

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-06/T/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 18 April 2016
Original language: English
Classification: Public

IN THE CASE AGAINST

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

**DECISION ON DEFENCE REQUEST TO EXCLUDE THE TESTIMONY AND
RELATED EXHIBITS OF WITNESS AP15**

***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 Defence requests to exclude the testimony of witness AP15 and any material related to his testimony pursuant to Rule 114 of the Rules of Procedure and Evidence (“Rules”). It bases its request on the alleged failure of the *Amicus Curiae* Prosecutor (“*Amicus*”) to comply with his disclosure obligations. The Defence also asks that I consider other sanctions pursuant to Rules 60 and 114.¹ The *Amicus* asks that the Request be dismissed.²

2. For the reasons below, I dismiss the Request.

APPLICABLE LAW

3. The following provisions of the Rules, relevant to my decision, apply *mutatis mutandis* to these proceedings.³

4. Rule 113 requires the disclosure of exculpatory material by the Prosecutor. It provides, in relevant part:

(A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence.

5. Rule 114 sets out the remedy available in the event that a party does not comply with its disclosure obligations under the Rules and states in relevant part:

The Pre-Trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either Party [...] on sanctions to be imposed on a Party [...] who fails to perform its disclosure obligations pursuant to the Rules.

6. However, the Rules do not specify conditions precedent to the imposition of sanctions for disclosure violations and do not prescribe any applicable type of sanctions. Nonetheless, I am

¹ STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/T/TC, F0233, Defence Motion Seeking Exclusion of the Testimony of AP15 and of Documents Related Thereto Due to Failure of the Prosecution to Comply with its Disclosure Obligations, Confidential, 1 April 2016 (“Request”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0246, Response to “Requête de la Défense aux fins d’exclusion du témoignage de AP15 et des pièces y afférentes pour manquement de l’accusation à ses obligations de communication”, Confidential, 11 April 2016, para. 3 (“Response”).

³ Rule 60 *bis* (H) STL RPE.

guided by the principles developed by this and other international Tribunals on the considerations relevant to my determination on whether, and what type of sanctions, to apply if I am satisfied that a party has breached its disclosure obligations.⁴ Under these principles,⁵ the party seeking a remedy for non-disclosure must demonstrate material prejudice.⁶ Other relevant circumstances to consider may include whether the offending party has behaved diligently and the reasons for the late or non-disclosure of evidence.⁷

7. Where the interests of justice do require the imposition of sanctions, a number of remedies can be considered in order to mitigate any impact on trial fairness. This may include *inter alia* the postponement of the trial or testimony, the deferral of a witness's cross-examination or the exclusion of evidence,⁸ which is, in any event, at the extreme end of a scale of measures available to address breaches of disclosure obligations.⁹

8. Finally, Rule 60 addresses misconduct of counsel before the Tribunal and provides for a regime of sanctions in certain cases.

DISCUSSION

I. Positions of the Parties

A. Position of the Defence

9. The Defence seeks the exclusion of the testimony and related exhibits of witness AP15 as a sanction for the *Amicus's* failure to disclose to the Defence in advance that the witness had a

⁴ F0197, Public Redacted Version of Decision on Defence Request for Sanctions against the *Amicus Curiae* Prosecutor for Failing to Comply with Disclosure Obligations, 9 March 2016, paras 4-8 ("Decision on Request for Sanctions").

⁵ Decision on Request for Sanctions, para. 7; *see also*, ICTY, *Prosecutor v. Krstić*, IT-8-33-A, Appeal Judgement, 19 April 2004, para. 153; *see also* ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 262.

⁶ Decision on Request for Sanctions, para. 7; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1766, Decision on Motion Seeking Interim Relief for Late Disclosure, 25 November 2014, para. 11 ("Ayyash Decision on Interim Relief").

⁷ Decision on Request for Sanctions, para. 7; *see also* Ayyash Decision on Interim Relief, para. 13.

