

THE CONTEMPT JUDGE

Case No.: STL-14-06/PT/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 13 January 2016
Original language: English
Classification: Public

IN THE CASE AGAINST

AKHBAR BEIRUT S.A.L.
IBRAHIM MOHAMED ALI AL AMIN

DECISION ON REQUEST FOR AN ADDENDUM ON EXPERT REPORT

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

**Counsel for *Akhbar Beirut S.A.L.* and Mr
Ibrahim Mohamed Ali Al Amin:**
Mr Antonios Abou Kasm



INTRODUCTION

1. The *Amicus Curiae* Prosecutor (“*Amicus*”) has requested that I grant the late submission of an addendum to the expert report of witness Anne-Marie de Brouwer (“*Motion*”).¹ The Defence opposes the *Motion* (“*Response*”).² The *Amicus* also seeks leave to reply (“*Reply*”).³

2. For the reasons stated below, I dismiss the *Motion*.

BACKGROUND

3. On 27 October 2014, the *Amicus* disclosed the expert report and *curriculum vitae* of Dr Anne-Marie de Brouwer to the Defence.⁴ The Defence subsequently filed a notice challenging the qualifications of the witness as an expert and the relevance of her report.⁵

4. On 27 January 2015, I issued the Scheduling Order for the Pre-Trial Phase and ordered that the statements of any expert witnesses be disclosed by the calling party in accordance with Rule 161 (A) of the Rules of Procedure and Evidence (“*Rules*”) prior to 27 February 2015, with any notice in response to be filed by 17 March 2015.⁶ The timelines were set in order to allow the parties sufficient time to prepare in advance of trial.⁷

5. In the preceding and separate contempt case of *New T.V. S.A.L./Khayat*,⁸ the *Amicus* filed the same expert report authored by Dr de Brouwer that he proposes to submit in the present proceedings. I issued the final judgment in that matter on 18 September 2015 and held, *inter alia*, that Dr de Brouwer’s conclusions on the effects of the disclosure of purported confidential witness information were either not applicable to or did not address the Lebanese context.⁹ I

¹ STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0143, Request for an Addendum on Expert Report, 9 December 2015. All further references to filings and decisions refer to this case number unless otherwise stated.

² F0154, Defence Response to Request for an Addendum on Expert Report, 15 December 2015.

³ F0160, Request for Leave to Submit a Short Consolidated Reply to Defence Responses of 15 December 2015, 16 December 2015.

⁴ *Motion*, para. 1.

⁵ *Id.* at para. 2.

⁶ F0073, Scheduling Order on Pre-Trial Proceedings, 27 January 2015, para. 10 and Disposition.

⁷ *Id.* at para. 10.

⁸ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05 (“*New T.V. S.A.L./Khayat*”).

⁹ *Motion*, para. 3; *see also* STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05, F0176, Public Redacted Version of Judgment, 18 September 2015 (“*Khayat Judgment*”), paras 106-109.

stated that I was therefore unable to rely on the generic expert testimony provided by Dr de Brouwer.¹⁰

6. I issued a scheduling order for these proceedings on 14 October 2015 and initially fixed the commencement of the trial for 28 January 2016.¹¹

7. On 6 November 2015, the *Amicus* communicated a request to Dr de Brouwer that she prepare an addendum to her expert report.¹²

8. On 7 December 2015, the *Amicus* submitted his proposed amended witness¹³ and exhibit¹⁴ lists for this matter; at that time he did not seek to make any amendments to Dr de Brouwer's expert report, previously tendered as an annex to the *Amicus*'s pre-trial brief filed on 5 March 2015.¹⁵ Only on 9 December 2015 did the *Amicus* submit the present request.

9. On 18 December 2015, I postponed the commencement of the trial in these proceedings to 24 February 2016 as a result of my decision to permit amendments to the *Amicus*'s witness and exhibit lists and the concomitant need to provide additional time to the Defence to prepare its case.¹⁶

APPLICABLE LAW

10. Rule 161 on the 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:

¹⁰ *Khayat Judgment*, para. 126.

¹¹ Motion, para. 4.

¹² *Id.* at para. 5.

¹³ F0135, Motion to Amend the Prosecution Witness List, Confidential, 7 December 2015; Annex B, Confidential, 7 December 2015, pp. 3-4 (a public redacted version of the motion was filed on 11 December 2015).

¹⁴ F0120, Motion to Amend the Prosecution Exhibit List, Confidential, 16 November 2015; Annex B, Confidential, 16 November 2015, p. 10 (a public redacted version of the motion was filed on 11 December 2015).

¹⁵ F0083, Prosecution Pre-Trial Brief Pursuant to Rule 91 (G) (i), 5 March 2015; Annex A, Prosecution Exhibit List, Confidential, 5 March 2015, p. 10; Annex B, Prosecution Witness List, Confidential, 5 March 2015, p. 3.

¹⁶ F0164, Decision on Motions to Amend the *Amicus Curiae* Prosecutor's Exhibit and Witness Lists, 18 December 2015.

- (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.

