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

THE APPEALS CHAMBER

Case No.: **STL-11-01/PT/AC/AR90.1**

Before: **Judge David Baragwanath, Presiding**
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Kjell Erik Björnberg

Registrar: **Mr Herman von Hebel**

Date: **24 October 2012**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON THE DEFENCE APPEALS AGAINST THE TRIAL CHAMBER'S "DECISION ON THE DEFENCE CHALLENGES TO THE JURISDICTION AND LEGALITY OF THE TRIBUNAL"

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

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

HEADNOTE[1]

Defence Counsel for Messrs Ayyash, Badreddine, Oneissi and Sabra—the Accused in this case—have challenged the legality of the establishment of the Tribunal before the Trial Chamber. In its Decision, the Trial Chamber dismissed the Defence motions and concluded, inter alia, that (i) a challenge to the legality of the Tribunal is not a preliminary motion challenging jurisdiction; (ii) the Tribunal was established by Security Council Resolution 1757 (2007); and (iii) the Chamber did not have the authority to review this Resolution. Counsel for Messrs Ayyash, Badreddine and Oneissi appeal against the Trial Chamber's decision. They primarily argue that the Tribunal was established illegally and that it has no authority to try the Accused.

The Appeals Chamber unanimously dismisses the three appeals.

The Appellants base their appeal on Rule 90 of the Rules of Procedure which allows for interlocutory appeals on challenges to the Tribunal's jurisdiction. However, the term "jurisdiction" is narrowly defined by Rule 90(E) and does not encompass challenges to the Tribunal's legality. The Appeals Chamber thus holds that the Defence appeals are not admissible under Rule 90 of the Rules. They are also not admissible under the notion of inherent jurisdiction. However, counsel for Messrs Badreddine and Oneissi received certification to appeal the Trial Chamber's decision under Rule 126(C) of the Rules.

The Appeals Chamber holds that even though the case has not been assigned to the Trial Chamber, the Trial Chamber retained the discretion to address the Defence motions as "other motions" under Rule 126 after rejecting them as preliminary motions. Consequently, having received two certified appeals, the Appeals Chambers considers both admissible. By majority, counsel for Mr Ayyash's appeal is dismissed for lack of certification, it being noted that Mr Ayyash does not suffer any prejudice as the essence of his counsel's arguments is raised by the other two Appellants. Judges Baragwanath and Riachy dissent from this decision.

The Appeals Chamber holds unanimously that the Trial Chamber correctly determined that the Tribunal was established as an independent institution by Security Council Resolution 1757 (2007), adopted under Chapter VII of the United Nations Charter. The Resolution integrates the provisions of a draft agreement negotiated between the United Nations and Lebanon, which was not ratified by the latter. The Appeals Chamber notes that the Security Council has acted in a similar manner on other occasions.

The Appeals Chamber also holds, Judge Baragwanath dissenting, that the Trial Chamber was correct in stating that it lacked the authority to review a Security Council Resolution. The majority considers that the Security Council has a broad discretion as to the characterization of a particular situation as a threat to international peace and security and that the Tribunal cannot judicially review the Security Council's actions. This finding is also supported by the difficulty of establishing any meaningful standard of such review in the absence of legal criteria to that effect. Moreover, the Security Council's decisions are influenced by a plethora of complex legal, political, and other considerations, which are difficult to evaluate from the outside. Similarly, once the Security Council

[1] This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

has found the existence of a threat to international peace and security under Article 39 of the Charter, it lies in its discretion to determine which measures under Articles 41 and 42 of the Charter are required to maintain or restore international peace and security.

The Appeals Chamber consequently rejects all other Defence arguments. Judges Baragwanath and Riachy concur with the dismissal of the appeals but offer additional reasons for doing so.

INTRODUCTION

1. Counsel for the Defence of Messrs Ayyash,[2] Badreddine[3] and Oneissi[4] appeal against the Trial Chamber "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal".[5] They primarily argue that the Tribunal was established illegally and that it had no authority to try the Accused.[6] After briefing was completed,[7] we held an oral hearing on 1 October 2012.[8]

2. We unanimously determine that the appeals must be dismissed. We hold that the appeals submitted by counsel for Mr Badreddine and Mr Oneissi are admissible. We hold, Judges Baragwanath and Riachy dissenting, that the appeal submitted by counsel for Mr Ayyash is inadmissible. We affirm the Trial Chamber's decision that this Tribunal was legally established by Security Council Resolution 1757 (2007). We also agree, Judge Baragwanath dissenting, that we are not vested with authority to judicially review the Security Council's actions with regard to this Resolution and consequently reject all other Defence arguments.

[2] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR90.1, Interlocutory Appeal on Behalf of Mr. Ayyash Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal" Dated 30 July 2012, 24 August 2012 ("Ayyash Appeal"). All further references to filings and decisions relate to this case unless otherwise stated.

[3] Appellate Brief of the Defence for Mr Badreddine against the "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 August 2012 ("Badreddine Appeal").

[4] Appeal Brief of the Oneissi Defence Against the Trial Chamber Decision Relating to the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 24 August 2012 ("Oneissi Appeal").

[5] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012 ("Impugned Decision").

[6] Ayyash Appeal; Badreddine Appeal, para. 114; Oneissi Appeal, paras 58-60.

[7] Prosecution Consolidated Response to the Ayyash, Badreddine and Oneissi Defence Appeals of the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 14 September 2012 ("Prosecutor's Consolidated Response"); Observations of the Legal Representative of Victims on the Interlocutory Appeal Briefs and Responses to the Trial Chamber's Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 19 September 2012 ("LRV Observations"); Badreddine Defence Reply to "Prosecution Consolidated Response to Ayyash, Badreddine and Oneissi Defence Appeals of the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal'", 19 September 2012 ("Badreddine Reply").

[8] Scheduling Order on Interlocutory Appeals, 27 August 2012; *see also* Decision on the Badreddine Defence Request for a Right of Audience to be Granted to Professor Maison, 20 September 2012 (denying the request); Scheduling Order for Appeals Hearing, 20 September 2012 (setting out a timetable and inviting the parties to address a number of specific questions).

SUBMISSIONS OF THE PARTIES

3. Counsel for all three Appellants assert that their appeals are properly before the Appeals Chamber.[9] They request the Appeals Chamber to set aside the Impugned Decision for a number of reasons.

4. Counsel for Mr Ayyash argue that the Trial Chamber erred by finding that Security Council Resolution 1757 is the "sole legal basis" for establishing the STL and by refusing to consider arguments regarding violations of the Lebanese constitution.[10] They add that the Trial Chamber erred in law by failing to review Security Council Resolution 1757.[11] They conclude that the Trial Chamber also erred by rejecting the argument that the Tribunal was improperly created because its jurisdiction is impermissibly narrow and selective.[12]

5. Counsel for Mr Badreddine argue that the Tribunal must review the legality of its establishment. Consequently, in their submission the Impugned Decision is contradictory as it accepts in principle a review of legality but then rejects any review of the actions of the Security Council.[13] Counsel argue that the Security Council is not "sovereign" and that the Tribunal has the power to review the Council's resolutions in an incidental matter.[14] Counsel aver that in adopting Resolution 1757 the Security Council abused the powers conferred to it by the United Nations Charter. They argue that Resolution 1757 is thus vitiated and the Tribunal illegally constituted.[15]

6. Counsel for Mr Oneissi contend that the Trial Chamber erred in refusing to examine the legality of the Tribunal's existence as a preliminary motion challenging jurisdiction[16] and in finding that it was established by law.[17] In particular, they claim that the Trial Chamber should have examined Security Council Resolution 1757 for compliance with international law.[18] They argue that

[9] Ayyash Appeal, paras 7-11; Badreddine Appeal, paras 10-33; Oneissi Appeal, paras 4-22, 56.
[10] Ayyash Appeal, paras 12-19.
[11] *Id.* at paras 20-23.
[12] *Id.* at paras 24-25.
[13] Badreddine Appeal, paras 34-50.
[14] *Id.* at paras 51-65; *see also* Badreddine Reply, para. 11.
[15] Badreddine Appeal, paras 66-113.
[16] Oneissi Appeal, paras 4-22.
[17] *Id.* at paras 23-29.
[18] *Id.* at para. 30.

the Resolution was passed to impose the provisions of a treaty that Lebanon did not ratify,[19] and that this constituted an abuse of power by the Security Council.[20]

7. The Prosecutor responds that the appeals should be dismissed.[21] He argues that no appeal lies as of right from the Impugned Decision and that only the certified appeals filed by counsel for Mr Oneissi and Mr Badreddine are properly before the Appeals Chamber.[22] On the merits, the Prosecutor argues that the Trial Chamber was correct (1) in finding that the "Legality Challenges" were not preliminary motions challenging jurisdiction;[23] (2) in determining that Security Council Resolution 1757 was the legal basis for the establishment of the Tribunal;[24] and (3) in concluding that it was not vested with power to review the validity this resolution.[25]

8. The Victims' Legal Representatives submit that the Appeals Chamber should thoroughly examine the Tribunal's legality by looking into the current interpretation of Charter law and by examining the Security Council's antiterrorist practice in order to place Resolution 1757 in proper context.[26] The Victims' Legal Representatives assert that the Security Council is only bound by substantive and structural limits provided in the Charter, that it has broad discretion under Chapter VII and that Resolution 1757 complies with the law and duly follows Security Council practice.[27]

[19] *Id* at para. 43.
[20] *Id* at paras 47-52.
[21] Prosecutor's Consolidated Response, para. 4.
[22] *Id.* at paras 5-8.
[23] *Id* at paras 16-31.
[24] *Id.* at paras 32-38.
[25] *Id.* at paras 39-85.
[26] LRV Observations, paras 3-8.
[27] *Id.* at paras 9-20.

