to the issues in this case.<sup>19</sup>

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<sup>10</sup> Notice, paras 7-11.

<sup>11</sup> *Id.* at paras 9-11.

<sup>12</sup> *Id.* at para. 13.

<sup>13</sup> *Id.* at para. 14.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* at paras 18-20.

<sup>16</sup> *Id.* at para. 21.

<sup>17</sup> *Id.* at para. 12.

<sup>18</sup> *Id.* at para. 15.

<sup>19</sup> *Id.* at para. 17.

## II. The position of the Accused

14. The Defence submits that, in addition to providing factual evidence about her and her organization's professional relationship with the Accused, Ms Sabbagh's statement presents expert evidence on the extent to which the *Al Jadeed* TV broadcasts adhered to the best practices of investigative journalism.<sup>20</sup>

15. The Defence argues that Ms Sabbagh plainly qualifies as an expert in the field of investigative journalism. Her expertise is demonstrated in her *curriculum vitae*, and notably she has direct experience and knowledge relevant to the Arab world and Lebanon in particular.<sup>21</sup>

16. Further, the Defence asserts that Ms Sabbagh's statement complies with Rule 161. It states that the Rule does not require expert evidence in the form of a "report" and that a reliable, relevant and probative statement falling within an expert's area of expertise is sufficient. It avers that the statement provides clear and detailed information on the best practices of investigative journalism, is relevant to understanding the Accused's investigative journalism work and is probative of the practices with which the Accused would have been familiar at the time of the broadcasts and thus their state of mind.<sup>22</sup>

17. The Defence contends that Ms Sabbagh's statement was disclosed properly. It claims that my Order only concerned any experts on which the *Amicus* would rely. It adds that it complied fully with the requirements of Rule 161, that it was reasonable to conclude compliance with my order on conduct of the proceedings was sufficient and that it is not required to disclose witness material before the *Amicus* has closed his case or the Defence has decided to put on its own case. Moreover, in his notice pursuant to Rule 161, the *Amicus* has demonstrated that he was able to examine and make detailed submissions on the statement, and therefore he suffers no prejudice even if the disclosure was not timely. The *Amicus* is also able to cross-examine the witness.<sup>23</sup>

18. Finally, the Defence submits that Ms Sabbagh's prior dealings with the Accused have no bearing on whether she can be called as an expert witness. Any alleged bias is a matter for cross-examination and goes to the weight of the testimony.<sup>24</sup>

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<sup>20</sup> Submission, paras 4-5.

<sup>21</sup> Response, paras 9-11.

<sup>22</sup> *Id.* at paras 12-14.

<sup>23</sup> *Id.* at paras 15-20.

<sup>24</sup> *Id.* at paras 21-22.

### III. Discussion

19. First, I observe that the Defence did not comply with my Order that expert statements be disclosed in October 2014.<sup>25</sup> In regard to the disclosure of expert statements, the Order applied to both Parties. I determined that “expert witness statements [must] be disclosed, subject to the Rules, [...] by 13 October 2014, sufficiently in advance of trial to allow the *Parties* to prepare for trial”.<sup>26</sup> In the disposition, I ordered that “[e]xpert statements pursuant to Rule 161 [...] must be disclosed to the *other Party*, subject to the Rules, [...] no later than 13 October 2014”.<sup>27</sup> It is clear from these words and the tenor that I did not limit this ruling to *Amicus* expert statements. The Defence did not seek reconsideration of this Order nor certification to appeal.

20. Secondly, while I acknowledge Ms Sabbagh’s long career as a journalist, editor and the Executive Director of Arab Reporters for Investigative Journalism, I agree with the *Amicus* that her witness statement does not satisfy the test for admission as an expert statement. Upon reviewing the *Al Jadeed* TV broadcasts, Ms Sabbagh concludes that she “[did] not see any serious professional flaws with the manner in which the investigation was conducted and the series screened”. She states that “Rami Al Amin and Al Jadeed’s investigative team appear to have strived to follow the principles and best practices that ARIJ promotes and that were imparted to Al Jadeed’s investigative journalists since 2012”. She then analyses and draws conclusions about various aspects of the broadcasts.<sup>28</sup> However, though she refers earlier in the statement to a manual for investigative journalists to which she contributed and which ARIJ adapted for use in its trainings, she does not supply specific support for her findings. Notably, she does not point to any particular portions of this manual, which is substantial and deals with a wide variety of topics, or to any other source. Moreover, while she does describe certain principles of investigative journalism in the statement, she neither explicitly nor clearly provides a basis for these principles; nor does she link them directly to her conclusions in regard to the Accused.<sup>29</sup> Given the lack of clarity as to the sources for the applicable principles and the unconnected gaps between principles and conclusions, one can rely only on Ms Sabbagh’s judgement in light of her experience. But in order for me to reasonably determine the statement’s reliability and probative value, there should be some discernible explanation related to her

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<sup>25</sup> Order, para. 13, p. 6.

<sup>26</sup> *Id.* at para. 13.

<sup>27</sup> *Id.* at p. 6.

<sup>28</sup> Notice, Annex A, pp. 10-11.

<sup>29</sup> *Id.* at pp. 6-7, pp. 10-11.

conclusions as to the sources or methods she used.<sup>30</sup> Further, such explanation is necessary to afford the *Amicus* a fair opportunity to prepare to challenge Ms Sabbagh's alleged expert conclusions.<sup>31</sup> Accordingly, I do not consider that the statement is sufficiently reliable or probative as an expert statement.

21. For these reasons, I do not admit any part of Ms Sabbagh's witness statement as an expert statement and find that she cannot testify as an expert. Of course, Ms Sabbagh can provide factual testimony.

#### **IV. Confidentiality**

22. Certain submissions in this matter were filed confidentially. Though there may be information in the filings that should remain confidential, they should be made public with appropriate redactions. I therefore order the Parties to file, as appropriate, public redacted versions of their submissions. I encourage the Parties to verify their redactions with one another before filing their redacted submissions. A public redacted version of this Decision will also be issued.

### **DISPOSITION**

#### **FOR THESE REASONS;**

**PURSUANT** to Rules 154 and 161 of the Rules;

#### **I**

**DECIDE** that Ms Sabbagh's witness statement cannot be admitted, in whole or in part, as an expert statement and that she cannot testify as an expert; and

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<sup>30</sup> See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 April 2013 ("Čavoški Decision"), para. 12; ICTY, *Prosecutor v. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 ("Milošević Decision"), para. 8.

<sup>31</sup> See Čavoški Decision, para. 22; Milošević Decision, para. 8.

**ORDER** the Parties to file public redacted versions of the submissions related to this Decision.

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

Dated 8 May 2015

Leidschendam, the Netherlands



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Judge Nicola Lettieri  
Contempt Judge

