



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: 31 July 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON THE LEGAL REPRESENTATIVES OF VICTIMS' APPLICATION
TO CALL EVIDENCE, SCHEDULE THE PRESENTATION OF EVIDENCE AND
DIRECTIONS ON DISCLOSURE OBLIGATIONS**

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 & Mr Chad
Mair

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothee Le Fraper du
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Counsel for Mr Hussein Hassan Oneissi:

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Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Geoffrey Roberts
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BACKGROUND

1. The role and participation of victims in trials conducted under international criminal law procedural law varies among the different institutions. Some international criminal courts and tribunals permit participation beyond testifying as a witness, while in others the role has been confined to that of a witness. Victims of international crimes tried before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone have had no standing to participate in the proceedings—except as witnesses called by a Party.¹ This is one model.

2. Another model permits limited victims' participation in the proceedings. The Statute and the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, like the Rome Statute of the International Criminal Court (ICC) allow a form of victim 'participation'. Victims granted participant status at the Special Tribunal—and the ICC—are not a 'party' to the proceedings.² The Extraordinary Chambers in the Court of Cambodia, which is a national court, follows another, civil law, model where victims may participate in the proceedings as 'civil parties' or '*parties civiles*'.³

3. The statutory provisions allowing limited victims participation—namely, Article 17 of the Statute of the Special Tribunal and Article 68 (3) of the ICC Statute, which set out in identical terms the frameworks of victim participation—are drawn from the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹ The Mechanism for International Criminal Tribunals and the Residual Special Court for Sierra Leone have the same procedures.

² STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1326, Directions on the Conduct of the Proceedings, 16 January 2014 ('Directions on the conduct of the proceedings'), para. 2. The Lebanese Code of Criminal Procedure has the civil party system. As the Explanatory Memorandum of the Special Tribunal's President of 12 April 2012 illustrates, the Special Tribunal's Statute excludes that victims may act as '*parties civiles*'. 'The main *raison d'être* of *parties civiles*, namely their participation in criminal proceedings for the purpose of seeking compensation is removed. However, Article 25 (1) provides that the Tribunal 'may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal', and victims may later bring an action for compensation before a national court or other competent body. See Rules of Procedure and Evidence – Tribunal's President's Explanatory Memorandum (as of 12 April 2012) ('Explanatory memorandum'), paras 15-16; UN S/2006/893 (15 November 2006) 'Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon', paras 31-32.

³ See Extraordinary Chambers in the Court of Cambodia (ECCC) Internal Rules, Rev. 9, as revised on 16 January 2015, Rule 23 'General Principles of Victims Participation as Civil Parties'. This Rule provides that the purpose of Civil Party action before the ECCC is to: a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the Prosecution, and b) seek collective and moral reparations.

4. Under Article 6 of the UN Declaration, the responsiveness of judicial processes to the needs of the victims should be facilitated by allowing their ‘views and concerns’ to be presented at ‘appropriate stages of the proceedings’.⁴

5. Article 17 of the Statute provides that ‘where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial’. Victims therefore have a conditional right to participate in the Special Tribunal’s proceedings.⁵

6. The main difference in the victims’ participation procedures before the Special Tribunal and the ICC concerns the compensation regime. The ICC can itself grant reparations to victims—and it has its own statutory Trust Fund for Victims—but the Statute of the Special Tribunal specifies that victims may bring an action for compensation in a national court or other competent body, based on a judgement finding an accused ‘guilty of a crime that has caused harm to a victim’.⁶ In both the right to compensation is conviction-based.⁷

7. At the Special Tribunal victims participating in the proceedings can seek, and be permitted, to present evidence. The Trial Chamber is seized of an application by the Legal Representatives of Victims to be permitted to present *viva voce* (live) and written evidence.⁸ This decision is about how the victims’ evidence can be presented.

⁴ Article 6 of the UN Declaration reads in the relevant part: ‘The responsiveness of judicial and administrative processes to the needs of the victims should be facilitated by: [...] (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system [...]’. The General Assembly called upon states to take the necessary steps to give effect to the provisions contained in the Declaration and affirmed the necessity of adopting national and international measures to secure the universal and effective recognition of, and respect for, the rights of victims of crime and abuse of power. *See* UN Doc A/RES/40/34/Annex (1985).

⁵ It is not a mere ‘interest’ to participate. *See*, with regard to Article 68 (3) of the ICC Statute, substantially identical to Article 17 of the Statute of the Special Tribunal, *The Rome Statute of the International Criminal Court - A commentary*, Third Edition, ed. Otto Triffterer and Kai Ambos, p. 1697; *see also* *The Rome Statute of the International Criminal Court - A commentary*, Volume II, ed. Antonio Cassese, Paola Gaeta and John R. W. D. Jones, p. 1405 (describing it as a potential right to participation).

⁶ *See* Article 25 of the Statute.

⁷ Further, under the Special Tribunal’s Rules of Procedure and Evidence, victims cannot participate before the confirmation of an indictment, during the investigation stage (*see* Rule 86 (A)).

⁸ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, 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 (‘Motion’); F3240, Additional Submissions of the Legal Representative of Victims in

THE LEGAL PRINCIPLES

Who are the participating victims?

8. Rule 2 defines a *victim* as ‘a natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction’. A *victim participating in the proceedings* is defined as a ‘victim of an attack within the Tribunal’s jurisdiction who has been granted leave by the Pre-Trial Judge to present his views and concerns at one or more stages of the proceedings after an indictment has been confirmed’.

9. In the *Ayyash* case, the Pre-Trial Judge has granted the status of victims participating in the proceedings to 76 people.⁹ There are currently 72 participating victims, as two have withdrawn from the proceedings and two are deceased.¹⁰ The decision of the Pre-Trial Judge granting this status was based on *prima facie* evidence that they had suffered physical, material or mental harm as a direct result of the attack of 14 February 2005. In May 2012, the Registrar, pursuant to a decision of the Pre-Trial Judge, designated Legal Representatives to represent the interests of the participating victims.¹¹

Modes of victims’ participation in the proceedings

10. Specific Rules define the modes of victims’ participation during the trial. These include making opening statements—which the Legal Representatives did on 17 January 2014¹²—and closing arguments,¹³ questioning witnesses,¹⁴ filing motions and

Support of Its Application to Present [...] Written Witness Statements, 21 July 2017 (confidential) (‘Additional submissions’).

⁹ In eight decisions, the main one being: STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0236, Decision on Victims’ Participation in the Proceedings, 8 May 2012 (public with confidential and *ex parte* annex) (‘Pre-Trial Judge decision on victims participation’) and the last one: STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3226, Eighth Decision on Victims’ Participation in the Proceedings, 13 July 2017.

¹⁰ *See, e.g.*, Decision on the Request of the Legal Representative of Victims to Withdraw One Participating Victim from the Proceedings, delivered in court on 24 April 2017.

¹¹ STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0249, Designation of Victims’ Legal Representatives, 16 May 2012. Rule 2 defines the *legal representative of a victim participating in the proceedings* as ‘counsel representing a victim participating in proceedings before the Tribunal’.

¹² Rule 143 ‘Opening Statements’; transcript of 17 January 2014, pp 53-87. *See also* transcript of the pre-trial conference, 29 October 2013, p. 31 (where the Trial Chamber granted two applications from the Legal Representatives, to make an opening statement, and have a small number of victims in the courtroom during the opening statement).

¹³ Rule 147 (A) ‘Closing Arguments’.