STANDARD OF REVIEW ON APPEAL

9. Under Article 26 of our Statute and Rule 176 of the Rules of Procedure and Evidence, an appeal may be lodged on the grounds of "an error on a question of law invalidating the decision" or "an error of fact that has occasioned a miscarriage of justice". Counsel for the Defence contend that the Trial Chamber committed several errors in its Impugned Decision. These errors are all errors of law.

10. Persuasive and succinct principles of appellate review have been developed by other international courts and tribunals in relation to such errors.[28] In particular, we agree with the following standard adopted by the ICTY Appeals Chamber:

> 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. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[29]

We record that "not every error of law leads to a reversal or revision of a decision of a Trial Chamber."[30] We will therefore review only errors of law that have the potential to invalidate the decision of the Trial Chamber.[31]

[28] The Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), respectively, contain the same grounds for appeal as the Statute of the Special Tribunal for Lebanon, *see* Art. 25 ICTYSt, Art. 24 ICTRSt. The Statutes of the International Criminal Court ("ICC") and the Special Court for Sierra Leone ("SCSL") have similar grounds of appeal.

[29] ICTY, *Prosecutor v D Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević* Appeal Judgment"), paras 13-14 (with further references to the case-law of the ICTY Appeals Chamber); *see also* ICTR, *Gatete v The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 8 (with further references to the case-law of the ICTR Appeals Chamber); SCSL, *Prosecutor v. Sesay et al.*, Case No SCSL-04-15-A, Judgment, 26 October 2009, para. 31; ICC, *Prosecutor v. Banda et al.*, Case No. ICC-02/05-03/09 OA 2, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and Additional Instructions on Translation", 17 February 2012, para. 20.

[30] ICTY, *Prosecutor v Kunarac et al.*, Case Nos IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para 38.

[31] We note that, in exceptional circumstances, we may also address legal issues that would not lead to the invalidation of a Trial Chamber's decision, but are nevertheless of general significance to the Tribunal's jurisprudence, *see Milošević* Appeal Judgment, para. 12.

DISCUSSION

I. Admissibility

11. All three Appellants base their appeals on Rule 90 of the Rules.[32] They state that their challenges to the legality of the Tribunal's existence were preliminary motions challenging jurisdiction and fall within the ambit of Rule 90(A)(i).[33] Appeals against decisions on such motions lie as of right. Were the Appellants' motions to qualify as preliminary motions under Rule 90(B)(i) then their appeals would be admissible. However, the Prosecutor contends that the appeals are inadmissible, because the Impugned Decision was not a decision on a preliminary motion challenging jurisdiction as defined by Rule 90.[34]

12. Rule 90(A) defines exhaustively[35] a number of preliminary motions that must be brought in writing and no later than thirty days after the disclosure of the material supporting the indictment. Rule 90(A)(i) lists such motions and includes motions that "challenge jurisdiction" as one of them. Rule 90(E) defines a motion challenging jurisdiction in the following terms:

> For the purpose of paragraphs (A) (i) and B (i), a motion challenging jurisdiction refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal, including that it does not relate to the Hariri attack or an attack of a similar nature and gravity that is connected to it in accordance with the principles of criminal justice.

13. The Appellants challenge the legality of the Tribunal's existence. However, they do not challenge the indictment on any of the grounds listed in Rule 90(E). The Trial Chamber consequently found that such challenges were "not challenges to jurisdiction—as exclusively and correctly defined in Rule 90 [...]"[36] and therefore did "not fall within the definition of a 'Preliminary Motion' under

[32] Badreddine Appeal, para. 11; Ayyash Appeal, para. 11; Oneissi Appeal, para. 10; The Defence for Mr. Hussein Hassan Oneissi Request for Extension of the Time and Word Limit to File an Appeal to the "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 1 August 2012, paras 2-3.
[33] Badreddine Appeal, paras 15-23; Ayyash Appeal, para. 9.
[34] Prosecutor's Consolidated Response, para. 5.
[35] "Preliminary motions, *being* motions which [...]". [Emphasis added]. Contrary to the submissions by counsel for Badreddine during the appeals hearing (Appeals Hearing Transcript, 1 October 2012 ["Appeals Hearing"], p. 160), Rule 89(F), (G), and (H) do not support a broader definition of the term "preliminary motion." All they stand for is that the Pre-Trial Judge may set specific time-limits for the filing of such motions, other than the 30-day limit provided in Rule 90(A). Indeed, this is what happened in this case, when the Pre-Trial Judge set 4 May 2012 as the deadline for the filing of preliminary motions on jurisdiction, explicitly basing his decision on Rule 89(F), *see* STL, *Prosecutor v. Ayyash et al.*, Case No STL-11-01/PT/PTJ, Status Conference Transcript, 12 April 2012 ("Status Conference"), p. 47.
[36] Impugned Decision, para. 37.

Rule 90(A)."[37] We agree with this finding and are not persuaded by the Defence arguments against it.[38] Judges Baragwanath and Riachy dissent from the following part of the opinion.[39]

14. It is true that in the *Tadić* case before the ICTY on which the Appellants rely, the Appeals Chamber decided that a challenge to jurisdiction could also encompass a much broader challenge to the legality of that court's existence.[40] However, the Appeals Chamber's broad interpretation of the term "jurisdiction" was possible because the ICTY Rules of Procedure and Evidence at the time did not define it.[41] After the term was narrowly defined in an amendment to the ICTY Rules in a manner similar to Rule 90(E),[42] the ICTY Appeals Chamber rejected all challenges that fell outside the definition.[43] Similarly, while in *Kanyabashi* a Trial Chamber of the ICTR entertained a challenge to legality as an "objection based on jurisdiction",[44] in *Nzirorera* a three-member panel of the ICTR Appeals Chamber[45] rejected such challenges after the Rules were later amended to define "jurisdiction" in narrow terms.[46]

15. Counsel for Badreddine argues in essence that the case-law of the ICTY and ICTR after the tightening of their Rules should be disregarded, because the Rules were changed only after challenges to these tribunals' legality had already been made.[47] However, this argument does not prevail over the clear wording of our Rule 90(E). A motion challenging the legality of the Tribunal

[37] *Id* at para 38.
[38] *See* Badreddine Appeal, paras 15-23; *see also* Ayyash Appeal, para. 10.
[39] Below, paras 14-23.
[40] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision"), para. 6.
[41] *See* Rule 73 of the relevant ICTY Rules of Procedure and Evidence at the time (IT/32/Rev. 5, 15 June 1995), which merely provided that "[p]reliminary motions by the accused shall include: (i) objections based on lack of jurisdiction [...]."
[42] *See* Rule 72(D) ICTY RPE.
[43] *See* ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.2, Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009 ("*Tolimir* Appeal Decision"), paras 11-12, with further references in fn. 23; *see also* ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal, 7 December 2009 ("*Karadžić* Trial Decision"), para. 8.
[44] ICTR, *Prosecutor v Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997 ("*Kanyabashi* Decision"), paras 4-6. Rule 73 of the relevant ICTR Rules of Procedure and Evidence at the time (5 July 1996) only provided that "[p]reliminary motions by the accused shall include: (i) objections based on lack of jurisdiction [...]."
[45] Under the Rules in place at the time, a party seeking to appeal a Trial Chamber's decision on jurisdiction had to first seek leave from a three-member bench of the Appeals Chamber, which had to determine whether the appeal fell within the definition of jurisdiction provided by the Rules.
[46] ICTR, *Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004, paras 9-10; *see* Rule 72(D) ICTR RPE.
[47] Badreddine Appeal, paras 21-22.

simply does not fall under Rule 90(A); and therefore the Appellants have no automatic right to appeal against the Impugned Decision under Rule 90(B).

16. In addition to Rule 90, the Defence also claims that the concept of the court's jurisdiction is intrinsically linked to its legality. They argue that if a motion challenging the jurisdiction of the Tribunal on the narrow grounds provided under Rule 90(E) is admissible, this should *a fortiori* apply to the overarching question of the legality of the Tribunal's existence.[48] The Appellants refer to our decision in *El Sayed* where we stated that the Tribunal retains inherent jurisdiction to determine its own jurisdiction.[49] But this decision must be viewed in its proper context. It addressed an exceptional situation, namely whether the Tribunal had the authority to address an individual's request for documents in a criminal file in a case already before the Tribunal in which that individual was neither an accused nor a suspect before the Tribunal.[50] As such, it did not address the Tribunal's power to rule on its own legality but was limited to whether the Tribunal could "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."[51] Indeed, when discussing the notion of inherent jurisdiction, we made it clear that such 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 *compétence de la compétence*)."[52]

17. Similarly, we described the power of the Appeals Chamber to entertain appeals outside of the Rules as exceptional and limited to cases where "a situation has arisen that was not foreseen by the Rules."[53] But here the issue is not one that the drafters of the Rules could not anticipate. On the contrary, the language of Rule 90 was drafted in a specific and narrow way. As a consequence, no appeal can be entertained. The jurisprudence of both national courts[54] and international courts and tribunals[55] shows that they also eschew such a course of action.

