

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-06/PT/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 2 March 2016
Original language: English
Classification: Public

IN THE CASE AGAINST

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

**PUBLIC REDACTED VERSION OF DECISION ON MOTION FOR AMENDMENT
OF THE RULE 91 (G) (iii) EXHIBIT LIST AND FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 154**

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*”) seeks leave to add 42 exhibits to his exhibit list and further requests that 26 of those exhibits be admitted from the bar table pursuant to Rules 149 (C) and 154 of the Rules of Procedure and Evidence (“Rules”).¹ The Defence opposes the Motion.²

2. For the reasons set out below, I grant the *Amicus*’s Motion in part.

APPLICABLE LAW

3. Consistent with well-established international criminal case-law and that of this Tribunal’s Trial Chamber, I may permit the *Amicus* to amend his exhibit list under Rule 91 (G) (iii) in the interests of justice.³ In making such a determination, I must balance the *Amicus*’s interest in presenting available evidence against the rights of the Accused to adequate time and facilities to prepare for trial. The evidence must be *prima facie* relevant and probative, and I may consider the following factors, among others: (i) whether the *Amicus* has shown good cause for not seeking the amendments at an earlier stage, (ii) the stage of the proceedings and (iii) whether granting the amendments would result in undue delay.⁴

4. Admitting certain material into evidence from the “bar table” is a well-established practice before international criminal courts and tribunals, including this Tribunal.⁵ The practice

¹ STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0189, Motion for Amendment of the Rule 91 (G) (iii) Prosecution Exhibit List and for Admission of Evidence Pursuant to Rule 154, Confidential, 16 February 2016, para. 1 (“Motion”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0194, Réponse Partielle de la Défense a la “Motion for Amendment of the Rule 91(G)(iii) Prosecution Exhibit list and for Admission of Evidence Pursuant to Rule 154”, 19 February 2016, para. 3 (“Response”).

³ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0107, Public Redacted Version of the Decision on the Motion to Amend the Prosecution Exhibit List and Witness List, 11 March 2015, para. 7; *see also* F0164, Public Redacted Decision on Motions to Amend the *Amicus Curiae* Prosecutor’s Exhibit and Witness Lists, 18 December 2015, para. 3.

⁴ *Ibid.*

⁵ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0120, Decision on *Amicus Curiae* Prosecutor’s Motion for Admission of Evidence Pursuant to Rule 154, 9 April 2015, para. 7; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1802, Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events, 30 December 2014, para. 29; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, paras 5-7; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, paras 4-6; *see also* F0173, Decision

permits the chamber or judge to receive documentary evidence without requiring witness testimony as a means to achieve judicial economy. In order to gain admission from the bar table, material must satisfy the basic requirements for admission articulated in Rules 154 and 149 (C) and (D). Such Rules apply *mutatis mutandis* in contempt proceedings.⁶

DISCUSSION

I. Positions of the Parties

A. Position of the Amicus

1. Amendment to Exhibit List

5. The *Amicus* seeks to add 42 exhibits to his list, of which 12 relate to screenshots taken by witness AP15 in relation to the availability of *Al Akhbar* articles on online platforms⁷, 24 relate to public decisions and orders of the Trial Chamber in the *Ayyash et al.*⁸ case, three are witness statements,⁹ one is a published academic article recently authored by the *Amicus's* purported expert witness¹⁰ and two are documents that were inadvertently omitted from the original exhibit list.¹¹

6. The *Amicus* further seeks admission from the bar table of 26 exhibits, namely the two documents that were inadvertently omitted from the original exhibit list and the 24 public decisions and orders issued by the Trial Chamber in the *Ayyash et al.* case.¹²

7. The *Amicus* provides a number of reasons as to why he had not included these documents in his original or amended Exhibit list.

8. With respect to the screenshots of *Al Akhbar's* online platforms, the *Amicus* recalls that witness AP15 was added to the Prosecution Witness List on 18 December 2015 and is an

on *Amicus Curiae* Prosecutor's Motion for Admission of Evidence Pursuant to Rule 154, 19 January 2016, paras 3-5.