¹⁴ For cases where the Legal Representatives of Victims questioned witnesses, *see, e.g.*, transcript of 22 January 2014, pp 17-18; transcript of 4 December 2014, pp 28-44.

briefs,¹⁵ and receiving all documents filed by the Parties and the case file submitted by the Pre-Trial Judge to the Trial Chamber before commencement of the trial, except for confidential and *ex parte* material or for other restrictions imposed in the interests of justice.¹⁶ These modes of participation are exercised through the Legal Representatives.¹⁷

Presentation of evidence by or for the participating victims

11. The Special Tribunal's Rules explicitly envisage the presentation of evidence upon the request of a participating victim. Rule 150 (D) provides that 'a victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require'.¹⁸

12. Under Rule 87 (B), 'a victim participating in the proceedings may request the Trial Chamber, after hearing the Parties, to call witnesses and to authorise him to tender other evidence'. Similarly, Rule 146 (A) provides that 'victims participating in the proceedings may, on notice to the Prosecutor and the Defence, request the Trial Chamber to call witnesses'. Rule 150 (D) does not distinguish between victims called by a Party or the Trial Chamber, upon the Legal Representatives' request, and would allow for 'dual status witnesses', namely those who could testify for a Party and as participating victims.¹⁹ This contrasts with the ICC procedures, where the victims' entitlement to apply for giving or

¹⁵ As to examples of filings from the Legal Representatives of Victims, *see*, e.g., STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2325, Request of the Legal Representative of Victims to Allow Three Participating Victims to Attend Proceedings in the Courtroom, 17 November 2015; STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2660, Request of the Legal Representative of Victims to Rescind Protective Measures Granted to One Participating Victim, 20 July 2016.

¹⁶ Rule 87 (A) and (B) 'Modes of Participation of Victims in the Proceedings'.

¹⁷ *See* Article 17 of the Statute (providing, in the relevant part, that the victims' views and concerns may be presented by the Legal Representatives where the Pre-Trial Judge or the Chamber considers it appropriate); Rule 86 (C) (ii) (reading 'a victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial Judge authorises otherwise'); Pre-Trial Judge decision on victims participation, paras 108, 112 (stating that 'the victims authorised to participate in proceedings pursuant to this decision may only do so through a legal representative'). *See also* Directions on the conduct of the proceedings, para. 19.

¹⁸ Rule 150 (D) was amended on 8 February 2012. Previously, the Rule read: 'A victim participating in the proceedings shall not be permitted to give evidence unless a Chamber decides that the interests of justice so require.' The presumption is therefore reversed in favour of allowing victims participating in the proceedings to also appear as witnesses, if the test is satisfied. *See* STL Office of the President, Summary of Accepted Rule Amendments and Some Key Rejected Rule Amendment Proposals (Fourth Plenary of Judges, February 2012) ('Summary of Rule Amendments'), p. 19.

¹⁹ *See* STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0256, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, 18 May 2012, para. 60; Explanatory memorandum, para. 21.

calling evidence is not explicitly provided for in the Statute or Rules but rather is recognised in practice, as reflected in its case law.²⁰

13. The overriding principle in deciding whether victims may present or call evidence must be that in Rule 150 (D), namely, ‘that the interests of justice so require’.²¹ The Trial Chamber will apply this principle in deciding whether to receive evidence from participating victims.

14. The submission of evidence at trial may be a means for the victims to express their ‘views and concerns’, as the ICC case law provides.²² The Trial Chamber has also noted that it ‘may call witnesses to testify for the participating victims and allow them through their legal representatives to tender documents and records into evidence’.²³

15. The Statute provides that the victims have a qualified right to participate in the proceedings. But this right is not expressed in absolute terms. When seized of a request for victims participating in the proceedings to present their views and concerns in a specific manner, the Trial Chamber must determine whether the stage of the proceedings is appropriate for their participation, and whether the manner proposed is not prejudicial or inconsistent with the rights of the Accused to a fair trial.

16. The Trial Chamber has also to determine, as the manner proposed is through the presentation of evidence, whether the evidence can be called and whether the interests of justice require that the participating victims are permitted to give evidence. For guidance in determining when the interests of justice require a chamber to receive the evidence of participating victims the Trial Chamber has examined the relevant international case law.²⁴ The ICC criteria may be relevant to this determination. Further, the Trial Chamber will

²⁰ The ICC case law has interpreted Article 69 (3) of the Rome Statute (reading, relevantly, ‘[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth’) as ‘leav[ing] open the possibility for victims to move the Chamber to request the submissions of all evidence that it considers necessary for the determination of the truth’. The ICC Appeals Chamber has ruled that, in order to allow victims to participate meaningfully in the trial, the Trial Chamber may, where appropriate, authorise them to tender evidence. See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008 (*‘Lubanga Appeals Chamber decision’*), paras 97-99.

²¹ See Motion, paras 13, 15. See also Additional submissions, paras 1, 21.

²² ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, 22 January 2010 (*‘Katanga decision of 22 January 2010’*), para. 82.

²³ Directions on the conduct of the proceedings, para. 19.

²⁴ The expression ‘interests of justice’ appears in five articles of the Statute (Articles 15 (c), 16 (4) (d), 20 (2), 21 (3), 30) and in 26 Rules (Rules 26 (A) (ii), 26 (B) (ii), 26 (D), 44, 50 (D), 51 (B) (iv), 51 (E), 57 (D) (vi), 57 (F), 57 (G), 57 (H), 59 (A), 59 (F), 74 (A), 77 (C), 77 (E), 78 (A), 86 (B) (x), 87 (A), 89 (C), 92 (A), 92 (C), 102 (F) (iii), 119 (A), 122, 124, 137 (v), 141, 145 (C), 146 (B), 150 (D), 155 (C), 157, 178 (B), 188 (C)). It is

also be guided by the general provision as to the admission of evidence, under Rule 149 (C), requiring that evidence, for its admission, must be relevant and have some probative value.

17. The ICC case law has identified several requirements for trial chambers to permit victims to give or call evidence, namely:

- (i) the presentation of evidence needs to be consistent with the rights of the Accused; and
- (ii) the hearing of the victims' evidence must be considered appropriate, taking into account its relevance to the issues of the case and capacity to assist the Chamber in its understanding of the case or evidence heard.²⁵

18. Point (i) is explicitly provided for in Article 17 of the Special Tribunal's Statute. This provision—and more generally Articles 16 and 21 of the Statute²⁶—requires the Trial Chamber to ensure that the presentation of the victims' views and concerns will not be prejudicial to or inconsistent with the rights of the Accused to a fair and impartial trial.

never defined. It has been noted that this expression 'appears in many different legislative contexts, in various legal systems, where it is generally used to acknowledge the need for discretion and the inability of legal texts to codify answers for difficult issues. That is why the term is not defined anywhere.' See William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, p. 663, in relation to Article 53 (1) of the ICC Statute.

²⁵ An additional requirement is that victims are not allowed to testify anonymously. In the *Ayyash* case, the identity of all the participating victims has been disclosed to the Parties (see STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims against the Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 39, holding that totally anonymous participation by victims is generally prejudicial to and inconsistent with the rights of the accused and the fairness of the trial). See, for the ICC requirements, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1780-Red, Public Redacted Version of 'Decision on the Request by the Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims' Views and Concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), 15 February 2017 ('*Ntaganda* decision of 15 February 2017'), paras 11, 16-19; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2032, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence During the Trial, 26 June 2009 ('*Lubanga* decision on victims' evidence'), para. 20, referring to *Lubanga* Appeals Chamber decision, para. 4. See also ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1665, Directions for the Conduct of the Proceedings and Testimony in accordance with Rule 140, 20 November 2009 ('*Katanga* decision of 20 November 2009') paras 30, 45, 47; *Katanga* decision of 22 January 2010, paras 84, 87; ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-2138, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, 22 February 2012 ('*Bemba* decision of 22 February 2012'), paras 21-24.

²⁶ Article 16 sets forth the rights of the Accused, including the right to be tried without undue delay, and that the onus is on the Prosecutor to prove the guilt of the Accused; Article 21, 'Powers of the Chambers', relevantly provides that the Special Tribunal shall confine the trial strictly to an expeditious hearing of the issues raised by the charges, and take strict measures to prevent any action that may cause unreasonable delay.

19. According to ICC case law, the participation of the victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth.²⁷ The Special Tribunal's Statute and Rules contain no equivalent provision. In addition, a preliminary requirement is that the victims' personal interests must be affected by the proceedings, issue, or evidence.²⁸ This too is provided in Article 17 of the Statute of the Special Tribunal.