[48] Ayyash Appeal, paras 9-11; Counsel for Badreddine, Appeals Hearing, pp. 155-158.
[49] STL, *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 43.
[50] *Id.* at para. 38.
[51] *Id.* at para. 45
[52] *Id.* at para. 48.
[53] *Id.* at para. 54.
[54] *See* for example the statement of Lord Westbury in the English House of Lords decision of *Attorney-General v. Sillem et al.*: "The 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.

18. In sum, the appeals are not admissible under Rule 90 or through the notion of inherent jurisdiction. However, counsel for Mr Badreddine and Mr Oneissi requested and received certification to appeal the Impugned Decision from the Trial Chamber pursuant to Rule 126(C) of the Rules.[56] For this Rule to be applicable the motions filed before the Trial Chamber by counsel for Messrs Badreddine and Oneissi must first be motions "other than preliminary motions".[57] We have held above that the motions challenging legality are not motions challenging jurisdiction under Rule 90(A)(i). They also do not fall under the other three categories of preliminary motions in Rule 90(A)(ii-iv). They are therefore not preliminary motions.[58] None of the other exceptions set out in Rule 126(A) apply. Consequently, they are "other motions" under this Rule.

19. Rule 126(B) permits a party to apply to the Trial Chamber by motion only "after a case is assigned to the Trial Chamber." We have previously determined that a case is assigned to the Trial Chamber once the Pre-Trial Judge has transferred the case file to it under Rule 95.[59] The case had not yet been assigned to the Trial Chamber at the time Defence counsel filed their motions challenging legality before it. It could then be argued that the Trial Chamber was not authorized to address the

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It is not competent to either tribunal or both collectively to create any such right." (UK, House of Lords, 6 April 1864, 10 H.L. Cas. 704 (1864)), p. 721.

[55] The Appeals Chambers of the ICTY, the SCSL, and the ICC have all rejected appeals that were filed even though certification to appeal was not granted, or attempts to appeal such certification decisions. For example, the ICTY 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." (ICTY, *Prosecutor v. R. Delić*, Case No.IT-04-83-Misc.1, Decision on Prosecution's Appeal, 1 November 2006, p. 3). The SCSL 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 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." (SCSL, *Prosecutor v Norman et al.*, Case No. 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). The ICC Appeals Chamber held that "the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated [...] is inexistent." (ICC, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 39).

[56] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Decision Certifying for Appeal the "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 23 August 2012 ("Certification Decision"), pp. 2-3.

[57] Rule 126(A) provides that "[t]his 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."

[58] *See* above fn. 35.

[59] STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 19.

Defence motions. However, these motions were originally brought as preliminary motions challenging jurisdiction under Rule 90. Once the Trial Chamber was seized of the Defence motions and correctly decided that they were not preliminary motions, it retained the discretion to dispose of them as "other motions" under Rule 126.[60] This is so even though the case has not been assigned to the Trial Chamber.

20. We note that the requirement of "assignment" is not absolute because there are circumstances where the Trial Chamber may dispose of issues before the transfer of the case file. One example is a preliminary motion on jurisdiction under Rule 90. Another example is the power of the Pre-Trial Judge under Rule 89(E) to refer issues that are in dispute to the Trial Chamber. In the present case, the Pre-Trial Judge referred the Defence motions to the Trial Chamber pursuant to Rule 90.[61] But he could have done so under Rule 89(E). In light of this, were the Appeals Chamber to insist on the transfer of the case file (i.e. "assignment") before the filing of the motions, this would cause enormous delay because the Appellants could simply re-file their motions once the case is assigned. Yet Article 21(1) of the Statute requires us to "take strict measures to prevent any action that may cause unreasonable delay." The Trial Chamber's consideration of this issue thus avoided further delay.

21. We also note in this context that the Defence challenges to the legality of the Tribunal are important matters. They are in effect more fundamental than a challenge to the jurisdiction of this Tribunal as defined under Rule 90(E) because they aim at nullifying Security Council Resolution 1757 and, ultimately, the very existence of the Tribunal. Finally, as a practical matter, there was no need for the Trial Chamber to be in possession of the case-file before admitting the Defence motions, which did not relate to the particulars of the case per se but rather to the general issue of the Tribunal's legality.

22. For these reasons, once it was seized with the motions under Rule 90 and even after rejecting them under that Rule, the Trial Chamber was vested with the authority to decide the motions challenging the legality of the Tribunal as "other motions" under Rule 126 and to certify them for

[60] *See Karadžić* Trial Decision, para. 10; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, para. 43; ICTY, *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR72, Decision on Notice of Appeal, 9 January 2003, p. 2; *see also Tolimir* Appeal Decision, para. 13. We note that the Trial Chamber did not specify in the Impugned Decision any provision in the Rules on which it based its decision to address the Defence motions. However, in the Certification Decision, the Trial Chamber referred to Rule 126(C) as the basis for certification, *see* Certification Decision, paras 5-6.

[61] *See* Status Conference, p. 47.

appeal. The appeals filed by counsel for Messrs Badreddine and Oneissi are thus properly before the Appeals Chamber.

23. Counsel for Mr Ayyash did not seek certification, as required for an interlocutory appeal of decisions under Rule 126. Consequently, his appeal is inadmissible. There is no unfairness resulting from this. For one, counsel for Mr Ayyash took a conscious choice not to seek certification from the Trial Chamber.[62] While in their view the appeal was based on Rule 90, they should have also considered that this position might be rejected by the Appeals Chamber. Indeed, counsel for Mr Ayyash were put on notice that the Prosecutor objected to the filing of the Defence appeals under Rule 90 when the Defence sought an extension of time from the Appeals Chamber.[63] In our decision on this request, we explicitly stated that it would be the Appeals Chamber's "task to determine whether that legal basis is correct or not, when we receive the substantive arguments of counsel."[64] Subsequent to our decision, counsel for Messrs Badreddine and Oneissi sought certification.[65] Moreover, we note that Mr Ayyash suffers no prejudice in this case. The essence of his counsel's arguments was also raised by the other two Appellants. If their appeals were successful, the effects of that decision would also apply to him.[66]

II. Whether the Trial Chamber erred when it held that the Tribunal was established by Security Council Resolution 1757

24. The Trial Chamber held that "Security Council Resolution 1757 is the sole legal basis of establishing the Tribunal."[67] It determined that it was "not necessary to examine any issues in the Defence motions alleging violations of Lebanese domestic law (including its Constitution) going to the issue of the Tribunal's foundation."[68] While counsel for Mr Badreddine "adhere[] to the conclusion of the [Trial] Chamber according to which the Tribunal was established by way of the

[62] *See* Appeals Hearing, p. 42.
[63] *See* Prosecution Consolidated Response to the Badreddine Defence and Oneissi Defence Requests for Extensions of Time and Page Limits for Filing Appeals to the Trial Chamber "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 2 August 2012, para. 5.
[64] Decision on Defence Requests for Extension of Word and Time Limits, 6 August 2012, para. 12.
[65] *See* STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Requête de la Défense de M. Badreddine aux fins de certification de l'appel de la « Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal », 8 August 2012, para. 2 ("Toutefois, à titre conservatoire et à toutes fins utiles, [la Défense] saisit par la présente la Chambre de céans aux fins de certification d'appel au cas où la Chambre d'appel considérerait que cet appel relèverait du régime de la certification").
[66] This was also the Prosecutor's position in the Appeals Hearing, *see* Appeals Hearing, pp. 113-114.
[67] Impugned Decision, para. 46;
[68] *Id* at para. 50.

Resolution",[69] counsel for Mr Oneissi challenge the Trial Chamber's approach. They argue that "[a] Security Council resolution intended to bring into force a treaty cannot achieve the intended goal in that it lacks the requisite legal power."[70] In their submission, Security Council Resolution 1757 could not effect this treaty unilaterally and in violation of Lebanese sovereignty.[71] The Prosecutor responds that the Trial Chamber did not err.[72]

25. It is undisputed that the Government of Lebanon and the United Nations initially agreed to enter into negotiations for the purpose of establishing a Tribunal of an international character.[73] A draft agreement was subsequently negotiated and signed by both parties but was not ratified by Lebanon. Yet, ratification is the pre-requisite for the entry into force of agreements binding upon Lebanon. In this situation, the Security Council passed Resolution 1757 on 30 May 2007. The Resolution stated:

> The Security Council, [...]
>
> 1. Decides, acting under Chapter VII of the Charter of the United Nations, that:
>
> a. The provisions of the annexed document [the draft agreement], including its attachment [the Statute of the Tribunal], on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19(1) of the annexed document before that date [...]

26. Lebanon was thus given the opportunity to ratify the draft agreement. As an alternative, the Security Council would establish the Tribunal without the explicit consent of Lebanon. Given that Lebanon did not ratify the draft agreement, its *provisions* entered into force by virtue of the Security Council's powers under Chapter VII of the United Nations Charter. The Trial Chamber was correct in pointing out this difference and determining that the *provisions'* binding effect "derives from their

[69] Badreddine Appeal, para. 66.
[70] Oneissi Appeal, para. 46; *see also* para. 45.
[71] Oneissi Appeal, paras 43-45.
[72] Prosecutor's Consolidated Response, paras 32-38.
[73] *See* S/RES/1644 (2005) (acknowledging the request of the Lebanese Government for the establishment of a tribunal of an international character and requesting "the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard"); *see also* S/RES/1664 (2006) (requesting the Secretary-General to "negotiate an agreement with the Lebanese Government aimed at establishing a tribunal of international character [...]"); *see also Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), paras 2-5.

incorporation in the Chapter VII resolution" as opposed to the entering into force of an agreement between Lebanon and the United Nations.[74]

27. Counsel maintain that the Tribunal was established by an "agreement" that was adopted with the coercive power of the Security Council. In other words, they suggest that the Security Council unilaterally "enacted" the draft agreement.[75] This assertion lacks any factual or legal basis. Resolution 1757 is carefully worded. It does not make reference to the entering into force of the "agreement" but rather refers only to the provisions of the "annexed document" and its "attachment." There is no indication that the Security Council considered replacing Lebanon's consent to the draft agreement by implementing it unilaterally as an agreement,[76] rather than exercising its powers under Chapter VII.