⁶ Rule 60 *bis* (H) STL RPE.

⁷ Motion, paras 5-6.

⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC ("*Ayyash et al.*").

⁹ Motion, paras 7, 10.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² F0189, Annex C, Confidential, 16 February 2016, pp.1-5.

individual who has monitored the continuous availability of the *Al Akhbar* articles in online platforms.¹³ The screenshots indicating the content of *Al Akhbar's* website on a given date comprise 12 of the items sought to be added to the Exhibit list.¹⁴ The *Amicus* argues that this information is equally available to the Defence should they monitor the website themselves.¹⁵

9. With respect to the 24 public decisions and orders of the Trial Chamber, the *Amicus's* earlier request for their admission under the rubric of judicial notice was denied on 19 January 2016.¹⁶ The *Amicus* explains that he had hoped to make one final motion to amend his exhibit list and wished to include in the motion [REDACTED].¹⁷ He argues that these materials have already been deemed as “reliable, relevant and of probative value to the issues at trial” in my previous decision,¹⁸ and that in light of their disclosure to the Defence in December 2015, the Accused will suffer no prejudice whatsoever by their addition to the Exhibit List.¹⁹

10. The *Amicus* also proposes to add two items inadvertently omitted from his previous request to amend his Exhibit List and which were thought to have been included as part of a combined exhibit related to the service of a cease-and-desist letter on the Accused.²⁰ The *Amicus* seeks to include these items as a “matter of completeness” and indicates that they were disclosed to Defence “as soon as their omission was noticed”.²¹

11. The *Amicus* further seeks to add a published article authored by proposed witness Dr Anne-Marie de Brouwer to his Exhibit List. He details that this article is a substantial reproduction of the expert report he will tender in these proceedings and that it is being proposed in connection with her qualification as an expert and not as a replacement of her initial report.²²

¹³ Motion, para. 5.

¹⁴ *Id.* at para. 6.

¹⁵ *Ibid.*

¹⁶ Motion, para. 7.

¹⁷ *Id.* at para. 8.

¹⁸ *Id.* at para. 7.

¹⁹ *Id.* at para. 9.

²⁰ *Id.* at para. 11.

²¹ *Ibid.*

²² Motion, para. 12.

12. Lastly, the *Amicus* seeks the addition of three statements to his Exhibit List, all of which relate to the three witnesses that were added to the Witness List on 18 December 2015.²³ All of the statements have been disclosed to the Defence.²⁴

13. The *Amicus* argues that none of the evidence in the proposed exhibits changes the nature of the case and all go to proof of the issues that were outlined in the Order in Lieu of an Indictment and the *Amicus*'s pre-trial brief.²⁵

14. Finally, the *Amicus* recalls an earlier and separate motion in which [REDACTED].²⁶ He notes that there are related, but pending, motions filed before me in which he seeks [REDACTED].²⁷ Therefore, the *Amicus* requests that the motions be "resolved".²⁸

2. Admission of Evidence Pursuant to Rule 154

15. In the event that the sought amendments to the Exhibit List are granted, the *Amicus* also requests that 26 items, described in Annex C of his Motion and which constitute 24 decisions from the Trial Chamber in the *Ayyash et al.* case and two documents inadvertently omitted from previously lists, be admitted from the bar table pursuant to Rules 149(C) and 154.²⁹ The *Amicus* argues that the documents all constitute non-testimonial evidence generated by the Tribunal and have the necessary indicia of reliability, authenticity and probative value.³⁰

B. Position of the Defence

16. The Defence submits a partial response in opposition to the Motion requesting that I dismiss the Motion outright for lack of timeliness. Alternatively, the Defence requests a further opportunity to file a complete response within an appropriate amount of time.³¹ The Defence notes that given the imminent start of the trial, they are unable to fully and properly respond to

²³ Motion, para. 13.

