

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-05/S/CJ

Before: Judge Nicola Lettieri, Contempt Judge

Registrar: Mr Daryl Mundis, Registrar

Date: 24 September 2015

Original language: English

Classification: Public

IN THE CASE AGAINST

KARMA MOHAMED TAHSIN AL KHAYAT

**PUBLIC REDACTED VERSION OF DECISION ON REQUEST FOR
AUTHORISATION TO INSPECT CONFIDENTIAL DOCUMENTS IN THE *AL
JADEED* CASE**

***Amicus Curiae* Prosecutor:**
Mr Kenneth Scott

Counsel for Ms Karma Khayat:
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Shyamala Alagendra

**Counsel for *Akhbar Beirut* S.A.L. and Mr
Ibrahim Mohamed Ali Al Amin:**
Mr Antonio Abou Kasm



INTRODUCTION

1. The Defence in case STL-14-06 (“*Al Akhbar* case”) seeks an order allowing it to consult all confidential documents in this case (“*Al Jadeed* case”).¹ The *Amicus Curiae* Prosecutor (“*Amicus*”) opposes the Request.² Having considered the Parties’ arguments, I grant the Request in part, as explained below.

PROCEDURAL HISTORY

2. The Defence submitted a request in the *Al Akhbar* case to “inspect all the confidential documents in the *Al Jadeed* case”.³ The *Amicus* opposed the request.⁴

3. As Contempt Judge in the *Al Akhbar* case, I referred the request to the *Al Jadeed* case and ordered that any response should also be filed there.⁵ Consequently, the *Amicus* filed the Response in the *Al Jadeed* case.⁶ The Defence in the *Al Jadeed* case chose not to make submissions with respect to the Request.

APPLICABLE LAW

4. No provision of the Tribunal’s Rules of Procedure and Evidence (“Rules”) addresses the ability of a party in one case to obtain confidential material in another case. However, facing this issue, the Trial Chamber endorsed principles articulated and applied by other international criminal tribunals. I will follow the Trial Chamber’s approach.

5. In general, a party 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

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/T/CJ, F0166, Defence Request for Authorisation to Inspect Confidential Documents in the *Al Jadeed* Case, Confidential, 1 June 2015 (“Request”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0168, Response to Defence Request for Authorisation to Inspect Confidential Documents in the *Al Jadeed* Case, Confidential, 16 June 2015 (“Response”).

³ STL, *In the case against Akhbar Beirut S.A.L and Al Amin*, STL-14-06/PT/CJ, F0098, Public Redacted Version of the “Defence Request for Authorisation to Inspect Confidential Documents in the *Al Jadeed* Case” Dated 1 June 2015, 15 June 2015.

⁴ STL, *In the case against Akhbar Beirut S.A.L and Al Amin*, STL-14-06/PT/CJ, F0099, Response to Defence Request for Authorisation to Inspect Confidential Documents in the *Al Jadeed* Case, Confidential, 12 June 2015.

⁵ STL, *In the case against Akhbar Beirut S.A.L and Al Amin*, STL-14-06/PT/CJ, F0100, Order on Defense Request for Authorisation to Inspect Confidential Documents in the *Al Jadeed* Case, Confidential, 15 June 2015, paras 2-3.

⁶ Response.

nature and if a legitimate forensic purpose for such access has been established.⁷ If the material requested is confidential, access may be granted when a Chamber is satisfied that the applicant party has shown that the material is likely to assist the case materially or there is a good chance that it would.⁸ This standard is met when a factual nexus between the two cases—geographic, temporal, or otherwise—has been demonstrated.⁹

6. However, a Chamber retains discretion to deny access to confidential material if there are reasonable grounds for doing so.¹⁰ With respect to *ex parte* material, I concur with the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) that a higher standard must be met in establishing a legitimate forensic purpose.¹¹ The ICTY Appeals Chamber has reasoned that such material, “‘being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution’ and that consequently ‘the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed’”.¹²

DISCUSSION

I. Arguments of the Parties

A. The position of the Defence in the Al Akhbar case

7. The Defence seeks an order allowing it to consult all the confidential documents in the *Al Jadeed* case, including future documents, whether they be: (a) transcripts of hearings held in

⁷ *Prosecutor v. Ayyash et al.*, STL-13-04/I/PTJ, F1467, Decision on Joint Defence Motion For Access To Confidential Materials in the *Merhi* Case, 31 March 2014 (“*Merhi* Decision”), para. 2.

