

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS PANEL

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

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

Registrar: Mr Daryl Mundis

Date: 25 November 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**

**DECISION ON APPLICATION FOR LEAVE TO SUBMIT *AMICUS CURIAE*
OBSERVATIONS**

***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 Al Khayat:**
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Shyamala Alagendra
Ms Maya Habli

**Counsel for Committee to Protect
Journalists:**
Ms Natalie Reid



I. INTRODUCTION

1. The Appeals Panel is seized of an application by the Committee to Protect Journalists (“Applicant”) requesting leave to submit observations in the present appellate proceedings as *amicus curiae*.¹ The *Amicus Curiae* Prosecutor (“*Amicus*”) opposes the Application,² while Defence Counsel for *Al Jadeed* [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) (“*Al Jadeed* TV”) and Ms Karma Mohamed Tahsin Al Khayat (together: “Defence”) supports the Application.³

2. In this decision, the Appeals Panel rejects the Application in its entirety.

II. SUBMISSIONS

3. The Applicant submits that it is an independent non-profit organisation which defends the rights of journalists and freedom of the press, and that it has previously assisted various regional and domestic courts as an expert on such matters in legal proceedings.⁴

4. The Applicant requests leave to file a brief addressing two grounds which, in its view, are outcome-determinative. The first ground addresses “how to reconcile, in the[] [present] circumstances, the imperatives of protection of the integrity of the Tribunal’s proceedings with the fundamental right of freedom of the press” (“First Ground”).⁵ Under this ground, the Applicant states that it will address legal and policy considerations that other courts have taken into account in striking this balance.⁶ The second ground addresses the potential effect of applying a principle of corporate criminal liability, under international criminal law to media organisations such as *Al Jadeed* TV (“Second Ground”).⁷ Under this head, the Applicant submits that its brief will provide an overview of the legal standards concerning corporate criminal liability and an assessment of the consequences of its application in this case and others like it.⁸ The Applicant submits that these issues have yet to be developed in

¹ STL, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Al Khayat*, STL-14-05/A/AP, F0015, Application for Leave to Submit *Amicus Curiae* Observations, 9 November 2015 (“Application”). All further references to filings and decisions relate to this case number unless otherwise stated.

² F0017, Response to the “Application for Leave to Submit *Amicus Curiae* Observations” of 9 November 2015, 18 November 2015 (“*Amicus* Response”).

³ F0020, Defence Response to “Application for Leave to Submit *Amicus Curiae* Observations”, 18 November 2015 (“Defence Response”).

⁴ Application, paras 2-3.

⁵ *Id.* at para. 10.

⁶ *Id.* at para. 11.

⁷ *Id.* at para. 10.

⁸ *Id.* at para. 12.

the proceedings and that they will aid in the proper determination of the present case and in clarifying the law.⁹

5. The *Amicus* opposes the application. He firstly submits that the Applicant, contrary to the *Amicus Curiae* Practice Direction,¹⁰ intends to address factual matters in this case and that *amicus curiae* briefs should not concern policies, politics “or other dynamics with the press”.¹¹ Secondly, he points out that the Contempt Judge had previously invited third parties to present *amicus curiae* submissions concerning freedom of speech or the press in this case – an opportunity which the Applicant did not take up – and that there is no role for the proposed *amicus curiae* brief at this stage of the proceedings.¹² Thirdly, the *Amicus* posits that the Applicant is neither impartial nor independent, since the Application stipulates that the Accused and the Applicant have communicated with each other throughout the contempt proceedings and since the required statement concerning such contact was not included in the Application.¹³ Lastly, the *Amicus* submits that the grounds proposed by the Applicant have already been addressed by the jurisprudence of national and international courts, as well as in previous decisions in this case, and that the Applicant has equated its role to that of a party to the appeal.¹⁴

6. The Defence agrees with the Applicant that the proposed observations would assist the Appeals Panel in determining this appeal.¹⁵ It submits that, in light of its expertise in the area of media freedom, the Applicant is able to provide unique and important legal analysis, information and perspective to relevant matters.¹⁶

III. DISCUSSION

7. Pursuant to Rules 60 *bis* (H), 131 (A) and 176 (B) of the Rules of Procedure and Evidence (“Rules”), the Appeals Panel “may decide, after hearing the Parties, that it would assist the proper determination of the case to [...] grant leave to a State, organisation or person to make written submissions on any issue, or to allow a State, organisation or person

⁹ Application, paras 10, 13.

¹⁰ Practice Direction on *Amicus Curiae* Submissions before the Special Tribunal for Lebanon, STL/PD/2012/05, 23 February 2012 (“*Amicus Curiae* Practice Direction”).

¹¹ *Amicus* Response, paras 10-11.

¹² *Id.* at paras 12-13.

¹³ *Id.* at paras 14, 16.

¹⁴ *Id.* at paras 19-21.

¹⁵ Defence Response, para. 6.

¹⁶ *Id.* at para. 7.

to appear before it as *amicus curiae*".¹⁷ An *amicus curiae* submission, unless otherwise ordered, "shall be limited to questions of law, and may not include factual evidence relating to elements of a crime charged."¹⁸ Therefore, in exercising its discretion on whether to grant leave, the Appeals Panel's primary consideration is whether the Applicant's proposed observations would assist it in determining questions of law that are present and live in the appellate proceedings between the parties.¹⁹

8. The Appeals Panel holds that neither of the grounds identified in the Application addresses questions of law that are at issue in the present appeal.

