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

THE APPEALS CHAMBER

Case No: STL-11-01/T/AC

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

Registrar: Mr Daryl Mundis

Date: 28 July 2015

Original language: English

Classification: Public

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

REASONS FOR DECISION ON APPLICATIONS FILED BY COUNSEL FOR WITNESS PRH012 AND ORDER ON CONFIDENTIALITY

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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

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Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan, Mr Emile Aoun & Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz, Mr John Jones & Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan & Mr Philippe Larochelle

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INTRODUCTION

1. A witness in the *Ayyash et al.* case sought to appeal the Trial Chamber's decision to summon that witness to testify before the Tribunal ("Application").[1] The witness also requested that we suspend the operation of the summons ("Request for Suspensive Effect").[2] We decided, by majority, Judge Baragwanath dissenting, to dismiss both the Application and the Request for Suspensive Effect.[3] Because of the urgency of the matter—the witness was scheduled to testify the following day—we noted that written reasons would follow.[4] We provide them here.

BACKGROUND

2. The Prosecutor requested the Trial Chamber to issue a summons for witness PRH012 to appear to testify before the Tribunal in the *Ayyash et al.* proceedings.[5] The Trial Chamber invited counsel acting for the witness to make written submissions on the matter.[6] Counsel opposed the issuing of a summons, arguing, *inter alia*, that hearing the witness's evidence was not necessary for a number of reasons. Counsel also submitted that the witness should not be compelled to testify because she works for a news organization, asserting a privilege that would apply to war zone correspondents.[7]

3. The Trial Chamber decided that, in the circumstances of the case, "a summons [was] necessary to secure the witness's attendance to ensure a fair, impartial and expeditious trial".[8] It held that the witness's prospective evidence was relevant and probative, related to material facts pleaded in the indictment and went directly to the acts and conduct of three of the Accused. The

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[1] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2040, Decision on Prosecution Application for a Summons to Appear for Witness 012 and Order Issuing a Summons for a Witness, 1 July 2015 ("Decision on Summons"); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC, F2068, Application to Appeal Pursuant to Inherent Jurisdiction Made on Behalf of Witness PRH012, Confidential with Confidential Annex, 9 July 2015. Counsel also filed an addendum (STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC, F2068, Addendum to Application to Appeal Dated 9 July 2015 Pursuant to Inherent Jurisdiction, Confidential, 12 July 2015 ("Addendum")).
[2] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC, F2067, Witness PRH012: Urgent Application for Suspension of Compulsory Testimony, Confidential with Confidential Annex, 9 July 2015.
[3] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC, F2073, Decision on Applications Filed by Counsel for Witness PRH012, Confidential, 13 July 2015, para. 4.
[4] *Ibid.*
[5] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1966, Application for a Summons to Appear in Respect of Witness PRH012, Confidential, 26 May 2015.
[6] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1995, Order Relating to Prosecution's Application for a Summons for Witness PRH012, 10 June 2015.
[7] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2019, Written Submissions on Behalf of Witness PRH012 in Opposition to the Prosecutor's Application Dated 26 May 2015 for a Summons to Appear, Confidential with Confidential Annexes, 21 June 2015.
[8] Decision on Summons, para. 30

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Trial Chamber further noted that the witness appeared to be the only person who could provide the particular evidence, that no form of privilege operated to prevent the Trial Chamber from summoning the witness and that the witness had stated that she would not voluntarily appear before the Tribunal.[9]

4. The witness filed a request for certification to appeal the Decision before the Trial Chamber.[10] While this request was still pending, the witness additionally filed the Application and the Request for Suspensive Effect directly before the Appeals Chamber. In the Application, the witness argues that the Appeals Chamber should review the Trial Chamber's Decision on Summons and advances six grounds of appeal.[11] In the Request for Suspensive Effect, the witness seeks to suspend the operation of the summons.[12]

5. Subsequent to these submissions, the Trial Chamber denied the certification request.[13] The Trial Chamber held that it was "prepared to construe Rule 126 liberally, in this particular case, and to follow the ICTY precedent in *Brđanin*, in certifying an issue for interlocutory appeal where the interests of third parties are affected".[14] However, it found that the witness "neither identified any issue that affects the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber nor formulated any question for certification for interlocutory appeal".[15]

6. The Prosecutor responded to the Application and the Request for Suspensive Effect, requesting that they be dismissed.[16] He argues that the witness is not entitled to directly seize the Appeals Chamber of an appeal[17] and that the Appeals Chamber has no jurisdiction to suspend the summons in the absence of a properly filed appeal.[18]

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[9] Decision on Summons, para. 29.
[10] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2059, Application for Certification for the Appeal of the Trial Chamber Decision Dated 1 July 2015, Pursuant to Rule 126, Confidential, 8 July 2015.
[11] Application, paras 18-32.
[12] Request for Suspensive Effect, p. 1.
[13] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2069, Decision Denying Certification to Appeal the Trial Chamber's Decision on Issuing a Summons to Witness 012, 10 July 2015 ("Certification Decision").
[14] *Id.* at para. 16.
[15] *Id.* at para. 23.
[16] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC, F2071, Prosecution Consolidated Response to "Application to Appeal Pursuant to Inherent Jurisdiction on Behalf of Witness PRH012", "Witness PRH012: Urgent Application for Suspension of Compulsory Testimony", and "Addendum to Application to Appeal Dated 9 July 2015 Pursuant to Inherent Jurisdiction", Confidential, 13 July 2015 ("Response").
[17] *Id.* at paras 6-10.
[18] *Id.* at paras 11-13.

