



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER
SPECIAL TRIBUNAL FOR LEBANON

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: 12 December 2017

Original language: English

Classification: Public

THE PROSECUTOR
 v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**DECISION ON RULE 122 AGREEMENTS AS TO EVIDENCE BETWEEN THE
 PROSECUTION, AYYASH AND SABRA DEFENCE ON THE EFFECTS OF THE
 14 FEBRUARY 2005 EXPLOSION ON THE VICTIMS PARTICIPATING IN THE
 PROCEEDINGS**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Hugh Milne

**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**

Mr Emile Aoun, Mr Thomas Hannis & Chad Mair

Counsel for Mr Hassan Habib Merhi:

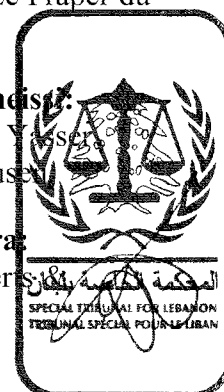
Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen & Mr Jad Youssef Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Youssef Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Geoffrey Roberts & Ms Sarah Bafadhel



1. The Defence of each Accused has agreed, under Rule 122 of the Special Tribunal's Rules of Procedure and Evidence, not to contest that the explosion on 14 February 2005, in Beirut, killed the former Prime Minister of Lebanon, Mr Rafik Hariri, and 21 others, and that it injured 226 people, as identified, respectively, in Schedules A and B of the Indictment.¹ The Trial Chamber recorded the agreement between the Prosecution and counsel for each Accused in a decision on 11 April 2014.²

2. On 11 April 2017, the Trial Chamber's Presiding Judge, as Judge Rapporteur for reaching agreement between the Parties on matters in dispute, ordered the Legal Representatives of Victims to submit to the Parties, by 3 May 2017, proposals for agreements as to the content of any documents whose admission into evidence they intended to seek.³

3. The Legal Representatives filed a schedule of 195 'proposed agreed facts' and asked the Trial Chamber to direct the Parties to express whether they agreed to them within 14 days.⁴ The Trial Chamber then explored with the Parties the realistic time for them to express a position on the 'proposed agreed facts'. It noted the Prosecution's stance that it could make any necessary agreements within 14 days, and allowed further discussions to occur between the Legal Representatives and the Defence, without issuing any order.⁵ At a case management meeting on 17 May 2017 and at the status conference on the same date, the Presiding Judge as Judge Rapporteur invited submissions on the 'proposed agreed facts'. The Defence filed written responses on 17 May 2017. The Prosecution had responded on 12 May 2017.⁶

¹ Now the amended consolidated indictment. See STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016. The Trial Chamber notes that one participating victim, V073, is not listed in Schedule B of the amended consolidated indictment among those injured as a result of the explosion.

² F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014 ('Decision on agreed facts of 11 April 2014'), disposition, recording, among others, the following facts as not contested at trial: (i) in addition to killing Mr Rafik Hariri, the explosion killed 21 other persons listed in Schedule A of the Indictment; (ii) the explosion injured 226 persons listed in Schedule B of the Indictment.

³ F3077, Order to Legal Representative of Participating Victims on Updated Witness and Exhibit List and Agreements as to Evidence, 11 April 2017.

⁴ F3116, Request of the Legal Representative of Victims to Call Witnesses and Tender Other Evidence and for Guidance on Its Disclosure Obligations, in Compliance with the Judge Rapporteur's 11 April 2017 Order, with Confidential Annexes A, B and C, 3 May 2017 (public with confidential annexes) ('Legal Representatives' application'), para. 33; confidential annex C 'Schedule of Proposed Agreed Facts by the Legal Representative of Victims'.

⁵ Transcript of 4 May 2017, pp 87-88.