20. Further criteria considered by ICC trial chambers in determining whether to authorise the evidence are whether the evidence is cumulative to or unnecessarily repetitive of other evidence already heard; whether it is representative of a larger group of participating victims or a victim is uniquely placed to give evidence about a particular matter; and whether it will likely bring to light substantial and relevant new information. ICC trial chambers have also cited these requirements and factors in relation to non-victims' evidence.²⁹

21. Moreover, the ICC case law distinguishes between the presentation of evidence by victims and the expression of their views and concerns in person, which are governed by different requirements.

22. The ICC threshold for granting victims' applications to testify is higher than that for applications to express views and concerns. For the latter trial chambers consider whether the victims' personal interests are affected and whether their anticipated accounts are

²⁷ ICC, *Katanga* decision of 22 January 2010, para. 91. As noted above, the Appeals Chamber has founded the participation of victims on Article 69 (3) of the Rome Statute, providing for the Court's authority to request the submission of all evidence that it considers necessary for the determination of the truth. See ICC, *Prosecutor v. Banda Abakaer Nourain*, ICC-02/05-03/09-545, Decision on the Participation of Victims in the Trial Proceedings, 20 March 2014 ('*Banda Abakaer* decision'), para. 25.

²⁸ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010 ('*Katanga* Appeals Chamber decision of 16 July 2010'), para. 40; *Ntaganda* decision of 15 February 2017, para. 11. The ICC Appeals Chamber has held that the exercise of a chamber's discretionary power to authorise the presentation of evidence 'is linked to the requirements of Article 68 (3) of the ICC Statute such that the Chamber must be satisfied that the personal interests of the victim are affected'. See *Banda Abakaer* decision, para. 27.

²⁹ According to ICC case law, the Legal Representatives of Victims may draw the Chamber's attention to witnesses other than the victims they represent. The Trial Chamber is not aware of any instance, before the ICC, where non-victims witnesses have been authorised to present evidence upon a victims' request. The only example may be in *Lubanga*, where one of the Legal Representatives proposed two potential expert witnesses on the use of names in the Democratic Republic of Congo through an email to the Trial Chamber—after two other legal representatives had suggested that the Trial Chamber could call an expert on the matter. The Trial Chamber appointed one of the two proposed potential experts (in the *Lubanga* Judgment, the Trial Chamber referred to this witness as one of the 'experts' it called, while it separately referred to the three victim witnesses as called 'following a request from the Legal Representatives'). See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1934, Instructions to the Court's Expert on Names and Other Social Conventions in the Democratic Republic of Congo, 5 June 2009; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 11, 21; *Ntaganda* decision of 15 February 2017, paras 16, 18-19.

representative of the harm suffered by a large group of victims. Victims who fail to reach the threshold to testify may still be permitted to express their views and concerns in person. Expressing views and concerns is described as the equivalent of presenting submissions: it will not form part of the trial evidence.³⁰

23. Also relevant is Article 25 of the Special Tribunal’s Statute, which explicitly provides that the Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an Accused convicted by the Special Tribunal. While this does not require the Special Tribunal’s ‘identification’ for a victim to seek compensation before a national court or other competent body, based on a conviction, it makes the ‘identification’ of the victims, and the related harm, of enhanced relevance to the trial proceedings and to the victims’ right to participate. In support of this, the Explanatory Memorandum on the Rules of Procedure and Evidence states,

Notwithstanding that the trial proceedings in the Tribunal are not aimed at determining compensation but rather establishing whether an accused is guilty [or innocent],³¹ the drafters of the Rules of Procedures and Evidence deemed it fair and appropriate to grant extensive participation in proceedings to victims. [...]

Based on the Tribunal’s “identification”, victims may later bring an action for compensation before a national court and, for the purpose of such “identification”, the participation of victims in the criminal proceedings before the Tribunal may prove of enormous value’.³²

24. As the identification, in a judgement, of the victims, and the harm they suffered, is explicitly envisaged by the Statute, the Trial Chamber finds that giving recognition to, and adequately recording, their harm³³ *may* make participation by victims meaningful.

25. The interests of justice *may* therefore permit hearing evidence for this purpose, provided that this is consistent with the fair trial rights of the accused. Further, the Appeals Chamber has acknowledged that the personal interests of the victims include their potential ability to claim compensation.³⁴ But whether this conditional right should be exercised at this

³⁰ See *Ntaganda* decision of 15 February 2017, para. 10; *Bemba* decision of 22 February 2012, paras 19-20.

³¹ The text states, incorrectly, ‘establishing whether an accused is guilty or innocent’, whereas the Trial Chamber is only required to determine guilt beyond reasonable doubt.

³² See Explanatory memorandum, para. 16.

³³ Motion, para. 13.

³⁴ STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0005, Decision on the Request of the Legal Representative of Victims Seeking Leave to Respond to the Badreddine Defence Interlocutory Appeal, 17 June 2016, para. 5.

stage of the proceedings, namely, during the trial, is another issue, because it may, in some circumstances, be more appropriately exercised during a sentencing hearing.

Victims' participation during sentencing proceedings

26. Under Rule 87 (C) of the Special Tribunal's Rules, a victim participating in the proceedings may be heard by the Trial Chamber on the personal impact of the crimes on them, or file written submissions on the matter, at the sentencing stage, upon the Trial Chamber's authorisation.

27. This goes to the Trial Chamber's consideration of the suffering of the victims when determining the gravity of the crime or as an aggravating circumstance on sentence. It does not specifically preclude the Trial Chamber from allowing the victims to be heard, in relation to the harm they suffered, at this stage of the proceedings. The Trial Chamber, however, needs to ensure, as is recognized in the ICC's case law, that the issues and facts are not unnecessarily repeated. The Trial Chamber emphasises here that victims' participation must be proportionate and consistent with the right of the Accused to a fair and expeditious trial.³⁵

The personal interests of the participating victims must be affected

28. As to the preliminary requirement that the personal interests of the victims are affected, the Pre-Trial Judge has found that the personal interests of participating victims—who were found to have *prima facie* suffered harm as a direct result of the attack—were affected.³⁶ Relying on ICC case law, the Pre-Trial Judge held that 'personal interest' means the legitimate interest which a participating victim must demonstrate in order to justify participating in the proceedings in a specific manner, for example by calling witnesses or tendering evidence.³⁷

29. The Trial Chamber agrees and finds that, once it has been established that an individual victim may participate in the proceedings, this recognizes that this individual has a personal interest in the proceedings.³⁸

³⁵ See *Lubanga* decision on victims' evidence, para. 26.

³⁶ Pre-Trial Judge decision on victims participation, para. 91.

³⁷ See Pre-Trial Judge decision on victims participation, para. 89, referring to ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on Victims' Participation, 18 January 2008, paras 96-97; *Lubanga* Appeals Chamber decision, para. 99; ICC, *Katanga* decision of 22 January 2010, paras 58, 62.

³⁸ *Katanga* decision of 22 January 2010, para. 61. Further, ICC Pre-Trial Chambers in the *Katanga*, *Bemba* and *Abu Garda* cases found that the personal interests of victims stem from their right to truth, justice and reparations (*Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights

30. However, where the Legal Representatives seek to intervene, the Trial Chamber may still request that they establish the link between their request and the victims' personal interests, if it is unclear.³⁹

31. When the mode of participation sought is the presentation of evidence, the 'personal interest' requirement—or the link between the victims' personal interest and the mode of participation—is met when the relevance of the proposed evidence and its capacity to assist the Trial Chamber in its understanding of the case is established.

The scope of victims' participation—the overlap between the role of the victims and the Prosecutor's case

32. As to the scope of victims' participation and the relationship between the victims' potential entitlement to present evidence and the Prosecutor's role, under ICC case law the principle that the Prosecutor bears the onus of proving the guilt of the Accused⁴⁰ does not prevent victims from leading evidence pertaining to the guilt or innocence of the accused. This is based on the consideration that the Court may request the submission of all evidence that it considers necessary to determine the truth.⁴¹

33. The victims' right to participate must be interpreted to make their participation meaningful and 'if victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused [...] their right to participate in the trial would potentially become ineffectual'.⁴²

Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, paras 31-44; *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 12 December 2008, para. 90; *Prosecutor v. Abu Garda*, ICC-02/05-02/09-121, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 September 2009, para. 3). Judge Song, in a separate opinion to an ICC Appeals Chamber decision of 13 June 2007, stated that the interest 'that justice is done' qualifies as personal interest within the meaning of Article 68 (3) of the Rome Statute. 'The victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice; this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable'. See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, Separate Opinion of Judge Sang-Hyun Song, para. 13.