28. Such an approach—where the Security Council decided to effect the provisions of an agreement as opposed to the agreement itself—is not unprecedented. In its Resolution 687 (1991) regarding the conflict between Iraq and Kuwait, the Security Council brought into force the provisions of a non-binding minute, agreed to by the parties, but not ratified by Iraq according to the procedure in place at the time, relating to the borders between them. The Security Council did not transform the non-binding minute into a binding contractual instrument, but simply imposed binding legal consequences extracted from its substance under its Chapter VII powers.[77] This has also been the case in several other instances,[78] and in particular with respect to terrorism.[79]

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[74] Impugned Decision, para. 48; *see also* para. 49.
[75] Oneissi Appeal, paras 43-44.
[76] We need not decide whether the Security Council in fact possesses such powers. However, we note that under the relevant international legal instruments, including the Vienna Convention on the Law of Treaties (23 May 1969, 1155 U.N.T.S 331), the proper conclusion of an agreement requires the consent of both parties (*see* specifically Arts 2, 11).
[77] *See* S/RES/687(1991):

> Noting that Iraq and Kuwait, as independent sovereign States, signed at Baghdad on 4 October 1963 "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", thereby recognizing formally the boundary between Iraq and Kuwait and the allocation of islands, which were registered with the United Nations in accordance with Article 102 of the Charter of the United Nations and in which Iraq recognized the independence and complete sovereignty of the State of Kuwait within its borders as specified and accepted in the letter of the Prime Minister of Iraq dated 21 July 1932, and as accepted by the Ruler of Kuwait in his letter dated 10 August 1932,
>
> [...]
>
> 2. Demands that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations, Treaty Series, 1964;

29. It is also irrelevant that the term "agreement" was maintained in the Annex to Resolution 1757. This is merely a consequence of the two alternatives offered by the Resolution, one being the ratification of the Annex as an agreement by Lebanon, the other being the entering into force of the provisions of the Annex under Chapter VII of the United Nations Charter. What is important is the content of Security Council Resolution 1757, which intended to effect the provisions of the Annex, regardless of minor terminological discrepancies.

30. We also add that the Security Council's unilateral decision to establish the Tribunal should not obscure the reality that Lebanon as a founding member of the United Nations participated in the drafting of the United Nations Charter, and when agreeing to it, gave its consent to be bound by Chapter VII decisions under Article 25.[80] We also note, and as pointed out by the Trial Chamber, the Government of Lebanon requested the Tribunal's establishment, cooperates with it, and fulfils obligations stemming from the Tribunal's Statute as well as Resolution 1757.[81]

31. In summary, the Tribunal was not established by an international agreement but by Resolution 1757, adopted by the Security Council pursuant to Chapter VII of the United Nations Charter. We therefore reject the Defence arguments that the Trial Chamber erred in this regard and consequently dismiss the remaining arguments that the Trial Chamber erred in not considering alleged violations of the Lebanese Constitution.[82]

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3. Calls upon the Secretary-General to lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material, including the map transmitted by Security Council document S/22412 and to report back to the Security Council within one month;

4. Decides to guarantee the inviolability of the above-mentioned international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations;

[...]

[78] S/RES/1874 (2009) (incorporating into the text of the resolution various obligations of parties to the Non-Proliferation Treaty and imposing them on the Democratic People's Republic of Korea, which had previously withdrawn from that treaty); S/RES/1284 (1999) (modifying the content of an already existing treaty between the United Nations and Iraq, unilaterally imposing new provisions upon Iraq); S/RES/748 (1992) (overruling a treaty provision from the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by requiring Libya to extradite certain individuals to the United States of America or the United Kingdom).

[79] *See* S/RES/1373(2001), imposing on all States, including those that had *not* ratified it, obligations stemming from the text of the International Convention for the Suppression of the Financing of Terrorism (9 December 1999, 2178 U.N.T.S. 197); *see also* UN Doc. A/56/PV.17, 3 October 2001, at 6.

[80] Art. 25 of the Charter provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"; *see also* LRV Observations, para. 10.

[81] Impugned Decision, paras 7-10, 14.

[82] Oneissi Appeal, para. 31.

III. Whether the Trial Chamber erred when it held that it could not review Security Council Resolution 1757

32. The Trial Chamber held that the Tribunal "is not vested with any power to review the actions taken by the Security Council."[83] It consequently declined to judicially review the "actions of the Security Council in passing Resolution 1757."[84] Counsel for the Appellants argue that the Trial Chamber committed an error in not reviewing the Resolution.[85] They claim that the Security Council's resort to Chapter VII measures constituted an abuse of power; that it was unjustified because there was no threat to international peace and security; that the Tribunal's establishment was an inappropriate measure; that consequently, the Tribunal was established illegally; and that the proceedings against the Appellants should be dismissed.[86] The Prosecutor responds that the Trial Chamber did not commit any error in this respect.[87]

33. The Security Council is a principal organ of the United Nations.[88] All member States of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security."[89] When carrying out this important function, "the Security Council shall act in accordance with the Purposes and Principles of the United Nations."[90] Member States are duty bound to carry out its decisions.[91] Chapters VI, VII, VIII and XII set out the specific powers of the Security Council. Relevant to counsel for the Appellants' submissions are Articles 39 and 41 of the Charter:

> Article 39
>
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

[83] Impugned Decision, para. 55.
[84] *Id.* at para. 55.
[85] Badreddine Appeal, paras 7-8, 45-76, 114; Oneissi Appeal, paras 14-30.
[86] Badreddine Appeal, paras 77-114; Oneissi Appeal, paras 52, 59.
[87] Prosecutor's Consolidated Response, paras 39-64; *see also* LRV Observations, para. 4.
[88] Art. 7(1) UN Charter.
[89] Art. 24(1) UN Charter.
[90] Art. 24(2) UN Charter.
[91] Art. 25 UN Charter.

Article 41

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

34. Security Council Resolution 1757, establishing the Tribunal, was taken pursuant to these provisions. In particular, the Resolution reaffirmed the Security Council's finding—made in previous resolutions[92]—that "this terrorist act [the 14 February 2005 bombings killing former Lebanese Prime Minister Hariri and others] and its implications constitute a threat to international peace and security."[93] The Resolution explicitly states in its first operative paragraph that the Security Council acted "under Chapter VII of the United Nations Charter."[94] The Resolution was passed with the votes of ten members of the Security Council.[95] Five members abstained.[96] No member voted against the Resolution.[97]

35. Counsel for the Appellants do not question that the Resolution met all the formal requirements under the United Nations Charter. Rather, they asked the Trial Chamber for a judicial review of the Resolution. As pointed out by the Trial Chamber, "such review would entail reviewing and determining whether the Security Council, as the Defence motions ask, validly assessed a threat to international peace and security under Chapter VII of the United Nations Charter, and then, whether it acted within its powers in creating the Tribunal."[98] We agree with the Trial Chamber, Judge Baragwanath dissenting, that the Tribunal does not have the authority to make such an assessment. For reasons that follow, the Security Council's determination as to the existence of a threat to international peace and security is not subject to judicial review. The same applies to the Security Council's decision regarding the measures it employs once it has found that such threat exists.

[92] S/RES/1636 (2005); S/RES/1644(2005).
[93] S/RES/1757 (2007), p. 2.
[94] S/RES/1757 (2007), p. 2.
[95] Belgium, Congo, France, Ghana, Italy, Panama, Peru, Slovakia, United Kingdom of Great Britain and Northern Ireland, United States of America, *see* UN Security Council Verbatim Record, UN Doc. S/PV.5685 (2007)
[96] China, Indonesia, Qatar, Russian Federation, South Africa, *see* UN Security Council Verbatim Record, UN Doc. S/PV.5685 (2007).
[97] UN Security Council Verbatim Record ,UN Doc. S/PV.5685 (2007), pp. 5-6.
[98] Impugned Decision, para. 54.

A. The lack of authority to review

36. The Trial Chamber correctly stated that "[t]he Statute of the Tribunal—enacted by the Security Council—provides no explicit source of power authorising the Tribunal to judicially review the actions of the Security Council and make either a binding order or a declaration carrying legal weight in respect of its actions."[99] Similarly, the United Nations Charter is silent on the possibility of any review of the Security Council's determinations.