⁸ *Ibid.*

⁹ *Ibid.* I note that while the approach taken by the Trial Chamber reflects certain case-law from other international criminal tribunals, a slightly different approach has also been followed. Under this other approach, a “legitimate forensic purpose” regarding confidential material exists if the applicant demonstrates that the material is “relevant and essential”. Relevance may be determined by showing a nexus between the applicant’s case and the case from which the material is sought. Essentiality is established if the applicant demonstrates a “good chance that access to [the material] will materially assist the application in preparing his case”. See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Gvero Defence Request for Access to Confidential Materials from the Karadžić Case, 6 February 2013, para. 9.

¹⁰ See *Merhi* Decision, para. 5.

¹¹ See ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on *Vlastimir Đorđević*’s Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010 (“*Šainović* Decision”), para. 10; ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Defence Motion for Access to Confidential Material in *Prosecutor v. Milan Martić*, 17 April 2014, para. 8.

¹² *Šainović* Decision, para. 10.

closed or private session; (b), exhibits (c); submissions filed by the parties; (d) decisions rendered; (e) or any other confidential documents.¹³ The Request covers confidential *inter partes* and *ex parte* material.¹⁴

8. The Defence asserts that it has identified the material sought by its general nature.¹⁵ Further, the material is “relevant and essential for [the Defence] preparation due to the links between the [*Al Akhbar* case] and the *Al Jadeed* case”.¹⁶

9. In this regard, the Defence contends that the two cases concern the same type of allegedly criminal conduct—publishing and/or broadcasting information on purported confidential Tribunal witnesses—and the same effects.¹⁷ Moreover, the conduct in both cases is attributed to the same class of persons and occurred in Lebanon.¹⁸ For these reasons, the Defence submits, the cases were the subjects of the same Decision in Proceedings for Contempt with Orders in Lieu of an Indictment.¹⁹

10. [REDACTED].²⁰

11. The Defence emphasizes that the requested documents are essential to the Defence’s case because they would allow the Defense to assess the credibility of incriminating evidence and potentially exonerate the Accused. Fairness dictates that the Defence has access.²¹

12. Finally, the Defence reasons that any protective measure ordered for a witness in the *Al Jadeed* case shall continue to be applied *mutatis mutandis* in the *Al Akhbar* case if the Defence receives the requested documents.²²

B. The position of the Amicus

13. In opposing the Request, the *Amicus* first takes issue with the Defence’s reliance on a Trial Chamber decision in the Tribunal’s main proceedings. In the *Amicus*’s view, the

¹³ Request, para 8.

¹⁴ *Ibid.*

¹⁵ *Id.* at para. 9.

¹⁶ *Id.* at para. 10.

¹⁷ *Id.* at para. 11.

¹⁸ *Ibid.*

¹⁹ *Id.* at para. 12.

²⁰ *Id.* at para. 16.

²¹ Request, para. 17.

²² *Id.* at para. 19.

circumstances of the Trial Chamber's decision—a request for documents following the joinder of the *Ayyash et al.* and *Merhi* cases—are significantly different to those here.²³ He emphasizes that the *Ayyash et al.* and *Merhi* cases had been joined and involved alleged co-perpetrators of the same crime. The cases were thus based on the same evidence. Access was granted to ensure all counsel were on the same footing. The *Amicus* adds that decisions at the ICTY are also inapposite because they concerned the “same, bigger, international armed conflict, and this inevitably linked the various accused to each other”.²⁴

14. In contrast, the *Amicus* contends that the *Al Akhbar* and *Al Jadeed* cases are distinct, involving “two different crimes committed by different and unrelated Accused at two different times, in different ways”.²⁵ Despite their similarities, he insists that any nexus is merely of a “legal and/or abstract nature”.²⁶ Thus, any confidential material in the *Al Jadeed* case would not be of material assistance in the *Al Akhbar* case.²⁷