⁸ Decision on Request for Sanctions, para. 8; *see also* ICTR, *Prosecutor v. Karemera, Ndirumutse and Nzirorera*, ICTR-98-44-T, Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda, 27 November 2006, para. 3.

⁹ Decision on Request for Sanctions, para. 8; *see also* ICTY, *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to *ex parte* portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 34; *see also* ICTR, *Prosecutor v. Ntahobali*, ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ and Others, 3 December 2008, para. 20.

remunerated contract with the Tribunal.¹⁰ It also suggests further sanctions be taken against the *Amicus* pursuant to Rules 60 and 114.¹¹ The Defence refers to AP15's testimony that he had signed a remunerated contract with the Tribunal in exchange for his assignment to monitor the online availability of the *Al Akhbar* articles which form the basis for the present contempt charges.¹² The Defence claims that the *Amicus* had not divulged such information to the Defence before the witness's testimony.¹³ It avers that this violation infringes the rights of the Accused to a fair trial, in particular its ability to fully investigate and prepare for the cross-examination of witness AP15.¹⁴

10. The Defence asserts that it is well accepted in international jurisprudence that any promises made or allowances provided to a witness can reasonably affect that witness's credibility and must be disclosed to the Defence.¹⁵ The Defence cites Section IV of the Registry Regulations on Assistance and Allowances for Victims and Witnesses Testifying Before the Special Tribunal for Lebanon for support that the 1,200 EUR in compensation provided to witness AP15 exceeds the reasonable expenses for a witness that need not be disclosed.¹⁶

11. The Defence further relies on Tribunal case-law that any benefits paid or promises made to witnesses which go beyond what is reasonably required must be disclosed given the potentially exculpatory nature of such information.¹⁷ The Defence contends that the *Amicus* ought to have informed the Defence without delay of the existence and terms of the contract witness AP15 signed with the Tribunal.¹⁸

12. The Defence further claims that the *Amicus* knowingly and deliberately disclosed the statement of witness AP15 to the Defence, knowing that it contained errors and false information that could render the witness susceptible to prosecution under Rule 60 *bis*.¹⁹ The Defence notes that the witness's signed statement contains a paragraph in which he states that he had not been

¹⁰ Request, para. 1.

¹¹ *Id.* at para. 25.

¹² *Id.* at para. 2.

¹³ *Ibid.*

¹⁴ Request, paras 2, 20, 21.

¹⁵ *Id.* at para. 4.

¹⁶ *Id.* at paras 10-11.

¹⁷ *Id.* at para. 5.

¹⁸ *Id.* at para. 6.

¹⁹ *Id.* at para. 13.

offered any promises or incentives to provide such a statement and further fails to mention his remunerated contract with the Tribunal.²⁰

B. Position of the Amicus

13. The *Amicus* opposes the Defence Request, arguing that it should have been clear to the Defence since the motion for amendment of his Witness List was filed on 7 December 2015, that witness AP15 would be an individual from outside the *Amicus* team assigned to monitor the ongoing availability of *Al Akhbar* material online.²¹

14. The *Amicus* clarifies that witness AP15 was not an expert witness, but simply an individual who performed the mechanical task of accessing certain websites and taking screenshots on a daily basis.²² The witness was not paid for his testimony or any opinion,²³ but rather was compensated for the time spent on carrying out the duties associated with his assignment.²⁴ The *Amicus* distinguishes this from the potentially exculpatory nature of benefits obtained by an individual by virtue of simply “being a Prosecution witness”.²⁵

15. The *Amicus* argues that the evidence of witness AP15 is objective, easily verifiable and documented by screenshots disclosed to the Defence²⁶ in advance of his testimony.²⁶

16. Finally, the *Amicus* contends that the witness’s remunerated contract with the Tribunal is information which can only go to the weight and credibility of the witness’s evidence and that the Defence had every opportunity to test this in cross-examination.²⁷ Therefore, the *Amicus* avers that the Defence has not shown any material prejudice that would justify the extreme measure of excluding evidence.²⁸

²⁰ Request, para. 14.

