

**BEFORE THE CONTEMPT JUDGE**  
**SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-14-05/PT/CJ  
**Before:** Judge Nicola Lettieri, Contempt Judge  
**Registrar:** Mr. Daryl Mundis  
**Date:** 2 March 2015  
**Filing Parties:** The Defence for Al Jadeed S.A.L.  
The Defence for Karma Mohamed Tahsin al Khayat  
**Official language:** English  
**Classification:** Public with confidential annex

**IN THE CASE AGAINST**  
***AL JADEED [CO.] S.A.L. / NEW T.V. S.A.L. (N.T.V.)***  
**KARMA MOHAMED TAHSIN AL KHAYAT**

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**DEFENCE RESPONSE TO “MOTION FOR ADMISSION EVIDENCE PURSUANT  
TO RULE 154”**

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Mr. Kenneth Scott

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Mr. Karim A.A. Khan QC  
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## I. INTRODUCTION

1. The Defence for Al Jadeed S.A.L. and Karma Khayat (“Defence”) hereby respond to the *Amicus* Prosecutor’s *Motion for Admission of Evidence Pursuant to Rule 154* (“Motion”)<sup>1</sup> and the addendum thereto (“Addendum”).<sup>2</sup>
2. The Defence provide general submissions on the *Amicus*’ Motion and Addendum below. Detailed submissions on each of the items the *Amicus* seeks to admit into evidence pursuant to the Motion and Addendum are provided in the attached confidential annex.<sup>3</sup>

## II. APPLICABLE LAW

3. Rule 154 of the Rules of Procedure and Evidence (“Rules”) provides that: “*Subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149(C) and (D).*”
4. Rule 149 of the Rules states in relevant part:  
*(C) A Chamber may admit any relevant evidence which it deems to have probative value.*  
*(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules. [...]*
5. The Trial Chamber has explained that:<sup>4</sup>  
*Material tendered under Rule 54 – like any other evidentiary material – must meet the basic requirements for the admission of evidence in being relevant and probative; its probative value must not be outweighed by its prejudicial effect. The offering Party*

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<sup>1</sup> *In the case against Al Jadeed [C.O.] S.A.L. / New TV S.A.L. (N.T.V.) and Karma Mohamed Tahsin al Khaysat*, STL-14-05/PT/CJ, F0099, 16 February 2015.

<sup>2</sup> Addendum to “Motion for Admission of Evidence Pursuant to Rule 154, F0099”, F0099/ADD, 23 February 2015.

<sup>3</sup> The annex is submitted confidentially as it refers to information that is likewise classified.

<sup>4</sup> *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 7 (internal citations omitted).

*must also be able to demonstrate, with clarity and specificity, where and how each document or record fits into its case. A document or record is admissible if sufficient indicia of reliability are established; definite proof of reliability need not be shown. Probative value, in this sense, is distinct from the weight ultimately attributed to a document or record by the Trial Chamber.*

6. On the particular issue of the admission of media reports and news articles pursuant to Rule 154, and as far as the Defence is aware, the Trial Chamber has not provided a definitive exposition of the law governing the admission of such materials.<sup>5</sup>
7. At the *ad hoc* Tribunals and the International Criminal Court, news reports and media articles are generally treated with great caution and admissible through bar table motions for only limited purposes, if at all. The Trial Chamber in the *Župljanin et al.* case, for example, noted that newspaper and press articles “*are often not sufficiently reliable to serve as evidence unless they have been tendered through a witness*”<sup>6</sup> and therefore declined to admit such documents from the bar table.<sup>7</sup> The Trial Chamber in the *Milutinović et al.* case held that it would “not generally consider newspaper articles admissible [through the bar table] solely to prove the truth of their contents” and indicated that such admission was limited to circumstances where a party specifically indicated that the written news item would be used to test a witness’s “knowledge of the events reported therein”.<sup>8</sup> The Trial Chamber in the *Karemera et al.* case similarly held that it would admit from the bar table interviews given to the news media by persons who would be called to testify because the opposing party would have the

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<sup>5</sup> The Defence note that the Trial Chamber’s recent decision in the *Ayyash et al.* case permitting the admission of certain newspaper articles was limited to issues concerning “the movements of the former Lebanese Prime Minister Mr. Rafik Hariri and to relevant political events occurring in the months before his assassination”. The Trial Chamber did not specifically engage the general submissions of the *Ayyash* Defence concerning the admission of news articles and reports through the bar table. *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements relevant to Rafik Hariri’s Movements and to Political Events, 30 December 2014, paras. 2, 12. 30-32.

<sup>6</sup> ICTY, *Prosecutor v. Župljanin et al.*, IT-08-91-T, Decision Granting in Part the Prosecution’s Bar Table Motion and Granting the Prosecution’s Supplemental Bar Table Motion, 1 February 2011, para. 20 (emphasis added).

<sup>7</sup> *Ibid.*, para. 27.

