



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No.: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr. Daryl Mundis

Date: 31 March 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ON JOINT DEFENCE MOTION FOR ACCESS TO CONFIDENTIAL MATERIAL IN THE *MERHI* CASE

Office of the Prosecutor:

Mr. Norman Farrell, Mr. Graeme Cameron
& Mr. Alexander Milne

Victims' Legal Representatives:

Mr. Peter Haynes, Mr. Mohammad F. Mattar
& Ms. Nada Abdelsater-Abusamra

Counsel for Mr. Salim Jamil Ayyash:

Mr. Eugene O'Sullivan, Mr. Emile Aoun
& Mr. Thomas Hannis

Counsel for Mr. Mustafa Amine Badreddine:

Mr. Antoine Korkmaz, Mr. John Jones
& Mr. Iain Edwards

Counsel for Mr. Hassan Habib Merhi:

Mr. Mohamed Aouini, Ms. Dorothee Le Fraper
du Hellen & Mr. Jad Khalil

Counsel for Mr. Hussein Hassan Oneissi:

Mr. Vincent Courcelle-Labrousse, Mr. Yasser
Hassan & Mr. Philippe Larochelle

Counsel for Mr. Assad Hassan Sabra:

Mr. David Young, Mr. Guénaél Métraux
& Mr. Geoffrey Roberts



INTRODUCTION

1. Counsel for the four Accused in the case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* filed a joint motion for access to confidential material filed in the case of *Prosecutor v. Hassan Habib Merhi* before the two cases were joined on 11 February 2014.¹ The joint Defence motion was filed before the Trial Chamber, after the *Merhi* case had been joined with the *Ayyash* case,² and after withdrawing an identical pending motion before the Pre-Trial Judge.³ The Prosecution partially opposed the motion,⁴ and a joint reply was filed.⁵ Counsel for Mr. Merhi and the Legal Representative for Victims made no submission. As a result of the joinder of the *Ayyash* and *Merhi* cases, counsel for Mr. Merhi received access to confidential filings in the *Ayyash* case record and, additionally, confidential and *ex parte* filings provided to all other Defence counsel. However, Defence counsel in the *Ayyash* case did not receive commensurate access to the case record of the *Merhi* proceedings.⁶ This decision resolves that inconsistency.

APPLICABLE PRINCIPLES

2. A party to proceedings may obtain material from any source—including from another case—to assist in the preparation of its case if the material sought has been identified by its general nature and if a legitimate forensic purpose for such access has been established. Access to confidential material may be granted when a Chamber is satisfied that the party seeking access has established that the material sought is likely to assist the case materially or there is a good chance that it would. This standard is met when a nexus between the two cases—geographical, temporal, or otherwise—is shown.⁷ The Trial Chamber endorses these principles.

¹ STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, Joint Defence Motion for Access to Confidential Material in the Merhi Case, 22 October 2013.

² STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, Joint Defence Motion for Access to Confidential Material in the Merhi Case, 14 February 2014.

³ STL-13-04/PT/PTJ, Notice of Withdrawal of Joint Defence Motion for Access To Confidential Material In The Merhi Case, 14 February 2014.

⁴ STL-11-01/T/TC, Prosecution's Response to "Joint Defence Motion for Access to Confidential Material in the Merhi Case", 20 February 2014.

⁵ STL-11-01/T/TC, Joint Defence Reply to Prosecution Response to Defence Motion for Access to Confidential Material in the Merhi Case, 25 February 2014.

⁶ Counsel for the four Accused did not receive access to the *Merhi* case record upon joinder because, at the time the two cases were joined, these counsel had their motion for access pending before the Pre-Trial Judge. Consequently, they did not receive automatic access to the case record in *Merhi* as a result of joinder, comparable to the access which was provided to the *Ayyash* case record for counsel to Mr. Merhi.

⁷ ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Decision on Momčilo Perišić's Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009, paras 4-5; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and

DISCUSSION

3. The joint Defence motion requested access to all confidential material—filings and disclosure—from the *Merhi* case before its joinder with the *Ayyash* case. Additionally, the joint Defence motion seeks access to confidential and *ex parte* filings where: i) access is required to ensure the fundamental right to a fair trial of the Accused in the *Ayyash* case; ii) the reason for the *ex parte* status of the filing no longer applies; or, iii) the *ex parte* nature of the filing can be lifted without prejudice to the parties in the *Merhi* case.⁸ The Trial Chamber considers that the material sought by the joint Defence motion has been identified by its general nature.

4. The Prosecution responded submitting that all material disclosed to counsel for Mr. Merhi before the joinder has been disclosed to the other four Accused in the *Ayyash* case.⁹ Acknowledging this in their joint reply, counsel for the four Accused withdrew the part of their motion pertaining to materials disclosed in the *Merhi* case. Accordingly, only two categories of materials from the joint Defence motion—confidential filings, and confidential and *ex parte* filings—remain for consideration.¹⁰

5. Defence counsel submit that the interrelationship between the two cases makes the material sought relevant to the preparation of the Defence.¹¹ In its decision on joinder, the Trial Chamber highlighted that all five Accused are alleged co-perpetrators in the same conspiracy.¹² The two joined cases are closely linked, and this overlap establishes a legitimate forensic purpose for the access sought. The Trial Chamber is accordingly satisfied that the material sought *prima facie* will materially assist the Defence case. The remaining question, consequently, is whether reasonable grounds exist to deny access to any of the material sought. The Prosecution distinguished between ‘pre-confirmation filings’ and ‘post-confirmation’ filings in the *Merhi* case, so these two categories will be addressed individually.