9. With respect to the First Ground, neither the *Amicus* nor the Defence have raised, on appeal, issues relating to freedom of the press concerning the counts charged in this case.²⁰ In particular, the Contempt Judge's consideration of the relevance of freedom of the press, which the Applicant has identified as "depart[ing] from prior decisions in the international courts and tribunals",²¹ has not been identified nor addressed as a ground of appeal by the parties. As such, and irrespective of whether factual matters are raised under this ground,²² it is not a live issue before the Appeals Panel.²³ It is not the place or the role of an *amicus curiae* to raise new issues on appeal.

10. With respect to the Second Ground, while the elements and application of corporate criminal liability to the facts are indeed contested between the parties,²⁴ the Appeals Panel is of the view that the matters identified by the Applicant do not address the substantive legal

¹⁷ Rule 131(A).

¹⁸ Article 4, *Amicus Curiae* Practice Direction.

¹⁹ In this respect, the Appeals Panel finds relevant the jurisprudence of the *ad hoc* international criminal tribunals, whose respective provisions on *amicus curiae* submissions are substantively similar to Rule 131(A): ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010, para. 7; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36-R11bis, Decision on Request from the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief, 18 July 2008, p. 3; ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005, p. 3.

²⁰ See generally STL, F0005, Prosecution's Appeal Brief, 20 October 2015 (Confidential), with a public redacted version filed on 22 October 2015 ("*Amicus* Appeal Brief"); STL, *In the Case Against Al Khayat*, STL-14-05/A/AP, F0013, Karma Khayat's Appellant's Brief, 5 November 2015 (Confidential) ("*Defence* Appeal Brief").

²¹ Application, para. 11.

²² See Application, para. 10; *Amicus* Response, paras 10-11. See also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR98bis.1, Decision on Application for Leave to Submit an *Amicus Curiae* Brief, 21 September 2012, p. 2.

²³ However, the Appeals Panel notes that neither the Rules nor the *Amicus Curiae* Practice Direction *per se* bar the filing of *amicus curiae* briefs on appeal if the applicant has not first availed themselves of the opportunity to do so at the trial stage.

²⁴ See *Amicus* Appeal Brief, paras 95-146; F0014, Respondent's Brief to "Prosecution's Appeal Brief", 9 November 2015, paras 81-130.

questions which are raised on appeal and that, in any event, the Application lacks specificity on how these matters would assist in the proper determination of this appeal. In this context, the Applicant's general proposal to provide an overview of comparative and international standards on corporate criminal liability²⁵ is insufficient to inform the Appeals Panel of their relevance to the particular legal questions that have been raised in this appeal.

11. The Appeals Panel further notes that an application for leave to make *amicus curiae* observations must include, *inter alia*, "a statement identifying and explaining any contact or relationship the applicant had, has, or will have with another Participant in the case."²⁶ Here, the Application simply states that the Applicant "has been monitoring developments in this Case, and has communicated with Al Jadeed S.A.L. [...] and Ms Khayat [...] throughout the contempt proceedings".²⁷ No other information concerning the prior contact between the accused and the Applicant in relation to the proceedings in this case is included in the Application. Pursuant to the *Amicus Curiae* Practice Direction, in addition to identifying such contact, the Applicant is obliged to *explain* any such contact or the relationship between it and the parties.²⁸ Without such information, the objectivity of the Applicant in assisting the Appeals Panel cannot be properly ascertained.²⁹

²⁵ Application, paras 12, 13.

²⁶ Article 3 (1)(i), *Amicus Curiae* Practice Direction.

²⁷ Application, para. 4.

²⁸ See Article 3 (1)(i), *Amicus Curiae* Practice Direction.

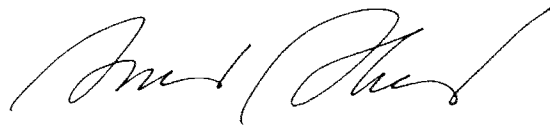
²⁹ See e.g. ICTY, *Prosecutor v. Gotovina and Markač*, IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012, para. 12.

IV. DISPOSITION**FOR THESE REASONS;****PURSUANT** to Rules 60 *bis* (H), 131 (A) and 176 (B) of the Rules and Article 4 of the *Amicus Curiae* Practice Direction;**THE APPEALS PANEL****DENIES** the Application.

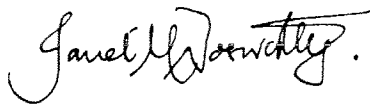
Done in Arabic, English and French, the English version being authoritative.

Dated 25 November 2015

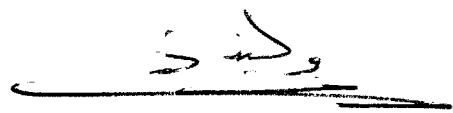
Leidschendam, The Netherlands



Ivana Hrdličková, Presiding Judge



Janet Nosworthy, Judge



Walid Akoum, Judge