⁶ F3137, Prosecution Response to 'Request of the Legal Representative of Victims to Call Witnesses and Tender Other Evidence and for Guidance on Its Disclosure Obligations, in Compliance with the Judge Rapporteur's 11 April 2017 Order, with Confidential Annexes A, B and C', 12 May 2017 ('Prosecution response'); F3145, Defence for Hussein Hassan Oneissi Response to the "Request of the Legal Representative of Victims to Call

4. The ‘proposed agreed facts’ concern the deaths and injuries resulting from the explosion on 14 February 2005, including the specific causes of death and type of injuries, the relationship between those killed and the victims participating in the proceedings, the material, physical and mental harm suffered, related diagnoses and treatments. According to the Legal Representatives, none of the ‘proposed agreed facts’ are potentially controversial or prejudicial to a Party’s interest, as they only seek ‘to establish who has died, who has been injured, who their dependants were, who the bereaved people were, and in the briefest possible detail what they’ve suffered’.⁷

5. Rule 122, ‘Agreements as to Evidence’, provides:

The Prosecutor and the Defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or elsewhere is not contested, and, accordingly, a Chamber may consider such alleged fact as being proved, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of victims.

6. Article 17 of the Special Tribunal’s Statute gives participating victims a qualified statutory right to present their views and concerns. The Trial Chamber has analysed how the Statute explicitly envisages the identification, in a judgement, of the victims and the harm they suffered. On this basis, it found that giving recognition to, and adequately recording, the victims’ harm, may make their participation meaningful.⁸

7. Within this statutory framework, the Trial Chamber interprets Rule 122 as allowing it to record agreements as to evidence between the Parties on ‘facts’ regarding the participating victims’ identification and harm, which the Legal Representatives propose and the Parties agree are not contested.

Witnesses and Tender Other Evidence and for Guidance on Its Disclosure Obligations, in Compliance with the Judge Rapporteur’s 11 April 2017 Order, with Confidential Annexes A, B and C”, 17 May 2017 (public with confidential annex A) (‘Oneissi Defence response’); F3146, Merhi Defence Response to the Request from the Legal Representative of Victims relating to 195 Agreed Facts, 17 May 2017 (‘Merhi Defence response’); F3147, Sabra Response to “Request of the Legal Representative of Victims to Call Witnesses and Tender Other Evidence and for Guidance on Its Disclosure Obligations, in Compliance with the Judge Rapporteur’s 11 April 2017 Order”, 17 May 2017 (‘Sabra Defence response’); F3148, Ayyash Defence Submissions on ‘Request of the Legal Representative of Victims to Call Witnesses and Tender Other Evidence and for Guidance on Its Disclosure Obligations, in Compliance with the Judge Rapporteur’s 11 April 2017 Order, with Confidential Annexes A, B and C’, 17 May 2017 (‘Ayyash Defence response’).

⁷ Transcript of 4 May 2017, pp 87-88; Legal Representatives’ application, para. 21.

⁸ F3260, Decision on the Legal Representatives of Victims’ Application to Call Evidence, Schedule the Presentation of Evidence and Directions on Disclosure Obligations, 31 July 2017 (‘Decision of 31 July 2017’), para. 24.

8. The Prosecution and counsel for the Accused, Mr Salim Jamil Ayyash and Mr Assad Hassan Sabra, do not contest any of the ‘proposed agreed facts’.⁹ The Prosecution is satisfied that the Trial Chamber may treat them as proven.¹⁰ It states that the issue, as framed by Rule 122, is not whether a Party agrees that a certain fact is true, but rather whether it agrees not to contest a certain fact.¹¹ The Sabra Defence submits that it does not contest the ‘proposed facts’ for the sake of procedural efficiency, which however is neither an agreement nor an acknowledgement that the facts should be considered proven. Counsel for Mr Ayyash and Mr Sabra submit that it is for the Trial Chamber, under Rule 122, to determine whether it may consider each of those facts proven or whether it requires the admission of additional evidence.¹²