Sealed Exhibits, 22 April 2009, paras 10-11; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-T-439, Decision on Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 14 March 2008, p. 4.

⁸ Joint Defence motion, paras 1, 6-11.

⁹ Prosecution response to joint Defence motion, para. 10.

¹⁰ Joint Defence reply, paras 2, 9.

¹¹ Joint Defence motion, para. 2.

¹² Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, para. 22.

A. Pre-Confirmation Filings

6. As a threshold matter, the Prosecution submits that the Trial Chamber is not competent to rule upon the joint Defence motion in so far as it relates to any pre-confirmation filings. According to the Prosecution, access to pre-confirmation filings in the *Merhi* case is governed by Rule 88 of the Rules of Procedure and Evidence, which is within the exclusive jurisdiction of the Pre-Trial Judge.¹³ Further, it is unclear whether, under Rule 70, the Trial Chamber intends to dispense with all or part of Rule 95.¹⁴

7. The joint Defence reply argues that the Prosecution's reliance on the exclusive jurisdiction of the Pre-Trial Judge regarding pre-confirmation material is misplaced as their request is based on a 'general right of access to relevant and probative materials from other proceedings', and not on Rule 88.¹⁵

8. Having access to material relevant to preparing a defence is fundamental to the right to a fair trial. The joined case is now before the Trial Chamber, and as the issue for determination does not fall within Rules 93, 117 and 118—that is, within the Pre-Trial Judge's sole competence—the Trial Chamber may decide the issue.¹⁶

9. The Prosecution, however, argues that even if the Trial Chamber is competent to rule upon access to pre-confirmation filings, these filings are not subject to disclosure under Rules 110 or 113. And, further, the requested disclosure would provide the other four Accused with pre-confirmation material from the *Merhi* case that would exceed the access given to counsel for Mr. Merhi.¹⁷ This is partly correct. Counsel for the other four Accused are no more entitled to the *ex parte* material filed in the *Merhi* case than are counsel for Mr. Merhi. Rules 110 and 113, however, are irrelevant because they relate to the disclosure of material held by Prosecutor, and the Defence is seeking access to material which is part of a case record (*Merhi*) that has been joined to the *Ayyash* case. This

¹³ Prosecution response to joint Defence motion, para. 11. Nonetheless, the Prosecution concedes that Rule 70 does not expressly address the current circumstances where the pre-trial stage has been completed for some but not all Defence teams (see, paras 5, 16).

¹⁴ Prosecution response to joint Defence motion, para. 16.

¹⁵ Joint Defence reply, paras 4-6.

¹⁶ In this regard, see Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, para. 72, which reads in part: 'The Pre-Trial Judge retains certain unique roles, as set out in Rule 130 (B), relating to Rules 93 (questioning of anonymous witnesses), 117 (*in camera* hearings on security interests of States and other international entities) and 118 (submissions related to information never subject to disclosure without consent of the provider). The Trial Chamber has no competence to decide matters falling within Rules 93, 117 or 118 as they are within the sole domain of the Pre-Trial Judge'.

¹⁷ Prosecution response to joint Defence motion, paras 4, 12, 14.

part of the motion is dismissed in so far as it seeks access to filings to which counsel for Mr. Merhi do not have access.

B. Post-Confirmation Filings

10. The Prosecution accepts that access should be granted to the post-confirmation confidential *inter partes* filings in the *Merhi* case. However, it submits that the joint Defence motion fails to identify any legal basis that would allow for access to post-confirmation confidential and *ex parte* filings. Nonetheless, the Prosecution does not object to the Defence receiving access to its confidential and *ex parte* filings in the *Merhi* case, except for its submissions on the initiation of proceedings *in absentia* of 9 December 2013 which details confidential investigative efforts.¹⁸

11. Counsel for the four Accused in the *Ayyash* case should be given access to the post-confirmation case record in the *Merhi* case commensurate to that given to counsel for Mr. Merhi. This will ensure that all Defence counsel in the joined case are on an equal footing. The ‘Prosecution submissions pursuant to Rule 106’, filed on 9 December 2013 in the *Merhi* case, is classified as confidential and not confidential and *ex parte*, as described by the Prosecution. Counsel for Mr. Merhi have this filing, and there is no reason why counsel for the other four Accused should not also have it.

12. The Registry should therefore provide counsel for Mr. Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra with access to confidential or *ex parte* post-confirmation filings in the *Merhi* case before joinder on 11 February 2014 equivalent to that given to counsel for Mr. Merhi. This includes the Prosecution filing of 9 December 2013.

¹⁸ Prosecution response to joint Defence motion, paras 7-9.

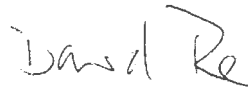
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ORDERS the Registry to provide counsel for Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra with access to confidential and confidential and *ex parte* filings on the *Merhi* case record before 11 February 2014 equivalent to that given to counsel for Mr. Hassan Habib Merhi.

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

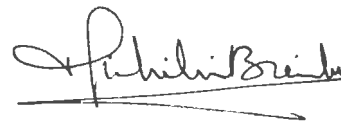
Leidschendam,
The Netherlands
31 March 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