15. The *Amicus* further argues that the fact that the cases share some witnesses in common is irrelevant. [REDACTED].²⁸

16. Given the nature of the connection between the two cases, the *Amicus* submits that the only material assistance the requested documents would provide is an opportunity to the study the legal strategies adopted in the *Al Jadeed* case.²⁹

17. However, if I determine that the Defence is entitled to all or some of the requested documents, the *Amicus* claims that such access should exclude *ex parte* filings and “material related to protected witnesses and all other material protected by virtue of the same exceptional circumstances recognized in the *Al Akhbar* case”.³⁰ The *Amicus* makes additional submissions in a confidential and *ex parte* annex to the Response.³¹

²³ Response, para. 2.

²⁴ *Ibid.*

²⁵ *Id.* at para. 3.

²⁶ *Ibid.*

²⁷ *Id.* at para. 4.

²⁸ Response, paras 5-7.

²⁹ *Id.* at para. 9.

³⁰ *Id.* at para. 14.

³¹ Response, Annex A, Confidential and *Ex Parte*.

II. Discussion

18. As described above, the Defence requests access to all the *inter partes* and *ex parte* confidential documents in the *Al Jadeed* case, including future documents, whether they be: (a) transcripts of hearings held in closed or private session; (b) exhibits; (c) submissions filed by the parties; (d) decisions rendered; (e) or any other confidential documents.³² I thus consider that the material sought has been identified by its general nature.³³

19. I further conclude that the Defence has generally established a legitimate forensic purpose for access to the confidential material it seeks. Indeed, the Defence has identified significant factual nexuses between the *Al Jadeed* and *Al Akhbar* cases. In both, a Lebanese journalist and the Lebanese media corporation for which he/she worked were charged with interfering with the Tribunal's administration of justice by broadcasting/publishing in Lebanon information on purported confidential Tribunal witnesses, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. Moreover, the alleged acts and conduct in question in the cases occurred only months apart. Based on this substantial overlap, I am satisfied that the material is likely to materially assist the Defence's preparation by permitting it to identify common factual and legal issues, better understand the Contempt Judge's treatment of these issues and, in doing so, evaluate their relevance in the *Al Akhbar* case.

20. However, I find that reasonable grounds exist to deny the Request with respect to one type of material. The Defence cannot receive access to material in the *Al Jadeed* case that provides information subject to interim non-disclosure measures still in place in the *Al Akhbar* case. To allow such access would undermine those measures. Accordingly, confidential material in the *Al Jadeed* case that would be covered by the interim measures in the *Al Akhbar* case shall be withheld unless and until the Contempt Judge in the *Al Akhbar* case varies such measures; at which point the Defence may have access in accordance with the Contempt Judge's instructions.

21. Further, the Defence has not provided specific reasons why it seeks access to *ex parte* material in the *Al Jadeed* case and has thus failed to meet the higher standard required to

³² See above para. 7.

³³ See *Merhi* Decision, para. 3; ICTY, *Prosecutor v. Hadžić*, IT-02-54-T, Decision on Motion on Behalf of Goran Hadžić Seeking Access to Confidential Material in *Prosecutor v. Slobodan Milošević* Related to Croatia, 22 March 2012, para. 12.

establish a legitimate forensic purpose for such material. Moreover, I consider that the *ex parte* material in the *Al Jadeed* case pertains to procedural issues that are unique to this case and thus is not likely to assist the Defence's case materially. Consequently, I deny the Request with respect to *ex parte* filings.

DISPOSITION

FOR THESE REASONS,

I

GRANT the Request in part;

ORDER the Registry to provide the Defence in the *Al Akhbar* case access to confidential *inter partes* transcripts of hearings, exhibits and filings in the *Al Jadeed* case, subject to the limitations detailed in paragraph 20 of this Decision;

INSTRUCT the Registry to consult with the Parties in this case in regard to providing such access; and

DENY the Request in all other respects.

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

Dated 24 September 2015

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