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DISCUSSION

I. Application to appeal

7. We recall that the power of the Appeals Chamber to entertain an appeal is circumscribed by our Statute and Rules of Procedure and Evidence.[19] In particular, we have held that:

> [I]nterlocutory 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.[20]

8. There is no provision in the Rules explicitly permitting an interlocutory appeal as of right against a Chamber's decision to subpoena a witness pursuant to Rule 78. Furthermore, the Trial Chamber rejected the request for certification to appeal its decision ordering witness PRH012 to appear to testify at the Tribunal.

9. The witness argues that, despite the absence of an appeal as of right and the denial of certification by the Trial Chamber, we should nevertheless consider the appeal as falling under our "inherent jurisdiction to do justice to third parties whose rights are infringed by a Trial Chamber decision".[21] The witness relies on our decision in the *El Sayed* case, arguing that "[i]n this case justice requires appellate review, both because of the severe and immediate impact on the witness's rights, [the witness's] safety and profession and for the wider reasons that the Trial Chamber judgment impermissibly restricts a recognised testamentary privilege".[22]

10. However, the matter of *El Sayed* was quite distinct from the present circumstances and, as we have stressed before, "must be viewed in its proper context".[23] In *El Sayed* we ruled that the Tribunal had jurisdiction to consider an individual's request for documents in a case before the

[19] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("LRV Appeal Decision"), para. 11.

[20] LRV Appeal Decision, para. 9; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber's "Decision on Trial Management and Reasons for Decision on Joinder", 21 May 2014, para. 14 ("We may intervene in interlocutory decisions of the Trial Chamber or the Pre-Trial Judge only on appeal as of right or following certification."); *cf.* STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, 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 ("*Ayyash et al.* Jurisdiction Appeal Decision"), para. 23 (dismissing an appeal because there was neither an appeal as of right nor a grant of certification).

[21] Application, para. 1.

[22] *Id.* at para. 21; *see also* Addendum, paras 3, 7.

[23] *Ayyash et al.* Jurisdiction Appeal Decision, para. 16.

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Tribunal when that individual was not a suspect or an accused.[24] It therefore "[fell] outside the literal scope of the Rules"[25] and was "not a criminal matter falling under our primary mandate".[26] It was only in that specific context that we decided to entertain an appeal against a decision of the Pre-Trial Judge, stressing that:

> The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.[27]

11. In the case before us, unlike in *El Sayed*, "the issue is not one that the drafters of the Rules could not anticipate".[28] There is no gap or lacuna in the Rules. Indeed, Rule 78 is a key element of the Tribunal's core procedure in criminal matters and explicitly provides for the possibility to summon a witness to testify before the Tribunal "when warranted by the interests of justice". If the drafters had intended to provide for an automatic right of appeal against a Trial Chamber's decision in this regard, they could have done so. However, they did not. We have no authority to create such a right on our own.[29] The Appeal was dismissed for these reasons.

II. Request for suspensive effect

12. The witness requested the Appeals Chamber, "whether or not it decides to hear the appeal", to suspend the operation of the summons.[30] However, we have held repeatedly that absent exceptional circumstances we lack the power to order the suspension of a decision if we are not properly seized of an appeal.[31] Because we decided that we had no authority to consider the Application, it follows that we could not order any suspension either. We therefore rejected the Request for Suspensive Effect.

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[24] 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 ("*El Sayed* Jurisdiction Appeal Decision"), paras 50-53.
[25] STL, *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal By Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, para. 20.
[26] *Id.* at para. 27.
[27] *El Sayed* Jurisdiction Appeal Decision, para. 54.
[28] *Ayyash et al.* Jurisdiction Appeal Decision, para. 17.
[29] *See* the references to domestic and international case-law provided in *Ayyash et al.* Jurisdiction Appeal Decision, para. 17, fns 54-55.
[30] Request for Suspensive Effect, p. 1.
[31] STL, *Prosecutor v. Ayyash*, STL-11-01/PT/AC/AR126.7, F0004, Order on Request for Suspensive Effect of Appeal, 4 April 2014; STL, *In the matter of El Sayed*, CH/AC/2011/01, Order on Urgent Prosecution's Request for Suspensive Effect Pending Appeal, 12 September 2011.

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III. Order on confidentiality

13. We note that the submissions before us were filed confidentially. However, given that the Trial Chamber has now lifted the confidentiality of its relevant decisions[32] and in light of the public nature of the proceedings before the Tribunal,[33] we will issue our decision publicly.

14. There is also no reason to maintain the confidentiality of our Decision of 13 July 2015, the Request for Suspensive Effect[34] and the Response.[35] We therefore order the Registrar to reclassify these filings as public. With respect to the Application and the Addendum, we order counsel for the witness to file public redacted versions of these submissions.

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[32] *See* e-mails from CMSS informing Legal Workflow users about the change in classification with respect to the Decision on Summons and the Certification Decision, 24 July 2015.
[33] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F0171/COR, *Corrected Version* of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 12.
[34] We do not lift the confidentiality of the Annex (F2067/A01).
[35] We note that the Prosecutor does not object to the lifting of confidentiality of this filing (*see* Response, para. 14).