³⁹ *Katanga* decision of 22 January 2010, para. 62.

⁴⁰ See Article 16 (3) (b) of the Special Tribunal's Statute.

⁴¹ Based on Article 69 (3) of the ICC Statute.

⁴² *Lubanga* Appeals Chamber decision, para. 97, see also paras 93-95; See also *Katanga* decision of 22 January 2010, para. 81. Judges Pikis and Kirsch dissented from the *Lubanga* Appeals Chamber decision, stating that victims cannot adduce evidence on the guilt of the accused and that their participation is confined to the expression of their views and concerns. See Partly Dissenting Opinion of Judge G.M. Pikis, paras 4-6, 15; Partly Dissenting Opinion of Judge Philippe Kirsch, 23 July 2008, paras. 4-5, 23-24, 39 (referring to the Statute envisaging that the accused is faced by one Prosecutor, 'rather than, potentially, multiple accusers'.)

34. Victims do not, however, have an unfettered right to lead evidence, as they are required to demonstrate why their interests are affected by the evidence.⁴³ According to ICC case law, Legal Representatives may be allowed to call witnesses to the extent that this does not transform them into auxiliary prosecutors. Nevertheless, ‘if victims are requested to testify on the role of the accused in the crimes charged, this does not make them supplementary prosecutors in the case’.⁴⁴ The ICC Appeals Chamber has held, with regard to the assessment of whether the victims’ personal interests are affected, that it involves verifying, in each case, whether the interests asserted by the victims do not fall outside their personal interests and belong instead to the role assigned to the Prosecutor.⁴⁵

35. In the *Katanga* Judgment, the Trial Chamber relied on the evidence of the two victims who had testified upon the request of the Legal Representatives, in relation to the attack on Bogoro (a village in the Democratic Republic of the Congo), during which the crimes for which the Accused was charged were committed.⁴⁶ The Trial Chamber will be particularly mindful of any overlap between evidence for the Prosecution and that of the views and concerns of the participating victims.

Manner of calling witnesses for participating victims

36. There may be some inconsistency in the Rules about the manner of calling witnesses for or by participating victims. Rules 87 (B) and 146 (B) (ii), on the one hand, and Rule 112 *bis*, on the other, could be inconsistent as to whether the Trial Chamber or the participating victims call the witnesses.

37. As noted above, Rule 87 (B) provides that ‘a victim participating in the proceedings *may request the Trial Chamber, after hearing the Parties, to call witnesses and to authorise him to tender other evidence*’ (*italics added*). On its face the text is ambiguous and could be read in two ways; either the request is for the Trial Chamber *itself* to call the witnesses, or alternatively, for the Trial Chamber to permit the Legal Representatives to call witnesses themselves.

⁴³ See *Lubanga* Appeals Chamber decision, para. 99.

⁴⁴ *Katanga* decision of 20 November 2009, paras 22 (b), 82; *Katanga* Appeals Chamber decision of 16 July 2010, paras 110-113; see also ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 51.

⁴⁵ See *Lubanga* Appeals Chamber decision of 13 June 2007, para 28. See also Separate Opinion of Judge Georghios M. Pikis, para. 16.

⁴⁶ See ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014 (paras 352, 731, 735, 814, 842, 844, 853-854, 877-879).

38. Rule 146 (B)—which provides the sequence for presenting evidence at trial—provides that, unless otherwise directed by the Trial Chamber in the interests of justice, the evidence called by the Trial Chamber at the request of victims participating in the proceedings should follow the evidence for the Prosecutor and precede the evidence for the Defence.

39. Rule 112 *bis*, ‘Disclosure by Victims Participating in the Proceedings’, provides that ‘where the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed’. On one hand, Rule 87 (B) (on the first interpretation) and Rule 112 *bis* appear to envisage the Legal Representatives calling the evidence themselves, after receiving the Trial Chamber’s authorization, while Rule 146 (B) (ii) appears to restrict the actual calling of evidence to the Trial Chamber itself. The second interpretation of Rule 87 (B) also supports the literal text of Rule 146 (B) (ii).

40. The Trial Chamber must therefore resolve the issue of any inconsistencies between these three Rules using the Rule 150 (D) test of the interests of justice. The inconsistencies, however, appear to have no significant impact on the Trial Chamber actually receiving the evidence, as the only real issue would be of who questions the witness first—the Trial Chamber or the Legal Representatives.⁴⁷

41. Further, who ‘the calling Party’ is has relevance to the order of ‘questioning of witnesses’ under Rule 145. This Rule, however, does not specifically cover this situation, as neither the Trial Chamber nor the Legal Representatives are ‘Parties’. Moreover, the Trial Chamber issued—before the commencement of the trial—instructions for the modalities of examination of witnesses called for the Legal Representatives.⁴⁸

The overlap between Rule 146 (B) and Rule 167—judgement of acquittal at the close of the Prosecutor’s case

42. Another possible complication lies in the operation of Rule 167, which provides that at the close of the Prosecutor’s case, the Trial Chamber shall, by oral or written decision and

⁴⁷ The English original version of Rule 87 (B)—providing that participating victims could be authorized to call witnesses—was amended by the fourth Plenary of Judges to reflect the French version of the Rule, providing that the Trial Chamber calls witnesses, on behalf of participating victims. Therefore, this has been considered ‘the correct procedure’. See Summary of Rule Amendments, p. 24. The French version of Rule 112 *bis* differently refers to a ‘*droit de présenter des éléments de preuve*’.

⁴⁸ Directions on the conduct of the proceedings, para. 15.

after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.

43. But Rule 146 (B) provides that the evidence called by the Trial Chamber at the request of the participating victims occurs between evidence for the Prosecutor and evidence for the Defence. Logically, therefore, if the Trial Chamber were to acquit the Accused after hearing submissions under Rule 167, there could be no evidence called by the Trial Chamber for the participating victims as the case would be over, and the Trial Chamber would lack jurisdiction. However, the Trial Chamber may, in the interests of justice, vary the sequence for the presentation of evidence.

Other relevant Rules

44. Finally, Rules 154, 155, 156 and 158 provide for the admission into evidence, respectively, of documentary material tendered ‘from the bar table’; written statements of a witness, in lieu of oral testimony, when the evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment; written evidence in lieu of examination in chief, but with cross-examination; and the written statements of a witness who is ‘unavailable’. Under Rule 149 (C) evidence must be relevant and have some probative value.

45. The Trial Chamber may only receive evidence under these Rules; it follows that any application to receive evidence for the participating victims must fall within an identified Rule for the admission of evidence.

SUBMISSIONS

Legal Representatives of Victims submissions

46. The Legal Representatives of Victims request the Trial Chamber to permit them to call nine live witnesses and present the evidence of 19 other witnesses in written statements, under either Rules 155 or 158.⁴⁹

47. They additionally present a schedule of ‘proposed agreed facts’ and state that the Parties’ agreement to them will substantially eliminate the need to seek the admission of most of the approximately 400 documents contained in their exhibit list, to corroborate the witness

⁴⁹ They consist of 18 statements proposed to be admitted under Rule 155 and one statement under Rule 158.

testimonies and statements. The ‘proposed agreed facts’ concern the deaths and injuries resulting from the attack in Beirut, on 14 February 2005, that killed the former Lebanese Prime Minister, Mr Rafik Hariri, the relationship between the individuals killed and the victims participating in the proceedings, the harm they suffered, related diagnosis and treatments, and the specific causes of death. The main supporting materials are medical records, identity documents, death certificates of participating victims, family personal status extracts, forensic examinations and documents relating to financial expenses.

