SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No.: **STL-11-01/PT/AC/AR126.3**

Before: **Judge David Baragwanath, Presiding**
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Ivana Hrdličková, Judge Rapporteur

Registrar: **Mr Herman von Hebel**

Date: **10 April 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON APPEAL BY LEGAL REPRESENTATIVE OF VICTIMS AGAINST PRE-TRIAL JUDGE'S DECISION ON PROTECTIVE MEASURES

Prosecutor:
Mr Norman Farrell

Legal Representatives of Victims:
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

Head of Defence Office:
Mr François Roux

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux

INTRODUCTION

1. The Legal Representative of Victims ("LRV") has seized us with an appeal against a decision of the Pre-Trial Judge relating to protective measures for victims participating in the proceedings ("VPPs").[1] The Appeal is directed against the Pre-Trial Judge's holding that VPPs may not participate anonymously.[2] The LRV requests us to reverse this holding and exempt him from disclosing the identities of VPPs to the Defence and the Prosecutor.

2. We hold by majority, Judges Riachy and Nsereko dissenting, that the Appeal is admissible. However, we unanimously dismiss the Appeal, and affirm the Pre-Trial Judge's decision that VPPs cannot remain totally anonymous.

BACKGROUND

3. In his first Decision on Victim's Participation in the Proceedings, the Pre-Trial Judge granted VPP status to 58 applicants, and invited those VPPs who wished to remain anonymous or seek other protective measures to submit a request to that end to the Pre-Trial Judge.[3] A further 10 victims were later granted VPP status.[4] The LRV submitted three requests in which a number of VPPs requested the non-disclosure of their identities not only *vis-à-vis* the public but also *vis-à-vis* the Parties for the duration of the proceedings and after final judgment ("total anonymity").[5] The Pre-Trial Judge declined to recognize the validity of total anonymity as a protective measure and found that it was not available under the Statute and Rules of Procedure and Evidence ("Rules").[6] The LRV obtained

[1] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Appeal of the Legal Representative of Victims Against the Decision of the Pre-Trial Judge Refusing Protective Measures, 8 February 2013 ("Appeal"), para. 2. All further references to filings and decisions relate to this case number unless otherwise stated.
[2] STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Legal Representative of Victims' First, Second and Third Motions for Protective Measures for Victims Participating in the Proceedings, 19 December 2012 ("Impugned Decision"), para. 27, Disposition; *see* Appeal, paras 2, 74-75.
[3] STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision on Victims' Participation in the Proceedings, 8 May 2012 ("Decision on Victims' Participation"), para. 131.
[4] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Second Decision on Victims' Participation in the Proceedings, 3 September 2012; Third Decision on Victims' Participation in the Proceedings, 28 November 2012.
[5] STL, *Prosecutor v Ayyash et al.* STL-11-01/PT/PTJ: First Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Seventeen Victims Participating in the Proceedings, 29 October 2012; Second Motion of the Legal Representative of Victims for Protective Measures (Anonymity) of Six Victims Participating in the Proceedings, 2 November 2012; Third Motion of the Legal Representative of Victims for Protective Measures (Confidentiality) of Eight Victims Participating in the Proceedings, 2 November 2012.
[6] Impugned Decision, paras 22-27.

certification to appeal this decision in relation to this specific issue.[7] He now challenges the Pre-Trial Judge's finding on appeal.[8] The Prosecution[9] and counsel for Messrs Sabra[10] and Badreddine[11] responded, disputing the LRV's standing to bring the appeal, and arguing that total anonymity should be refused or otherwise strictly limited. The LRV filed a request for leave to reply, attaching the reply at the same time.[12] The Victims' Participation Unit ("VPU") made submissions supporting the availability of total anonymity.[13]

DISCUSSION

I. The LRV's reply

4. More than seven days after the filing of the responses to his Appeal, the LRV filed a request for leave to file a reply, together with the proposed reply. We note that Rule 8 (B) of the Rules was recently amended and now requires that any request for leave to file a reply must be filed within two days of the response. Given that the responses were submitted before the Rule change, we find that the old version of the Rule—which did not contain a time limit for the filing of the request—applied and the request was not made out of time.[14]

5. However, it was improper for the LRV to attach the substance of his reply to the request seeking leave to file it. While the practice at other courts has not been consistent in this regard, we

[7] STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measures, 30 January 2013 ("Certification Decision"), paras 24-26. Before certification was granted, the Pre-Trial Judge asked the LRV to identify the VPPs on whose behalf he had filed the motion for certification (STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PTJ, Interim Order on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measures, 18 January 2013). The LRV clarified that he was seeking to bring the appeal on behalf of all current VPPs (STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Notice of the Legal Representative of Victims Pursuant to the Pre-Trial Judge's Interim Order of the 18 January 2013, 24 January 2013).

[8] Appeal, para. 2.

[9] Prosecution Response to the Legal Representatives of Victims Appeal against the Decision of the Pre-Trial Judge Refusing Protective Measures, 28 February 2013 ("Prosecutor's Response").

[10] Sabra Response to the Appeal of the Legal Representative of Victims against the Decision of the Pre-Trial Judge Refusing Protective Measures, 26 February 2013 ("Sabra Response").

[11] Response of the Badreddine Defence to the Appellate Brief of the Legal Representative of Victims against the Pre-Trial Judge's Decision Refusing to Grant Protective Measures, 28 February 2013 ("Badreddine Response").

[12] Application for Leave to Reply and Consolidated Reply of the Legal Representative of Victims to the Responses of the Prosecution and Counsel for Sabra and Badreddine to his Appeal against the Decision of the Pre-Trial Judge Refusing Protective Measures, 8 March 2013 ("Application for Leave to Reply").

[13] Submission from the Victims' Participation Unit on Protective Measures for Victims Participating in the Proceedings, Confidential and *Ex Parte*, 1 March 2013 ("VPU Submission"). A public redacted version was filed the same day. The Registrar had previously sought leave on behalf of the VPU to file submissions (Registrar's Request to Permit Submissions from the Victims' Participation Unit Regarding Victim Anonymity, 1 February 2013), which we granted (Order on Submissions from the Victims' Participation Unit, 12 February 2013).

[14] The amended version of the Rules entered into force on 6 March 2013.

find that it would be a circumvention of Rule 8 (B) if counsel in effect places the reply on the case-record despite not having been granted leave to do so.[15] In the future, unless otherwise ordered, counsel should wait for the Chamber's decision to grant leave—based on the reasons offered by counsel in the request for leave— before filing the reply.

6. Nevertheless, in the present case, in the interests of judicial economy, we exceptionally turn to the question of whether leave should be granted on the basis of the grounds outlined in the substantive part of the LRV's application.[16] We first must look to the applicable standard for granting leave to reply. We have held that a reply "must generally be limited to circumstances where new issues arise of the respondent's brief" and that it "is not a vehicle for an appellant to simply reiterate or refine arguments made in the appeal".[17] With respect to the issue of whether the LRV has standing to file an appeal, the response did not raise this as a new issue. Indeed, the LRV devoted some four pages to the issue in his Appeal.[18] Leave to reply is rejected in this regard.[19] Likewise, the LRV's assurances that he will not seek anonymity for VPPs who intend to present evidence are repetitive of his Appeal and do not warrant the filing of a reply.[20] While not addressed in his Appeal, the LRV's remaining arguments[21] are also not responding to a new issue—the LRV's failure to make arguments in this regard in the Appeal does not justify filing a reply.[22] In sum, we do not grant leave for filing the reply.

II. Admissibility of the Appeal

7. The LRV argues that the VPPs have standing to file an appeal before the Appeals Chamber.[23] He submits that Rule 126 of the Rules should be construed as encompassing the possibility for VPPs to seek and receive certification to appeal a decision if such a decision relates to the VPPs' personal

[15] *See* ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Order Re Exhibit 5D1312, 22 April 2008, para. 3 (referring to the Chamber's general order that a "request for leave to file a reply should not include the substance of the reply, which should await the decision of the Chamber upon whether to grant such leave").
[16] *See* Application for Leave to Reply, para. 1 (requesting leave on the basis of the substantive grounds set out in the reply).
[17] STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/AC/AR126.1, Order on Defence Request for Leave to File a Reply, 8 October 2012 ("Order on Reply"), para. 3; *see also* STL, *In the matter of El Sayed*, CH/AC/2012/01, Order on Request by Mr El Sayed for Leave to File a Reply, 7 November 2012 (with further references).
[18] Appeal, paras 13-34.
[19] Application for Leave to Reply, paras 13-22.
[20] *See* Appeal, para. 60; Application for Leave to Reply, para. 28.
[21] Application for Leave to Reply, paras 23-27.
[22] Order on Reply, para. 3.
[23] Appeal, paras 13-22.

interests.[24] The Prosecutor and counsel for Mr Sabra submit that the VPPs have no standing to lodge interlocutory appeals.[25] Counsel for Mr Badreddine do not object to the admissibility of the Appeal because the Impugned Decision directly affects the VPPs personal interests in the proceedings. However, they caution against a too flexible interpretation of Rule 126.[26]

8. At the outset, we reject the LRV's argument that his Appeal is admissible because neither the parties nor the Pre-Trial Judge raised any objections to his request for certification of the Impugned Decision.[27] Whether a matter is properly before the Appeals Chamber is not a decision for the parties or the Pre-Trial Judge. Indeed, we have to verify in each and every appeal that we have jurisdiction to hear it. It is therefore also irrelevant that the Prosecutor and counsel for Mr Sabra—despite their argument that the LRV has no standing to bring his Appeal—do not object to the Appeals Chamber taking a decision on the merits.[28]

9. We recall that under our Rules, interlocutory decisions are not subject to an automatic right of appeal. Indeed, an appeal against such decisions may only be filed if this right is explicitly granted in the Rules or if certification to appeal is given by the first instance Judge or Chamber. In the instant case, the Rules do not provide for an automatic right of the VPPs to appeal against decisions on their protective measures. While the Pre-Trial Judge granted the VPPs certification under Rule 126 (C) of the Rules upon the LRV's request, Rule 126 (E) makes it clear that only a "Party" may appeal to the Appeals Chamber once certification is given. Rule 2 defines "Party" as the "Prosecutor or the Defence". Under its express wording, Rule 126 (E) therefore does not make provision for an appeal by the LRV.