<sup>8</sup> ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Pavković Second Motion for Admission of Documents from Bar Table, 28 November 2007, para. 6.

opportunity to cross-examine the individuals on the contents of these prior reported statements.<sup>9</sup>

8. The Trial Chamber in the *Karadžić* case informed the parties that media reports fell into the category of documents that the Chamber was unlikely to admit from the bar table because such items “*would not meet the reliability and probative value requirements without a witness to testify to the accuracy of the information contained therein*”.<sup>10</sup> The Trial Chamber in *Karadžić* later reiterated this general holding and specifically clarified that the “*fact that such written media reports may be interviews with the Accused or other relevant persons and thus consist of questions and answers does not alleviate the Chamber’s concern that they may be subject to journalistic analysis or interpretation or may have been manipulated in some other way*”, and accordingly declined to admit from the bar table two such items.<sup>11</sup> The *Karadžić* Trial Chamber contrasted written media reports containing the alleged words and deeds of the accused and other relevant persons with “*video media reports, [] because the video footage contained therein will usually speak for itself*”.<sup>12</sup>
9. Trial Chamber I of the ICC, in the *Lubanga* case, held in determining upon a bar table motion that “*generally, newspaper articles cannot usually be relied on to report with sufficient reliability the events they purport to address*”.<sup>13</sup> ICC Trial Chamber II, in the *Katanga et al.* case, also declined to admit news reports from the bar table:<sup>14</sup>
- Media reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In the case of the newspaper accounts proffered by the Prosecution, the latter has failed to inform the Chamber either of the background and qualifications of the journalists or of their sources, in*

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<sup>9</sup> ICTR, *Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Admit Documents from the Bar Table: Public Statements and Minutes, 14 April 2009, para. 5.

<sup>10</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 12.

<sup>11</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012, para. 19 (emphasis added).

<sup>12</sup> *Ibid.*, para. 20.

<sup>13</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Annex to Decision on “Prosecution’s Second Application for Admission of Documents from the Bar Table pursuant to Article 64(9), 21 October 2010, ICC-01/04-01/06-2589-Anx, pp. 14-15 (emphasis added).

<sup>14</sup> ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 31 (emphasis added).

*order to satisfy the Chamber as to their objectivity and professionalism. Under these circumstances, the Chamber is unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts.*

10. The Majority of ICC Trial Chamber III, in the *Bemba* case, did permit certain media items to be admitted from the bar table, but warned that it would approach such items with caution and held “*that they may be admitted for limited purposes*”, “*in particular, [...] to corroborate other pieces of evidence*”.<sup>15</sup> Judge Ozaki dissented from the Bemba Majority’s underlying findings regarding the admissibility of news reports from the bar table and opined in a manner consistent with ICC Trial Chambers I and II on this issue:<sup>16</sup>

*[T]he admission into evidence of newspaper articles and other media reports when their authors are not called to testify at trial must be approached with great caution, and in the present circumstance I am of the view that the probative value of the press article at issue is insufficient to outweigh the potential prejudice if it is admitted for the truth of its contents. [...] I do not consider the possibility of corroboration sufficient to justify admission.*

11. As examined above, the weight of international criminal jurisprudence is decidedly against the admission, from the bar table, of media reports and news articles to prove the truth of their contents because these items are insufficiently reliable for use in legal proceedings and therefore the probative value of such items is heavily outweighed by the potential prejudice. Importantly, this general principle applies in full to the written reported statements in the media of the accused, and other relevant persons who are *not* being called to testify. The burden is on the party seeking admission of the news / media item to provide the Chamber or Judge with specific information and arguments as to why, for each particular news or media item, the general principle against admitting such items from the bar table should not apply.

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<sup>15</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 8 September 2012, 8 October 2012, ICC-01/05-01/08-2299-Red, paras. 95, 104.

<sup>16</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Partly Dissenting Opinion of Judge Ozaki on the Decision on the admission into evidence of items deferred in the Chamber’s “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” (ICC-01/05-01/08-2299), 27 June 2013, ICC-01/05-01/08-2721-Anx, para. 5.

### III. GENERAL SUBMISSIONS

12. In the confidential annex to this filing the Defence provide specific submissions on each of the items listed in the confidential annexes to the Motion and Addendum that the *Amicus* seeks to admit from the bar table.
13. The Defence accept that, in view of the envisioned circumscribed proceedings for this case, there may be sound trial management justifications for admitting from the bar table a significant portion of a party's documentary evidence, including items that a party intends to utilize during the questioning of a witness.
14. The Defence also acknowledge that given that the core facts of this case involve the alleged actions of a journalist, Ms. Karma Khayat, and a media company, Al Jadeed S.A.L., the parties may wish to rely upon a significant amount of materials sourced from the media and public domain. In this regard, with respect to media items sourced from Ms. Khayat and/or Al Jadeed S.A.L. that are included in the Motion and Addendum, the Defence do not object to the admission of such items presuming that that they otherwise meet the relevance and probative value criterion.
15. However, with respect to media items sourced from third parties, including news / media items purporting to report the words and/or actions of Ms. Khayat and/or other Al Jadeed S.A.L. personnel, the normal bar table admissibility test must be applied in full in order to ensure a fair trial and respect for the fundamental rights of the accused. The Defence note that with respect to the reliability element of the bar table admissibility test, the *Amicus*, for almost all of the items included in the Motion and Addendum, merely notes the source from which the *Amicus* obtained the item and does not provide specific submissions as to why the information contained in the item should be considered sufficiently reliable to admit into evidence from the bar table. The authenticity of an item – i.e. that the item is what it purports to be – is of course a different issue than the *reliability* of an item (though it may assist in evaluating said reliability), as the jurisprudence examined above addressing the admission of news and media items makes clear.

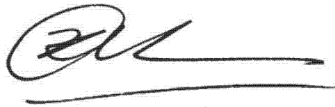
16. Finally, for sake of clarity, and as a general point, the Defence do not accept as accurate and proper the description and characterization provided by the *Amicus* in the annexes to the Motion and Addendum for each of the items listed therein.

#### IV. RELIEF REQUESTED

17. For the reasons set out above and in the annex hereto, the Defence respectfully request that the Contempt Judge admit or decline to admit into evidence the items included in the Motion and Addendum in accordance with the Defence's position for each item as set out in the annex hereto.

**Word Count:** 2,109

**Respectfully submitted on this 2nd day of March 2015,**



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Karim A.A. Khan QC  
Lead Counsel for Al Jadeed S.A.L. and Karma Mohamed Tahsin Al Khayat