37. Under Chapter VII of the Charter, the Security Council has broad discretion to characterize a particular situation as a threat to international peace and security.[100] Yet, according to Article 24(2) of the United Nations Charter, in exercising its powers the Security Council may act only "in accordance with the Purposes and Principles of the United Nations". Indeed, in its advisory opinion on the *Condition of Admission of a State to Membership in the United Nations*, the International Court of Justice ("ICJ") has held that:

> [t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.[101]

38. The composition of the Security Council under the United Nations Charter (five permanent members and ten non-permanent members, elected on the basis of geographical representation, five of which are replaced each year) and its voting regime (requiring at least nine votes for a decision as well as the absence of a veto by any of the permanent members) ensure an inherent system of internal checks on the Security Council's exercise of its powers.[102]

39. Beyond that notion of self-restraint, however, there is nothing in the Charter that gives any of the other organs of the United Nations the power to review the Security Council's actions. Attempts to introduce such powers of review for the ICJ—the principal judicial organ of the United Nations—

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[99] *Id* at para. 55.
[100] *See* Nico Krisch, "Article 39", in Bruno Simma *et al* (eds), *The Charter of the United Nations, A Commentary*, 3rd ed. (Oxford University Press 2012) ("*Charter of the United Nations*", and "Krisch, Article 39", respectively), margin number 4.
[101] ICJ, Conditions of Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 57 (1948), p. 64.
[102] *See* Krisch, Article 39, margin number 6 with further references (noting that "SC members regularly debate the limits of the scope of action under Art. 39, thus indicating their conviction that the concepts carry some meaning and are not completely indeterminate").

at the time the United Nations Charter was drafted were defeated.[103] Indeed, the ICJ has categorically stated that it "does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned."[104] While the ICJ may pronounce itself *incidentally* on the legality of Security Council decisions in the course of proceedings before it,[105] the extent of the Court's power to do so and its practical effects are unclear.[106] In any event, this Tribunal's authority as an independent institution created by the Security Council outside of the United Nations system[107] must necessarily be much more limited than that of the ICJ.

40. The Defence has referred to case-law from other international and regional courts that in their view support a power of this Tribunal to review the actions of the Security Council in general, and Resolution 1757 in particular. However, with one exception, none of the cited courts did in fact hold that they had the authority to judicially review Security Council resolutions.[108]

41. In *Tadić*, the only exception, a majority of Judges of the Appeals Chamber of the ICTY decided that it had the authority "to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council"[109] and that it was not barred from doing so "by the so-

[103] *See* Anne Peters, "Article 24", in *Charter of the United Nations*, margin number 5; *see also* Andreas Zimmermann, "Article 27", in *Charter of the United Nations*, margin number 155.
[104] ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 16 (1971) ("Legal Consequences Opinion"), para. 89.
[105] *Ibid.*
[106] *See* ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 3 (1992) ("Lockerbie Order"), Dissenting Opinion of Judge Weeramantry, p. 66: "However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter. Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal." *See also* ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 325 (1993), Separate Opinion of Judge Lauterpacht, para. 99.
[107] The Tribunal is not part of the United Nations, as demonstrated by its operating mechanisms. For instance, although following the United Nations common system in several areas of its work, the Tribunal is not funded through the United Nations budget approved by its General Assembly. While created by a Security Council Resolution, the Tribunal is not an organ of the United Nations. The Convention on Privileges and Immunities of the United Nations (13 February 1946, 1 U.N.T.S. 15) does not apply *per se* to the Tribunal. Thus, the Tribunal does not enjoy a status similar to that of the ICTY and ICTR. It is a separate subject of international law.
[108] We need not address case-law advanced by the Defence that does not relate to judicial review of Security Council resolutions. (*See* Badreddine Appeal, paras 35-36, 39; Oneissi Appeal, para. 25).
[109] *Tadić* Appeal Decision, para. 22.

called 'political' or 'non-justiciable' nature of the issues it raises".[110] We note that even though we may generally rely on the persuasive jurisprudence of other international courts and tribunals, we are not bound by it. In this particular case, we are not persuaded by the reasoning of the ICTY Appeals Chamber. We note that the decision was taken by majority[111] and that it overturned a contrary decision of the Trial Chamber,[112] indicating the starkly different legal views on the issue even then. In particular, as pointed out by the Prosecutor,[113] the majority's reliance on two cases from the ICJ does not withstand closer scrutiny.

42. For one, as the ICTY Appeals Chamber itself stated, these cases addressed questions of incidental jurisdiction.[114] But the question of whether the Tribunal may review—and potentially find invalid—a Security Council resolution is not merely a question of "incidental jurisdiction". Indeed, if the ultimate consequence of such a finding would be to discontinue all proceedings at the Tribunal then this would directly render nugatory the will of the Security Council as expressed in Security Council Resolution 1757. As such, it would not be incidental at all—it would have the effect of a binding legal order.

43. Second, both pronouncements of the ICJ relied on by the *Tadić* Appeals Chamber were advisory opinions requested by the Security Council[115] and the General Assembly,[116] respectively. As such, while certainly carrying great legal authority, they did not have a binding effect on either United Nations organ.[117] On the contrary, the ICTY was not requested by the Security Council to examine either the legality or the effects of the resolution establishing it. Had the ICTY Appeals Chamber found that that resolution was indeed invalid, this would have resulted in the discontinuation of all proceedings before the ICTY. As such, this decision would have gone beyond the mere provision of advice and guidance.

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[110] *Id.* at para. 25.
[111] *Tadić* Appeal Decision, Dissenting Opinion of Judge Li, paras 2-4.
[112] ICTY, *Prosecutor v Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 5 (holding that the ICTY was "not a constitutional court set up to scrutinise the actions of organs of the United Nations" and did not have the authority to "investigate the legality of its creation by the Security Council".).
[113] Prosecutor's Consolidated Response, paras 48, 50-55.
[114] *Tadić* Appeal Decision, paras 20-21.
[115] *Legal Consequences* Opinion, para. 1.
[116] ICJ, Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, I.C.J. Reports 47 (1954), p. 48.
[117] *See* ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 177 (1989), para. 31 (holding that "[t]he jurisdiction of the Court [...] to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding"). *See also* ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, I.C.J. Reports 65 (1950), p. 71.

44. In conclusion, we do not find the reasoning of the ICTY Appeals Chamber in the *Tadić* case persuasive in this regard and decline to follow it. We also note that in a later decision, the ICTY Appeals Chamber appears to have applied a more cautious approach.[118]

45. None of the other decisions cited by the Defence stand for the proposition that courts have the power to review the Security Council's actions.

46. Contrary to the submissions by counsel for Mr Badreddine,[119] the ICTR Trial Chamber in *Kanyabashi* did not state that it had the power to review the Security Council resolution establishing that Tribunal. Rather, it held that "the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself."[120] It explicitly held that the question of whether a threat to international peace and security existed "was a matter to be decided exclusively by the Security Council."[121] Moreover, in a subsequent decision, another Trial Chamber of the ICTR held in *Karemera* that

> [...] it does not have the authority to review or assess the legality of Security Council decisions and, in particular, that of Security Council Resolution 955 [establishing the ICTR]. The Chamber further emphasises in this regard that Article 39 of the Charter of the United Nations gives a discretionary power to the Security Council in assessing the existence of a threat to the peace [...], and in taking the measures it deems appropriate to maintain or restore international peace and security.[122]

47. Likewise, in *Kadi*, the European Court of Justice did not review the legality of a Security Council resolution. Rather, it assessed the validity of implementing legislation on the European level. The court specified that the "review of lawfulness [...] applies to the Community act intended to give

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[118] ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-AR73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in the Case, 15 September 2006, paras 14-16 (stating that "[...] the Appellant appears not to be disputing the procedural validity of the UN Security Council Resolution 1668/2006 [extending the mandate of a particular Judge], but argues that it is not binding upon the Tribunal since the Statute has not been amended. The Appeals Chamber recalls that the UN Security Council, acting under Chapter VII of the UN Charter as a legislator, has adopted the Statute and established the Tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security [...]. *Without assuming competence to adjudicate on the validity of a resolution passed by the Security Council*, the Appeals Chamber considers that the UN Security Council Resolution 1668/2006 was directed to administrative matters and did not interfere with the Tribunal's judicial function" [emphasis added].)

[119] Badreddine Appeal, paras 38, 46.

[120] *Kanyabashi* Decision, para. 26.

[121] *Id.* at para. 22.

[122] ICTR, *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, *Inter Alia*, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, para. 25.

effect to the international agreement at issue, and not to the latter as such."[123] The court held the following:

> With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*.[124]

48. The European Court of Human Rights in the *Nada* case explicitly followed the reasoning of *Kadi* when it limited its review to measures implementing a Security Council resolution.[125] With regard to certain allegations of violations of the European Convention on Human Rights[126] by Switzerland, it held that "there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions."[127] In a concurring opinion, one Judge of the court pointed out that the Security Council was required to act within the confines of the United Nations Charter.[128] Yet, he recognized that "Security Council resolutions as such fall outside the Court's direct supervision, the United Nations not being a party to the Convention" and that it was only acts taken by States pursuant to these resolutions that could be reviewed.[129]

49. Our own decision in *El Sayed* does not support an authority of this Tribunal to review Security Council resolutions. As stated above,[130] this decision must be viewed in its narrow factual context. It did not touch on any authority of the Tribunal to assess the legality of its own creation by reviewing the Security Council resolution establishing it.[131]

50. Finally, we are of the view that this Tribunal is not comparable to national administrative or constitutional courts that are vested with power to review decisions of other organs of the State.[132]

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[123] CJEU, *Kadi et al. v. Council of the European Union et al.*, Case Nos C-402/05 P & C-415/05 P, Judgment, 3 September 2008 ("*Kadi* Judgment"), para. 286.
[124] *Kadi* Judgment, para. 287.
[125] ECtHR, *Nada v. Switzerland*, App. No. 10593/08, Judgment, 12 September 2012 ("*Nada* Judgment"), para. 212.
[126] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222.
[127] *Nada* Judgement, para. 212.
[128] *Nada* Judgment, Separate Opinion of Judge Malinverni, para. 15.
[129] *Id. at* para. 20.
[130] *See* above, paras 16-17.
[131] *Ibid.*
[132] *See also Lockerbie* Order, Dissenting Opinion of Judge Weeramantry, p. 55: "However, unlike in many domestic systems where the judicial arm may sit in review over the actions of the executive am, subjecting those acts to the test of

Unlike those courts, the Tribunal is not endowed with any legal guidelines with which to undertake such an exercise. Moreover, as a body not integrated in the United Nations system,[133] the Tribunal cannot pretend to possess the power to supervise any of the organs of the United Nations in the discharge of their mandate under the Charter. We do not therefore consider the decisions of national courts in this respect to be relevant or helpful.