11. One of the functions of Rule 161 is to fix timetables for parties to disclose expert reports, and for the opposing parties to respond as to whether they accept the statement, wish to cross-examine the expert or challenge the expert's qualifications or the relevance of any parts of the report. The Rule does not otherwise regulate the admission into evidence of expert reports or statements, nor the manner in which expert witnesses should testify.¹⁷ I do note however that expert reports and addenda are subject to the general standards of admissibility for all evidence which requires the material be relevant and have probative value.¹⁸

12. The case-law of this and other international criminal courts and tribunals provides precedent and guidance as to how to treat expert evidence. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") stipulate that the following criteria must be met before an expert report is admitted into evidence: i) the author of the report must be classified as an expert; ii) the report must meet the minimum standard of reliability, be relevant and of probative value; and iii) the content of the report must fall within the witness' area of expertise.¹⁹ I also note that Rule 161 of the Rules of this Tribunal closely mirrors the language found in Rule 94 *bis* of the Rules of Procedure and Evidence for the ICTY.

13. The jurisprudence also provides that establishing a time-limit for the disclosure of expert reports serves the purpose of giving the other party sufficient notice in order to prepare for the expert witness's testimony. The time-limit is not absolute as addenda or corrigenda may be necessary in order to, *inter alia*, rectify mistakes the expert identifies in her report or if new and

¹⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014 ("*Ayyash Expert Decision*"), para. 4; *see also* STL, *In the case against New T.V. S.A.L. and Khayat*, STL-14-05/PT/CJ, F0114, Decision on Expert Witness Anne-Marie de Brouwer, 27 March 2015, para. 9.

¹⁸ Rule 149 (C) STL RPE.

¹⁹ *Ayyash Expert Decision*, para. 4.

relevant documentation is obtained by the calling party. However, the need for such addenda or corrigenda should, considering the purpose of imposing a time-limit on the parties, be balanced against the additional burden it places upon the responding party in preparing for the expert witness's testimony.²⁰ Therefore, the late disclosure of an addendum to an expert report warrants the same considerations as the addition of documents to an exhibit list. In other words, it must be determined whether it is in the interests of justice to admit the addendum into evidence.²¹ In this respect, the considerations are whether the addendum is *prima facie* relevant and probative, whether the Prosecution has shown good cause to file the addendum at a late stage, and the extent to which the new filing creates an additional burden on the defence.²²

DISCUSSION

I. Positions of the Parties

A. Position of the Amicus

14. The *Amicus* states that in light of my view of Dr de Brouwer's evidence in the *New T.V. S.A.L./Khayat* proceedings, he has asked this witness to prepare an addendum to her report that responds to the "issues raised" in the judgment.²³ However, Dr de Brouwer has informed the *Amicus* that given her other commitments, she would only be in a position to provide the requested addendum by mid-January 2016.²⁴ In other words, the addendum had not yet been prepared at the time that this Motion was filed.

15. The *Amicus* avers that the substantial part of the expert's work is already contained in her expert report, disclosed to the Defence many months ago, and as a result, an addendum to her report at this stage will not cause undue or substantial prejudice to the Defence.²⁵ In the event

²⁰ ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008, ("*Gotovina Expert Report Decision*") para. 17.

²¹ *Gotovina Expert Report Decision*, para. 18.

²² *Id.* at para. 18; see also 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. 5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F1228, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, para. 4.

²³ Motion, para. 5.

²⁴ *Id.* at para. 6.

²⁵ Motion, para. 7.

that the Defence requests it, the *Amicus* agrees to postpone the cross-examination of Dr de Brouwer until the “Defence case”.²⁶

B. Position of the Defence

16. The Defence avers that the *Amicus* strives to use the addendum to fill in lacunae in the expert report, while not doing so until two months after the release of the *New TV S.A.L./Khayat* judgment that impugned the applicability and relevance of the expert evidence.²⁷ The Defence maintains that this request comes at too late a stage of the proceedings as the proposed addendum would not be complete until halfway through the month of January when the trial is imminent.²⁸

17. Furthermore, the Defence argues that the addendum will have to have significant detail in order to address the frailties of the report identified in the *New TV S.A.L./Khayat* judgment, and as such, will in essence constitute an entirely new report.²⁹ The Defence recalls its right to file new notice challenging the addendum pursuant to Rule 161 (B) and to call a defence expert in rebuttal.³⁰ However, the Defence asserts that at this late stage, there is insufficient time for the Defence to undertake such steps before trial. Therefore, the Defence would require a further postponement in order to exercise these rights and that would, in turn, violate the right of the Accused to be tried without undue delay.³¹

18. Finally, the Defence calls into question Dr de Brouwer’s competence to produce an addendum of probative value, given her lack of knowledge of the Lebanese context.³²

C. Reply from the Amicus

19. The *Amicus* has requested leave to submit a consolidated reply to the Defence’s Responses of 15 December 2015, submitting that new issues have arisen which relate to the fair and expeditious conduct of the proceedings. He avers that it is in the interests of justice to grant leave as the Defence has inaccurately and falsely characterized the requests made by the *Amicus*,

²⁶ *Id.* at para. 8. The *Amicus* has indicated in his Motion that such a postponement would carry to the end of February on the basis of the 14 October 2015 Scheduling Order. This submission was made, however, before my subsequent decision in F0164 which postponed the start of this trial to the end of February, with the commencement of the Defence case to be scheduled thereafter, subject to submissions of the parties and available court time.