48. The Prosecution and Defence filed responses.⁵⁰ The Parties and the Legal Representatives also presented relevant submissions in a status conference held on 17 May 2017.⁵¹ Subsequently, the Legal Representatives requested the Trial Chamber to grant leave to amend their witness list by adding four witnesses, who are victims participating in the proceedings, and whose statements they intend to tender into evidence under Rule 155.⁵²

49. At the request of the Trial Chamber, the Legal Representatives of Victims filed additional submissions as to why the Trial Chamber should permit the presentation of evidence, in the form of written statements, by a few proposed witnesses who had already provided evidence as Prosecution witnesses in the *Ayyash* trial.⁵³ The Parties did not respond.

50. A short separate decision will deal with the proposals for agreements as to evidence in the Legal Representatives’ motion.

51. Under Rule 150 (D), the Legal Representatives request permission to call seven participating victims to testify. For the effectiveness of the proceedings, a group of representative witnesses has been chosen. Their expected evidence, as summarised in

⁵⁰ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, 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 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; 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.

⁵¹ Transcript of 17 May 2017, pp 2-8, 28-35.

⁵² F3132, Request of the Legal Representative of Victims to add four Witnesses to its Witness List, with Confidential Annex A, 10 May 2017 (public with confidential annex A).

⁵³ Additional submissions.

confidential annex A,⁵⁴ will relate to their personal experiences and the material, mental and physical harm suffered due to the attack on 14 February 2005. The testimonies will add to the narrative evidence of the case, ‘may add pertinent details to the issues between the Parties’, and will enable the participating victims to express their views and concerns. Receiving this evidence is in the interests of justice, in order for the judgement to record the harm suffered. The personalisation of their harm is an essential requirement under Article 25 of the Statute.⁵⁵

52. The Legal Representatives also intend to call two non-victim witnesses to provide observations on the collective harm suffered by victims generally—both within and outside the body of those who have chosen to participate—and the wider social, cultural and economic impact of the events of 14 February 2005 on the Lebanese people.

53. These witnesses are: (i) Professor Dr Rianne Letschert, a victimologist who has conducted interviews with the majority of the participating victims. She would testify about the victimological profile of the participating victims as victims of terrorism, their needs, and how access to justice can fulfill these; and (ii) Dr Fares Souaid, a surgeon, political observer and former Member of the Lebanese Parliament. He would testify about the political background and chain of events that preceded and followed the assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri, and, as a physician, about the humanitarian and psychological problems and pain of victims. Their statements will be disclosed to the Parties and the Trial Chamber in the ‘near future’.⁵⁶

54. As Rules 87 (B) and 146 (A) are ambiguous on the modalities of witness examination, the Legal Representatives submit that evidence should be adduced by questions from the ‘calling party’, rather than by questions through the bench.⁵⁷

55. The statements of the other proposed witnesses will also demonstrate the material, mental and physical harm suffered by the victims. It is in the interests of justice to receive this material so it can become part of the judgement. This evidence does not go to proof of the acts and conduct of the Accused. Its admission is favoured by Rule 155 (A) (i) (d)—as it concerns the impact of crimes upon victims—and avoids the potentially re-traumatising effects for

⁵⁴ Confidential annex A contains an amended and updated witness list, detailing the method by which the evidence is sought to be adduced (*viva voce* or under Rules 155 or 158), the time estimate for the examination in chief and whether the witnesses are newly added. It also provides information as to witness availability.

⁵⁵ Motion, paras 8-9, 13, 29.

⁵⁶ Motion, paras 10-12.

⁵⁷ Motion, para. 14.

those who find it difficult to talk about the events publicly. Efforts have been made to avoid unnecessary repetition of this kind of evidence.⁵⁸

56. The presentation of this evidence—the *viva voce* witnesses and witness' statement summaries for the public record, if the statements are declared admissible—would take less than two weeks and, as such, would not significantly impact the timeline of the trial.⁵⁹

57. In their additional submissions regarding statements of proposed witnesses who gave evidence as Prosecution witnesses, the Legal Representatives generally submit that the information contained in those statements (i) supplement, rather than duplicate, the evidence previously given; (ii) came to the attention of the Legal Representatives after the participating victims provided evidence; (iii) relate to the harm they and their families suffered; (iv) its presentation is in the interests of justice; and (v) it is not prejudicial to the interests of any Party.⁶⁰

58. The documents that the Legal Representatives intend to tender into evidence under Rule 154 include medical records, identity documents and death certificates of participating victims, documents relating to financial expenses they incurred, press clippings, photographs of the crime scene, investigative reports regarding the finding of bodies and employment records.⁶¹ All documents were disclosed to the Parties on 2 May 2017; 70 of them had been disclosed earlier, during the questioning of witnesses.⁶² Five have already been admitted into evidence.⁶³ Confidential annex C contains a list of 195 'proposed agreed facts' that, if wholly or substantially agreed to by the Parties, would render the admission of most of the documents unnecessary.

59. The Legal Representatives will file formal applications to tender evidence under Rules 154, 155 and 158. They request guidance from the Trial Chamber on their disclosure obligations under Rule 112 *bis*, if the application is granted.⁶⁴

⁵⁸ Motion, paras 15-17.

⁵⁹ Motion, para. 13.

⁶⁰ Additional submissions, para. 1. *See also* paras 17-21.

⁶¹ Motion, paras 18-19. An amended and updated exhibit list is contained in confidential annex B. *See* Motion, paras 29-31.

⁶² Either by the Prosecution or the Legal Representatives of Victims. The documents listed in annexes A and B, except for the statements of four participating victims the Legal Representatives were yet to obtain, were also disclosed to the Parties by 2 May 2017. *See* Motion, paras 20, 31.

⁶³ Motion, para. 20, referring to 1V00001, 1V00002, 1V00003, 1V00004, and 1V00005.

⁶⁴ Motion, paras 22, 26-27, 33 (ii).

60. At the status conference on 17 May 2017, the Legal Representatives submitted that setting a fixed date for the commencement of the victims' case would assist with regard to the arrangement of the witnesses' attendance. Nothing in the victims' case is likely to sway the outcome of the proceedings. It is not important if its case precedes, follows, or runs concurrently with the Parties' submissions under Rule 167 'Judgement of Acquittal at Close of the Prosecutor's Case'. However, when suggested by the Presiding Judge at the status conference, the Legal Representatives favour interposing the victims' case before the formal close of the Prosecution case, under Rule 146 (B). A situation where all the Accused were acquitted by judgement before a victims' case could be presented would render their participation pointless. That victims are permitted to participate is part of the justification for the Special Tribunal's existence.⁶⁵

Prosecution submissions

61. The Prosecution does not object to the admission of the evidence proposed in the Legal Representatives' application. The Prosecution supports the use of Rule 146 (B) in the manner proposed in order to ensure certainty to the victims in this process and in the interests of justice.⁶⁶

Defence submissions

62. The Ayyash, Sabra and Merhi Defence responses only address their position on the 'proposed agreed facts', which will be dealt with a different decision.

63. While not agreeing to any of the 'proposed agreed facts', the Merhi Defence submits that it will not, however, object in principle to the admission of the documents underlying the 'proposed agreed facts', insofar as they satisfy the requirements of Rules 149 and 154.⁶⁷

64. The Oneissi Defence takes no position with regard to the Legal Representatives' request to call participating victims as witnesses. However, with regard to the proposed evidence of one of the two non-victim witnesses, Dr Souaid, it asks the Trial Chamber to request clarification from the Legal Representatives as to: (i) the scope of his testimony; (ii) his witness status (as to whether he will testify as a lay witness or expert); and (iii) the disclosure of his witness statements, which did not occur. The Defence also notes that the

⁶⁵ Transcript of 17 May 2017, pp 30-32.

⁶⁶ Prosecution response, para. 1; transcript of 17 May 2017, p. 32.

⁶⁷ Merhi Defence response, paras 2-3.