10. However, we hold by majority that Rule 126 (E) is exceptionally applicable by analogy to allow for a narrow right to an interlocutory appeal of the VPPs in strictly confined circumstances and only after obtaining certification. Judges Riachy and Nsereko dissent from this holding and from the following part of this decision relating to admissibility.

11. We are mindful that the jurisdiction of the Appeals Chamber is limited by the Statute and Rules. Specifically, there can be no right of appeal if it was the express intention of the drafters to

[24] Appeal, para. 22.
[25] Sabra Response, para. 6; Prosecutor's Response, para. 4.
[26] Badreddine Response, paras 3-4.
[27] Appeal, paras 23-26.
[28] Prosecutor's Response, para. 8; Sabra Response, para. 8.

exclude it.[29] We find however that Rule 126 is ambiguously drafted, creating a lacuna in the Rules that needs to be addressed in order to do justice.

12. As pointed out by the LRV,[30] Rule 126 (A) on the one hand refers to "*all* motions",[31] which presumably includes motions filed not only by the parties but also by the LRV, if granted permission to do so. Rule 126 (B) then refers to the right of a party to "apply by motion for appropriate ruling or relief". Rule 126 (C) does not contain this limitation but states that "[d]ecisions on *all* motions under this Rule are without interlocutory appeal save with certification [...]". Rule 126 (E) then again refers to "a Party" that may appeal. This apparent inconsistency can be explained by the fact that Rule 126 is essentially based on the nearly identical Rule 73 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Unlike before this Tribunal, however, the ICTY does not give victims a right to participate in the proceedings. While Rule 73 therefore is clear in the ICTY context, Rule 126 is less so in our proceedings.

13. To resolve this ambiguity, we must first look at the Rules to verify whether they otherwise explicitly permit or prohibit appeals by the VPPs. We note that the Rules do not contain any general provision that would exclude a right of the VPPs to lodge interlocutory appeals. On the contrary, Rule 86 (C) grants an appeal as of right to any unsuccessful applicant for the status of VPP against the decision of the Pre-Trial Judge denying them that status. Moreover, Rule 86 (D) specifically prohibits appeals against decisions relating to the grouping of victims in the proceedings. *Argumentum e contrario*, if the drafters of the Rules had believed that VPPs did not have a general right to file interlocutory appeals, the express prohibition of Rule 86 (D) in relation to one specific matter would not have been necessary. In sum, the Rules do not contain any general prohibition of interlocutory appeals by VPPs but do permit appeals by persons seeking to participate as VPPs.

14. We are also guided by the provisions of the Statute. In particular, Article 17 provides that

> [w]here 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.

[29] *See* STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 ("Jurisdiction Decision"), para. 17.
[30] Appeal, para. 18.
[31] "This Rule applies to all motions other than preliminary motions, motions relating to release, and others for which an appeal lies as of right according to these Rules."

Consistent with this mandate, the Pre-Trial Judge has permitted the LRV to "file [...] motions or briefs on any issue that affects the victims' personal interests".[32] If such filings are permitted, then the LRV should also be allowed to appeal a decision on them, provided that they meet the certification threshold of Rule 126. This is certainly true in relation to matters where the Statute or Rules expressly provide for the LRV to bring the matter before a Judge or Chamber at first instance.[33] In particular, it would be unjust to deny the VPPs access to the Appeals Chamber if for instance their rights under Article 17 of the Statute were not given full effect or were unduly limited by the Pre-Trial Judge or the Trial Chamber. Moreover, clarification of the law by the Appeals Chamber ensures that Article 17 is interpreted and applied through all stages of the proceedings in a uniform manner.

15. Neither the Statute nor the Rules define what qualifies as the VPPs "personal interests". Indeed, whether an issue is relevant to the personal interests of the VPPs is necessarily a highly case-specific inquiry.[34] However, for the purposes of whether VPPs have standing to seek appellate review of interlocutory first instance decisions, we hold that such personal interests must necessarily be limited to situations where the VPPs' own interests as participants in the proceedings are fundamentally concerned. We can discern three such specific situations:

- Decisions on applications for status as a VPP (a right of appeal is already provided for under Rule 86 (C)).
- Decisions on the modalities of victims' participation in the proceedings (such as decisions concerning access of the LRV to documents and decisions on whether victims may call evidence and make submissions).

[32] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, 18 May 2012 ("Decision on Modalities"), para. 31.
[33] *See, e.g.*, Rules 133 (A), 87 (A).
[34] *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, para. 28 ("More broadly, any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis. Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations. More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. Even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.").

- Decisions on protective measures for VPPs and the variation of such measures.

16. We also hold that the right to seek appellate review in these limited circumstances does not prejudice the Accused. In the absence of prejudice, we must seek to give full effect to the rights of the victims as mandated by Article 17 of the Statute. In any event, if it were demonstrated that there was such harm, the Appeals Chamber would retain the discretion to reject an appeal on that basis.

17. Both the Prosecutor and counsel for Mr Sabra refer to the case-law of the International Criminal Court ("ICC") under which participating victims have not been permitted to initiate interlocutory appeals. However, we are not bound by that jurisprudence. Moreover, there are a number of differences between the legal framework of the ICC and that of our Tribunal. For instance, while the ICC does not allow victims to appeal a chamber's refusal to grant victim status, our Rules explicitly do. Furthermore, we note that while participating victims have never been granted leave to appeal an interlocutory decision at the ICC, this specific issue for that reason has not been addressed conclusively by the ICC Appeals Chamber.

18. In sum, we hold by majority, Judges Riachy and Nsereko dissenting, that the Appeal is admissible in analogy to Rule 126 (E).

III. Merits of the Appeal

A. Standard of review on appeal

19. In the Impugned Decision, the Pre-Trial Judge held that "before the Tribunal, the total anonymity of VPPs *vis-à-vis* the Parties for the duration of the proceedings cannot legally be recognised".[35] The LRV contends that this holding was a legal error. We have previously adopted the standard of appellate review applicable to such alleged errors as set out by other international tribunals:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...]

[35] Impugned Decision, para. 22.

The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[36]

20. We point out that not every error leads to a reversal or revision of a decision at first instance and that we will only review errors of law that have the potential to invalidate that decision.[37]

B. Scope of the Appeal

21. The issue certified for appeal by the Pre-Trial Judge concerns the availability of "total anonymity" of VPPs as a valid protective measure[38] in proceedings before him. In the Impugned Decision, the Pre-Trial Judge held that total anonymity of VPPs "notionally contravenes the rights of the accused,"[39] is inconsistent with Article 25 of the Statute,[40] and is not covered by any other exception in the Rules.[41] He thus refused the LRV's request to consider whether this particular protective measure was merited in relation to individual VPPs.[42]

22. The Pre-Trial Judge defined total anonymity as the non-disclosure of the identity of VPPs *vis-à-vis* the parties for the duration of the proceedings.[43] This Appeal is therefore not concerned with other measures for the protection of VPPs, such as anonymity *vis-à-vis* the public or the withholding of their identities from the parties on an interim basis, or with matters related to the general disclosure of information in the possession of the VPPs. Moreover, the only question that was certified for appeal is whether, as a protective measure, VPPs' identities may be withheld from the parties throughout the proceedings.[44] As pointed out by the Prosecutor and counsel for Mr Sabra,[45] the LRV attempts to bypass this limitation by framing the question of anonymity as one not relating to the VPPs' *protective measures* but rather to their *disclosure* obligations under Rule 112 *bis*.[46] We find that this goes beyond the grant of certification and dismiss his arguments in this regard.

[36] Jurisdiction Decision, para. 10, with references to the case-law of the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL"), and the ICC.
[37] Jurisdiction Decision, para. 10 (with further references).
[38] Certification Decision, paras 24-26.
[39] Impugned Decision, para. 23.
[40] Impugned Decision, para. 24.
[41] Impugned Decision, para. 26.
[42] Impugned Decision, paras 22, 27, 37.
[43] Certification Decision, paras 25-26; *see also* Impugned Decision, para. 22.
[44] Certification Decision, para. 24.
[45] Prosecutor's Response, paras 13-16; Sabra Response, para. 11.
[46] Appeal, paras 35-41; *see also* VPU Submission, paras 10-11.