²⁴ *Ibid.*

²⁵ Motion, para. 14.

²⁶ *Id.* at para. 18.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Motion, para. 15.

³⁰ *Id.* at paras 16-17.

³¹ Response, paras 7, 17-18.

this Motion while at the same time preparing responses to the other recent filings and preparing for trial.³²

17. The Defence recalls my earlier decision in which I allowed the *Amicus* to amend his witness and exhibit lists but determined that it was necessary and in the interests of justice to postpone the trial in order to grant the Defence adequate time to prepare in light of such amendments. It argues that it is in a more disadvantaged position, given the imminent start of the trial, with respect to the amendments proposed in this Motion as compared to the previous situation where a postponement was granted.³³

18. The Defence notes the voluminous nature of these exhibits, which exceed 4,000 pages of materials and avers that it is burdened by the requirement to analyse each piece, page by page.³⁴

19. The Defence asserts that the *Amicus* has failed to demonstrate good cause for not seeking the amendment of his Exhibit List at an earlier date.³⁵ In this sense, the Defence rejects the validity or relevance of the *Amicus's* argument that the concerned materials were already at the disposal of the Defence team and that the Defence should have anticipated its admission at trial.³⁶ The Defence recalls that the Rules permit the presiding judge to set deadlines for disclosure in order to allow the Defence adequate time and facilities to prepare for trial and that if the *Amicus* were permitted to introduce new evidence at any stage of the proceedings, this would defeat the underlying purpose of such Rules.³⁷

20. In particular, the Defence opposes the admission of the document authored by the *Amicus's* proposed expert witness, arguing that it is a disguised attempt to circumvent my previous decision rejecting the request for an addendum to the witness's expert report.³⁸ It further notes that the article was authored in 2015 and the *Amicus* has failed to explain why he

³² Response, paras. 5, 7.

³³ *Id.* at para. 22.

³⁴ *Id.* at paras 6, 12.

³⁵ *Id.* at para. 10.

³⁶ *Id.* at para. 11.

³⁷ *Id.* at para. 14.

³⁸ *Id.* at para. 24.

only seeks its addition to the Exhibit List at this point in time.³⁹ The Defence argues that this exhibit should be rejected for the same reasons that the request for an addendum was rejected.⁴⁰

21. Lastly, the Defence requests that I impose a deadline before the commencement of trial after which the *Amicus* will no longer be permitted to request amendments to his Exhibit and Witness lists.⁴¹

II. Discussion

A. Motion to Amend the Exhibit List

22. After reviewing the proposed additional exhibits, considering the submissions of the Parties, and balancing the *Amicus*'s interest in presenting available evidence against the rights of the Accused to adequate time and facilities to prepare for trial, I find that the interests of justice only permit the addition of 15 of the exhibits in question into the Prosecution Exhibit List: the materials relating to the evidence of witness AP15 and the three witness statements.

1. Exhibits related to Witness AP15

23. The exhibits related to witness AP15 constitute twelve separate groupings of screenshots reflecting the purported availability of certain material on *Al Akhbar* online platforms at different points in time. Although they total more than 2,000 pages of material, I note that much of the content is a reproduction of the same material on different dates. I also find that what is proposed to be added to the Prosecution Exhibit List is consistent with the scope and nature of witness AP15's testimony as detailed in the *Amicus*'s Amended Witness List.⁴² Once this witness was permitted to be added to the witness list, the Defence was on notice about the tasks that the witness would carry out and was free to undertake its own monitoring of the public online platforms as part of its investigations and preparations for trial. As a result, I find that the material is relevant and of probative value to the issues at trial and that its addition to the

³⁹ Response, para. 25.

⁴⁰ *Id.* at para. 24.

⁴¹ *Id.* at para. 29.

⁴² F0197, Decision on Defence Request for Sanctions Against the *Amicus Curiae* Prosecutor for Failing to Comply with Disclosure Obligations, Confidential, 22 February 2016, paras 31-32; *see also* F0135, Motion to Amend the Prosecution Witness List, Confidential, 7 December 2015, para. 9.