Legal Representatives did not seek to add him to their witness list in the request for amendment of 10 May 2017.⁶⁸

65. Counsel for Mr Oneissi are unable to properly assess, based on the information provided, whether Dr Souaid's evidence fulfils the ICC's case law requirements for a witness to be called to testify by the Legal Representative of Victims before that Court. In particular, in relation to his expected evidence on political aspects, it has not been demonstrated how it would affect the victims' personal interests, the relevance has not been clearly stated, and it appears unnecessarily repetitive of evidence already tendered by the Prosecution. In relation to Dr Souaid's expected testimony on the humanitarian and psychological problems and pain of the victims, the Legal Representatives have not stated whether he has examined the victims in order to be in a position to validly provide such an opinion.⁶⁹

66. The Ayyash, Merhi and Sabra Defence do not have a position as to whether the Legal Representatives should present their evidence before or after any Defence application under Rule 167. They also do not express a definitive determination as to whether they will make any application under Rule 167 at the end of the Prosecution's case. The Merhi and Sabra Defence agree that Rule 167 submissions and the victims' evidence should not, for preparation purposes, run concurrently. The Ayyash Defence submits that for a judgement under Rule 167, taking the Prosecution's evidence at its highest is the standard the Trial Chamber will apply, and the Legal Representatives' evidence is not Prosecution evidence. According to counsel for Mr Oneissi, the Defence Rule 167 submissions should come after the Prosecution case and before the victims' evidence. Otherwise 'the victims would have expressed an opinion' and evidence would be heard 'against the accused who is acquitted'. However, counsel will accept the Trial Chamber's possibly different view on this.⁷⁰

DISCUSSION

67. Calling evidence for the participating victims, or allowing their legal representatives to call the evidence themselves raises some issues going to the heart of the case against the Accused as charged in the amended consolidated indictment.

68. Harm to the named victims of the attack—or death—is an essential element of proof in relation to the charges, for example intentional homicide (and attempted intentional

⁶⁸ Oneissi Defence response, paras 3-4, 13.

⁶⁹ Oneissi Defence response, paras 5-6.

⁷⁰ Transcript of 17 May 2017, pp 32-35.

homicide) with premeditation by using explosive materials. The evidence of at least some of the participating victims goes to proof of the Prosecution's case. That is one reason why the Prosecution itself has called some of the participating victims to testify in its case.

69. Without proof of death or injury the trial could not proceed. In this sense some of the anticipated evidence could be called in the Prosecution's case. But in principle it could probably have called most of the participating victims to provide evidence of something going to proof of a charge.

70. The Legal Representatives—or the Trial Chamber in calling evidence on their behalf—cannot act as a 'second Prosecutor'. The Trial Chamber must therefore carefully balance the competing interests of the qualified statutory right of the participating victims to present their views and concerns, in Article 17 of the Statute, against the right of the Accused to a fair and expeditious trial. The balance, of course, must be exercised in favour of the Accused's statutory right.

71. The Trial Chamber must ensure that the participating victims do not 'double-up' the Prosecution evidence by presenting further evidence that simply supports the Prosecution's case. There is thus an inevitable tension here between the two competing objectives, those of allowing the participating victims to present their views and concerns and the right of the Accused to a fair and expeditious trial. It is also inevitable that participating victims will most probably support a Prosecution case against those they may believe have harmed them or their relatives. The interest of some may be in ensuring that Accused persons are convicted and sentenced.

72. The Trial Chamber must therefore proceed with caution in delimiting the extent of receiving evidence from participating victims that does not form part of the Prosecution case, and avoid as much as possible, any overlap. It must do this while simultaneously recognizing the qualified statutory right to present views and concerns and balancing the rights of the Accused to a fair and expeditious trial. Whatever the decision it must also satisfy the interests of justice test in Rule 150 (D).

a) *Request to call witnesses and to be authorised to tender other evidence*

(i) *Viva voce witnesses – seven participating victims*

73. The anticipated evidence of the proposed seven participating victims concerns their personal experiences and the harm they suffered due to the attack on 14 February 2005. They are either relatives of individuals who died as a result of the explosion or individuals who suffered harm as a result.⁷¹ The Pre-Trial Judge has found that the personal interests of these participating victims—who he found to have *prima facie* suffered harm as a direct result of the attack—were affected.⁷² This means that their personal interest in the proceedings has been recognized. The Trial Chamber is satisfied that allowing the proposed evidence will enable the participating victims to express their views and concerns as recognized by the Statute.⁷³

74. The Statute requires the Special Tribunal, if specified conditions are satisfied, to ensure these participating victims' right to participate. Further, this is the appropriate stage of the proceedings for them to present their views and concerns, given that, if a judgement of acquittal under Rule 167 were entered, their right to participate in the manner proposed would be nullified. This requires the Trial Chamber vary the order for the presentation of evidence under Rule 146 (B). In this respect the Trial Chamber considers that the interests of justice permit both the participating victims to testify and a variation of the order of presentation of evidence.

75. Furthermore, the Trial Chamber is satisfied that the proposed victims' case is contained, proportionate and unopposed.⁷⁴ The presentation of the evidence is anticipated to take less than two weeks—including the presentation of summaries of written statements, if admitted. The Trial Chamber finds therefore that it will not affect the Accused's right to a fair trial, and in particular their right to be tried without undue delay. Further, under Rule 112 *bis*,

⁷¹ See transcript of 17 January 2014 (opening statements), pp 81, 86 (where the Legal Representatives described the two categories of participating victims as the injured survivors and the bereaved of those who died in the attack). The proposed witnesses are V056, V004, V009, V031, V001, V016, V027.

⁷² Pre-Trial Judge decision on victims participation, para. 91.

⁷³ See *Katanga* decision of 22 January 2010, para. 82.

⁷⁴ As held by the *Lubanga* Trial Chamber with regard to the presentation of views and concerns, decisions on the presentation of evidence need to be fact-specific and take into account the circumstances of the trial as a whole. As considered by that ICC Trial Chamber, the personal contributions of a few victims are unlikely to have the same impact on the proceedings as when a large number of them individually wish to participate, and the Legal Representatives have a crucial role in advising the victims on the most appropriate form of participation. *Lubanga* decision on victims' evidence, para. 27.

the Trial Chamber will impose disclosure obligations to ensure that the Parties have adequate time to prepare, if counsel wish to question the participating victims.

76. In addition, the evidence proposed, while it may assist the Trial Chamber in better understanding the events and the impact of the crime on the victims—by allowing it to recognize their harm—concerns mostly uncontroversial matters. That the proposed witnesses or the relatives of the proposed witnesses were victims of the explosion are already agreed facts between all the Parties.⁷⁵ Further, it relates to the identification of the victims and their harm, as envisaged in Article 25 of the Statute. The proposed evidence could therefore not alter the Prosecutor's onus to prove the guilt of the Accused beyond reasonable doubt, nor transform—in any real sense—the victims into supplementary prosecutors in this case.⁷⁶

77. As to whether the participating victims' views and concerns may be presented in the form of evidence—that is whether the interests of justice require that those participating victims are permitted to give evidence—the Trial Chamber is satisfied that the proposed evidence is relevant to the events that occurred on 14 February 2005, the effects of the explosion on victims,⁷⁷ and the harm suffered by the victims as its result.⁷⁸ It is also representative of a larger group of participating victims. Its probative value to the case, however, is something on which the Trial Chamber will seek further submissions at a later stage of the case.

78. As stated above, the fact that the proposed witnesses or the relatives of the proposed witnesses were victims of the explosion is an agreed fact between the Parties.⁷⁹ However, pursuant to Rule 122, the Trial Chamber may decide that a more complete presentation of those facts is required in the interests of justice, in particular the interests of the victims.

⁷⁵ F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014 ('Decision on agreed facts of 11 April 2014'), para. 1, 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.

⁷⁶ Article 16 (2) (b), under the 'Rights of the Accused' provides that 'the onus is on the Prosecutor to prove the guilt of the Accused'.

⁷⁷ F1371, Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014, para. 21; F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013, para. 31 (where the Trial Chamber was satisfied of the relevance of 23 witness statements as concerning the effects of the explosion on victims).

⁷⁸ F2720, Amended Consolidated Indictment, 12 July 2016, paras 4, 42.

⁷⁹ Decision on agreed facts of 11 April 2014, para. 1; *see also* F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015, para. 19.

79. The Trial Chamber is also satisfied that the proposed evidence will provide a more comprehensive narrative of the events and offer a more complete picture of the impact of the charged crimes upon their individual victims.

