

**THE CONTEMPT JUDGE**

Case No.: STL-14-05/PT/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 28 November 2014
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

**PUBLIC REDACTED DECISION ON *AMICUS CURIAE* PROSECUTOR'S
REQUEST FOR RECONSIDERATION OF DECISION OF 14 NOVEMBER 2014**

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



INTRODUCTION

1. With respect to two witnesses, Witnesses AP05 and AP06, the *Amicus Curiae* Prosecutor (“*Amicus*”) sought non-disclosure of parts of their witness statements to the Defence.¹ In my decision of 14 November 2014, I rejected this application.² *Amicus* now seeks reconsideration of this decision by advancing new arguments he failed to bring in his original application. Despite this failure, I grant the request in part on an exceptional basis in order to avoid injustice.

BACKGROUND

2. On 11 June 2014, the *Amicus* sought, *inter alia*, interim non-disclosure to the Defence of the identities of three witnesses in this case, as well as their witness statements.³ The *Amicus* committed, in lieu of disclosure, to provide the Defence summaries of the withheld statements and to make further disclosures closer to trial when other protective measures were in place.⁴ Upon considering the *Amicus*’s representations with respect to each witness, as well as the particular nature of this case, I found that such interim non-disclosure was warranted pending the implementation of appropriate protective measures.⁵

3. On 10 October 2014, with respect to two of the above-referenced witnesses, Witnesses AP05 and AP06, the *Amicus inter alia* applied for (1) various protective measures *vis-à-vis* the public and (2) permanent non-disclosure *vis-à-vis* the Defence of sections of their witness statements.⁶ He pledged to disclose redacted versions of the statements to the Defence pending this decision,⁷ which he attached in a confidential and *ex parte* annex.⁸ The Defence responded, opposing the Application in part.⁹

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0063, Application for Non-Disclosure and Request for Protective Measures with Annexes, 10 October 2014 (“Original Application”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0084, Decision on *Amicus Curiae* Prosecutor’s Application for Non-Disclosure and Request for Protective Measures with Annexes, Confidential and *Ex Parte*, 14 November 2014 (“Decision of 14 November 2014”) (a redacted version was filed the same day).

³ F0031, Redacted Version of “Application for Protective Measures and Non-Disclosure with Annexes”, Dated 11 June 2014, 30 June 2014 (“Application of 30 June 2014”).

⁴ Application of 30 June 2014, para. 15.

⁵ F0045, Decision on *Amicus Curiae* Prosecutor’s Application for Protective Measures and Non-Disclosure, 20 June 2014 (“Decision on Application of 30 June 2014”), paras 5-7.

⁶ Original Application.

⁷ *Id.* at para. 9.

⁸ Original Application, Annex B, Confidential and *Ex Parte*.

⁹ F0076, Confidential Redacted Version of “Defence Response to Application for Non-Disclosure and Request for Protective Measures with Annexes”, Dated 27 October, Confidential, 31 October 2014.

4. In my decision of 14 November 2014, I granted the protective measures sought for the witnesses in part but rejected the application of non-disclosure of their statements to the Defence.¹⁰ It is this latter part of the decision for which the *Amicus* now seeks reconsideration.¹¹ In view of the *Amicus*'s request, I ordered the suspension of that part of the decision until further notice.¹² The Defence opposes the *Amicus*'s request.¹³

APPLICABLE LAW

5. Rule 140 of the Rules provides the following:

A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice.

Pursuant to Rule 60 *bis* (H), Rule 140 is applicable, *mutatis mutandis*, in contempt proceedings.¹⁴

6. Rule 140 establishes a bifurcated procedure. The party requesting reconsideration must first obtain leave of the Presiding Judge of Chamber to file a reconsideration request. If such request is filed before a single Judge, previous practice has been to require that leave must be granted by that Judge.¹⁵ The step of first seeking leave serves as a filter to prevent the filing of unwarranted requests for reconsideration.¹⁶ Any request for leave must therefore undergo a *prima facie* examination of the merits of the sought reconsideration and will be dismissed if it is manifestly unfounded.¹⁷

7. In this regard, I recall the applicable standards for reconsideration. In particular, the Appeals Chamber has held that:

¹⁰ Decision of 14 November 2014, Disposition.

¹¹ F0086, Urgent Request for Leave to Submit Request for Reconsideration of the Decision of 14 November 2014, 20 November 2014 ("Reconsideration Request").

¹² E-mail from Legal Officer of the Contempt Judge to the parties, 24 November 2014.

¹³ F0087, Defence Response to "Urgent Request for Leave to Submit Request for Reconsideration of the Decision of 14 November 2014", 27 November 2014 ("Response").