Prosecution Exhibit List would not improperly prejudice the Defence. I therefore admit these twelve exhibits.

24. I note, however, that the *Amicus* is limited to adding the specific screenshots detailed in his Motion. Although the *Amicus* has noted that witness AP15 will continue to monitor the availability of these articles online and that “additional exhibits will be created on a daily basis until the day that Witness AP15 testifies”⁴³, any screenshots not previously approved for addition to the Prosecution Exhibit List in accordance with this Decision will not be permitted to be tendered into evidence. In any event, the *Amicus* may question the witness on the availability of the material at different points in time.

2. Three witness statements

25. Each of the proposed witness statements is *prima facie* relevant and of probative value in regards to the *actus reus* and/or *mens rea* of the crime charged in the Order in lieu of an Indictment. Although these three documents were disclosed shortly before the commencement of trial, they are not lengthy and their content is not outside the scope of the summaries that the *Amicus* provided to the Defence in its Amended Witness List. I further recall my previous decision holding that evidence which goes outside the scope of testimony detailed by the *Amicus* in his Amended Witness List, will not be admitted at trial, either in the form of a witness statement tendered under Rule 156 or by way of *viva voce* testimony.⁴⁴ I therefore permit the addition of the three witness statements to the *Amicus*'s exhibit list.

3. Decisions and Orders issued in the *Ayyash et al.* case

26. The *Amicus* is free to make decisions to consolidate his filings in order to maintain judicial economy but this cannot be done at the cost of the Defence's right to adequate time and facilities to prepare its case. A party's decision not to file a motion for the addition of certain exhibits until new, separate material is first received does not constitute good cause for the lack of timeliness in this request. I therefore find that the *Amicus* has not demonstrated that it is in the interests of justice to add this material to his Exhibit List, given the imminent start of trial and

⁴³ Motion, para. 6.

⁴⁴ F0198, Decision on Motion for Admission of the Statement of Witness AP02 and of Witness AP14 pursuant to Rule 156, Confidential, 22 February 2016, para. 17.

lack of good cause to explain the lateness of his request. Therefore, I dismiss the Motion to add the twenty-four decisions and orders of the Trial Chamber in the *Ayyash et al.* case to the *Amicus's* Exhibit List.

4. Inadvertently excluded documents

27. I note *Amicus's* assertion that he inadvertently omitted two documents when submitting its first two Exhibit Lists and only discovered this error on the eve of trial. However, an inadvertent error at this late stage of the proceedings does not constitute good cause for permitting an amendment of the exhibit list. Given the imminent start of the proceedings, I find that trial fairness and the rights of the Accused would be unduly prejudiced if I were to permit the addition of such documents to the *Amicus's* Exhibit List, of which the Defence had no prior knowledge. I dismiss the *Amicus's* request to add these two documents to his exhibit list.

5. Publication authored by Dr de Brouwer

28. The *Amicus* seeks to add to the Exhibit List a recently published article authored by witness Dr de Brouwer in order to support this witness's qualifications as an expert. The article largely reproduces the content of the report authored by this witness that the *Amicus* proposes to tender as an exhibit at trial.

29. Although this article was only recently published, I do not find that fact amounts to good cause which would justify its late admission when the start of trial is imminent. In this sense, I recall my earlier decision in which I dismissed the *Amicus's* request to file an addendum to Dr de Brouwer's expert report, on the basis, among others, that it was not timely and would create an unduly prejudicial burden on the Defence on the eve of trial.⁴⁵ I note that the *Amicus* seeks to use this article as further proof of the witness's qualifications as an expert. However, this does not make it any less burdensome on the Defence, particularly when the Defence has provided notice of its opposition to her qualification as an expert.⁴⁶ I find the *Amicus* has failed

⁴⁵ F0172, Decision on Request for Addendum to Expert Report, 13 January 2016, paras. 22, 25

⁴⁶ F0154, Defence Response to the Request of *Amicus Curiae* Prosecutor for an Addendum on Expert Report, 15 December 2015, para. 3; *see also* F0072, Response to "Notice Submitted by Assigned Counsel pursuant to Rule 161 (B) of the Rules of Procedure and Evidence" dated 26 November 2014, Confidential, 4 December 2014, para. 2.

to demonstrate good cause for the late admission of this exhibit to his Exhibit List and therefore reject its addition to the Exhibit List.