C. Applicable law

23. The basic principles of victim participation in the proceedings before the Tribunal are set out in Article 17 of the Statute and in Rules 86 and 87 of the Rules. In essence, victims are permitted to express their "views and concerns" throughout all stages of the proceedings if their personal interests are affected. However, this must not prejudice the rights of the accused.

24. The Statute and Rules also require that proceedings before the Tribunal are held in public unless there are exceptional reasons justifying a departure from this principle.[47] Article 16 (2) of the Statute makes the entitlement of an accused to a fair and public trial subject to measures ordered by the Tribunal for the privacy and protection of victims and witnesses. Article 12 (4) establishes within the Registry a Victims and Witnesses Unit to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". Rules 115 and 133 specify certain protective measures available to victims and witnesses, such as interim non-disclosure of the identity of victims and the non-disclosure of the identity of victims to the public and media. Neither the Statute nor the Rules contain any provision explicitly allowing for the total anonymity of victims that exercise their right to be VPPs *vis-à-vis* the parties.

D. Whether the Pre-Trial Judge erred when finding that total anonymity of VPPs entails prejudice in the proceedings before the Tribunal

25. The Pre-Trial Judge held that "it is not conceivable to convict a person for a crime committed against a VPP who is involved in the trial proceedings and yet, by remaining anonymous, does not allow the accused a full defence".[48] The LRV argues that this was an error.[49] He submits that VPPs may choose different degrees of participation in proceedings such as that of an "entirely passive" participant or "silent observer" and argues that some of these desired methods of involvement do not

[47] *See, e.g.*, Arts 16, 20, 23 STL St.; Rules 73, 96, 136 STL RPE; *see* STL, *In the matter of El Sayed*, CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed Against Pre-Trial Judge's Decision of 8 October 2012, 23 November 2012, para. 12; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, *Corrected Version of* Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 12; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Victims' Participation in the Proceedings, 8 May 2012, para. 129; *see also* Prosecutor's Response, para. 9.
[48] Impugned Decision, para. 23.
[49] Appeal, paras 42-63; *see also* VPU Submission, paras 20-31.

prejudice the Accused if the identity of the victims is not revealed to them.[50] Counsel for Messrs Badreddine and Sabra submit that the Pre-Trial Judge did not err.[51]

26. We have noted the references by the LRV and the parties to the relevant practice of the ICC. Indeed, the ICC's provisions on victim participation are the most comparable to those of the Tribunal.[52] ICC Pre-Trial and Trial Chambers have not explicitly prohibited total anonymity of participating victims during trial and have rejected the notion that anonymous victims should never be permitted to participate in the proceedings on the basis of unfairness to the accused.[53] Rather, victims are permitted to preserve anonymity unless they desire a degree of participation that would make anonymity incompatible with the rights of the accused.[54] ICC Pre-Trial Chambers have applied these principles and have held that they will not permit total anonymity where victims engage in forms of participation that add evidence to the case against the accused (on the basis that this would violate the principle against anonymous accusations) or question witnesses.[55] ICC Trial Chambers have not permitted victims to testify as witnesses or to "present their views and concerns" unless they relinquish their anonymity *vis-à-vis* the parties.[56] One Trial Chamber noted that in light of the

[50] Appeal, paras 53-58.
[51] Badreddine Response, para. 5; Sabra Response, para. 19.
[52] Article 68 (3) ICC St. This provision mirrors Art. 17 STL St. The ICTY, ICTR and SCSL do not give victims participatory rights. The Extraordinary Chambers in the Courts of Cambodia allow participation in a manner more akin to *parties civiles* in civil law jurisdictions.
[53] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008, para. 130; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, para. 37; *see also* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1556, Decision on the applications by victims to participate in the proceedings, 15 December 2008, paras 126-133; ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, paras 92, 93.
[54] *See* ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2027, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, para. 19; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008, para. 131; *see also* ICC, *Prosecutor v Bemba*, ICC-01/05-01/08-699, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, paras 27, 31.
[55] *See* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-462-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, pp. 7-8. This list has been cited in several later decisions; *see, e g.* ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, paras 180-183; *see also* ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, paras 92-93.
[56] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2027, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, para. 19; *see also, e.g.*, ICC, *Prosecutor v Bemba*, ICC-01/05-01/08-2220, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08, 24 May 2012, para. 12; ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, paras 92, 93; ICC, *Prosecutor v. Katanga*

need to safeguard the fairness of the proceedings, the extent of participation of a victim must be significantly limited if that victim is anonymous.[57] While we have considered this jurisprudence, which despite some limitations does not explicitly prohibit total anonymity of participating victims, we do not find it persuasive as in our view it does not take fully into account the potential of prejudice arising to the accused if the identity of the participating victims were to be withheld from them, as set out below. We also note that until now there has been no conclusive decision by the ICC Appeals Chamber on this issue.[58]

27. The LRV asserts that the Pre-Trial Judge mistakenly conflates the role of VPPs and witnesses, wrongly assuming that the general right of an accused to know the identity of a witness testifying against him or her also applies to VPPs.[59] He also draws particular attention to the fact that a victim seeking to remain anonymous will not be called as a witness by the LRV.[60] We first note that there are many other ways that a VPP may participate in proceedings under the Rules. This includes tendering evidence and examining witnesses called by the parties.[61] In any event, we find it unnecessary to address the prejudice arising from specific forms of participation. This is because totally anonymous participation by victims is inherently prejudicial to the accused, regardless of how active or passive their desired method of participation and even for victims who do not seek to give or tender evidence.

28. In order to qualify to be a VPP, a person must have suffered physical, material or mental harm as a direct result of an attack within the Tribunal's jurisdiction.[62] By accepting a victim's application and granting VPP status, the Pre-Trial Judge decides that there is *prima facie* evidence the victim has suffered harm as a result of the crimes alleged against the accused in the indictment, a finding that is then either confirmed or annulled in the final judgment.[63] Consequently, we consider

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and Chui, ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, para. 22 (c).

[57] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, para. 37.

[58] In the *Lubanga* appeal proceedings, the issue of victim participants' anonymity has been raised by the Defence at least in relation to the issue of reparations. ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-2972, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations », rendue par la Chambre de première instance le 7 août 2012, 5 February 2013, paras 48-60 (in particular).

[59] Appeal, paras 42-52; *see also* VPU Submission, paras 4-7.

[60] Appeal, para. 60.

[61] *See* Rules 87 (B)-(D), 171 (B) STL RPE; Impugned Decision, para. 25.

[62] Art. 25 STL St; Rules 2, 86 STL RPE; *see also* Decision on Victims' Participation.

[63] Decision on Victims' Participation, para. 3.

that during trial the very existence of each VPP might be construed as constituting a specific accusation, separate and additional to those made by the Prosecution. An accused is generally entitled to mount a defence against such accusations.[64] If VPPs are not required to disclose their identity at all, this would amount to an anonymous accusation against the accused, in breach of fair trial rights guaranteed under Article 16 of the Statute.[65]

29. Without knowledge of the identities of VPPs, Defence counsel would likely not be in a position to effectively challenge the status of individual victims before the final judgment of the Trial Chamber identifying them as such.[66] For example, it would be impossible for the Defence to challenge the veracity of victims' statements on their applications for participation. Nor would they have the information necessary to uncover any false declarations or fabricated identities before the final decision.[67] Such a situation might conceivably lead to prejudice to the accused. Further, the Defence would have a limited ability to challenge the extent of victim participation, as they would not be in a position to properly assess whether or not the proposed participation relates to the victims' "personal interests".

30. We also accept, as argued by the Sabra Defence before the Pre-Trial Judge, that total anonymity has the strong potential to limit the ability of the Defence to request the disclosure of relevant exculpatory information from the LRV, as the Defence is unable to identify relevant

[64] Pursuant to the *audi alteram partem* principle, a decision that is not entirely and unconditional favourable to an individual must not be taken without allowing that individual to state their position on that issue. In a criminal trial, the right to an adversarial trial means that "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party" (ECtHR, *Laukkanen and Manninen v. Finland*, 50230/99, Judgment, 3 February 2004, para. 34). This extends beyond evidence relating to the alleged offence (ECtHR, *Kamasinski v. Austria*, 9783/82, Judgment, 19 December 1989, para. 102). Further, an accused person has a right to "acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings" as part of the right of a criminal defendant to adequate facilities to prepare their defence (ECommHR, *Jespers v Belgium*, App. No. 8403/78, 29 September 1982, para. 56). This principle is a corollary of several fair trial rights, *see* International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 ("ICCPR"); Art. 14 (1) (right to a public hearing); Art. 14 (3) (a) (right of an accused to be informed promptly and in detail of the charges against him/her and the right of an accused to defend him or herself); Art. 14 (3) (b) (right to adequate time and facilities to prepare a defence).