¹⁴ See STL, *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0059, Decision on Defence Request for Reconsideration of Decision on Certification, 1 September 2014, para. 6.

¹⁵ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0172, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, para. 30, fn. 33.

¹⁶ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1214, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 13 November 2013, para. 4; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1603, Decision on Leave to Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014, paras. 4-5.

¹⁷ *Ibid.* In some systems, this would be spelled out as an examination as to the *fumus boni juris* of the request (assessment of the possibility of success) and the *periculum in mora* (possible prejudice).

[R]econsideration is an exceptional measure and subject to strict requirements. A party seeking the remedy must demonstrate that reconsideration is necessary to avoid an injustice. What constitutes an injustice is case-dependent, but “[a]t a minimum, it involves prejudice.” The party must allege prejudice on specific grounds, which may include that a decision is “erroneous or [. . .] constituted an abuse of power on the part of the Chamber” or that “new facts or a material change in circumstances” have arisen after the decision is made. We recall that “the presence of these grounds is not sufficient per se. The party seeking reconsideration must also show that they resulted in prejudice”.¹⁸

DISCUSSION

I. Whether leave should be granted to request reconsideration of my decision that both witness statements must be disclosed in unredacted form

8. The *Amicus* argues that I should grant leave to request reconsideration for a variety of reasons. He asserts that the witness statements of Witnesses AP05 and AP06 include information that “do not concern in any way cases STL-14-05 and STL-14-06”.¹⁹ The *Amicus* proposes certain redactions, arguing that the redacted information has nothing do with the two cases and withholds no relevant or material information from the Defence.²⁰ He further submits that disclosing the statements in full would impact ongoing investigations and that the relevant portions, for which he seeks redactions, concern specific measures taken in the field to protect witnesses and the integrity of Tribunal investigations.²¹ In a confidential and *ex parte* annex, the *Amicus* specifies that the relevant portions pertain to [REDACTED]. Such information, he asserts, is extremely delicate and should not be made known to the Defence.²² In this context, the *Amicus* makes reference to certain broadcasts by *Al Jadeed* TV which relate to the Tribunal and the *Amicus*’s work in particular.²³

9. The Defence responds that the *Amicus*’s request is manifestly unfounded.²⁴ It argues that the *Amicus* merely seeks to “bolster its original inadequate submissions [...] through the reconsideration mechanism”.²⁵ It further submits that the *Amicus* misapprehends the nature of his

¹⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10 (footnotes referring to other case-law omitted).

¹⁹ Reconsideration Request, para. 14.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Reconsideration Request, Annex C, Confidential and *Ex Parte* (“Annex C”), paras 7, 12

²³ Reconsideration Request, para. 16; *see also* Annex A; Annex B, Confidential.

²⁴ Response, para. 4.

²⁵ *Id.* at para. 11.

disclosure obligations, which are not related to the relevance of the witness statements.²⁶ It also asserts that the *Amicus* has failed to link the *Al Jadeed* broadcasts to the decision for which reconsideration is sought.²⁷

10. I first recall that the *Amicus* has already unsuccessfully sought similar redactions of the witness statements. I rejected his original request because the *Amicus* had failed to demonstrate how disclosure to the Defence “would cause specific prejudice to any ongoing investigation or be contrary to the interests of the Tribunal or public”.²⁸ I also held that “[t]o prevent the Defence from receiving information to which it is normally entitled, the *Amicus* must offer more than mere general assertions of risk”.²⁹ The *Amicus* acknowledges as much and now submits more information that, in his view, “further justifies the sought redactions and reconsideration” of my previous decision.³⁰ I find such approach wasteful of the Court’s and the Parties’ time and resources. Reconsideration of a decision is the exception and will be granted only under very limited circumstances. “[It] must not become a mechanism that is systematically used to redress the imperfections contained in the parties’ motions”.³¹ Indeed, “[m]otions presenting only arguments that were or could have been made before the previous decision was rendered are [...] generally frivolous”.³² While I could reject the *Amicus*’s request on this basis, I consider that the protected interests at stake require me to examine the request on the merits. However, I stress that I do so exceptionally.

11. I summarily dismiss the *Amicus*’s arguments that the proposed redactions contain information that is not relevant to the Defence. In his original application, the *Amicus* conceded that, ordinarily, both witness statements would have to be disclosed in full to the Defence pursuant to Rule 110 (A) (ii).³³ Under Rule 116, the only question is whether there are important grounds militating against such disclosure, including prejudice to other investigations or risk to

²⁶ Response, paras 12-14.

