

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-11-01/T/CJ/R60bis.1
Before: Judge David Baragwanath, Contempt Judge
Registrar: Mr Daryl Mundis
Date: 8 December 2015
Original language: English
Classification: Confidential and *Ex Parte*

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**INTERIM DECISION ON *AMICUS CURIAE* REQUEST FOR AUTHORIZATION
TO USE CONFIDENTIAL FILINGS**

Head of Defence Office:
Mr François Roux

Amicus Curiae:
Mr Kenneth Scott



1. On 29 April 2013, I ordered an investigation into three different events pertaining to certain allegations of contempt and directed the Registrar to appoint an *amicus curiae* investigator (“*Amicus*”) for this purpose.¹ I subsequently ordered the Registrar to provide the *Amicus* with all confidential filings in this matter.²

2. On 31 January 2014, I made two orders in lieu of an indictment for contempt concerning two of the three events, recused myself from these proceedings and retained jurisdiction over the investigation into the third event.³ The *Amicus*, while continuing this investigation, also acts as *amicus curiae* prosecutor in the two cases arising from the orders in lieu of an indictment (STL-14-05 and STL-14-06). The case in respect to the former—the “first event”—has proceeded to trial and is currently in the appellate phase. The case in respect to the latter—the “second event”—awaits trials, to commence in January 2016. The third event, over which I remain seized, is still under investigation.

3. Under Articles 6 and 7 of the relevant Practice Direction,⁴ documents filed by the participants in proceedings retain their classification unless and until a Judge or Chamber orders to the contrary. The *Amicus* has now applied for permission to disclose two documents to the Defence in the forthcoming trial regarding the second event. These filings originate with the Head of Defence Office, are each marked “confidential” and are therefore to be treated as such unless an order to the contrary is made.⁵ They are a memorandum submitted by the Head of Defence Office to the Pre-Trial Judge (“First Document”)⁶ and a submission filed before me (“Second Document”).⁷ The *Amicus* argues that the concerns raised by the Head of Defence Office in these filings with respect to “media disclosures” are directly relevant and have probative value.⁸ He asserts that while the filings contain sensitive information and should remain confidential, their probative value outweighs confidentiality

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60bis.1, F0021, Decision on Allegations of Contempt, Confidential, 29 April 2013 (a public redacted version was made available the same day). All further references to filings relate to this case number unless otherwise stated.

² F0022, Order Authorizing the Registry to Disclose Confidential Information, 1 May 2013 (“Order of 1 May 2013”).

³ F0049, Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, Confidential and *Ex Parte*, 31 January 2014 (public redacted versions were filed in the cases STL-14-05 and STL-14-06).

⁴ Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, 14 June 2013, STL/PD/2010/07/Rev.2 (“Practice Direction”).

⁵ F0060, *Amicus Curiae* Request for Authorization to Use Confidential Filings in the STL-14-06 Case, 13 November 2015 (“Request”), paras 3, 8.

⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0849, Internal Memorandum, Confidential, 12 April 2013.

⁷ F0006, Submissions of the Defence Office Following the Order for a Contempt Judge Dated 15 April 2013, 19 April 2013.

⁸ Request, para. 4.

concerns. In any event, the filings could be maintained under seal and would not be disclosed in any public hearing or filing.⁹ The *Amicus* explains that he directs his Request to me because I provided him access to the two confidential filings in my Order of 1 May 2013.¹⁰

4. Since the First and Second Documents were both submitted by the Head of Defence Office, I invited the Head of Defence Office to make submissions on the Request.¹¹ He submits that the Request relates to the STL-14-06 case and consequently should have been filed before the Contempt Judge in that case.¹² According to him, I therefore lack jurisdiction to decide on the Request. If, however, I were to find that I have jurisdiction, the Head of Defence Office claims to “reserve[] the right to file submissions regarding the merits of the Request”.¹³

5. While the *Amicus* frames his Request as an authorization to disclose the First and Second Documents to the Defence in the STL-14-06 case, he actually seeks a reclassification of their filing status with respect to the Defence.