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DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER,

DISMISSED, Judge Baragwanath dissenting, the Application and the Request for Suspensive Effect;

ORDERS the Registrar to reclassify the following filings from confidential to public:

- Decision on Applications Filed by Counsel for Witness PRH012 of 13 July 2013 (F2073)

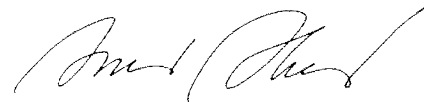
- Request for Suspensive Effect (F2067)[36]

- Response (F2071); and

ORDERS counsel for the witness to file public redacted versions of their Application (F2068) and Addendum (F2068/ADD).

Judge Baragwanath appends a Dissenting Opinion.

Done in Arabic, English and French, the English version being authoritative.
Dated 28 July 2015
Leidschendam, the Netherlands



Judge Ivana Hrdličková
Presiding Judge

[36] *See* above fn. 34.

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DISSENTING OPINION OF JUDGE BARAGWANATH

I. Introduction

1. My colleagues have rejected summarily a direct appeal by an appellant who claims the status of "war correspondent journalist" and consequential qualified privilege against testifying before the Trial Chamber. The basis for this decision is that, without certification under Rule 126 (C) from that Chamber, the Appeals Chamber lacks jurisdiction to entertain both the appeal and an application for a stay of an order for the journalist's appearance while the appeal is considered without haste. Because I am satisfied that Rule 126 has no application to this case and that, as determined in our *El Sayed* Jurisdiction Appeal Decision,[1] we possess the inherent jurisdiction to consider both the appeal and the stay, I dissent.

2. My conclusion that Rule 126 has no present application begins with the status of the claimed privilege which is supported by the provisions of Lebanon's Constitution and international human rights instruments. The latter in particular must be contrasted with the lesser status of judge-made rules, which are presumed to give effect to, and be consistent with, such instruments. It is further supported by the language, context and purpose of Rule 126.

3. However, to avoid possible misunderstanding, I wish to state clearly that this decision is confined to questions of law and contains no comment on the conditions of Lebanon in 2005 or since. There has been no evidence suggesting that the events over which this Tribunal has jurisdiction occurred in the context of an armed conflict; or submissions as to what degree of unrest is required to trigger the status of "war correspondent" as claimed by the appellant. Since the appeal is dismissed, that topic will not arise for consideration.

II. The appeal, the stay application and their dismissal

4. The appellant applied unsuccessfully to the Trial Chamber to set aside an order to appear before it on Tuesday 14 July 2015 to give evidence. That Chamber subsequently declined to issue a certificate authorizing an appeal. At 4.44pm on Friday 9 July 2015 the appellant filed out of caution an application to this Chamber ("Direct Appeal") asking us to exercise our inherent

[1] 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 ("*El Sayed* Jurisdiction Appeal Decision") (*see* Appendix).

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jurisdiction to hear the appeal. It was accompanied by an application for a stay of the Trial Chamber's order, pending the Appeals Chamber's consideration of the Direct Appeal.

5. On Monday 13 July 2015 the Majority dismissed, with reasons to follow, both the application for stay and the Direct Appeal, decisions from which I dissented.

III. The privilege at issue in this case

6. The appellant is a journalist employed by a significant news agency which reports on political and social developments in Lebanon to that country and around the world. A senior officer of that news agency asserts in the Direct Appeal that its reputation and value as a news organization depend on its continued ability to be trusted as a source of impartial news and information.

7. The officer recounts the personal background of the appellant and his assessment that to be compelled to give evidence in the present trial would seriously compromise the journalist's role, with potential adverse consequences both for the news agency and for the journalist.

A. The appellant's claim: the Randall Decision and its scope

8. It is against this background that the appellant asks this Chamber to recognize that she is entitled to privilege of the kind recognized by the ICTY Appeals Chamber in *Brđanin and Talić*[2] ("*Randall* Decision"). For the reasons it expressed, that decision recognized, under international law, a qualified privilege for journalists reporting from conflict areas:

> [C]ompelling war correspondents to testify [...] may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest. [...] [F]or a Trial Chamber to issue a subpoena to a war correspondent a two-prong test must be satisfied. First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.[3]

9. The scope of this privilege extends beyond the sphere of this Tribunal; like legal professional privilege, it operates in every context.

[2] ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.
[3] *Id.* at paras 44, 50.

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10. The recognition of this privilege is based, in part, on the crucial role of the press in monitoring and reporting on events both in and affecting Lebanon and around the world. In particular, judicial notice may be taken of the wide range of Lebanese media, the strength and vigour of the opinions they express, and the profound interest of the Lebanese people in the work of journalists across all media. For example, as was noted in a decision which directed the commencement of contempt proceedings for alleged breaches of Rule 60 *bis*:

> The importance of the press as the eyes, ears and voices of the community is at its highest when confronted with the power of public decision-makers, such as judges. That was expressed lucidly by Jeremy Bentham:
>
> > Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the securest of all guards against impropriety. It keeps the judge himself, while trying, under trial.[4]

11. Indeed, the free press is a vital element of the rule of law and the men and women who are part of the reporting profession carry out a vital public service. As the *Randall* Decision stated:

> Both international and national authorities support the [...] proposition[] that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news. [...] [S]ociety's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents.[5]

12. This interest is also related to the right to receive information as recognized under international human rights law and under Lebanese law. The Lebanese Constitution provides that:

> Lebanon is a parliamentary democratic republic based on respect for public liberties, especially the freedom of opinion and belief[.][6]
>
> [...]

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[4] STL, *In the Case Against New TV S.A.L. and Al Khayat*, STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014, para. 15; STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014, para. 15.
[5] *Randall* Decision, paras 35-36.
[6] Lebanese Constitution, Preamble, para. C.

