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:	**19 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 JUDICIAL NOTICE

***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*") requests that I take judicial notice of 24 public documents pertaining to protective measures granted in the *Ayyash et al.*[1] case, in addition to the fact that protective measures have been granted to 50 Prosecution witnesses in those same proceedings ("Motion").[2] The Defence opposes the Motion.[3] The *Amicus* also seeks leave to reply.[4]

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

APPLICABLE LAW

3. Rule 160 of the Rules of Procedure and Evidence ("Rules"), Judicial Notice, reads as follows:

> (A) The Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (B) At the request of a Party or *proprio motu*, the Trial Chamber, after hearing the Parties, may decide, in the interests of a fair and expeditious trial, to take judicial notice of adjudicated facts from other proceedings of the Tribunal or from proceedings of national and international jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to acts and conduct of the accused that is being tried.

4. The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") both contain similar provisions for taking judicial notice.[5] Thus, guidance can be sought, persuasively, from the jurisprudence of those Tribunals in interpreting Rule 160.

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[1] STL, *Prosecutor v. Ayyash et al.,* STL-11-01/T/TC ("*Ayyash et al.* case").
[2] STL, *In the case against Akhbar Beirut S.A.L. and Al Amin,* STL-14-06/PT/CJ, F0142 Request for Judicial Notice, 9 December 2015 ("Motion"). All further references to filings and decisions refer to this case number unless otherwise stated.
[3] F0152, Defence Response to the *Amicus Curiae* Prosecutor's Request for Judicial Notice, 15 December 2015 ("Response").
[4] F0160, Request for Leave to Submit a Short Consolidated Reply to Defence Responses of 15 December 2015, 16 December 2015 ("Reply").
[5] Rule 94(A) of the ICTY RPE and Rule 94 (A) of the ICTR RPE are identical to Rule 160 (A) STL RPE. Rule 160 (B) STL RPE shares very similar language to the corresponding rules on Judicial Notice for other international tribunals. The text of these rules has been amended numerous times but the current version of Rule 94(B) ICTY RPE reads as follows: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings." Rule 94 (B) ICTR RPE reads as

5. A determination under Rule 160 must be informed by the purpose of taking judicial notice which is to achieve judicial economy and the harmonization of judgments, while ensuring respect for the accused's right to a fair, public and expeditious trial.[6] Each sub-section of Rule 160 sets out different, albeit possibly overlapping, categories of judicial notice.[7] The first requires that a court take judicial notice of facts that are notorious, not subject to reasonable dispute and constitute common knowledge[8], while the second relates to specific facts of which a chamber may in its discretion take judicial notice, provided that they have been previously adjudicated in a final judgment.[9] Notably, once a fact of common knowledge is judicially noticed, it becomes conclusive evidence.[10] In the case of judicial notice of an adjudicated fact, such facts are merely presumptions that may be rebutted by the opposing party through the introduction of evidence at trial.[11]

6. Adjudicated facts are "facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding."[12] The following legal criteria, amongst others, have emerged as standards which must be met before a chamber can exercise its discretion to take judicial notice of an adjudicated fact: (i) the fact must be distinct, concrete and identifiable; (ii) judicial notice must not be used as a mechanism to circumvent the general rules governing the admissibility of evidence; (iii) the fact must be relevant to the matters at issue in the current proceedings; (iv) the fact must not include findings or characterizations that are of an essentially legal nature and must not involve legal conclusions based on interpretations of facts; (v) the fact

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follows: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings."

[6] ICTR, *Setako v. Prosecutor,* ICTR-04-91-A, Judgement, 28 September 2011, para. 200; *see also* ICTR, *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-T/ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001 ("*Ntakirutimana Decision*"), para. 28.

[7] *See Ntakirutimana Decision*, para. 25.

[8] ICTR, *Prosecutor v. Karemera et al.,* ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera Decision*"), para. 22.

[9] *Ntakirutimana Decision*, para. 26.

[10] *Karemera Decision*, para. 42.