²¹ Response, paras 6-7.

²² *Id.* at para. 8.

²³ *Ibid.*

²⁴ Response, para. 12.

²⁵ *Id.* at paras 11-12.

²⁶ *Id.* at para. 13.

²⁷ *Id.* at para. 15.

²⁸ *Id.* at para. 14.

II. Discussion

17. I first note that contrary to what the Defence suggests, witness AP15 did not receive the amount of 1,200 EUR in exchange for his testimony but as remuneration for the task of monitoring certain websites prior to his testimony. Consequently, the Registry Regulations relied on by the Defence, which concern the provisions of allowances to witnesses for certain personal expenses do not apply in the current context.

18. However, I find that the fact that the witness had a contract with the Tribunal and was remunerated for his services is a relevant piece of information that could affect his credibility. Therefore, the *Amicus* was required to disclose this information to the Defence pursuant to Rule 113. I note that the *Amicus* has not explained why he failed to do so.

19. I must next assess whether any material prejudice has resulted from this non-disclosure and if so, what type of remedy or sanction would be appropriate in the circumstances.

20. The Defence became aware of witness AP15's contract and compensation during his cross-examination. Indeed, the witness readily provided this information when asked about his motivation for agreeing to carry out his duties for the *Amicus*.²⁹ At that time, the Defence had every opportunity to explore the witness's credibility and reliability in light of such information.³⁰ Despite my encouragement, it chose not to do so.³¹ I am therefore not persuaded that it was "deprived of its right to fully cross-examine the witness".³² In particular, given the limited scope of the witness' testimony regarding a simple task that he performed, the Defence has failed to explain why the late disclosure had put the Defence's investigation on the "wrong track" or why it lost "precious time" to its detriment.³³ Mere unsubstantiated assertions are not sufficient to show material prejudice, which is required in order to impose sanctions. I therefore find that no such prejudice was shown and consequently dismiss the Defence Request to exclude the evidence or related exhibits of witness AP15 and similarly reject the application of any other type of sanction.

²⁹ STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/T/CJ, Transcript of Trial Proceedings, 1 March 2016, p. 26 ("March 1 Transcript").

³⁰ March 1 Transcript, pp. 36-38.

³¹ *Id.* at pp. 37-38.

³² Request, para. 21.

³³ *Ibid.*

21. I note however that the Defence remains free to make submissions about what impact the contract may have on the weight to be afforded to witness AP15's evidence in its final brief. I will make this determination after reviewing witness AP15's testimony in light of the entirety of evidence presented at trial.

III. Confidentiality

22. The Parties have filed the Request, Annex to the Request and Response confidentially. The Defence reasons that this was necessary given that witness AP15 provided some evidence in private session but requests that I order the reclassification to public of several portions of the transcript of 1 March 2016.³⁴ The *Amicus* does not oppose this aspect of the Defence's Request but asks that the name of a Tribunal staff member mentioned on page 26, line 18 remain confidential.³⁵ Accordingly, I order the reclassification of the pertinent sections of the transcript. I also order the Parties to file public redacted versions of their filings in this matter.

³⁴ Request, para. 26.

³⁵ Response, para. 17.

DISPOSITION**FOR THESE REASONS;****PURSUANT TO** Rules 113 and 114;**I****ORDER** the Parties to file public redacted versions of their filings;**ORDER** the reclassification to public of the following portions of the 1 March 2016 transcript for these trial proceedings: page 24, line 16 through to page 25, line 9; page 26, line 11 through to page 35, line 4; and page 35, lines 12 through 17, ensuring the redaction of the names of any Tribunal employees including on page 26, line 18; and**DISMISS** the Request.

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

Dated 18 April 2016

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