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> The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association shall be guaranteed within the limits established by law.[7]

The Constitution also specifically endorses Lebanon's accession to the Universal Declaration of Human Rights (1948).[8] This document adds the:

> [F]reedom [...] to seek, receive and impart information and ideas through any media and regardless of frontiers.[9]

A third guarantee, to similar effect, is provided by Article 19 of the International Covenant on Civil and Political Rights (1966)[10] to which Lebanon has also acceded. Others appear in various regional human rights treaties.[11]

IV. The Statute, the rule-making power of the judges and Rule 126

13. This Tribunal was created by Security Council Resolution 1757 (2007) to which the Tribunal's Statute was annexed.[12] Article 8 of the Statute established the Pre-Trial Judge as well as the Trial and Appeals Chambers, whilst Article 28 empowered the judges of the Tribunal to adopt the Rules of Procedure and Evidence, requiring them to be "guided, as appropriate, by the Lebanese Code of Criminal Procedure as well as by other reference materials reflecting the highest standards of international criminal procedure". In exercise of that power the judges

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[7] Lebanese Constitution, Art. 13.
[8] *Id.* at Preamble, para. B.
[9] Universal Declaration of Human Rights (1948), Art. 19.
[10] *See* International Covenant on Civil and Political Rights (1966), Art. 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputation of others;
   (b) For protection of national security or of public order (ordre public), or of public health and morals.

[11] *See* (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art. 10; American Convention on Human Rights (1969), Art. 13; African Charter on Human and Peoples' Rights (1981), Art. 9 (1).
[12] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, 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, para. 31.

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created Rule 126, which the Majority assumes applies to this case. That Rule provides in the relevant parts (emphasis added):

> **Motions requiring certification**
>
> A. This Rule applies to *all motions* other than preliminary motions, motions relating to release, and others for which an appeal lies of right according to these Rules.
>
> B. After a case is assigned to the Trial Chamber, either Party may apply by motion for appropriate ruling or relief. [...]
>
> C. Decisions on *all motions under this rule are without interlocutory appeal save with certification*, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

14. My colleagues consider that both the Direct Appeal pursuant to our inherent jurisdiction and therefore the application for the stay of the Trial Chamber's order fall clearly within the ample language of Rule 126:

- Rule 126(A): "This Rule applies to all motions [...]";
- Rule 126(C): "Decisions on all motions under this Rule are without interlocutory appeal save with certification [by the Trial Chamber]".

If that were so, I would have agreed with the summary dismissal of both applications. However, since such an interpretation runs counter to both the high policies that underlie the claimed privilege and, as will be seen, the language, context and purpose of the Rule, I have concluded that the applications fall outside Rule 126. I also consider that the appellant's appeal to the inherent jurisdiction of this Chamber over what is an "issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice"[13] should have been accepted.

V. Legal context – the construction of Article 28 and Rule 126

A. Approach to basic rights

15. As the *Al Jedda* decision of the European Court of Human Rights ("ECtHR") shows, a UN Security Council resolution is presumed not to authorise infringements of fundamental rights

[13] *El Sayed* Jurisdiction Appeal Decision, para. 48.

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unless it expresses a clear contrary intention.[14] In that case, a Security Council resolution with general language, which the House of Lords had previously held justified detention without trial, was held by the Grand Chamber of the ECtHR not to authorize conduct that infringed fundamental rights. Such rights are to be upheld if at all possible; any authority to override them, if indeed it can lawfully be conferred, must be given in explicit and clear terms.[15]

16. Accordingly, the judges of this Tribunal have no power, as the creators of the Rules pursuant to Article 28, to override whatever entitlement to qualified privilege the law provides to journalists reporting on conflict areas in the public interest. In particular, the right of a journalist entitled to privilege is of such high importance that the Rules cannot, in my view, deny the Appeals Chamber the opportunity to review its denial by the Trial Chamber. Article 28 of the Statute contains no language that can be said to authorize such a result; it is to be presumed that the rule-making power it confers will be exercised in conformity with the law, not to defeat it. Nor do the judges of this Tribunal have such a power in their judicial role.

17. The journalist's claim in this case is analogous to that of a lawyer who is asked in evidence to answer a question which professional legal privilege provides protection against answering. There, the law was stated by Lord Taylor CJ in *R v. Derby Magistrates' Court Ex parte B*:

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[14] ECtHR, *Al Jedda v. United Kingdom*, 27021/08, 7 July 2011, para. 102:

> [T]here must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights [...] In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

Whether and if so to what extent the UN Security Council can specifically override such rights does not require present consideration.

[15] A celebrated formulation of the principle is that of Lord Hoffmann in the UK House of Lords, *R v. Secretary of State for the Home Department, Ex parte Simms* [1999] UKHL 33; [2000] 2 AC 115, 8 July 1999, at 131:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The [UK] Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

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> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. [...] [It] is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors.[16]

18. Likewise, if the appellant in this case is entitled to privilege, it is a privilege created by the law not only for the individual journalist's benefit but for the press as a whole in the interests of the entire community. It is the obligation of the judges both as rule-makers and as adjudicators to protect whatever legal right of privilege a journalist may possess. It follows that the Rules, including Rule 126, are presumed not to deprive the Tribunal of its power and obligation to maintain whatever privilege the appellant may possess to the maximum extent permitted by law. If the Rules did lead to such a result, then the judges, in their rule-making capacity, would have acted *ultra vires* of the authority contained in Article 28 of the Statute.