²⁷ *Id.* at paras 15-17.

²⁸ Decision of 14 November 2014, para. 20.

²⁹ *Id.* at para. 23.

³⁰ Reconsideration Request, para. 12.

³¹ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, p. 3; see also STL, *Prosecutor v. Ayyash et al.*, STL 11-01/PT/PTJ, Decision on the Prosecution’s Request for Partial Reconsideration of the Pre-Trial Judge’s Order of 8 February 2012, 29 March 2012, para. 23.

³² ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR72.1, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal Concerning Jurisdiction” Dated 31 August 2004, 15 June 2006, para. 28.

³³ See Original Application, para. 4; Decision of 14 November 2014, para. 19.

witnesses. Lack of relevance is not one of those grounds. Reconsideration on that basis is therefore manifestly unfounded.

12. I also dismiss the *Amicus*'s arguments pertaining to the alleged prejudice that other investigations would suffer if the information he seeks to redact is disclosed from the Defence. As in his original application, the *Amicus* makes no substantiated argument why this would be the case. Mere repetition of unsuccessful arguments is insufficient to allow a request for reconsideration to go forward.³⁴

13. Next, I am not persuaded that the *Amicus*'s references to certain broadcasts by *Al Jadeed* TV justify, *prima facie*, reconsideration of my decision. I recall my finding in that decision that "disclosure to the Defence in this case has been proceeding for many months and the *Amicus* has made no claim that any disclosure has improperly been made public".³⁵ Here, apart from "noting" the *Al Jadeed* broadcasts,³⁶ the *Amicus* has made no assertion that any disclosed information will be made public in an unauthorized manner. Indeed, while one of the broadcasts seems to suggest that *Al Jadeed* TV was about to publish documents relating to the Tribunal's budget, there is no indication that the Defence will not comply with the strict confidentiality measures in place in the present proceedings. A reconsideration request on this ground is also manifestly unfounded.

14. However, I find *prima facie* justified the *Amicus*'s request for reconsideration based on the potential risk to victims and witnesses if the witness statements of Witnesses AP05 and AP06 are revealed to third parties, including the Defence in this case. I therefore grant leave to seek reconsideration with respect to this issue and will address it in full below.³⁷

³⁴ See, e.g., ICTY, *Prosecutor v. Mladić*, Decision on Defence Motion for Reconsideration or Certification to Appeal Decision on Foča Municipality Bar Table Motion, 31 January 2014, para. 6; ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, p. 5.

³⁵ Decision of 14 November 2014, para. 23.

³⁶ Reconsideration Request, para. 16.

³⁷ I note that the Defence requests that I order the *Amicus* to file a confidential redacted version of his request for reconsideration (Annex C) in order to respond to it (Response, para. 18). However, given the nature of the information, which *Amicus* requests should be kept from the Defence, I find that it would defeat the purpose of the *Amicus*'s application if the Defence were given this information. In light of the outcome of this decision, I find that no prejudice results from this.

II. Whether to grant reconsideration of my decision that both witness statements must be disclosed in unredacted form

15. After this *prima facie* assessment, I move to the second stage of the analysis required for reconsideration. I note that certain portions of the witness statements of Witnesses AP05 and AP06 contain [REDACTED].³⁸ I take into account the *Amicus*'s concern, raised here for the first time, that [REDACTED].³⁹ Indeed, such information should be protected as much as possible. [REDACTED]. Pursuant to Rule 116, such disclosure to the Defence in this case is therefore contrary to the public interest. In this light, reconsidering my decision to disclose the statements in full is justified to avoid an injustice.

16. I therefore order that the *Amicus* redact the information contained in paragraphs 10 and 11 of Witness AP05's statement and paragraphs 10-12 of Witness AP06's statement. I reject the other redactions proposed by the *Amicus* as they do not relate to the risks identified in this decision. I also order the *Amicus* to provide the following information to the Defence as a counterbalancing measure pursuant to Rule 116 (B): [REDACTED].

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rules 60 *bis*, 116 and 140 of the Rules;

I

GRANT the Motion in part;

RECONSIDER the Decision of 14 November 2014 in part;

ORDER the following:

- The *Amicus* must disclose to the Defence within seven days of this decision the witness statements of Witnesses AP05 and AP06 with the redactions and counterbalancing measures as set out in paragraph 16 of this decision;
- The *Amicus* must notify me of such disclosure once completed;

³⁸ [REDACTED].

³⁹ [REDACTED].

REMIND the Defence of its confidentiality obligations; and

DISMISS the Motion in all other respects.

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

Dated 28 November 2014

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