80. Some victims have already given evidence, live or under Rule 155, or their evidence has been received under Rule 158, as Prosecution witnesses. Some were also victims participating in the proceedings, who the Legal Representatives of Victims questioned after their examination in chief. This way, the Trial Chamber heard the testimonies of some people injured in the explosion, on the harm they suffered, and of relatives of those who died in or as a result of the explosion, on the harm they and their families suffered due to their loss.⁸⁰ Participating victims have also attended public sessions of the proceedings in the courtroom,⁸¹ including the opening statements.⁸²

81. The Trial Chamber recognizes that the live evidence now proposed by the Legal Representatives could appear at least as partially cumulative, since other witnesses have 'given oral testimony of similar facts'. Further, it concerns the impact of crimes upon victims. These two factors are listed under Rule 155 (A) (i) as favouring the admission of evidence in the form of a written statement in lieu of oral evidence.

82. However, the proposed witnesses are uniquely placed to give evidence about their individual experiences and the personal harm suffered, which is specific and unique to each individual victim. Therefore, since 'none of their personal histories are the same',⁸³ the evidence cannot strictly be considered 'cumulative'. Further, neither the Defence nor the Prosecution oppose any of these witnesses being called.

83. In light of the above, in the interests of justice, the Trial Chamber permits the proposed participating victims to give evidence, in order to ensure meaningful participation in the proceedings. The status of this evidence, as in how it can be used, and the weight that it

⁸⁰ These witnesses testified about how they heard about the explosion, searched for their relative, found out that they had died or, in some cases, identified the body. Transcript of 22 January 2014, pp 17-18, 21-31; transcript of 24 January 2014, pp 4-14; transcript of 4 December 2014, pp 4-69.

⁸¹ The Trial Chamber has permitted this on a case-by-case basis, pointing out that participating victims' presence in the courtroom is exceptional for the combination of the fact that their views and concerns may be presented there by the Legal Representatives and logistical and physical considerations. *See, e.g.,* F2854, Decision Allowing a Participating Victim to Attend Proceedings in the Courtroom, 25 November 2016; Decision Clarifying the Conditions under which Participating Victims May Attend Proceedings, delivered in court on 18 November 2014, *see* transcript of 18 November 2014, pp 1-3.

⁸² Four of the participating victims who attended the opening statement of the Legal Representatives in the courtroom, and were introduced to the Trial Chamber, are among the proposed live witnesses.

⁸³ *See Lubanga* decision on victims' evidence, para. 37, referring, in that case, to the account of former child soldiers.

can be given, however, will be the subject of further submissions and determination at a later stage in the proceedings. In this respect the Trial Chamber will carefully consider how it could be used in a judgement.

(ii) *Viva voce witnesses – two non-victim witnesses*

84. The Legal Representatives additionally request permission to call two non-victim witnesses, to testify to the collective harm suffered by victims and, with respect to one of them, also on the political background and chain of events that preceded and followed Mr Hariri's assassination. Their statements have not yet been disclosed to the Parties or provided to the Trial Chamber.⁸⁴

85. The testimony of Professor Dr Letschert, who has conducted interviews with the majority of the participating victims, will relate to the victimological profile of the participating victims as alleged victims of terrorism, their needs and the significance for them of accessing justice. This evidence will offer a more complete picture of the impact of the events of 14 February 2005, and charged crimes, upon their victims and will characterise the effect of the events on a larger group of participating victims. The nature of this evidence, along with the lack of any objection from the Parties, is sufficient for the Trial Chamber to conclude that it is in the interests of justice to authorise this witness to testify.⁸⁵

86. As to the other non-victim witness, Dr Souaid, the Legal Representatives are ordered to provide to the Trial Chamber and disclose to the Parties his witness statement or report, or a document outlining the scope of his testimony. After receiving this additional material, the Trial Chamber will decide whether to permit him to testify.

(iii) *Rule 155 and Rule 158 witness statements*

87. The Trial Chamber understands the Legal Representatives of Victims' application for leave to tender into evidence statements of participating victims and an individual who is not a participating victim,⁸⁶ under Rules 155 and 158, as a request for authorization to submit the

⁸⁴ Motion, paras 10-12.

⁸⁵ ICC case law holds that non-victim witnesses, at the Legal Representatives of Victims' request, should be called to appear, 'as far as possible', after the conclusion of both the Prosecution and the Defence cases (*see Katanga* decision of 22 January 2010, paras 94-95). However, unlike at the ICC, Rule 146 of the Special Tribunal's Rules expressly provides that 'evidence called by the Trial Chamber at the request of victims participating in the proceedings' follows the Prosecution's evidence and precedes the Defence's evidence. Nothing in this Rule allows distinguishing between 'evidence' from victims and evidence from non-victims.

⁸⁶ The witness is the legal guardian of two victims.

statements for admission into evidence through subsequent formal applications. Under Rule 87 (B), victims participating in the proceedings may request the Trial Chamber, after hearing the Parties, to authorise them to call witnesses and *tender other evidence*. Further, Rule 150 (D), by providing that a victim may be permitted to give evidence does not distinguish between *viva voce* evidence and evidence in the form of written statements.

88. The Trial Chamber also understands that, by the subsequent application for leave to amend their witness list by adding four witnesses, the Legal Representatives intended their request for leave to tender into evidence witness statements, to encompass the additional four witnesses. No Party opposed the application to amend the witness list.

89. The Trial Chamber, therefore, grants the application as their anticipated evidence is relevant for the reasons outlined in the next paragraph, and the addition will not delay the proceedings, nor prejudice any fair trial rights of the Accused. The Trial Chamber's decision will concern, therefore, the evidence of all 23 witnesses, as listed in confidential annex A to the 'Request of the Legal Representative of Victims to add four Witnesses to their Witness List, with Confidential Annex A' of 10 May 2017, at rows 10-32.⁸⁷

90. The witnesses are either relatives of individuals who died as a result of the explosion or individuals who suffered harm as a result. The evidence will provide information on the whereabouts and activities of the victims on 14 February 2005, the damage caused by the explosion, the harm they suffered as a result or, in the case of relatives of individuals who died because of the explosion, the harm they and their families suffered due to their relative's death. The Trial Chamber is satisfied that this evidence is relevant to the events that occurred on 14 February 2005 and the harm suffered by the victims. It will enable the participating victims to express their views and concerns and will not affect the Accused's right to a fair trial.

91. As to the witness statements of a limited number of participating victims who have already given evidence as Prosecution witnesses, the Trial Chamber finds the Legal Representatives' explanation—that they supplement the previous evidence, include information they became aware of after that evidence was given and relate to the harm suffered—generally satisfying, at this stage. Further, no Party responded to the additional submissions, raising any objection or concern. The Trial Chamber will consider specific

⁸⁷ V014, V041, V045, V049, V052, V068, V069, V080, V073, V026, V078, V058, V036, V037, V038, V082, V086, V008, V010, V033, V034, V048, and another.

submissions regarding witness statements in the context of its evaluation of their relevance and *prima facie* probative value, once any application for admission is submitted.⁸⁸

92. The Trial Chamber finds, therefore, that the interests of justice allow the Legal Representatives to present this evidence by applying for its admission under Rules 155 and 158. The Trial Chamber will impose the relevant disclosure obligations.

b) Scheduling for the presentation of the evidence, directions on disclosure obligations and modalities of examinations

93. The Legal Representatives of Victims submit that they would be greatly assisted by the setting of a fixed date for the commencement of the victims' case, to provide certainty for the organisation of the witnesses' attendance. Further, they submit that 'there should be a victims' case [...] it's part of the justification for this Tribunal that [victims] are permitted to participate within the Statute'.⁸⁹

94. Rule 146 (B) allows the Trial Chamber, in the interests of justice, to provide directions which may alter the sequence of presentation of evidence. The Trial Chamber is satisfied that altering the sequence of evidence is warranted in the circumstances because, should a judgement of acquittal be delivered under Rule 167, the victims' right to participation, through the presentation of views and concerns in the manner proposed, would be nullified.