B. The language, context and purpose of Rule 126

19. Moreover, in any event, on its true construction, Rule 126 cannot be fairly read as having that same effect. It is focused on issues *between Prosecutor and Defence* and says nothing about issues affecting third parties such as in the *In the matter of El Sayed*[17] (see below, para. 23). That is clear from a cumulative reading of Rule 126 (A)-(C).

20. Rule 126 (B), sandwiched between Rule 126 (A), stating "[t]his Rule applies to all motions [...]" and Rule 126 (C) stating that "[d]ecisions on all motions under this rule are without interlocutory appeal", provides that "*either Party* may apply by motion for appropriate ruling or relief [...]". These are to be read together: Rule 126 (B) makes plain that they are referring to all applications *by a Party*.

21. The focus of Rule 126 (C) is again on *issues between Prosecutor and Defence*. It takes care to avoid injustice in their case by addressing issues "that would significantly affect the fair

[16] United Kingdom, House of Lords, *R v. Derby Magistrates' Court Ex parte B* [1995] UKHL 18; [1996] 1 AC 487, 19 October 1995, at 507, 508.
[17] *See* STL, *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, paras 27-30.

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and expeditious conduct of the proceedings or the outcome of the trial". Concern for expedition requires that issues for which immediate resolution is not required be deferred to the end of the trial. But it says nothing about *an issue raised by a third party*, whether by Mr El Sayed in the *El Sayed* Jurisdiction Appeal Decision when he sought access to documents in the possession of the Prosecutor, or by a witness who claims privilege.

22. Read literally and in isolation from the factual and legal contexts, including the approach taken by the law to basic rights, the repetition of the words "all motions" in Rule 126 (A) and (C) would have foreclosed an appeal in a case like the *El Sayed* Jurisdiction Appeal Decision where a third party sought to seize the Tribunal of their matter. However:

> The modern approach of the court to construing [...] regulatory documents is to prefer a purposive to a literal approach.[18]

23. In the *El Sayed* Jurisdiction Appeal Decision, discussed at paras 26-27 below, the claimant was not denied access to the Tribunal and the Prosecutor was permitted to appeal. Rather, the decision of the Appeals Chamber was quite to the contrary. That case involved a Lebanese general who had been imprisoned for 3 ½ years in Lebanon without charge on suspicion of being involved in the attack of 14 February 2005. He had been released on the application of the Prosecutor shortly after the Tribunal was created on 1 March 2009. Mr El Sayed then applied to the Tribunal in order for the Prosecutor to disclose to him documents that were relevant to his detention. The Pre-Trial Judge granted the application which the Prosecutor sought to appeal. On the argument accepted by the majority in the present case, the Appeals Chamber would have held that the matter fell within Rule 126 (A) and, since the Rules made no provision for appeals in circumstances where a third party and the Prosecution are the exclusive litigants, this Chamber lacked jurisdiction to entertain the appeal. But we held that Rule 126 had no application and for reasons outlined at paras 26-27 below we accepted jurisdiction to consider the appeal.

24. Furthermore, this Chamber does not, in my view, properly consider the rationale behind certification and its application to the present case. Ordinarily, it is the Parties (Prosecution or Defence) who request certification to appeal a rendered decision. There, when a matter is not

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[18] United Kingdom, Supreme Court, *In the matter of Lehman Brothers International (Europe) (In Administration) and In the matter of the Insolvency Act 1986* [2012] UKSC 6, [2012] Bus L R 667 at 688, para. 47 (per Lord Walker).

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certified for appeal this does not result in the parties being barred from approaching the Appeals Chamber. Rather, a denial of certification simply means that the parties are denied the opportunity to appeal on an interlocutory basis. The parties are still able, if they so wish, to raise such matters in their appeal of the final trial judgment.

25. This rationale has no application to the present case any more than *In the matter of El Sayed*. The Majority's insistence that Rule 126 applied and the Trial Chamber's denial of certification forced the appellant to give evidence the following day, thereby extinguishing the opportunity to approach the Appeals Chamber on a permanent basis. Since the journalist is not a party to the proceedings, she will therefore have no right to appeal against the final trial judgment.[19] And since the journalist has been forced to give evidence, the matter has become moot. The end result is that the denial of the claim to privilege accorded to war correspondents will forever escape the scrutiny of the Appeals Chamber and any error made by the Trial Chamber will never be subject to appellate review. This, in my mind, is inconsistent with due process and the "highest standards of international criminal procedure" required by Article 28 of the Statute and applied *In the matter of El Sayed*.

26. The point of the *El Sayed* Jurisdiction Appeal Decision was to deal with just such a situation. It set out the principles on which, contrary to domestic law, international courts will accept jurisdiction despite the absence of specific authorizing language in the relevant Statute or rules:

> [T]he Tribunal possesses inherent jurisdiction [to] fill[] an unforeseen gap in the legal regulations, and serves to determine a procedural issue incidental to the exercise of the Tribunal's primary jurisdiction. In addition, it is consonant with, and indeed required by, the principle of fair administration of justice and full respect for the rights of all those involved in the proceedings before this Tribunal.[20]

[19] In this context, I note that none of the counsel representing the various accused in the *Ayyash et al.* proceedings opposed the summoning of the appellant to give evidence (*see* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2040, Decision on Prosecution Application for a Summons to Appear for Witness 012 and Order Issuing a Summons for a Witness, 1 July 2015, para. 1).

[20] *El Sayed* Jurisdiction Appeal Decision, para. 53; *see* also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1178, Decision on Application by Counsel for Messrs Badreddine and Oneissi Against President's Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 11 ("any exercise of inherent jurisdiction would have to address a lacuna in our legal regime.").