9. Counsel for the Accused, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi, submit that they cannot agree to any of the ‘proposed agreed facts’, because of the absence of instructions from the Accused, who are being tried *in absentia* and—according to the Merhi Defence—the potential consequences of such acceptance for Mr Merhi himself. Counsel for Mr Oneissi cannot agree not to contest any ‘proposed facts’ beyond the two facts the Prosecution and the Defence—including the Oneissi Defence—previously agreed not to contest, namely that the explosion killed Mr Hariri and 21 others, and that it injured 226 people.¹³ Lastly, the Oneissi Defence notes that the Legal Representatives previously stated that they did not consider it necessary to actively take part in the *inter partes* process of agreeing to facts for presentation at trial because ‘the vast majority of facts susceptible of agreement between the Prosecution and the Defence will likely have no bearing upon the presentation of the participating victims’ case’.¹⁴

10. The Trial Chamber has carefully examined the ‘proposed agreed facts’ and finds that it may consider proved at trial, in the cases against Mr Ayyash and Mr Sabra, the uncontested facts listed in annex A to this decision. The Trial Chamber has already expressed its difficulty in understanding the basis for counsel for Mr Merhi and Mr Oneissi not accepting those ‘proposed agreed facts’ as uncontested and how the absence of direct instructions from the

⁹ Prosecution response, paras 2-3; transcript of 17 May 2017, pp 7-8, 32; Sabra Defence response, paras 2-3; Ayyash Defence response, paras 2-3.

¹⁰ Prosecution response, paras 2-3.

¹¹ Transcript of 17 May 2017, pp 7-8.

¹² Sabra Defence response, para. 3; Ayyash Defence response, para. 3.

¹³ Merhi Defence response, para. 2; Oneissi Defence response, paras 9-11, referring to F1479, Decision on Agreed Facts under Rule 122, 2 April 2014, para. 1 and to Decision on agreed facts of 11 April 2014, para. 1.

¹⁴ Oneissi Defence response, para. 12, annex A to the Oneissi Defence response; transcript of 17 May 2017, p. 5.

Accused in this regard could affect this process.¹⁵ However, the consequence of this lack of agreement is that a presentation of those facts is therefore required. In authorising the Legal Representatives to submit documents for admission into evidence under Rule 154, the Trial Chamber directed them to file those supporting the ‘proposed agreed facts’ as a single document—which they did¹⁶—and instructed counsel for Mr Merhi and Mr Oneissi to raise any objections as to those documents’ *prima facie* reliability, or any other requirement for admission.¹⁷ The Trial Chamber has addressed the Legal Representatives’ application for the documents’ admission into evidence in a separate decision.¹⁸

11. As held in that decision, the Trial Chamber will not record as uncontested those facts proposed by the Legal Representatives which are based on documents that the Trial Chamber has found lacking the requisite relevance and probative value for admission into evidence.¹⁹

12. The Trial Chamber has also found that one of the ‘proposed agreed facts’ does not accurately reflect the underlying document, which has been admitted into evidence. The Legal Representatives may revise that proposed fact and verify whether the Merhi Defence, and the other Parties, agree not to contest it.²⁰

13. No agreement is needed to cover those facts the Trial Chamber has already recorded as agreed between the Parties.²¹ Further, there is no need to record as uncontested facts that participating victims had a different status in the proceedings before the Special Tribunal, or that anyone provided evidence, as these are not ‘facts’ at issue in the case.²²

¹⁵ Decision of 31 July 2017, para. 101. *See also* transcript of 4 May 2017, p. 85; transcript of 17 May 2017, p. 88.

¹⁶ F3286, The Legal Representative of Victims Motion for the Admission of Evidence pursuant to Rules 154, 155 and 158, with confidential Annexes A and B, 21 August 2017 (public with confidential annexes). Annex A lists and contains the documents supporting the ‘proposed agreed facts’. *See also* Amended Version of Annex A to “Legal Representative of Victims Motion for the Admission of Evidence pursuant to Rules 154, 155 and 158, with confidential Annexes A and B” (F3286), Including Additional Translations, 15 September 2017 (confidential).

¹⁷ Decision of 31 July 2017, paras 103-104, disposition.

¹⁸ F3456, Decision Admitting Documentary Evidence on the Legal Representatives of Victims’ Application, 4 December 2017 (‘Decision of 4 December 2017’).