B. The existence of a threat to international peace and security

51. Our finding that we lack the authority to review Security Council Resolution 1757 is also supported by the difficulty in establishing any meaningful standard of such review. What the Defence effectively asks the Tribunal is to evaluate the Security Council's assessment that the attack of 14 February 2005 and its implications were a threat to international peace and security. However, the United Nations Charter does not specify any legal criteria that the Security Council had to take into account when making this determination. Nor does the Charter define or spell out the prerequisites of what precisely constitutes "peace", "security" or the "threat to peace". This appears to be a deliberate choice in order to ensure that the Security Council enjoys a great measure of freedom and flexibility when carrying out its responsibility to maintain international peace and security.[134] As such, any findings by the Security Council are necessarily subjective in nature and influenced by a plethora of complex legal, political, and other considerations. Furthermore, the Security Council is not required to provide the specific reasons behind such calculations. Any outside attempt to evaluate whether the Security Council made a "correct" decision would therefore amount to mere speculation. It would be impossible to verify the facts on which the Security Council based its decision, how it weighed those facts, and whether it did so properly.[135]

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legality under the Constitution, in the United Nations system the International Court of Justice is not vested with the review or appellate jurisdiction often given to the highest courts within a domestic framework. [...] An important difference must also be noted between the division of powers in municipal systems and the distribution of powers between the principal organs of the United Nations, for there is not among the United Nations organizations the same strict principle of separation of powers one sometimes finds in municipal systems. [...] Nor is there a hierarchical arrangement of the organs of the United Nations [...] and each principal organ is *par inter pares*."

[133] *See* fn. 107 above.

[134] *See* Krisch, Article 39, margin number 2 (stating that "[t]he SC was to enjoy great freedom in its decision on the existence of a threat to the peace, a breach of the peace, or an act of aggression"); *see also* margin number 4.

[135] *See also Kanyabashi* Decision, para. 20 (holding that "the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber").

C. The nature of the measures taken by the Security Council

52. Likewise, once the Security Council has established the existence of a threat to international peace and security under Article 39 of the United Nations Charter, it retains the sole and exclusive prerogative to determine which measures under Articles 41 and 42 of the Charter are required to maintain or to restore international peace and security. While the establishment of criminal tribunals is not included in the list of measures open to the Security Council under Article 41, this list is by no means exhaustive ("may include").[136] Indeed, the Security Council has resorted to such a measure on two previous occasions.[137] This is not an issue of "customary development" of the Charter as counsel for Mr Badreddine asserts.[138] Rather, it is a matter of applying the Charter's provisions, which provide the Security Council with broad discretion as to which measures appropriately "give effect to its decisions."[139] What is important is that this decision is essentially political in nature, and as such not amenable to judicial review.

D. Conclusion

53. We conclude, Judge Baragwanath dissenting, that the Trial Chamber was correct in holding that the Tribunal does not possess the authority to judicially review the Security Council's actions when creating the Tribunal, in particular Security Council Resolution 1757. We thus reject all Defence arguments in this regard, including related arguments going to the contents of that Resolution.

54. In this context, we note that despite its finding that it could not review Security Council Resolution 1757, the Trial Chamber nonetheless proceeded to address Defence arguments challenging the legality of the Tribunal's establishment. This was an error. However, neither the Appellants nor the Prosecutor appealed this particular point. Moreover, the Trial Chamber's error does not invalidate the Impugned Decision because the Trial Chamber dismissed the Appellants' motions in their entirety. Therefore, there is no reason for the Appeals Chamber to intervene.

[136] *See* above para. 33, *see also* Nico Krisch, "Article 41", in *Charter of the United Nations*, margin number 12.
[137] S/RES/827 (1993) (establishing the ICTY); S/RES/955 (1994) (establishing the ICTR).
[138] Badreddine Appeal, para. 65.
[139] Art. 41 UN Charter.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER;

FINDS admissible the appeals filed by counsel for Mr Badreddine and Mr Oneissi;

FINDS inadmissible, Judges Baragwanath and Riachy dissenting, the appeal filed by counsel for Mr Ayyash;

UNANIMOUSLY DISMISSES the appeals.

Judge Baragwanath appends a Separate and Partially Dissenting Opinion.

Judge Riachy appends a Separate and Partially Dissenting Opinion.

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

Dated 24 October 2012,
Leidschendam, the Netherlands

Judge David Baragwanath
Presiding

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE BARAGWANATH

I. Introduction

1. I agree that the Defence challenges to the legality of the Special Tribunal for Lebanon must fail. Because my reasons differ, I write separately. Our difference is the latest stage of the long-standing debate whether a Security Council decision is subject to judicial review.[1]

2. The Security Council is, rightly and necessarily, the holder of great power. But that power is limited in law by the Charter of the United Nations which conferred it. The Judges of this Tribunal have been appointed ultimately under the same Charter and are directed both to apply the highest standards of international criminal justice[2] and to be independent in the performance of their functions.[3] A court which exercises criminal jurisdiction must consider and determine all arguable defences: here the argument that the decision of the United Nations Security Council to establish it by Resolution 1757 of 30 May 2007 fell outside the limits of its legal authority. Such defence is, in my opinion, a legal issue which we must decide.

3. Messrs Ayyash, Badreddine, Oneissi and Sabra are charged with crimes over which the Prosecutor claims the Tribunal has jurisdiction under Article 1 of the Statute appended to the Resolution. The primary issues on appeal are whether this Tribunal has power to review the decision of the Security Council to establish it by Resolution 1757; and if so what are the consequences. Three accused have appealed the Trial Chamber's decision. Mr Sabra did not seek to appeal. A further issue is whether procedurally Mr Ayyash has brought a valid appeal; I am satisfied that he has.

4. In support of their arguments, counsel for Messrs Ayyash, Badreddine and Oneissi advance two reasons. The first is that, within the context of the attack of 14 February 2005, the practice of the Security Council did not justify a decision that the conditions for triggering Articles 39 and 41 were satisfied.[4] The second is that the Resolution entailed abuse of power by the Security Council,

[1] Compare the various approaches in ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").
[2] Art 28(2) STLSt.
[3] Article 9(1) STLSt.
[4] Appeals Hearing, p. 164.

which being unable to reach an agreement conforming with the Constitution of Lebanon, imposed the Resolution for reasons unrelated to the proper purposes of Chapter VII to get over that obstacle.[5] It follows, they argue, that the Special Tribunal for Lebanon was not lawfully established and so has no authority over them. Therefore their appeals from the decision of the Trial Chamber, dismissing motions challenging the jurisdiction of the Tribunal, should be allowed and the Tribunal's activities, including all proceedings against the accused, should be brought to an end.

5. The Prosecutor contends that the Tribunal has no authority to review such decisions of the Security Council and that, in any event, the context justified the Council's decision. So the appeals should fail.

6. The Legal Representatives for Victims contend that the Tribunal has and should exercise authority to review Resolution 1757 and support the Prosecutor's argument that the context justified the Council's decision.

7. I conclude that the Tribunal does have, and this Chamber should exercise, authority to consider the legality of UN Security Council Resolution 1757, but that that the Appellants have not made out their challenges.

II. Right to Appeal

8. Counsel for the Appellants argued that their appeals are based on Rule 90(B)(i) of the Rules and may be brought as of right. Out of caution, counsel for Messrs Oneissi and Badreddine also secured certificates from the Trial Chamber pursuant to Rule 126(C) authorizing appeal. The Prosecutor, who consented to the issue of certification, accepts that we are seized of the appeals by Messrs Oneissi and Badreddine.

9. However the Prosecutor argues that Rule 90(B)(i) on which Mr Ayyash relied has no application because of the very precise and narrow wording of subparagraph (E) and so Mr Ayyash has no right of appeal. Since Mr Ayyash and also Mr Sabra may take advantage of any decision on the appeals by Messrs Oneissi and Badreddine that the Tribunal was never validly established, it might be thought unnecessary to deal with the Prosecutor's present argument. But the importance of the case is such that Mr Ayyash is entitled to know where he stands.

[5] Appeals Hearing, p. 170.

10. I conclude that he may appeal as of right, essentially on an application of the following principles:

(1) no-one may be tried except by a tribunal established by law;

(2) the Appellants claim the Tribunal was not validly established;

(3) the substantive right under (1) must import a procedural right to have their claim under (2) determined.