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It does so:

> [O]ver any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.[21]
>
> [...]
>
> The Appeals Chamber also exercises its inherent jurisdiction to consider this interlocutory appeal. The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.[22]

27. The *El Sayed* Jurisdiction Appeal Decision recognized that, where first instance redress is granted to the claimant, the respondent (there the Prosecutor) may appeal. That argument must apply *a fortiori* where a third party claimant wishes to appeal such a first instance decision which is adverse – particularly where matters such as privilege are at issue. In other words, where a person alleges fundamental rights are being breached, redress must be available. That must include, in the present case, recourse to this Chamber. Here that is required to ensure that a privilege to which the appellant may be entitled, conferred in the public interest by the general law, has not been wrongly denied. The present claim falls squarely within the principle of the *El Sayed* Jurisdiction Appeal Decision. As *In the matter of El Sayed*, the absence of explicit provision for appeal demonstrates a clear lacuna in our Rules which must be filled by this Chamber in the exercise of its inherent jurisdiction.

28. The decision of this Chamber *In the matter of El Sayed* warrants substantial citation and the material passages are appended to this dissent (footnotes omitted).

29. For these reasons, I find the Trial Chamber's denial of certification does not operate to deprive the Appeals Chamber of jurisdiction in this case.

[21] *El Sayed* Jurisdiction Appeal Decision, para. 48.
[22] *Id.* at para. 54.

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VI. The stay application

A. Jurisdiction

30. The Majority decision reasons that:

> [W]e have held repeatedly that absent exceptional circumstances we lack the power to order the suspension of a decision if we are not properly seized of an appeal. Because we decided that we had no authority to consider the Application it follows that we could not order any suspension either. We therefore rejected the Request for Suspensive Effect.[23]

31. If there had been such decisions of this Chamber, for reasons that follow, such jurisprudence would be unsupportable. But the cases cited for this proposition do not sustain the Majority's argument. In the first, counsel for the appellant had not yet filed their appeal brief.[24] That was also the position in the second case.[25] These cases provide no support for the proposition that where there are grounds for arguing that Rule 126 does not apply (as, for example, in the *El Sayed* Jurisdiction Appeal Decision) the Appeals Chamber cannot order a stay of the appealed decision so it can examine the merits of the appellant's arguments.

32. In fact, the power to do so derives from the customary international rule conferring on each international court the power to determine its own jurisdiction – the "*compétence de la competénce*" or "*Kompetenz-Kompetenz*" as this Chamber recognized in the *El Sayed* Jurisdiction Appeal Decision.[26] That this Tribunal and Appeals Chamber possesses such a power derives unarguably from their establishment by Security Council Resolution 1757 to which the Statute is annexed and whose Article 8 composes the respective Trial and Appeals Chambers with judges duly appointed by the Secretary-General pursuant to Article 9.

33. This principle is so vital to the proper administration of justice that it permits, in my view, a court to determine the legality of its own creation. A logician might perhaps argue that the position should be different where jurisdiction is at issue, as it is here and is often in arbitration cases: how can such a judge or arbitrator, who may in the end prove to have been

[23] Majority Decision, para. 12.

[24] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0004, Order on Request for Suspensive Effect of Appeal, 4 April 2014, para. 4.

[25] STL, *In the matter of El Sayed*, CH/AC/2011/01, Order on Urgent Prosecution's Request for Suspensive Effect Pending Appeal, 12 September 2011, para. 4.

[26] *El Sayed* Jurisdiction Appeal Decision, para. 43.

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invalidly appointed, determine the validity of his or her own appointment?[27] But for at least six decades such dilemma been resolved in the manner described by Oliver Wendell Holmes Jr: "[t]he life of the law has not been logic: it has been experience."[28] So the UK Supreme Court has recently confirmed the explanation by Devlin J in *Christopher Brown Ltd v. Genossenschaft Österreichischer Waldbesitzer*[29]:

> It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties.[30]

34. It was equally the right and duty of this Chamber to investigate the merits of the claim raised by the appellant and for that purpose, in accordance with its inherent authority to determine its own competence, to order a stay of the order issued by the Trial Chamber for as long as was reasonably necessary to complete an unpressured evaluation. It was also the right of the appellant to have the Direct Appeal considered at whatever length it demanded rather than on the basis that "[b]ecause we decided that we had no authority to consider the application it follows that we could not order any suspension either."[31]

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[27] On my approach we encountered that very problem in STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, 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, para. 17.
[28] O. W. Holmes, Jr., *The Common Law* (Boston, 1881), p. 1.
[29] United Kingdom, Queen's Bench Division, *Christopher Brown Ltd v. Genossenschaft Österreichischer Waldbesitzer* [1954] 1 QB 8, pp 12-13.
[30] United Kingdom, Supreme Court, *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, 3 November 2010, p. 811.
[31] Majority Decision, para. 12.

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B. Criteria for stay

35. These are:

1. Does the appellant have a *prima facie* case in law and in fact?
2. If the stay is wrongly granted and the uncertificated application to the Appeals Chamber fails, what would be the detriment to the proceedings and to the public interest?
3. If the stay is wrongly declined what would be the detriment to the appellant and to the public interest?
4. Is there an arguable case warranting due consideration?

1. **Does the appellant have a *prima facie* case?**

a) Is there legal support for the concept of war correspondent privilege for journalists?