6. Rule 133, which provides for specific orders for the privacy and protection of victims and witnesses, states in the relevant parts:

(G) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “subsequent proceedings”), unless and until they are varied in accordance with the procedure set out in this Rule; but

(i) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the subsequent proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(H) A Party to the subsequent proceedings seeking to vary protective measures ordered in the first proceedings, after having sought the consent of the witness in respect of whom the submission is made, must apply to the Chamber seized of the subsequent proceedings.

⁹ Request, para. 5.

¹⁰ *Id.* at para. 6.

¹¹ See Article 7 (6) of the Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, 14 June 2013, STL/PD/2010/07/Rev.2 (“Practice Direction”).

¹² F0061, Submissions of the Head of Defence Office on the “*Amicus Curiae* Request for Authorization to Use Confidential Filings in the STL-14-06” dated 13 November 2015, 19 November 2015 (“HDO Submissions”), paras 4-11.

¹³ HDO Submissions, para. 12.

(I) Before determining an application under paragraph (H) above, the Chamber seized of the subsequent proceedings shall obtain all relevant information from the first proceedings and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

(J) The Chamber determining an application under paragraph (H) shall ensure, with the assistance of the Victims and Witnesses Unit where necessary, that the protected victim or witness has consented to the variation of the protective measures. In exceptional circumstances, the Chamber may *proprio motu* order the variation of protective measures without this consent.

(K) An application to a Chamber to vary protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to “a Chamber” shall include a reference to “a Judge of that Chamber”.

7. By Article 28 of the Statute of the Tribunal, the Security Council gave the Judges power to adopt Rules of Procedure and Evidence. That is a form of subordinate law-making power which includes limited authority to determine policy. While Rule 133 does not deal specifically with confidentiality arising from the Practice Direction, it is appropriate to apply the policy of Rule 133's provisions to the present Request to limit the protection currently in force in respect of the two filings.¹⁴

8. Such policy provides by subrule (H) that the determination is to be made by the Judge or Chamber seized of the relevant proceedings and by subrule (I) that this Judge or Chamber shall consult the Judge or Chamber seized of the case when the protective measures came into effect.

9. It follows in my provisional opinion that since:

- in this case it is Contempt Judge Lettieri who is to hear and determine the forthcoming trial for the purpose of which the documents are sought;
- the First Document was addressed to the Pre-Trial Judge; and
- the Second Document was addressed to me as the Contempt Judge;

¹⁴ The technique of reasoning by analogy from the policy of legislation *in pari materia* was pioneered by Landis in a classic article “Statutes and the Sources of Law” *Harvard Legal Essays* (1934) p213 and has been adopted in appropriate contexts by scholars and judges: *see R v Lemon* [1979] AC 617 at 615. As Sir John Salmond reasoned: “Acts are a source of law; common law or customary law is a source of law; and the first principle prevails over the second.” *Grey and Iwikau: A Journey into Custom* (2002) p. 69. Here Rule 133 is the legislation with which judicial interpretation must conform.

the Request should have been made to Judge Lettieri who would consult the Pre-Trial Judge in respect of the First Document and myself in respect of the Second Document and that both the application of the policy of subrule (J) and the merits of the Request are matters for Judge Lettieri.

10. But for reasons of judicial economy and in case Judge Lettieri is of a different opinion from my provisional view, rather than dismiss the Request as made to the wrong Judge, by way of interim decision I refer it for consideration by Judge Lettieri in the STL-14-06 proceedings and reserve my final decision upon it until he has done so.

DISPOSITION

FOR THESE REASONS;

PURSUANT Rules 60 *bis* (H) and 133;

BY WAY of interim decision;

I

REFER the Request to Contempt Judge Lettieri in the STL-14-06 proceedings;

ORDER that the Request and the HDO Response be cross-filed in those proceedings; and

RESERVE my decision on the Request until Contempt Judge Lettieri has considered the Request.

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

Dated 8 December 2015

Leidschendam, the Netherlands



Judge David Baragwanath
Contempt Judge