[65] An accused is entitled to a "fair and public hearing" under Article 16 (2) STL St. An accused person in criminal proceedings is also entitled to be informed promptly and in detail of the nature and cause of the charge against him or her and to have adequate time and facilities to prepare his or her defence. Article 16 (4) (a)-(b) STL St.

[66] *See* Rule 86 (G) STL RPE.

[67] In the *Lubanga* Judgment, the ICC Trial Chamber withdrew the rights of nine persons to participate as victims, finding that there was a real possibility that some of them had fabricated their claim for victim status or had, at the instigation or encouragement of others, stolen the identities of others in order to receive the benefits of participating in the proceeding as a victim. This was discovered when the victims appeared as witnesses before the Trial Chamber, *see* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 484, 502.

material that may be in the possession of VPPs and target their requests accordingly.[68] Similarly, VPP anonymity would potentially prevent the Defence from identifying and raising before the court other challenges, for instance with respect to witnesses who are in some capacity connected to the VPPs. It is not at this stage possible to predict all potential fairness issues that might arise if anonymous victim participation were accepted. Suffice it to say that those we have mentioned carry the strong potential to have a prejudicial effect on the accused. We therefore hold that the Pre-Trial Judge did not err when finding that anonymity of VPPs *vis-à-vis* the Accused would not allow them a full defence.

31. Hence, although we recognize the rights of victims and the importance of their participation in these proceedings, we find that total anonymity is so prejudicial to the rights of the accused and the fair conduct of the trial that this exceptional measure should not be available in these proceedings, especially in consideration of the fact that extensive protective measures are otherwise available (redactions of sensitive information, delayed disclosure, anonymity *vis-à-vis* the public etc.).

E. Whether the Pre-Trial Judge erred in finding that total anonymity of VPPs entails prejudice in the proceedings before national jurisdictions

32. In providing another reason for rejecting total anonymity of VPPs, the Pre-Trial Judge stated that under Article 25, which provides for compensation to victims, "the accused is entitled to know the identity of the claimant VPP in order to be able to contest whether the claimant was indeed harmed by the accused's alleged criminal act, and is thereby entitled to seek compensation".[69] The LRV argues the Pre-Trial Judge erred in making this finding.[70] He submits that the Pre-Trial Judge ignored the provisions of Rule 86 (G), which also allow persons other than VPPs to seek a certified copy of the judgment in order to seek compensation before national courts. He adds that there would also be no prejudice in the *present* criminal proceedings, which are distinct from civil litigation in a

[68] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Sabra's Consolidated Response to the Motions of the Legal Representative of Victims for Protective Measures (Anonymity) of Twenty-Three Victims Participating in the Proceedings, 16 November 2012, para. 34.
[69] Impugned Decision, para. 24.
[70] Appeal, paras 62-63; *see also* VPU Submission, para. 8.

different jurisdiction. Whether a victim may seek compensation anonymously should therefore be left to the relevant domestic courts.[71]

33. Under Article 25 of the Statute and Rule 86 (G) of the Rules, persons who have suffered harm as the result of the commission of crimes by an accused convicted by the Tribunal may bring an action in a national court in order to obtain compensation, if they are identified as victims in the final judgment, or otherwise consider themselves to be victims. Article 25 (1) gives the Tribunal the specific power to identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.

34. The extent to which a domestic court can rely on determinations on victim status in a final judgment of the Tribunal is properly a matter for that court. This includes determining any prejudice to the accused that may result from the anonymity of claimants in civil compensation claims. We therefore conclude that to the extent that the Pre-Trial Judge based his decision on any such potential prejudice arising from litigation before domestic courts, he was in error. We further note that VPP status is not a condition-precedent of a victim's ability to seek compensation in a national court under Article 25 and Rule 86 (G). However, we note that the Pre-Trial Judge's determination that total anonymity is not a valid protective measure for VPPs before the Tribunal was not exclusively based on this specific finding. His error therefore does not invalidate the Impugned Decision.

F. Whether the Pre-Trial Judge erred in holding that Rule 93 of the Rules is not applicable to VPPs

35. The Pre-Trial Judge acknowledged that the Rules provide for total anonymity for witnesses in certain circumstances. Referring to the relevant Rule 93, he noted that "these are tightly constrained by a special procedure, and they does [*sic*] not apply to VPPs".[72] The LRV argues that this finding is erroneous. He claims that given the acceptance of anonymous witness testimony under Rule 93, anonymity of VPPs cannot be considered to be impermissibly prejudicial to the Defence.[73]

36. We are not persuaded by the LRV's argument. The question of witness anonymity has no bearing on the present matter. With respect to witnesses, total anonymity may be exceptionally justified on the basis that it is the only way for a witness to give testimony without being put at risk.

[71] Appeal, para. 63.
[72] Impugned Decision, para. 26.
[73] Appeal, paras 68-70; *see also* VPU Submission, para. 24.

But unlike witnesses, who may be compelled to give testimony,[74] victims choose to participate in the proceedings freely in order to access the participatory rights and other benefits of VPP status. Enjoyment of these rights is explicitly made conditional on victim participation being consistent with the rights of the accused and the fairness of proceedings under Article 17 of the Statute. For this reason, victim anonymity and witness anonymity must be treated as separate and distinct matters. There is also nothing "nonsensical" in the fact that a VPP who *also* testifies as a witness may be granted anonymity if such anonymity meets the stringent and exceptional requirements of Rule 93.[75] Indeed, that individual would receive this protection only because of risks related to their giving of evidence, which may be involuntary. On the other hand, VPPs who do not testify as witnesses cannot draw on the same exception.

G. Whether the Pre-Trial Judge failed to apply a balancing approach

37. In the Impugned Decision, the Pre-Trial Judge held that in relation to the establishment of protective measures for VPPs the "determination is not whether the accused's rights are prejudiced as a result of the measure, but rather whether the interests of justice require that the accused be deprived of their rights, or part of them, in this regard, and in the affirmative, whether a balance between the interests concerned can be established".[76] The LRV argues that while the Pre-Trial Judge correctly articulated the test he failed to apply it because he did not conduct a balancing exercise between the various concerned interests.[77]

38. We first note that contrary to the LRV's submission it is clear from the Impugned Decision as a whole that the Pre-Trial Judge did not merely consider the interests of the accused in isolation. Indeed, for those protective measures that are explicitly available under the Rules, the Pre-Trial Judge expressly referred to proportionality principles.[78] However, with respect to the issue of anonymity *vis-à-vis* the parties, the Pre-Trial Judge cautioned that such a measure "inherently risks violating the rights of the accused".[79] As for total anonymity, he forcefully stated that it would be "not conceivable to convict a person for a crime committed against a VPP who is involved in the trial

[74] *See* Rules 78, 130, 150, 151, 165 STL RPE.
[75] *Contra* Appeal, para. 70.
[76] Impugned Decision, para. 18.
[77] Appeal, paras 64-72.
[78] Impugned Decision, paras 19, 28-31.
[79] Impugned Decision, para. 20.

proceedings and yet, by remaining anonymous, does not allow the accused a full defence".[80] In other words there would simply be no counterbalancing measure available to remedy the prejudice to the accused. In particular, as we have held above, even the participation of "passive" or "silent" VPPs would still be inherently prejudicial. In such circumstances, it would have been futile for the Pre-Trial Judge to consider the interests of the VPP, especially given that under the mandate of Article 17 of the Statute VPP participation is permissible only insofar as it does not prejudice the rights of the accused. We have noted the serious concerns of the LRV that some VPPs might decide to discontinue their participation if their identities are revealed to the Defence and the Prosecutor.[81] However, while the Statute mandates us to protect the rights of the victims, in particular their entitlement to participate in the proceedings, it places paramount importance on the right of the accused to a fair trial.[82] The accused's rights must therefore prevail.

H. Conclusion

39. In sum, we hold that the totally anonymous participation of VPPs in the proceedings is generally prejudicial to and inconsistent with the rights of the accused and the fairness of the trial and is not a valid form of victim participation within the meaning of Article 17 of the Statute. This includes "passive" or "silent observer" VPPs. The Pre-Trial Judge was therefore correct in finding that totally anonymous participation by victims is inherently prejudicial in the present proceedings and that the identities of VPPs should be disclosed sufficiently in advance to give the Defence adequate time to prepare.[83]

40. We note that this appeal does not affect the availability of the other protective measures that victims may request under the Statute and Rules, which are extensive.

41. We accordingly dismiss the Appeal.

[80] Impugned Decision, para. 23.
[81] Appeal, para. 73; *see also* VPU Submission, paras 27-29.
[82] *See, e.g.*, ICTY, *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 71 ("Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated."); ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 104 ("The right to a fair trial is, of course, a requirement of customary international law."); *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 32 (referring to the "overarching principle of fair trial").
[83] Impugned Decision, paras 30-31.

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER;

FINDS the Appeal admissible, Judges Riachy and Nsereko dissenting;

UNANIMOUSLY DISMISSES the Appeal.

Judge Baragwanath appends a Concurring Opinion.

Judges Riachy and Nsereko append a Joint Partially Dissenting Opinion.