95. The Trial Chamber, therefore, under Rule 146 (B), in the interests of justice, directs that the presentation of the *viva voce* evidence authorised with this decision—and the presentation in court of written evidence, where admitted—will be interposed before the formal closure of the Prosecutor's case. The Trial Chamber also directs that the presentation of such evidence will start in the week of 28 August 2017. After hearing it, the Prosecution can complete the remainder of its case. Any submissions and deliberations under Rule 167 will follow.

96. Further, when suggested by the Presiding Judge during the status conference on 17 May 2017, the Prosecution supported this course of action, to ensure certainty to the victims

⁸⁸ The Trial Chamber finds specific arguments provided by the Legal Representatives—*i.e.* as to whether a certain witness statement, declared admissible, has not received an exhibit number yet, or a certain witness 'gave evidence publicly' (see Additional submissions, paras 19-20)—of themselves irrelevant to determining whether additional evidence from a certain witness can be presented, in the interests of justice.

⁸⁹ Transcript of 17 May 2017, p. 32.

and in the interests of justice,⁹⁰ as did the Legal Representatives. The Ayyash, Merhi and Sabra Defence did not object to it.

97. As to the concerns of the Oneissi Defence, the Trial Chamber notes that ICC trial chambers—although in the absence of specific statutory provisions on a judgement of acquittal at the close of the Prosecutor’s case or on the presentation of victims’ evidence—have provided explicit direction for any ‘no case to answer motion’ to follow the completion of the evidence called at the Legal Representatives’ request.⁹¹ Further, the presentation of the anticipated evidence authorised by this decision would not impact any Trial Chamber determination under Rule 167. This is because it does not provide *direct* evidence of the individual criminal responsibility of any Accused, although it may go to proving the elements of the offences charged. The participating victims’ evidence is also relevant to facts covered by existing agreements as to evidence under Rule 122, namely the deaths and injuries provoked by the explosion. As noted, the probative value of this evidence may be the subject of future submissions.

98. Having authorised the presentation of evidence as sought, the Trial Chamber under Rule 112 *bis* directs the Legal Representatives to disclose to the Parties and the Trial Chamber, by 23 August 2017, copies of the statements of all witnesses it has requested to call, and all statements taken in accordance with Rules 155 and 158—where this has not already occurred. This will enable the adequate preparation of the Parties for the victims’ case.

99. The modalities of witness examination will be governed by the guidelines in the ‘Directions on the Conduct of the Proceedings’ of January 2014.⁹² The Legal Representatives may first question the proposed witnesses, in examination in chief, as requested. The Prosecution may then examine them, followed by Defence counsel. The Trial Chamber may ask questions, at any stage.

c) *‘Proposed agreed facts’ and evidence in the form of documents*

100. The Trial Chamber will record relevant ‘agreed facts’, as listed in a table annexed to the decision, as being proved in the cases against Mr Ayyash and Mr Sabra.

⁹⁰ Transcript of 17 May 2017, p. 32.

⁹¹ ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1334, Decision No. 5 on the Conduct of Trial Proceedings, 3 June 2014, para. 34; *see also* ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-619, Decision on the Conduct of Proceedings, 2 June 2015, para. 17.

⁹² Directions on the conduct of the proceedings, para. 15.

101. The Trial Chamber has great difficulty in understanding why counsel for Mr Merhi and Mr Oneissi will not accept the ‘proposed agreed facts’ as uncontested, and how the absence of direct instructions from the Accused, as claimed, could affect this.⁹³ Most of the proposed agreed facts are uncontroversial, relating to matters such as dates of birth and medical reports of injuries. Consequently—and unfortunately—as a result of the lack of agreement, the Trial Chamber considers that a presentation of those facts is required in relation to Mr Merhi and Mr Oneissi.

102. The Trial Chamber notes that all Parties previously agreed not to contest that the explosion on 14 February 2005 killed Mr Hariri and 21 others, and that it injured 226, as all identified, respectively, in Schedules A and B of the Indictment.⁹⁴ The Trial Chamber recorded that agreement in a decision on 11 April 2014.⁹⁵ As the Trial Chamber may consider those facts as being proved, there is no need to receive documents establishing them in evidence.⁹⁶

103. The Legal Representatives argue that the documents they intend to tender into evidence corroborate witness testimonies and witness statements. The Trial Chamber orders the Legal Representatives to file the documents supporting the ‘proposed agreed facts’⁹⁷ as a single document, with a separate ERN range,⁹⁸ with an index including cross-references to the ‘proposed agreed facts’ by 23 August 2017. Based on the ‘proposed agreed facts’ they support, the Trial Chamber finds these documents relevant.

104. Counsel for Mr Merhi and Mr Oneissi—who do not accept the resulting facts as uncontested—are instructed to raise any objections they may have as to the documents’ *prima facie* reliability or any other requirement for admission under Rule 154 by 30 August 2017.

⁹³ See transcript of 4 May 2017, p. 85; transcript of 17 May 2017, p. 88.

⁹⁴ See now F2720, Amended Consolidated Indictment, 12 July 2016.

⁹⁵ F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, para. 1, 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.

⁹⁶ Cf. ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-227, Decision on the Join Submission regarding the Contested Issues and the Agreed Facts, 28 September 2011, para. 46.

⁹⁷ Except for those documents which are already in evidence, as noted by the Legal Representatives (*see* Motion, para. 20).

⁹⁸ ERNs are ‘evidence reference numbers’ used to catalogue and identify the parties’ documents and other evidence. See F2035, Decision on Prosecution Motion to Admit the Statements of Witness PRH424, 30 June 2015, fn. 5.

CONFIDENTIALITY

105. The Legal Representatives of Victims filed annexes A to C to their application, annex A to the 'Request of the Legal Representative of Victims to add four Witnesses to its Witness List, with Confidential Annex A', of 10 May 2017, and their additional submissions of 21 July 2017, confidentially. While reiterating the public nature of these proceedings, the confidentiality of the annexes and submissions can be maintained as they contain confidential information. A public redacted version should be filed as soon as practicable.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

AUTHORISES, under Rule 150 (D), the presentation of *viva voce* (live) evidence by victims V001, V004, V009, V016, V027, V031, V056, and Dr. Rianne Letschert;

ORDERS the Legal Representatives to provide to the Trial Chamber, and disclose to the Parties, the witness statement or report of Dr Fares Souaid, or a document setting out the scope of his testimony by 16 August 2017;

DEFERS deciding whether Dr Souaid may testify pending receipt of his witness statement, report or a document setting out the scope of his testimony;

SCHEDULES the presentation of the evidence called by the Trial Chamber at the request of the victims participating in the proceedings to commence in the week of 28 August 2017 (or another date, if necessary);

DIRECTS, under Rule 146 (B), that the presentation of this evidence will be interposed before the formal close of the Prosecutor's case;

ALLOWS the Legal Representatives of Victims to present the evidence themselves, subject to any direction of the Trial Chamber, under the guidelines in the 'Directions on the Conduct of the Proceedings' of 16 January 2014;

GRANTS the Legal Representatives of Victims' application to add four witnesses to their witness list, as submitted on 10 May 2017;

AUTHORISES the Legal Representatives of Victims to submit for admission into evidence, under Rules 155 and 158, the statements of the witnesses listed in confidential annex A to the

‘Request of the Legal Representative of Victims to add four Witnesses to its Witness List, with Confidential Annex A’ of 10 May 2017, at rows 10-32;

ORDERS the Legal Representatives of Victims, under Rule 112 *bis*, to disclose to the Parties and the Trial Chamber by 23 August 2017—where this has not occurred yet—copies of the statements of all proposed live and Rule 155 and 158 witnesses;

AUTHORISES the Legal Representatives of Victims to submit for admission into evidence any documents they may wish and the documents supporting the ‘proposed agreed facts’, according to the directions in this decision;

ORDERS the Legal Representatives of Victims to file by 23 August 2017 documents supporting the ‘proposed agreed facts’ as a single document, with a separate ERN range, including an index cross-referencing the ‘proposed agreed facts’; and

ORDERS counsel for Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi to file any objection as to the *prima facie* reliability, or any other requirement for admission under Rule 154, of the documents supporting the ‘proposed agreed facts’ by 30 August 2017.

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

Leidschendam,
The Netherlands
31 July 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