B. Motion to Admit Evidence under Rule 154

30. The *Amicus's* motion to admit evidence under Rule 154 relies on the approval of his request to amend his Exhibit List, as detailed above.

31. Given that I have dismissed the *Amicus's* request to add the concerned documents to his Exhibit List, the request for those same documents to be admitted by way of a bar-table motion is now moot.

C. Additional Pending Matter

32. The *Amicus* addresses a separate pending matter and asks that I resolve it so he can seek the admission of other documents into his Exhibit List.⁴⁷ I refer the *Amicus* to the Decision on Request to Use Material as Evidence and for Protective Measures,⁴⁸ in which I dismissed his request because the *Amicus* failed to provide me an opportunity to first review the materials before making a determination on their admissibility or requirement for protective measures.

D. Defence Requests

33. In its response, the Defence requests that I impose a deadline on the *Amicus* after which he would be unable to seek any further amendments of his Witness and Exhibit lists. However, I must consider any requests from the Parties on their own, and will rule on their timeliness on a case-by-case basis. Therefore, I dismiss the Defence request in this regard.

34. With respect to the Defence's request for additional time to file a complete response, I first note that I initially shortened the time by which the Defence was to respond to the present Motion to 19 February 2016.⁴⁹ I later granted the Defence an extension of the deadline to file a response to 23 February 2016 at noon.⁵⁰ Given the imminent start of trial in this matter, the *Amicus's* Motion needed to be addressed before the commencement of the presentation of his

⁴⁷ Motion, para. 18.

⁴⁸ F0199, Decision on Request to Use Material as Evidence and for Protective Measures, Confidential, 22 February 2016.

⁴⁹ Email from Chambers Legal Officer to the Defence, 18 February 2016.

⁵⁰ Email from Chambers Legal Officer to the Defence, 18 February 2016.

evidence-in-chief as it directly impacts on the *Amicus's* ability to present evidence. Any ruling on this matter after the close of the presentation of the case-in-chief would render the matter moot. I therefore reject the Defence's request for further time to file an additional response.

III. Confidentiality

35. The *Amicus* has filed the Motion and Annexes confidentially in order to respect the protective measures ordered thus far in this matter.⁵¹ Though there is indeed 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 77 (A), 91 (G) (iii), 149(C), 149 (D) and 154;

I

ORDER the parties to file public redacted versions of their filings in this matter;

GRANT the Motion in part;

GRANT the amendment of the *Amicus's* Exhibit List to include 12 exhibits which represent the groupings of screenshots:

- AP1406_236_ARA_04882-05274, AP1406_237_ARA_05275-05520, AP1406_238_ARA_05521-05910, AP1406_239_ARA_05911-06156, AP1406_242_ENG_07433-07590, AP1406_243_ENG_07591-07738, AP1406_244_ARA_07739-07789, AP1406_245_ENG_07790-07803, AP1406_246_ENG_07804-07813, AP1406_247_ARA_07814-07826, AP1406_248_ARA_07827-07842, and AP1406_249_ENG_07843-07855.

⁵¹ Motion, para. 19.

GRANT the amendment of the *Amicus's* Exhibit List to include three witness statements:

- AP1406_229_ENG_04858-04862, AP1406_235_ENG_04877-04881, and AP1406_232_ENG_04869-04874.

DISMISS the remainder of the Motion; and

DISMISS the Defence requests.

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

Dated 2 March 2016

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