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

Dated 10 April 2013,
Leidschendam, the Netherlands

Judge David Baragwanath
Presiding

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

CONCURRING OPINION OF JUDGE BARAGWANATH

I. Introduction

1. My reasons for agreeing that we should entertain but dismiss this appeal differ from my colleagues in the majority in relation to admissibility and elaborate on why I agree with them in relation to the merits of the Appeal. I therefore write separately.

2. Justice requires meticulous protection of the lawful rights of persons suspected or accused of crimes. But, subject only to that absolute requirement, the law should take care to protect those who have been victimized by crime. That indeed is the *raison d'être* both of the criminal law and of this Tribunal. The Statute of the Tribunal stipulates measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. That is a policy which, within the limits of a fair and expeditious trial, should receive full effect in decision-making. It is consistent with the reaffirmation in the United Nations Charter of fundamental human rights and of the dignity and worth of the human person,[1] which must have particular resonance for victims of the grave crimes that have resulted in the Tribunal's creation under Chapter VII.[2] Failure to apply such a policy would risk re-victimizing victims.

3. That is why on the first, procedural, issue I share the conclusion of Judges Chamseddine and Hrdličková that this Chamber should entertain the important certified ground of appeal against the Pre-Trial Judge's decision that permanent anonymity with respect to the parties can never be ordered to protect a victim participating in the proceedings. On the second, substantive, issue however I agree with all my colleagues that permanent anonymity should not be ordered as a protective measure. I need to explain why, despite the reason on which my first answer is based, I have concluded that refusal of victim anonymity is not merely a norm from which there may be departure in limited circumstances but, as the Pre-Trial Judge held and this Chamber agrees, an absolute.

II. The procedural issue

4. The policy of the Statute is evident from Articles 12 (4), 17 and 22 which are to be read in the context of the UN Charter. Article 12 (4) requires the establishment of a Victims and Witnesses Unit

[1] Preamble, Charter of the United Nations ("UN Charter").
[2] SC Res. 1757, UN Doc. S/RES/1757 (30 May 2007), (Second Recital, "[r]eaffirming its strongest condemnation of the 14 February 2005 terrorist bombings [...]").

which will provide measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. It could be read down, as merely providing bureaucratic procedures. It can also be read, as I interpret it, as the expression of a policy which is broader in scope and more consonant with the spirit of the whole Statute. Article 17 states that where the personal interests of victims are concerned, the 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" in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair trial. Article 22 goes so far, in the interests of victims as well as the public, as to provide for trial *in absentia*. Thus, Article 12 (4) acknowledges the interests of victims; Article 17 gives victims with such interests a significant right—that of being heard; Article 22 recognizes that victims as well as the public should be able to see the case come to trial rather than be buried in an archive, so long as stringent conditions for ordering trial *in absentia* are met[3] and the absent accused is guaranteed retrial at his election if he comes forward or is arrested. Rules 86 and 87 of the Rules of Procedure and Evidence ("Rules") then refine the procedures for victims to receive by order of the Pre-Trial Judge the status and specific participation rights of a "victim participating in the proceedings" ("VPP"). These pull together to bear out the policy of Article 12 (4) as informing the approach to be adopted by Judges on interpretation of victims' status before this Tribunal.

5. VPPs may include both immediate victims, who have suffered injury and are among the ones named in the indictment, but also secondary victims who have lost or sustained injury to a loved one and who are not so named.

6. In determining the first issue Lord Clarke's dissenting remark in *Al Rawi et al. v Security Service et al.* may be borne in mind:

> One of the problems raised by the appeal is that the declaration is stated in absolute terms, without reference to the facts of a particular case. I am firmly of the view that it is in general undesirable to determine bare questions of law in this way. I would expect the court ordinarily to require the relevant legal question to be decided in a particular factual context.[4]

7. Since we face the same problem we must take into account not only the easy cases, where the presumption of openness can safely apply, but also the argument that there could be an extreme case, as where it is asserted that (because of deep concern about the enormity of the crime and its effects) a

[3] STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.1, *Corrected Version of* Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 31.
[4] United Kingdom, Supreme Court, [2011] U.K.S.C. 34, [2012] 1 A.C. 531 (13 July 2011), ("*Al Rawi*") para. 125.

VPP will suffer psychological injury if deprived of that status, yet will be at serious risk of death or grave physical or mental harm whether personally or to someone close if an anonymity order is declined.[5]

8. Neither the Statute nor the Rules expressly authorize appeal from the decision of the Pre-Trial Judge. In domestic law that would bar any appeal. But as we decided in *El Sayed*,[6] the Statute and Rules are not to be read as a comprehensive codification of the law of this international tribunal. In that case we were not prepared to attribute to the Security Council or the Plenary of Judges who adopted the Rules an intention to decline access to appeal in a case simply not contemplated by either, when to do so would have presented risk of grave injustice.

9. Such could arguably be the consequence of cases falling within paragraph 7 above. The logical possibility of such a case requires in my judgment the same conclusion as in *El Sayed*, that an entitlement to appeal, adopting Rule 126 by analogy, is to be inferred from the policy of the Statute and the consequences of an erroneous decision at first instance.[7]

III. The substantive issue

10. Generally for the reasons given by my colleagues, I accept that normally the identity of a VPP should be disclosed to the accused. Moreover a decision by a VPP to undertake the active forms of participation permitted by Rule 87, such as requesting the Trial Chamber to call witnesses or tender evidence, or to examine and cross-examine witnesses and file motions and briefs, or make submissions on sentence, would necessarily entail loss of anonymity. That is required by the Statute and Rules which reflect settled principles of law for the protection of an accused, which are common to the highest standards of international justice with which we are to conform.[8] The precept that one must know one's accuser is age-old and deep-set in any concept of procedural fairness. So recent decisions of final authority have emphasized both the open justice principle[9]—that subject to certain established and limited exceptions trials should be conducted and judgments given in public; and also the *audi alteram partem* principle—that a party has a right to know the nature of the case against

[5] This formulation adapts the language of Rule 93 concerning anonymous witnesses.
[6] STL, *In the matter of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, in particular paras 54-57.
[7] *See also* STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Separate and Partially Dissenting Opinion of Judge Baragwanath, 24 October 2012, paras 14-28.
[8] *See* in particular Art. 28 (2) STL St.
[9] *See Al Rawi*, paras 10-11.

him, the evidence on which it is based, and the identity of his accuser.[10] So there can be no scope for any long-term or permanent anonymity order for a VPP who is an active accuser.

11. But the appeal is dealing with an absolute: the Pre-Trial Judge held that *in no circumstances could total anonymity be ordered.* It is argued that the same principle applies to a VPP who plays no active part in the accusatorial process. The issue for us is whether he was right to give such an absolute answer.[11]

A. Whether the Pre-Trial Judge erred when finding that total anonymity of VPPs entails prejudice to the accused in the proceedings before the Tribunal

12. As my colleagues recognize, VPPs may seek different degrees of participation in proceedings, including that of an entirely passive participant or silent observer.

13. For the reasons they give I have no doubt that it is only the latter types of VPP who could arguably be considered for total anonymity. I recognize that even though victims seeking to remain anonymous will not be called by the Legal Representative of Victims to give evidence (unless the provisions of Rule 93 were exceptionally held to apply) and may be prohibited from overt activity such as requesting Judges to call or cross-examine witnesses, there are other ways in which a VPP may participate in proceedings.

14. I prefer to reserve my opinion on whether the mere existence during trial of a VPP whose role is purely passive constitutes a specific accusation, separate and additional to those made by the Prosecution, against which an accused person is entitled to mount a defence, and that this would risk breaching the fair trial rights guaranteed under Article 16 of the Statute. But whatever one's view on the point, in criminal law the precept that justice to the accused must both be done and be seen to be done is of the utmost importance.

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[10] *Id.* at para. 12; United Kingdom, House of Lords, *R v Davis,* [2008] U.K.H.L. 36, [2008] A.C. 1128 (18 June 2008) (*"R v Davis"*).

[11] *See* the later discussion of anonymous evidence, below paras 21-25. In proceedings currently in process, six members of a nine member UK Supreme Court have limited the absolute character of public justice by holding that where Parliament has permitted an *ex parte* hearing in order to protect material that should not be disclosed on the grounds of public interest and national security, the appellate court must possess similar authority. The principle "never say never" appears to have been applied, *see* United Kingdom, Supreme Court, *Bank Mellat v HM Treasury,* U.K.S.C. 2011/0040, Statement by Lord Neuberger: 'Further update on proceedings' (21 March 2013) (available at: http://www.supremecourt.gov.uk/news/bank-mellat-v-hm-treasury.html). The case is on appeal from: United Kingdom, Court of Appeal, *Bank Mellat v HM Treasury,* [2010] EWCA Civ. 483, [2012] Q.B. 91 (4 May 2010).

15. While it can be argued that, without knowledge of the identities of VPPs, Defence counsel would not be in a position to effectively challenge their status before the final judgment of the Trial Chamber identifying them as such,[12] if their role is purely passive, it may be asked what harm is in practice done to the fair trial rights of the accused? But the answer, implicit in the decision of this Chamber, is that one simply does not know. The principle *favor rei* which we employed in our Decision on the Applicable Law[13] must give the accused the benefit of any real doubt.