36. As discussed above,[32] the *Randall* Decision provides direct and powerful appellate authority for the concept of such privilege. Therefore there is legal support for the appellant's privilege claim which should have been duly considered rather than summarily dismissed.

b) Is there legal support for the concept of uncertified recourse to the Appeals Chamber?

37. *In the matter of El Sayed* supplies such support. It is wholly fortuitous that the status of the journalist, a matter of importance extending far beyond the issues of this important case, should arise for determination simply because the witness is said to have received a telephone call which the Prosecution wish to adduce as evidence to assist in proving their case. If the Trial Chamber has decided this matter wrongly, the case would fall squarely within the language of the *El Sayed* Jurisdiction Appeal Decision, not least its emphasis on the need for the full exercise of the Tribunal's authority. As already noted, it does so:

> [O]ver any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.[33]
>
> [...]

[32] *See* above, paras 8-12.
[33] *El Sayed* Jurisdiction Appeal Decision, para. 48.

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> The Appeals Chamber also exercises its inherent jurisdiction to consider this interlocutory appeal. The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.[34]

Yet by contrast, the Majority state that:

> [I]nterlocutory 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.[35]

38. The footnote to that quotation cites our decisions in the *Ayyash* LRV Appeal Decision[36] and the *Merhi* Joinder Appeal Decision.[37] While the statement is correct in respect of issues between the Prosecution and the Defence as parties in the proceedings, the decisions cited contain no suggestion that they could apply to an appeal by a non-party such as the present journalist. In the *Ayyash* LRV Appeal Decision the present issue did not arise since certification for the appeal had been granted. In any event, since victims are expressly provided for as active participants in the proceedings by both our Statute and Rules, the decision is of no present relevance; it was reasonable to assume that an appeal by the Legal Representatives of Victims had been considered when the Rules were drafted. This is contrary to the Majority's assertion that "unlike in *El Sayed*, "the [present] issue is not one that the drafters of the Rules could not anticipate".[38] The present case provides a clear instance of a matter that could not have been anticipated. Likewise, the *Merhi* Joinder Appeal Decision concerned a dispute between the Prosecutor and an accused whose case had been joined by the Trial Chamber to the main *Ayyash et al.* trial. As an issue between Prosecutor and Defence, it fell clearly within the language of Rule 126.

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[34] *El Sayed* Jurisdiction Appeal Decision, para. 54.
[35] Majority Decision, para. 7.
[36] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("*Ayyash* LRV Appeal Decision"), para. 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").
[37] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber's "Decision on Trial Management and Reasons for Decision on Joinder", 21 May 2014 ("*Merhi* Joinder Appeal Decision"), para. 14 ("We may intervene in interlocutory decisions of the Trial Chamber or the Pre-Trial Judge only on appeal as of right or following certification").
[38] Majority Decision, para. 11.

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39. It has been noted that the time is long past when courts adopted a narrow literal approach to the interpretation of legislation. As explained in this Chamber's Interlocutory Decision on the Applicable Law, words are to be interpreted not in isolation but in total context.[39] I therefore accept the submission of the appellant that on the present facts the *El Sayed* Jurisdiction Appeal Decision is of direct application.

2. <u>If the stay is wrongly granted and the uncertified application to the Appeals Chamber fails, what would be the detriment to the proceedings and to the public interest?</u>

40. If a stay had been granted there would have been delay for the time required by the Appeals Chamber to consider the arguments without pressure and prepare its decision. Given the relative novelty of the claimed privilege, oral argument and an opportunity for amicus curiae submissions might have extended the length of the delay. But since the Prosecution have other witnesses waiting to be heard the delay in hearing the witness would not have materially interfered with the conduct of the trial.

3. <u>If the stay is wrongly declined what would be the detriment to the journalist and to the public interest?</u>

41. The privilege would be breached. The claim as to the consequences of such testimony as made by the senior officer of the appellant's news agency has not been the subject of contrary evidence. It is also worth repeating that the damage would have been irreversible.

4. <u>Is there an arguable case warranting due consideration?</u>

42. I would have held that there was such a case and that there should have been a stay pending this Chamber's unpressured decision on the merits.

VII. The merits

43. Rather than dismiss the claim summarily, this Chamber should, in my opinion, have ordered the stay so as to address the merits without haste. There is no purpose in speculating on

[39] STL, STL-11-01/I/AC/R176bis, F0936, Interlocutory Appeal on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 19-21.

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what course the appeal would have taken had the stay been granted. I offer no comment on the merits.

VIII. Conclusion

44. It is unnecessary to rehearse the challenges which led elected representatives of the people of Lebanon to seek from the Security Council the intervention which created this Tribunal. Lebanon, an outstanding contributor to the international rule of law,[40] is still striving against daunting pressures to fully restore peace and security within its borders.

45. In this context, I recognize that, if the factual basis for its exercise were made out – and I have emphasized that this opinion has not addressed that topic – war correspondent's privilege, like legal professional privilege, should not be cast away lightly. Because of its important function in society we should be vigilant to protect it to the maximum extent that the law permits. In the present case, our rules make no express provision for a third party to seize the Appeals Chamber of the present matter. But the deficiency in our rules is met by the settled jurisprudence of the *El Sayed* Jurisdiction Appeal Decision. It is for these reasons that inherent jurisdiction exists to ensure that justice is done. Hence my dissent.

Done in Arabic, English and French, the English version being authoritative.
Dated 28 July 2015
Leidschendam, the Netherlands

Judge David Baragwanath

[40] As witness its major contributions to the Roman Law that underlies the law of four continents, and to the creation of both of the United Nations and the Universal Declaration of Human Rights (1948).