11. Rule 90 reads:

(A) Preliminary motions, being motions which:

1. challenge jurisdiction;
2. allege defects in the form of the indictment;
3. seek the severance of counts joined in one indictment under Rule 70 or seek separate trials under Rule 141; or
4. raise objections based on the refusal of a request for assignment of counsel made under Rule 59(A)

shall be in writing and shall be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A) (i). Such motions shall be disposed of by the Trial Chamber or, in the case under (iv), by the Pre-Trial Judge.

(B) Decisions on preliminary motions are without interlocutory appeal save:

1. in the case of motions challenging jurisdiction;
2. in other cases where certification has been granted upon the basis that 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.

[...]

(E) For the purpose of paragraphs (A) (i) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal, including that it does not relate to the Hariri Attack or an attack of a similar nature and gravity that is connected to it in accordance with the principles of criminal justice.

12. There is awkwardness in applying Rule 90. The defence motions do not fall within the literal language of paragraph (E).

13. There is also a textual difficulty with the second rule permitting appeal prior to conclusion of the case.[6] Rule 126 provides:

> (A) 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.
>
> (B) After a case is assigned to the Trial Chamber, either Party may apply by motion for appropriate ruling or relief. Such a motion shall be oral unless decided otherwise by the Trial Chamber.
>
> (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.

This case has not yet been assigned to the Trial Chamber in the sense of Rule 95(B) which states: "[a]s soon as the Trial Chamber has received the file pursuant to paragraph (A), it shall be seized of the case." So, on a narrow literal reading, it can be argued there is no right of appeal under Rule 126 either. I am attracted to the argument that any lawful decision of the Trial Chamber should be appealable with a certificate, which would justify Messrs Badreddine and Oneissi's appeals here under Rule 126.[7] I do not however agree with my brethren that what they hold to be an invalid motion under Rule 90 can act as a springboard for the application of Rule 126: an invalid motion should simply be dismissed.

14. But as was held in our decision of 16 February 2011,[8] interpretation is not confined to the literal language of any text;[9] indeed in the present case it must also consider the very validity of the Statute and Rules in question. If the appellants are correct in their submission that the Security Council lacked authority to pass Resolution 1757, both it and the Statute to which it refers lack validity. Fundamental illegality would be destructive of, in this case, everything from and including

[6] At which stage appeal is permitted by Article 26 of the Statute, echoed by Rule 176.
[7] That would entail reading "[a]fter a case is assigned to the Trial Chamber" as including "whenever the Trial Chamber has jurisdiction to deal with an issue."
[8] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 ("Interlocutory Decision on the Applicable Law").
[9] Interlocutory Decision on the Applicable Law, paras 19-32.

the Resolution and its accompanying Statute, down to the Rules which rely upon it: all of these, including Rules 90 and 126, would be invalid.

A. Inherent power

15. The Rules were purportedly made under Article 28 of the Statute. This Article contains a statement of Security Council policy that there must be both "fair and expeditious trial" and compliance with "the highest standards of international criminal procedure". If the Resolution is *ultra vires* the United Nations Charter, it would be wholly unfair to keep the accused subject to constraints of a nonexistent STL jurisdiction; and to wait until the end of the trial to pronounce on this matter. It would not be expeditious; nor would the highest standards of international criminal procedure be complied with.

16. The courts will infer power to avoid fundamental injustice. So in *R v Bow St Magistrate ex p Pinochet (No 2)*, following a House of Lords decision which had been tainted by the appearance of judicial bias, Lord Browne-Wilkinson stated:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.[10]

17. That technique was applied in the *El Sayed* case.[11] There, to avoid fundamental injustice, an appeal right was granted where none at all had been provided by the Rules. For reasons comparable to those given in that case, this Chamber must construe the appeal rights actually conferred as imputing entitlement of the accused to challenge the Trial Chamber decision on the ground asserted by appeal to this Chamber, to which at least *de facto* authority must be attributed until there is a decision to the contrary.[12] It would be sensible for this Chamber to regulate such appeal by analogy with the Rules whose status is in issue. But the analogy should not be so close as to deprive the appellants of their ability to appeal.

[10] *R v Bow St Magistrate ex p Pinochet* (No 2) [2000] 1 AC 119 (HL).
[11] STL, *In the Matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010; STL, *In the Matter of El Sayed*, Case No. 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.
[12] New Zealand, Court of Appeal, *In re Aldridge* (1893) 15 N.Z.L.R. 361; *see* UK, House of Lords, *Boddington v British Transport Police* [1999] 2 AC 143.

18. I respectfully disagree with the argument that what is, on the Defence argument, an *ultra vires* rule can stand in the way of either a motion to the Trial Chamber or an appeal on the fundamental ground that the Tribunal was never validly created.

B. Interpretation of the Rules

19. If, on the other hand, the Rules are to be treated as *intra vires* the Charter, perhaps on the pragmatic basis that they should be treated as valid until the opposite is demonstrated, the general principle *in favorem libertatis*, applied in our decision of 16 February 2011, tells against such narrow interpretation of the Rules as to withhold a right of appeal against a fundamentally erroneous claim to jurisdiction.

20. Rule 90 grants: (i) appeal as of right in the case of fundamental challenges to jurisdiction (Rule 90(A)(i)), which go to the very legality of the Tribunal's establishment (Rule 90(B)(i)); and (ii) appeal with certificate in motions alleging defects in the form of the indictment, as to severance and representation (Rule 90(A)(ii), (iii) and (iv)) if the issue 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 (Rule 90(B)(ii)). Rule 126 allows appeal against an interlocutory decision of the Trial Chamber on any other matter upon certification to the same standard.

21. There is therefore a clear difference in hierarchy between Rules 90(A)(i) and other grounds of Rules 90 and 126. While it may be both just and expeditious to certify for interlocutory appeal on grounds alleging defects in the form of the indictment, as to severance and representation and also grounds certified as within Rule 126, Rule 90(A)(i), and on appeal Rule 90(B)(i), deal with cases where the Tribunal should not be sitting at all and so the appeal is of right, without need for certification.

22. Read together against the background of the principles stated at paragraph 10 above, Article 28 and Rule 90(E) must allow access to the Appeals Chamber where there is a decision of the Trial Chamber which goes to a challenge even more fundamental than that of jurisdiction as defined under Rule 90(E) – that the Security Council has no power to make the Resolution and so the Tribunal has no legal right to exist and claim authority over the accused.

23. The Rules draw extensively on the rules of other Tribunals, and Rule 90(E) is expressed in very narrow terms in order to avoid appeals as of right save in the case of fundamental absence of jurisdiction.[13] What the authors of the Rules cannot have had in mind was the circumstance that they were beating the air: lacking authority to make any rules at all, because the Statute on which they relied was invalid.

24. Since the Statute requires that rules be made "with a view to ensuring a fair and expeditious trial," Rules 90 and 126 cannot be interpreted as having the opposite effect. On the contrary, Rule 3 requires:

> (A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.
>
> (B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstance then under consideration.

25. Subparagraph (A), invoking the "spirit of the Statute", which requires fairness and expedition, makes a literal interpretation of Rule 90 impossible: its acceptance would entail impermissible unfairness and delay. It follows that there is evident ambiguity. Since the words cannot mean what they apparently say, what do they mean? That engages Rule 3(B) and the principle that the accused is entitled to whatever available interpretation is most favourable to him. An obvious method of interpretation is to infer the right to avoid injustice already mentioned, which is employed by courts where no other means of recourse exist.

26. It follows that Rule 90(E) must be construed so as to include the further ground of appeal as of right: that it raises the even more fundamental ground of challenge, that the Tribunal was never validly established.

27. I do not, with respect, agree with the approach that Rule 126, even if available, provides a sufficient answer. That Rule, like Rule 90(B)(ii), requires a certificate rather than permitting appeal

[13] For the distinction between major and minor classes of "jurisdiction", *see* UK House of Lords, *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 (HL).

as of right. The ground that the Resolution creating the Tribunal is wholly invalid is so fundamental that appeal must be as of right, not by leave.

28. In summary, the reasons for appeal as of right given in Rule 90(E) are of even stronger force in the present case. Since, if the appellants are correct, Rules 90 and 126 are based on an invalid Statute under an invalid Resolution, the verbal limitations of Rule 90(E) cannot be permitted to deprive the appellants of their absolute right to justice: to have the final Chamber of the Tribunal hear their argument to that effect.

29. I therefore take into account, in what follows, the submissions made in writing and orally by counsel appointed to represent Mr Ayyash.

III. Whether the Tribunal was established by agreement or by UN Security Council Resolution

30. I concur with the reasoning in Section II of the Majority Decision.

IV. The Authority of the Security Council

31. Since the Tribunal could be established by a valid Security Council resolution, the next question is—as Appellants' counsel contend—should the Tribunal proceed to consider whether Resolution 1757 validly created the Tribunal? To answer that important question requires that the Resolution be examined within its context.