16. I have concluded that is so even in this case, where the Defence has:

(1) been notified in the indictment of the name of each of the victims killed and of each of the persons injured in the attack of 14 February 2005;

(2) formally agreed not to contest those assertions;[14]

and so the only literally unidentified VPPs are "second-stage" victims: those who are victimized by the death or injury of another victim.[15] Of course there can be first stage victims who are identified as victims, but do not wish to be identified as VPPs, because this would imply taking a stand against the interests of the accused. But the Defence knowledge of the identity of each first-stage victim reduces the force in the argument of the Sabra Defence before the Pre-Trial Judge, that total anonymity must limit the ability of the Defence to request the disclosure of relevant exculpatory information from the LRV.[16] When as here the identity of the primary victims is known, while logically possible it is not inevitable that VPP anonymity would present a real risk of preventing the Defence from identifying and raising before the court other challenges, for instance with respect to witnesses who are in some capacity connected to the VPPs.

17. In the end however I agree with my colleagues that it is not at this stage possible to predict all potential fairness issues that might arise if anonymous victim participation were accepted.

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[12] *See* Rule 86 (G) STL RPE.
[13] STL, *Prosecutor v Ayyash et al.*, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 32.
[14] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution's Notice on the Implementation of the Pre-Trial Judge's "Order Regarding Narrowing Issues Contested at Trial", 19 March 2013, para. 5 (referring to Confidential Annex D [Letter from the Defence Counsel to the Acting Chief of Prosecutions, 21 February 2013]).
[15] STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PTJ, Decision on Victims' Participation in the Proceedings, 8 May 2012, paras 35-84.
[16] *See* STL, *Prosecutor v, Ayyash et al.*, STL-11-01/PT/PTJ, Sabra's Consolidated Response to the Motions of the Legal Representative of Victims for Protective Measures (Anonymity) of Twenty-Three Victims Participating in the Proceedings, 16 November 2012, para. 34.

18. From the overarching requirement of fairness to the accused follows that the possibilities of unfairness, coupled with the public trial and *audi alteram partem* principles, point to a general principle that there should be disclosure of victims' names. That is because anonymity of VPPs *vis-à-vis* the accused might not allow them a full defence.

19. The remaining question is whether justice to the accused can be achieved *only* by a blanket refusal of VPP anonymity. I return to this point at paragraph 27 after first considering Rule 93.

B. Whether the Pre-Trial Judge erred in holding that Rule 93 of the Rules as to witness anonymity is irrelevant to VPPs

20. Rule 93 provides a procedure whereby evidence of anonymous witnesses may be provided in cases "[w]here [...] there is a serious risk that a witness or a person close to the witness would lose his life or suffer grave physical or mental harm as a result of his identity being revealed" and alternative measures for protection would be insufficient to prevent such danger.

21. The Pre-Trial Judge acknowledged that this Rule provides for total anonymity for witnesses in certain circumstances. Referring to its provisions he noted that "these are tightly constrained by a special procedure, and they [do] not apply to VPPs".[17] The LRV argues that this finding is erroneous. He claims that given the acceptance of anonymous witness testimony under Rule 93, anonymity of VPPs cannot be considered to be impermissibly prejudicial to the Defence.[18]

Arguments against relevance of Rule 93

22. It can be argued that Rule 93 is an explicit statutory authorization that makes an exception from the rule that an accused must be able to confront his accusers. There is no such exception for VPPs. So *expressio unius est exclusio alterius*: the fact that it has been necessary to create an explicit exception under Rule 93 for witnesses suggests that in the absence of such express exception for witnesses none should be permitted. Moreover, Rule 159 (B) says that no conviction may be based solely or to a decisive extent on the statement of the witness under Rule 93. So even the exception of Rule 93 is very limited. It should not be used to allow a VPP to be anonymous, especially when there is no such exception under the Rules.

[17] Impugned Decision, para. 26.
[18] Appeal, paras 68-70; *see also* VPU Submission, para. 24.

Arguments in favour of relevance of Rule 93

23. By definition, a witness is one whose evidence is relevant to and tends to prove or disprove an issue in the case. Such status is more obviously calculated to prejudice an accused than a mere second-stage victim, whose identification may or may not allow the Defence to embark on a process of enquiry whether that is so.

Comment

24. It is in my view beside the point that unlike witnesses, who may be compelled to give testimony,[19] victims choose to participate in the proceedings freely in order to access the participatory rights and other benefits of VPP status. I have already set aside those who wish to exercise active participatory rights. The VPP's status must conform with the condition that it be consistent with the rights of the accused and the fairness of proceedings under Article 17 of the Statute. But of course the whole of the conduct of the case is subject to that very same condition. For this reason, victim anonymity and witness anonymity are not in my view to be treated as separate and distinct matters. It would be odd if a VPP who *also* testifies as a witness, and so participated actively in the proceeding, were able to receive anonymity (if the stringent and exceptional requirements of Rule 93 were met), when a purely passive VPP could not.[20] What must matter is the evaluation of the three basic values in play: (i) the nature and extent of the risk to the victim (or witness); (ii) the nature and extent of the risk to the accused of an unfair trial; and (iii) the need for the criminal law to operate not only fairly but in a manner that while giving effect to principle also reflects practicality.

C. The approach of the Pre-Trial Judge

25. In the Impugned Decision, the Pre-Trial Judge held that in relation to the establishment of protective measures for VPPs the "determination is not whether the accused's rights are prejudiced as a result of the measure, but rather whether the interests of justice require that the accused be deprived of their rights, or part of them, in this regard, and in the affirmative, whether a balance between the interests concerned can be established".[21] In other words, the accused is to be deemed to have been deprived of rights and the issue is whether that is outweighed by other considerations. The

[19] *See* Rules 78, 130, 150, 151, 165 STL RPE.
[20] Appeal, para. 70.
[21] Impugned Decision, para. 18.

LRV argues that while the Pre-Trial Judge correctly articulated the test he failed to apply it because he did not conduct a balancing exercise between the various concerned interests.[22]

26. The VPPs' argument can perhaps be pitched higher: in logic it may be that in some instances a factual investigation would satisfy the Judge or Chamber that there is in fact no real risk to the accused's rights. That would enable a challenge to the conclusion of the Pre-Trial Judge that an order for permanent anonymity "inherently risks violating the rights of the accused"[23] and that it would be "not conceivable to convict a person for a crime committed against a VPP who is involved in the trial proceedings and yet, by remaining anonymous, does not allow the accused a full defence".[24]

D. My approach

27. I have held (at paragraph 10 above) that the principles of open justice and *audi alteram partem* require disclosure in the case of an active participant. I have also held (at paragraph 18) that there must be a presumption that even the participation of "passive" or "silent" VPPs would still be inherently prejudicial. The remaining question is whether such presumption should be treated as irrebuttable.

28. I have noted the serious concerns of the LRV that some VPPs might decide to discontinue their participation if their identities are revealed to the Defence and the Prosecutor.[25] However, while the Statute mandates us to protect the rights of the victims, it places paramount importance on the fundamental right of the accused to a fair trial. I reiterate that the accused's right to a fair trial must always prevail.

29. But granted the right of the accused to a fair trial, in the case of a passive VPP the further issue to be considered is whether the interests of the victim can be such as to justify departing from the presumption of disclosure and accepting the cost and delay of embarking on an enquiry whether the presumption of disclosure can be rebutted.

30. In considering the ultimate result I bear in mind the caution voiced by Lord Hope in *Al Rawi*:

> As the Court of Appeal said, [...] it is a melancholy truth that a procedure or approach which is sanctioned by the court expressly on the basis that it is applicable only in exceptional

[22] Appeal, paras 64-72.
[23] Impugned Decision, para. 20.
[24] Impugned Decision, para. 23.
[25] Appeal, para. 73; *see also* VPU Submission, paras 27-29.

circumstances none the less often becomes common practice. Lord Shaw of Dunfermline's warning in *Scott v Scott* [1913] AC 417, 477-478, against the usurpation of fundamental rights that proceeds little by little under the cover of rules of procedure remains just as true today as it was then.[26]

31. I have posed and reflected on the extreme argument—for a victim who will suffer psychological impairment if not admitted as a VPP yet (adapting the test of Rule 93) would lose his life or suffer grave mental or physical harm as a result of his identity being revealed and cannot otherwise be protected.

32. The simple approach is to say that such person must put up with a lack of any formal status as a VPP. Yet it can be argued that to do so would overlook the elements of "psychological well-being, dignity and privacy" emphasized by Article 12 (4) of the Statute. Victims apply to become VPPs because that status matters to them. Those who have not been identified in the indictment as primary victims wish, because of the death or injury to a loved one, to be associated with the case. Must it always be said that they are to be denied such status because otherwise the accused cannot receive a fair trial?