²⁷ Response, paras 6-7.

²⁸ *Id.* at para. 8.

²⁹ *Id.* at para. 9.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Response, para. 10.

including those to which this Decision relates.³³ The *Amicus* then provides submissions which reiterate arguments presented in the very Requests to which the Defence has responded.³⁴

II. Discussion

20. With respect to the Request for Leave to Reply, I recall that the Appeals Chamber has held that a reply ““must generally be limited to circumstances where new issues arise out of the [response]””.³⁵ I find that none of the *Amicus*’s reasons satisfy this requirement. Each expresses mere disagreement with Defence arguments made in response to the Motions and in turn reiterates submissions already set out in the initial Requests. The *Amicus* does not identify any new issues arising out of the Response. Nor does the *Amicus* demonstrate any exceptional basis justifying a reply. I therefore reject the Request for Leave to Reply.

A. Good cause for late filing

21. Firstly, I recall that the *Amicus* was required to file all witness materials prior to 27 February 2015.³⁶ However, I recognize that where good cause is shown, such a deadline can be varied.³⁷ The release of a judgment ruling that a witness’s expert report is unreliable may provide good cause to file an addendum past the deadline. Notwithstanding, the *Amicus* has failed to demonstrate diligence in seeking to file this addendum at such a late stage in the proceedings. While the judgment which called into question the relevance and applicability of Dr de Brouwer’s expert report to the *New T.V. S.A.L./Khayat* proceedings was issued on 18 September 2015, the *Amicus* did not make the request to Dr de Brouwer to complete an addendum that addresses the deficiencies in her initial report until seven weeks thereafter. I am further perplexed that the *Amicus* failed to address his intention to file an addendum to the expert report in the Motion to Amend the Prosecution Exhibit List which the *Amicus* filed ten days after requesting an addendum from Dr de Brouwer.³⁸

³³ Reply, para. 3.

³⁴ *Id.* at paras 5-8.

³⁵ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0012, Order by Judge Rapporteur on Request for Leave to File a Reply, 8 May 2014, para. 4.

³⁶ See fn. 6.

³⁷ Rule 110 (A) (ii) RPE STL; Rule 9 (A) (i) RPE STL.

³⁸ F0120, Motion to Amend the Prosecution Exhibit List, Confidential, 16 November 2015; Annex B, Confidential, 16 November 2015, p. 10. (a public redacted version of the motion was filed on 11 December 2015)

22. Given that no good cause has been shown for the lack of timeliness in this request, I could dismiss the Motion on that basis alone. However, I find that an examination of the other relevant factors similarly supports the dismissal of this Motion.

B. Relevance and Probative Value

23. In order to determine whether it would be in the interests of justice to permit the filing of an addendum to Dr de Brouwer's expert report, I must also consider whether the proposed addendum is *prima facie* relevant and probative.

24. Although the *Amicus* mentions the witness's failure to address the Lebanese context in her initial report, he does not articulate whether this would form the subject of the addendum and if so, what pertinent expertise Dr de Brouwer may have developed in the period since she drafted her initial report. The fact that such an addendum has not yet been prepared prevents any further assessment of its relevance in order to balance the document's value to the *Amicus*'s case against the need to ensure the rights of the Accused.

C. Burden on the defence

25. Finally, in order to adequately address those findings from the *New T.V. S.A.L/Khayat* judgment that impugned Dr de Brouwer's report, the addendum could potentially be extensive and contain a significant amount of new information and as such, would create an additional and unduly prejudicial burden on the Defence on the eve of trial. I reject the inference that to permit cross-examination of Dr de Brouwer during the defence case would cure any prejudice caused by its late filing. It is a fundamental right that accused be able to examine in advance all evidence to be used against them at trial and that they be given adequate time and facilities for the preparation of their defence.³⁹ I find that the Accused's right to the latter is necessarily prejudiced if the former can only be exercised after the commencement of trial. For example, the Defence may wish to cross-examine other prosecution witnesses on matters raised in the addendum. To do so necessarily requires time, investigation and preparation. One month is therefore insufficient for the Defence to adequately prepare in light of such an addendum.

26. The *Amicus* has failed to show good cause for the Motion's lack of timeliness, nor how the information contained in the proposed addendum would be relevant and probative. In

³⁹ Art. 16 STL St.

balancing the duty of the *Amicus* to present the available evidence necessary to prove its case and the burden that an addendum will place on the Defence, I find that it is not in the interests of justice to permit the admission into evidence of the proposed addendum. Consequently, I dismiss the *Amicus*'s request to file an addendum to Dr de Brouwer's expert report.

DISPOSITION

FOR THESE REASONS;

I

DISMISS the Motion and

DISMISS the Request for Leave to Reply.

Done in Arabic, English and French, the English version being authoritative.
Dated 13 January 2016
Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