[11] *Ibid.*

[12] *Karemera Decision*, para. 40.

must not have been contested on appeal, or, if it has, the fact has been affirmed on appeal; (vi) the fact must not relate to the acts, conduct or mental state of the accused.[13]

7. In general, judicial notice of an adjudicated fact must be denied where the moving party has not identified the fact with sufficient precision. A vague and generalised request to take notice of an entire judgement will be insufficient to invoke Rule 160 (B) to take judicial notice of adjudicated facts.[14] Rather, the moving party must specifically point out paragraphs of the judgment containing the facts of which judicial notice is to be taken.[15]

DISCUSSION

I. Positions of the Parties

A. Position of the Amicus

8. The *Amicus* first requests that I take judicial notice of 24 public documents which are part of the Tribunal's official record and pertain to protective measures granted by the Trial Chamber in the *Ayyash et al.* case. The Motion is supplemented by an annex which contains these decisions and orders.[16]

9. Secondly, the *Amicus* requests that I take judicial notice that, as of 24 November 2015, protective measures had been granted for 50 of the 186 Prosecution witnesses testifying in the *Ayyash et al.* case, for reasons set out in Annex D.[17] The *Amicus* has provided further annexes containing independently maintained information from the Tribunal's Registry, in order to provide additional support that 50 Prosecution witnesses have received some form of protective measures.[18]

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[13] ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012, para. 8; *see also* ICTY, *Prosecutor v. D. Milošević*, IT-98-29/1-AR73.1, Decision on Interlocutory Appeals against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, para. 22; *see also* ICTR, *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 12; *see also Ntakirutimana* Decision, para. 30.

[14] ICTY, *Prosecutor v. Kupreškic et al.,* IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94 (B), 8 May 2001 ("*Kupreškic Decision*"), para. 12.

[15] *Kupreškic Decision,* para. 12

[16] Motion, para. 8; *see also* Annex C and Annex D of the Motion.

[17] Motion, para. 9; *see also* Annex D of the Motion.

[18] Motion, para. 7; *see also* Annex B of the Motion.

10. In essence, the *Amicus* asks that the Tribunal "take judicial notice of its own official records" and asserts that the information contained therein constitutes adjudicated matters from the *Ayyash et al.* case. The *Amicus* also argues that these are "matters of common knowledge" since they are readily verifiable by reference to a reliable and authoritative source.[19]

11. The *Amicus* affirms that the necessary requirements are met in order for the information in the official records to be considered adjudicated facts: the matter constitutes a concrete fact in that it is made up of an objective number extracted from the Tribunal's official record; it relates to evidence charged in the indictment in the present case; and it is relevant, given that it pertains to the security context and confidentiality concerns in which the alleged conduct of the Accused took place.[20]

B. Position of the Defence

12. The Defence opposes the Motion on the basis that the materials fail to meet the requirements of Rule 160.[21] In particular, the Defence notes that a fact of common knowledge of which the court may take judicial notice must not be subject to reasonable dispute, a requirement not satisfied by the *Amicus* in the present Motion.[22] Furthermore, a mere claim that an item constitutes common knowledge will not satisfy the rigorous requirements necessary to take judicial notice of an adjudicated fact in accordance with Rule 160 (B).[23]

13. In addition, the Defence avers that international jurisprudence has established that information does not become common knowledge by sole reason that it is found in a document produced by a United Nations organ or International Tribunal.[24] The Defence argues that this principle must equally apply to this Tribunal and that, in any event, the *Amicus* has failed to show that the facts contained in the Tribunal documents are common knowledge.[25]

14. Finally, the Defence recalls that judicial notice cannot be taken of facts which relate to the acts and conduct of the Accused. The Defence maintains that the *Amicus* nonetheless seeks to introduce these facts by way of judicial notice in order to support the two new charges that he

[19] Motion, para. 10.
[20] Motion, paras 11-12.
[21] Response, para. 2.
[22] Response, para. 5.
[23] Response, para. 8.
[24] Response, paras 6-7.
[25] *Ibid*.

sought leave to add to the Order in Lieu of an Indictment in an earlier motion.[26] The Defence asserts that the *Amicus* has failed to demonstrate the facts' relevance to the original sole count on the Indictment, given that the current allegations relate to "purported witnesses" whereas the facts contained in the various Tribunal documents concern the status of actual witnesses.[27]

II. Discussion

15. 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]'".[28] I find that none of the *Amicus*'s reasons satisfy this requirement. Each expresses mere disagreement with Defence arguments made in response to the Motion and in turn reiterates submissions already set out in the initial Request. 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.