33. This argument receives logical support from the analogy of Rule 93. Certainly there are very powerful reasons to avoid anonymous evidence. They are lucidly stated by Lord Bingham in the UK House of Lords case *R v Davis*.[27] Yet both the Rules of this Tribunal and legislation elsewhere acknowledge the possibility in some cases of combining justice to an accused with some measure of anonymous evidence.[28] If a witness can sometimes be permitted to give evidence anonymously, must not a secondary victim *a fortiori* sometimes be given similar permission?

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[26] *Al Rawi*, para. 73.

[27] *See R v Davis*, per Lord Bingham, paras 5, 34

[28] For example, the New Zealand experience began with: New Zealand, Court of Appeal, *R v Hughes* [1986] 2 NZLR 129 (19 June 1986) where three of five judges required an undercover police officer to disclose his true identity; two preferred immunity unless the identity was of such relevance that to withhold it would be contrary to the interests of justice. In: New Zealand, Court of Appeal, *R v Hines* [1997] 3 NZLR 529 (15 August 1997) (followed by the House of Lords in *R v Davis*) three judges held that a witness must give his name and address and that any change should be effected by Parliament; two dissented. One of the majority held that had it been appropriate to reconsider *R v Hughes* judicially the court should feel able to take a position different from a view that the right of the accused to know the identity of a prosecution witness is absolute or very close to absolute. Following the New Zealand Law Commission's Preliminary Paper 29: *Evidence Law: Witness Anonymity* (September 1997) (available at: http://www.nzlii.org/nz/other/nzlc/pp/PP29/PP29.pdf) and its Report 42. *Evidence Law. Witness Anonymity* (October 1997) (available at: http://www.lawcom.govt.nz/sites/default/files/publications/1997/10/Publication_43_84_R42.pdf) the New Zealand Parliament responded to *R v Hines* by enacting the *Evidence (Witness Anonymity) Amendment Act* 1997 (New Zealand) which empowered the High Court, subject to stringent safeguards, to make a witness anonymity order. The Court of Appeal upheld such orders made by the High Court in: New Zealand, Court of Appeal, *R v Atkins* [2000] 2 NZLR 46 (9 February 2000).

34. Despite the analogy of Rule 93 I have concluded that the answer is no. That Rule is very exceptional.[29] Although the importance of the interests of victims is clearly emphasized by the Statute, Article 17 recognizes that they are subordinate to those of the accused. Theirs is a double right both to fair trial and to expeditious process. The logical argument I have posed at paragraphs 29 and 31 stacks possibility on possibility and would inject complication and delay into a process which, while it must be fair, must also seek reasonable expedition. Just as an accused's entitlement to a fair trial does not require perfection, so the present decision requires a practical rather than theoretical evaluation. I regard the real possibility of the extreme case as so remote as to be outweighed by the considerations advanced in the decision of this Chamber. It follows that I agree both with its conclusion that the appeal must be dismissed and, subject only to the minor points on which I prefer a different approach, with its reasons.

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

Dated 10 April 2013,
Leidschendam, the Netherlands

Judge David Baragwanath

[29] *See* fn. 28 above.

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

JOINT PARTIALLY DISSENTING OPINION OF JUDGES RIACHY AND NSEREKO

1. While respecting the majority's views on the admissibility of this appeal, we disagree with their decision and consider the appeal to be inadmissible for the following reasons.

I. The power of the Appeals Chamber to entertain appeals

2. The power of the Appeals Chamber to hear appeals is conditioned by both the status of the appellants (parties to a case or third parties, *i.e.* whether they have standing to appeal) and the nature of the appeal (appeal against a final decision or appeal against an interlocutory decision). As a general principle of law, and of trial fairness, parties to a case are always allowed to appeal final decisions.[1] That is not the case with respect to interlocutory appeals or to appeals brought by persons who are not parties to the case (whether against a final decision or an interlocutory one).

3. In the latter two cases, the Appeals Chamber exercises its appellate powers only on the basis of express statutory authority—the Statute and the Rules of Procedure and Evidence ("Rules")—empowering it to do so. Therefore, in the absence of such authority, the Appeals Chamber cannot assume jurisdiction to hear the appeal, say by inference or otherwise. There is ample persuasive authority in support of this view from the jurisprudence of other courts, both national,[2] and international.[3]

[1] *See* para. 13 below.

[2] *See, e.g.*, United Kingdom, House of Lords, *Attorney-General v. Sillem*, 11 ELR 1200 (1864), pp. 1207-1208 (Lord Westbury stating that "[t]he creation of a new right of appeal is plainly an act which requires legislative authority. The court from which the appeal is given and the court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal or both collectively to create any such right."); *see also* Ghana (formerly, Gold Coast Colony), Privy Council (on appeal from the West African Court of Appeal), *Moore v Tayee* [1935] A.C. 72 (26 October 1934), paras 75-76 ("After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute, and unless the statutory conditions are fulfilled no jurisdiction is given to any court of justice to entertain them."); *see also* Australia, Supreme Court of South Australia, *James v. Keogh*, 102 SASR 51 (2008), Layton J (dissenting), para. 156 ("The jurisdiction of the Supreme Court to hear an appeal cannot rise above its source.").

[3] *See, e.g* , ICC, *Prosecutor v Lubanga,* ICC-01/04-01/06-2799, Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, paras 7, 8 (overturning a Trial Chamber decision granting the Kingdom of the Netherlands leave to appeal); ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2823, Decision on the "Registrar's Submission under Regulation 24*bis* of the Regulations of the Court In Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800" of 5 October 2011, 21 November 2011, para. 14 (where the Appeals Chamber stated that "[t]he Appeals Chamber has consistently held that its jurisdiction is clearly and exhaustively defined in the Statute and Rules of Procedure and Evidence and has equally consistently rejected any attempts to bring appeals outside this defined scope of jurisdiction"); *see also* ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision

4. We have previously adopted this approach at the STL. In our decision of 24 October 2012, the majority found that the Appeals Chamber cannot entertain appeals outside the Rules where the language of a rule is drafted in a "specific and narrow way" and the issue is not one that the drafters of the Rules could not have foreseen. In such cases, it cannot be said that there is a lacuna in the Rules that would allow an appeal to be admitted exceptionally.[4]

5. In the present case, our Rules do not grant any appeal as of right to victims participating in the proceedings ("VPPs") with respect to the issue of protective measures. Regarding interlocutory appeals that are not as of right, the Appeals Chamber's powers are defined by the provisions of Rule 126 of the Rules. In our view, this Rule is not applicable to the present case, either directly or by analogy.

II. Rule 126 may not be construed in any way to allow victims a right of appeal

6. Rule 126 is drafted as generally applicable to all decisions for which certification is required before they can be appealed. However, the Rule cannot be construed as recognizing, either directly or by analogy, any right of appeal by VPPs.

A. No ambiguity in Rule 126

7. Paragraphs (A) and (C) of Rule 126 contain general provisions regarding certification for interlocutory appeals. However, paragraphs (B) and (E) of the Rule clarify that only a party may, under circumscribed conditions, file an appeal before the Appeals Chamber. We have previously

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Denying Leave to Appeal, 13 July 2006 (where the Appeals Chamber rejected an attempt to appeal a decision for which leave to appeal was not granted); *see also* ICTY, *Prosecutor v. Delić*, IT-04-83-Misc.1, Decision on Prosecution's Appeal, 1 November 2006, p. 3 (where the Appeals Chamber decided that there was no right of appeal against a decision denying the amendment of the indictment because "there is no lacuna in the Rules, which justifies the Appeals Chamber considering this appeal *proprio motu*" and because "the Appeals Chamber has no inherent authority to intervene in an interlocutory decision of a Trial Chamber, not subject to a right of appeal and to which certification has been denied [...] on the basis of an allegation by the Prosecution that the Trial Chamber has abused its discretion by not allowing the Prosecution amendments."); *see also* SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, paras 32, 41 (where the Appeals Chamber held that it "may have recourse to its inherent jurisdiction, in respect of proceedings of which it is properly seized, when the Rules are silent and such recourse is necessary in order to do justice. The inherent jurisdiction cannot be invoked to circumvent an express Rule. [...] Where the Rules make provision for a particular situation, it is it is [*sic*] not a proper exercise of inherent jurisdiction for a tribunal to substitute its own view of what the rules should have been for what the Rules are."); *but see contra* ICTY, *Prosecutor v. Šešelj*, IT-03-67-R33B, Public Redacted Version of the "Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence" Rendered on 8 April 2011, 17 May 2011, para. 16.

[4] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, paras 16-18.

held that the interpretation of a legal document must take into account not only its text, but also its context.[5] Paragraphs (B) and (E) provide such context to Rule 126. These provisions should be interpreted so that they are internally consistent and provide a coherent interpretation of Rule 126. Thus, contrary to the majority's views on this point, we consider that paragraphs (A) and (C) of Rule 126 must be interpreted in conformity with paragraphs (B) and (E) which allow only a party to file appeals. As such, there is no ambiguity in Rule 126 and thus no lacuna in the Rules.

B. Victims are not parties

8. Rule 2 of our Rules defines "the parties" as the Prosecutor and the Defence. The Defence is also defined as the accused, the suspect and/or his counsel. Rule 2 contains a separate definition for VPPs. This explicit reference to VPPs clearly demonstrates that they cannot be characterized as parties under our Statute and Rules. They have a separate status which in turn means that they do not benefit from the same rights as parties.