¹⁹ Decision of 4 December 2017, paras 39-41; Legal Representatives’ Motion of 3 May 2017, annex C, proposed agreed facts nos. 37, 105, 190-191.

²⁰ Decision of 4 December 2017, paras 75-76; Legal Representatives’ Motion of 3 May 2017, annex C, proposed agreed fact no. 188.

²¹ *See above*, para. 1: that individuals died or were injured as a result of the explosion is already uncontested according to previous agreements as to evidence between all the Parties. However, the facts in annex A specify relevant biographical information regarding the deceased, or injured people, and or other information, including the specific causes of death or type of injuries.

²² *See e.g.* Legal Representatives’ Motion of 3 May 2017, annex C, proposed agreed fact no. 60. Apart from the ‘proposed agreed facts’ referred to in paragraphs 11 to 13 of the decision, all the other facts proposed by the Legal Representatives, which the Prosecution, Ayyash and Sabra Defence agree are uncontested, are listed in

14. As to the Oneissi Defence's submission that the Legal Representatives did not previously consider it necessary to actively take part in the *inter partes* process of agreeing to facts, the Oneissi Defence does not ask the Trial Chamber to draw any conclusion from this. Under Rule 122, only the Prosecution and the Defence may conclude agreements as to evidence. The Legal Representatives—who are not a Party in the proceedings—submitted proposals for agreements as to evidence to the Parties upon the Presiding Judge's order. The Oneissi Defence's observation is irrelevant to the issue of whether any Defence could agree that the 'proposed agreed facts' are not contested.

CONFIDENTIALITY

15. The Legal Representatives of Victims filed the annexes to their application of 3 May 2017 (filing F3116) confidentially, including annex C, 'Schedule of Proposed Agreed Facts by the Legal Representative of Victims'. The Trial Chamber has already directed the Legal Representatives to file a public redacted version of this annex.²³ The Oneissi Defence does not explain why it filed annex A to its response (filing F3145) confidentially. While this annex contains *inter partes* correspondence (more precisely, correspondence between participants and Parties), there is no apparent reason why it should remain confidential. It should therefore be reclassified.

16. As certain uncontested facts contain information which can identify confidential participating victims, the Trial Chamber issues a confidential and a public redacted version of annex A, listing the facts uncontested by the Prosecutor and counsel for Mr Ayyash and Mr Sabra.

annex A. The difference in the facts' numbering and number, between annex A to the decision and the 'proposed agreed facts' in annex C to filing F3116, results from a different order in their presentation and their rephrasing or merging accordingly. The Trial Chamber provided the Parties and Legal Representatives with a copy, in draft form, before publishing the list. The Trial Chamber finds that information on the participating victims' place of residence—which the Legal Representatives included in the 'proposed agreed facts'—is not relevant for its consideration under Rule 122. The wording in 'proposed agreed fact' no. 49—that V016 was injured due to the explosion—was covered by previous agreements between the Parties (*see* Decision on agreed facts of 11 April 2014, disposition, fact no. ii). It has been included, however, as contextual information pertaining to the participating victim's biographical information (*see* annex A, fact no. 39).

²³ Decision of 31 July 2017, para. 105.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

RECORDS, under Rule 122 of the Special Tribunal's Rules of Procedure and Evidence, the agreement of the Prosecutor and counsel for Mr Salim Jamil Ayyash and Mr Hassa Hassan Sabra that the 172 facts listed in annex A, proposed by the Legal Representatives of Victims, are uncontested; the Trial Chamber may consider them proved at trial in the cases against Mr Ayyash and Mr Sabra;

NOTES, in regard to Mr Hassan Habib Merhi and Mr Mr Hussein Hassan Oneissi, that in its decision of 4 December 2017 the Trial Chamber has decided to admit into evidence the documents supporting those facts uncontested by the Prosecutor and counsel for Mr Ayyash and Mr Sabra, with the exception of six documents; and

INSTRUCTS the Registry to reclassify annex A to the Oneissi Defence response (filing F3145) from confidential to public.

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

Leidschendam,
The Netherlands
12 December 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