16. Further, I recall that the sub-sections of Rule 160 entail different considerations in the determination of whether to take judicial notice of these facts and documents. I will therefore apply the legal tests separately for each category below.

A. Rule 160 (A)

17. The first sub-section of the Rule requires that I take judicial notice of facts of common knowledge. Facts involving interpretations or legal characterizations of facts are not capable of admission under Rule 160.[29] Rather, this subsection is normally reserved for general facts of history, geography or laws of nature that are widely known and beyond reasonable dispute.[30] A Chamber's decision to grant protective measures to a witness is a legal decision based on an evaluation of evidence presented to the court and is not a fact of common knowledge of which judicial notice can be taken. Therefore these documents cannot be admitted under Rule 160 (A).

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[26] Response, para. 9.
[27] *Ibid.*
[28] *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.
[29] *See* ICTY, *Prosecutor v. Simić et al.,* IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999 ("*Simić Decision*").
[30] *Karemera Decision,* para. 22.

B. Rule 160 (B)

18. The *Amicus* also bases his Motion on Rule 160 (B), asserting that the Trial Chamber's decisions can be considered adjudicated facts. However, the prerequisites are plainly not met in the circumstances.

19. First, I am unable to take judicial notice of the entirety of the 24 public documents from the *Ayyash et al.* case as international jurisprudence stipulates that entire judgments cannot form the basis for judicial notice.[31]

20. Indeed, a court must withhold judicial notice of a purported adjudicated fact if it is not discrete, concrete and identifiable in the findings of an original judgment. The *Amicus* has not referenced any specific portions in the 24 documents proposed where the court has succinctly stated the fact that 50 Prosecution witnesses did receive protective measures in the *Ayyash et al.* case. The specific portions in the documents that the *Amicus* has referenced in Annex D include the Trial Chamber's assessments of the law and their application to the particular facts before it. Rather, the *Amicus* improperly requests me to take judicial notice of a conclusion that he alleges could be reached as a result of reviewing a collection of information contained in numerous, and not final, decisions and orders of the Trial Chamber, instead of an identifiable, factual finding contained in a final judgment. Thus, it would be improper for me, before the trial in this case has even commenced, to simply adopt the large amount of information contained in these documents in order to reach a single factual and legal conclusion from the decisions granting protective measures in the *Ayyash et al.* case, for which the reasons are individualized amongst the various witnesses.

21. Second, the fact that 50 out of 186 Prosecution witnesses received protective measures is not a fact that is stated in a final judgment. The proceedings in the *Ayyash et al.* case are still underway and no final judgment has yet been issued. It is therefore premature to take judicial notice of this fact from the *Ayyash et al*. case.

22. I recall that I dismissed the *Amicus*'s request to amend the Order in Lieu of an Indictment by adding two new charges.[32] Therefore, I need not address the Defence's arguments referencing this previous motion.

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[31] *Kupreškic Decision*, para. 12

23. In sum, although the 24 documents which represent public decisions and orders from the Trial Chamber are reliable, relevant and of probative value to the issues at trial, they cannot be properly admitted under the rubric of judicial notice, and I dismiss this Motion accordingly.

DISPOSITION

FOR THESE REASONS;

PURSUANT TO Rule 160 of the Rules;

I

DISMISS the Motion; and

DISMISS the Request for Leave to Reply.

Done in Arabic, English and French, the English version being authoritative.
Dated 19 January 2016.
Leidschendam, the Netherlands

Judge Nicola Lettieri
Contempt Judge

[32] F0162, Decision on *Amicus Curiae* Prosecutor's Request for Leave to Amend Order in Lieu of an Indictment, 18 December 2015, Disposition.