9. Unlike the parties, VPPs at the STL have a narrow right to present their views and concerns.[6] This right is subject to constraints under our Statute and Rules, which tend to show that the spirit of the Statute and Rules does not allow them to participate as full parties, and thus enjoy similar rights to parties.

10. For example, under Article 17 of the Statute, the participation of victims is subject to the authorization of a Judge or Chamber, if said Judge or Chamber finds that this participation is appropriate and does not violate the rights of the Defence. Rule 87, which further elaborates on the modes of participation of victims at the STL, shows that their participation is strictly regulated.[7] For example, victims do not have the right to call witnesses, but they may ask the Trial Chamber to do so on their behalf. The Chamber's authorization is also required for examination and cross-examination of witnesses, for the production of evidentiary material, and the filing of submissions by VPPs. This

[5] STL, *Prosecutor v Ayyash et al.*, STL-11-01/I, Interlocutory Decision on the Applicable Law Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 19-20.
[6] Art. 17 STL St.
[7] We note that Rule 87 (D) provides that the Appeals Chamber can authorize victims to participate in the proceedings before it. This may not be construed as a recognition of a general right of appeal of victims participating in the proceedings. It only allows the Appeals Chamber to authorize victims to participate, which would require the Chamber to already be seized of an appeal submitted to it by the parties. Rule 87 (D) can also be considered to apply only at the appellate stage following a final judgment by the Trial Chamber. In other words, this Rule is simply an application of Article 17 of the Statute which allows the Pre-Trial Judge or a Chamber to authorize the victims participating in the proceedings to submit their views and concerns under certain conditions.

would not have been the case had the Statute and Rules considered that victims shared the same status as parties. Indeed, contrary to civil law systems such as Lebanon, VPPs at the STL are not *parties civiles* (civil litigants considered to be a party in a criminal trial).

11. We also note that the International Criminal Court ("ICC") has dealt with the question of whether victims are parties and, on the basis of similar provisions, has found that they are not.[8]

12. Thus, in our view, Rule 126 cannot be directly applied to VPPs, as they are not considered to be parties.

C. No possible application to victims by analogy

13. Contrary to the assertion of the majority, the Statute and Rules do not support a right of VPPs to seize this Chamber with interlocutory appeals. Article 26 of the Statute limits the power of appeal to only the accused and the Prosecutor. This provision is consistent with general principles of criminal law and international human rights law, which recognize a right of appeal of an accused person[9] but do confer a comparable right on victims when they do not have the status of *partie civile*.[10] Thus, we consider that, generally under the Statute, only parties may bring an appeal. Exceptions to this principle must be clearly articulated in the Rules and must be narrowly applied to the situation foreseen in that text.

14. When our Rules accord to the victims a right to appeal they do so explicitly. For example, Rule 86 (C) explicitly grants "an unsuccessful applicant for the status of victim participating in the proceedings" a right to appeal a decision of the relevant Judge or Chamber. It does not confer a

[8] ICC, *Situation in the DRC*, ICC-01/04-437, Decision on Application for Leave to Appeal the Decision on Requests of the OPCV, 18 January 2008, pp. 3-4 (finding that the Office of Public Counsel for Victims lacks standing to seek leave to appeal); 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, para. 93 (finding that a victim is not a "party"); ICC, *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-675, Reasons for the "Decision on 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation' and 'Prosecution's request for leave to file a response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'", 11 July 2008, Dissenting Opinion of Judge G.M. Pikis, para. 4 (finding that under the relevant provisions, "parties" are only the Prosecution and Defence); ICC, *Situation in Darfur, Sudan*, ICC-02/05-192, Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, 19 February 2009, p. 5 (refusing leave to appeal on the basis that the applicant was not a party).

[9] For example, Article 14 (5) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 U.N.T.S. 171) only recognizes a right to appeal of a person convicted of a crime. Article 2 (1) of the Additional Protocol 7 to the European Convention on Human Rights (Council of Europe, adopted 22 November 1984, E.T.S. 117, as amended by Protocol No. 11, adopted 11 May 1994, E.T.S. 155) also mentions this right as one belonging to a convicted person.

[10] ECtHR, *Garimpo v. Portugal*, 66752/01, Final Decision on Admissibility, 10 June 2004.

similar right on victims under the circumstances of this case. This limited right of applicants for victim status should not be extended to all other victims participating in proceedings who may be aggrieved by a decision of a Judge or Chamber. To extend a right of appeal to VPPs as is suggested by the majority would be against the clear spirit of the Rules and of the Statute.

15. In addition, we do not share the majority's view that because Rule 86 (D) specifically prohibits appeals against decisions relating to the grouping of victims in the proceedings and contains no general prohibition against participating victims' "right to file interlocutory appeals" such appeals are *argumentum e contrario* admissible.[11] We consider that this explicit prohibition was inserted in the Rules to ensure clarity. Indeed, Rule 86 (C) allows an appeal as of right. And in light of the close connection between the status of VPPs and their grouping, it was important to specify that only unsuccessful applicants are allowed to appeal decisions on victim status, whereas decisions regarding grouping are not subject to appeal.

16. It is thus not enough that the Rules contain no provisions *excluding* VPPs from lodging interlocutory appeals. Rather, the Statute contains a general presumption that non-parties are not permitted to lodge appeals, and the Rules contain no explicit provisions granting VPPs a right of appeal in relation to protective measures. There is thus no legal basis for such a right.

17. Whilst dealing with an issue similar to the one at hand the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stated as follows:

> If this view of the matter appears overly legalistic, any other ruling would open up the Tribunal's appeals procedure to non-parties – witnesses, counsel, *amicus curiae,* even member of the public who might nurse a grievance against a Decision of the Trial Chamber. This could not be. The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties.[12]

18. We therefore consider that the Appeals Chamber cannot invoke Rule 126, either directly or by analogy, as the basis for holding the appeal admissible. To do so would amount to an unwarranted extension of the Appeal Chamber's powers.

[11] *See* Majority Opinion, para. 13.
[12] ICTY, *In the Case of Dragan Opacić,* IT-95-7-Misc.1, Decision on Application for Leave to Appeal, 3 June 1997, para. 6.

III. Article 17 of the Statute cannot found the Appeals Chamber's jurisdiction

19. We disagree with the majority's view that the appeal can be held admissible on the basis of Article 17 of the Statute. This article merely mandates the Tribunal to permit victims to present their views and concerns at stages of *existing* proceedings before a Chamber where that Chamber determines it to be appropriate. Presenting views and concerns does not include initiating new proceedings or, as is held by the majority in this case, mounting an appeal before the Appeals Chamber. In our view, proceedings before the Appeals Chamber constitute a separate and distinct stage of the proceedings from the proceedings before the Pre-Trial Judge; the two should not be conflated.[13] Thus, permitting an appeal would be to allow the Legal Representative of Victims ("LRV") to initiate new proceedings.[14] Neither the Statute nor the Rules authorize such proceedings.

20. The majority also relies on the notion of "personal interest", as mentioned in Article 17, and considers that VPPs have standing to file appeals before the Appeals Chamber when their interests are "fundamentally concerned".[15] In our view, this criterion creates a new standard which does not exist in the Statute. As a general rule, an appellant must always demonstrate that he or she has standing to appeal[16] otherwise the appeal would be inadmissible. However, the majority here is adding "fundamentally concerned interests" as a basis for the right to appeal. We find no justifiable basis for this addition.

21. This is equally true where the Statute or Rules permit the LRV to seize the chamber of first instance with a request in relation to a specific matter relating to their personal interests.[17] Such provisions do not expressly confer a right of appeal on victims in relation to these matters and thus should not be interpreted as to enlarge the jurisdiction of the Appeals Chamber.

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[13] We find persuasive authority for this view in the ICC case of *Prosecutor v. Lubanga*, ICC-01/04-01/06-2823, Decision on the "Registrar's Submission under Regulation 24*bis* of the Regulations of the Court In Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800" of 5 October 2011, 21 November 2011, para. 13; ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté [*sic*] provisoire de Thomas Lubanga Dyilo", 13 February 2007, para. 43.

[14] This remains so notwithstanding the fact that the victims participating in the proceedings were part of the proceedings before the Pre-Trial Judge.

[15] *See* Majority Opinion, paras 14-18.

[16] On the issue of standing *see* STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, paras 60-65.

[17] *See* Majority Opinion, para. 14.

IV. The certification granted by the Pre-Trial Judge is not a recognition of a right of appeal for victims participating in the proceedings

22. Finally, we agree with the majority's view to reject the LRV's argument that the appeal is admissible because neither the parties nor the Pre-Trial Judge raised any objections to the request for certification.[18] We add that the certification granted by the Pre-Trial Judge has no bearing on the admissibility of the appeal. The determination of whether VPPs have a right to appeal falls squarely within the purview of the Appeals Chamber, which is the only competent body to decide this matter.

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

Dated 10 April 2013,
Leidschendam, the Netherlands

Judge Ralph Riachy

Judge Daniel David Ntanda Nsereko

[18] *See* Majority Opinion, para. 8.