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APPENDIX

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 38-48

II. Whether the Tribunal Is Endowed with Jurisdiction

A. The Power of International Tribunals to Pronounce Upon Their Own Jurisdiction

38. [...] the Prosecutor first asserts that the Pre-Trial Judge erred as a matter of law in concluding that the Tribunal has jurisdiction over the Application. The Appeals Chamber must therefore rule on the question of the Tribunal's authority to pronounce on the matter raised by the Applicant, namely whether the Pre-Trial Judge may request that the Prosecutor and the Applicant argue the merits of the Applicant's request that he be granted access to the relevant pieces of evidence. In other words, the Appeals Chamber must pass judgment on the issue of the Tribunal's own jurisdiction.

39. The question of the scope of an international tribunal's jurisdiction such as this one is complex. In order to appropriately address this question, it is necessary to consider it within the general context of *international* adjudication.

40. In the case of domestic courts, the scope of their jurisdiction (whether subject-matter jurisdiction or personal, territorial, or temporal jurisdiction) is normally defined by law. That this should be so is only natural, given that domestic courts make up a proper judiciary, consisting of a number of judicial bodies distributed over the state's territory, each being endowed with specific powers, a well-defined field of action, and a distinct territorial competence. Domestic judiciaries are organized not only horizontally, but also vertically, being part of a hierarchical organization in which the higher courts may revise or reverse decisions of the lower courts. Within domestic legal systems, questions of jurisdiction raised before a particular court may be settled by that court, if the law so provides, but may often be settled by a higher court. Indeed, in some countries, such questions must be referred to the highest judicial body, which has the authority to decide on the matter in such a manner that its decisions are binding on all the courts of the state. Similarly, other questions pertaining to the conduct of proceedings raised before a specific court may have to be settled by another court or by a higher court. This holds true for

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questions relating to the recusal of judges, to misconduct of the persons participating in the proceedings, and so on.

41. Things are different at the international level. In this field, there is no judicial *system.* Courts and tribunals are set up individually by States, or by intergovernmental organizations such as the United Nations, or through agreements between States and these organizations, but they do not constitute a closely intertwined set of judicial institutions. Indeed, each tribunal constitutes a self-contained unit or, as has been said, "a monad that is very inward-looking" or "a kind of unicellular organism". There is neither a *horizontal* link between the various tribunals, nor, *a fortiori*, a *vertical* hierarchy. As was aptly noted in 1995 by the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*, international law "lacks a centralized structure, [and] does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others."

42. It follows that international courts and tribunals may not rely on other international courts for the determination of jurisdiction and the host of other procedural matters not addressed by their own statutes. They have perforce to settle such issues for themselves. In other words, international judicial bodies must each exercise powers which in other legal systems are spread across a hierarchy of courts.

43. Whenever a question relating to the jurisdiction of an international tribunal is raised, therefore, it falls to the court itself to adjudicate it, for lack of any other judicial body empowered to settle the matter. In instances where that court's constituting documents do not expressly grant the court the power to decide on its own jurisdiction, the resulting condition may appear to be paradoxical. Indeed, in such instances, a court exercises a power not provided for in its statutory provisions, with a view to determining whether, under those provisions, it has the power to pass on the merits of the question at issue. The paradox, however, disappears if one recognizes that a customary international rule has evolved on the inherent jurisdiction of international courts, a rule which among other things confers on each one of them the power to determine its own jurisdiction (so-called *compétence de la compétence* or *Kompetenz-Kompetenz*). This rule is attested to, inter alia, by the numerous international decisions holding that international courts are endowed with the power to identify and determine the limits of their own jurisdiction.

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B. The Notion of Inherent Jurisdiction

44. The nature and structure of international courts referred to above entails, in addition to the power of each court to pronounce on its own jurisdiction, that international judicial bodies may have to exercise inherent jurisdiction to an extent larger than any domestic court. The notion of inherent jurisdiction has been referred to by many international judicial bodies, such as the International Court of Justice, the ICTY, the ICTR, the Special Court for Sierra Leone, the Inter-American Court of Human Rights, the European Court of Human Rights, the Iran-US Claims Tribunal, and the ILO Administrative Tribunal.

45. With regard to the Tribunal, by 'inherent jurisdiction' we mean the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. It can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.

46. International courts have exercised this inherent jurisdiction in many instances where their statutory provisions did not expressly or by necessary implication contemplate their power to pronounce on the matter. By way of example, one can mention the power to take interim measures, to request stays of domestic proceedings or to stay its own proceedings, to order the discontinuance of a wrongful act or omission, to appraise the credibility of a witness appearing to testify under solemn declaration before the international court, to pronounce upon instances of contempt of the court, to order compensation in appropriate circumstances, to consider matters or issue orders *proprio motu*, and to rectify material errors contained in a court's judgment.

47. The extensive practice of international courts and tribunals to make use of their inherent powers and the lack of any objection by States, non-state actors or other interested parties evince

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the existence of a general rule of international law granting such inherent jurisdiction. The combination of a string of decisions in this field, coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved.

48. The practice of international judicial bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings. More specifically, it serves one or more of the following purposes: (i) to ensure the fair administration of justice; (ii) to control the process and the proper conduct of the proceedings; (iii) to safeguard and ensure the discharge by the court of its judicial functions (for instance, by dealing with contempt of the court). It follows that inherent jurisdiction can be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction (as is the case with the *compétence de la compétence*), or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.

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