32. The Security Council is the executive mind and arm of the United Nations, given immense authority to respond urgently on behalf of the world community through measures which may include military force. It has a major, but by no means exclusively, political role which is, however, to be performed in accordance with the law;[14] it possesses elements of executive and legislative authority;[15] its decisions must often be made on the basis of confidential information; it even has unique capacity, in the interests of international peace and justice, to override the autonomous authority of states within their domestic jurisdiction, which forms the basis of the principle of

[14] *See* Sir Michael Wood, *The UN Security Council and International Law*, Hersch Lauterpacht Memorial Lecture, 7 November 2006, p. 7, para. 21: "The Security Council is often referred to as a political organ. That expression is presumably used to distinguish it from "legal" organs, or perhaps technical and administrative organs. But the term "political organ" may carry the unfortunate implication that the Council need pay little attention to the law."
[15] *Id.* para. 23.

sovereignty of all United Nations members recognized by the Charter.[16] Moreover in the event of a conflict between the obligations of Members of the United Nations under that Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.[17]

33. Specifically, to ensure prompt and effective action by the United Nations, its Members have conferred on the Council primary responsibility for the maintenance of international peace and security and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf.[18] They also agreed to accept and carry out the decisions of the Security Council under the Charter.[19]

34. The breadth of the powers conferred is made plain both in Chapter VI, dealing with "Pacific Settlement of Disputes", and more obviously in Chapter VII headed "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Of particular relevance are Articles 39, 41 and 42:

> Article 39
>
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. [...]
>
> Article 41
>
> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
>
> Article 42
>
> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[16] Art. 2(1) and (7) UN Charter.
[17] Art. 103 UN Charter.
[18] Art. 24(1) UN Charter.
[19] Art. 25 UN Charter.

35. Even so, the power of the Security Council is not without limits. That is made plain by Article 24(2):

> In discharging these duties *the Security Council shall act in accordance with the Purposes and Principles of the United Nations*. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.[20]

36. It must follow, as the Study Group of the International Law Commission has accepted, that the Security Council lacks plenary authority, which means that its resolutions may be *ultra vires* the Charter.[21]

37. It is indisputable that the broad terms in which the Purposes are stated further evidence the intention of the authors of the Charter to give the Security Council, with its major responsibility to perform them, very wide scope indeed.[22] The Principles stated specifically in Article 2 are also expressed broadly.[23]

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[20] Emphasis added

[21] This report is cited by the Grand Chamber of the European Court of Human Rights in *Case of Al-Jedda v The United Kingdom* (2011), 53 ECtHR 23, para. 57.

[22] Article 1 of the Charter provides:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

[23] Article 2 provides:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

38. Of particular note is that the sovereign equality of all United Nations member states (Principle 1), and their exclusive authority over matters essentially within their domestic jurisdiction (first clause of Principle 7), does not prejudice the application of enforcement measures under Chapter VII (second clause of Principle 7). It follows that, unless the conditions for activating Chapter VII action are satisfied, the Security Council may not intrude into the affairs of a member State.

39. But the claim of the Appellants is, in essence, that when creating the Special Tribunal for Lebanon the Security Council has performed such intrusion without lawful justification. Has this Tribunal authority to consider that contention?

V. The competing principles

A. Recognition of the status of the Security Council

40. The uniquely high status of the Security Council, given by each United Nations Member when ratifying the UN Charter in partial derogation of its own sovereignty, and the fact that the Security Council has primary responsibility for the maintenance of international peace and security, coupled in particular with its expansive powers under Chapter VII, has led much responsible opinion to the conclusion that its conduct is beyond the scope of any judicial review. To a large degree the need for judicial abstinence is overwhelming. The question is whether the rule of law requires any, and if so what, scope for some limited review.

41. Courts have long recognised that their role cannot extend to a second-guessing of the decisions of political decision-makers. Politicians at the national level have the legitimacy of the ballot box which is coupled with vulnerability to loss of office at the next election. They have access to the best advice and the opportunity for consultation and debate. They derive from a wide range of backgrounds and disciplines.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

42. As my colleagues emphasise, at the international level these advantages are even more pronounced. The fifteen members of the Security Council have the support both of their own officials and of their governments. No court could or would claim to possess the combined resources of the political decision-makers who consider whether the Security Council should utilise its Chapter VII powers.[24] Any Security Council Resolution under Chapter VII requires not only the support of nine members, but the absence of veto from one of the permanent members. Any complaint of error may be raised within the Security Council, within the General Assembly, and indeed by any affected person, whose voice may be made audible by the international media. While not exclusively political, the Security Council has both a major political function and powers expressed both subjectively and in very broad terms, dealing with the hotly disputed topics of the existence of threat to peace and measures to restore it. As noted before, the Security Council is the delegate of all member States. Since the International Court of Justice has no general authority to review acts of the Security Council, why should a temporary *ad hoc* Tribunal claim authority to examine the legality of one of them?

43. Such powerful considerations no doubt underlie the dissenting opinion of Judge Weeramantry in the *Lockerbie* decision (1993)[25] of the International Court of Justice, shared by the Trial Chamber and my colleagues, that decisions under Chapter VII are not open to judicial review.

[24] It is notable that even at the domestic level courts have been reluctant to engage with the kinds of decision the Security Council is called upon to make under Chapter VII, which include the use of military force. For example, in UK, House of Lords, *Chandler v Director of Public Prosecutions* (UK, [1964] AC 763 the appellants had been refused permission to cross-examine government officials in support of a claim that their trespass on Ministry of Defence land to protest against nuclear weapons was justified. Dismissing the appeal Lord Radcliffe stated at 798-9:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.

Those matters would appear even less amenable to judicial examination when they concern the conduct of the senior operative *international* institution, the Security Council which, unlike the Executive of a State whose conduct is nowadays often subject to review for legality by the courts of the same State, is acting as the delegate of all States, and with the authority whose breadth has been emphasised.

[25] *See* Majority Decision, fn. 106.

B. Recognition of the rule of law

44. But in this case the high public interest in not interfering with the difficult and important work of the Security Council is opposed by nothing less than the rule of law itself. The appellants assert, as is indisputable: (i) all accused are entitled to a hearing which is not only fair and impartial and by a competent, independent and impartial tribunal, but by one which is duly *established by law*;[26] (ii) the accused, who are presumed to be innocent unless and until proved guilty according to law, are entitled to advance whatever defences may be legally open to them. They further assert that such defences include their claim that the Tribunal lacks authority to try them.

VI. The authority to consider Security Council resolutions

45. How is one to resolve the clash between two vital principles: that the Security Council should be permitted to carry out its work without interference; and that the accused should be able to advance their defence to the tribunal before which they are charged? Normally clashes between competing public interests are to be dealt with taking into account the principles of legality and proportionality.[27] Here – however – the right to fair trial, including the rights both to a court established by law and to advance the accused's defence, is absolute and may not be trumped. Yet, a similar claim is made for immunity of Security Council resolutions from judicial consideration. So, two issues arise. The present one is *whether* the court has authority to review or otherwise assess the Security Council's decision in this case. The next is *how* such assessment is performed.

A. Power to consider?

46. In the present case, the Trial Chamber declined to assess Resolution 1757, on the ground that it was not vested with any power to review the actions taken by the Security Council; that the Tribunal is purely a creature of a Security Council Resolution; and that the Statute of the Tribunal provides no explicit source of power authorizing such review.[28]

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[26] Art. 14(1) of the International Covenant on Civil and Political Rights.

[27] *See* UK, Court of Appeal, *Douglas v Hello! Ltd* [2001] 1 QB 967, 1005 where the human rights principles of privacy and freedom of expression were in dispute. Sedley LJ held that "Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the [European] Convention [of Human Rights] proportionality is tested by, among other things, the standard of what is necessary in a democratic society."

[28] Impugned Decision, paras 53-55. *See* further Badreddine Appeal, para. 47.

47. A criminal court does not require explicit authority in order to engage in a judicial review of conduct which, if unlawful, will provide a defence. The power to do so is inherent in the judicial office and in the court or tribunal seized of a case: here the Chambers of the Tribunal. The Trial Chamber's view that there can be no power of review unless it is expressly conferred was the error of the criminal court of first instance in *Boddington*.[29] That court had held that the defence of illegality of a "no smoking" sign in a railway carriage, raised by the defence, was not an issue on which it could pronounce: that should be left to a court given authority in administrative law. The House of Lords corrected the error, holding that having been raised as a defence, the criminal court was bound in exercising the criminal jurisdiction to consider and deal with the issue. There is no principled reason why that decision of a final domestic court should not be regarded as "reflecting the highest standards of international criminal procedure" with which this international Tribunal's rules must comply. It is our responsibility to deal with the legal issue raised by the Defence. How we should do so is a further question.

48. Certainly the Tribunal is the creation of the Security Council; but, with respect to the Trial Chamber it is not its mere *creature*. On the contrary, what has been created is a court of law: a tribunal of independent judges,[30] charged with meeting the highest standards of international criminal procedure,[31] which necessarily imports that they will accord to the accused whatever defences may be lawfully open to them, including the right to insist that the tribunal is duly "established by law".

49. Although a Defence concession was made that Security Council resolutions can be presumed lawful,[32] the question is whether such presumption can be rebutted. As was emphasized on behalf both of the Defence and of Victims, no other court is seized of this issue. If the Tribunal does not address it, the Defence will lose by default the argument that their point has merit. It is perfectly true that no court, even the International Court of Justice, has a *general* power of review of decisions of the Security Council. The *travaux préparatoires* of the Charter reveal that a proposal to that effect was defeated.[33] But it does not at all follow that a Security Council resolution

[29] *Boddington*, above fn. 12.
[30] Art 9(1) STLSt.
[31] Art. 28(2) STLSt.
[32] Ayyash Appeal, para. 23.
[33] *See* para. 39 and fn 103 of the Majority Decision.

is unchallengeable if it conflicts with the Purposes and Principles of the very Charter under which it is made and in accordance with which Article 24(2) requires it to act.

50. The Appellants assert that, contrary to Article 24(2) of the Charter, the Security Council has infringed Principles 1 and 7: it has "intervene[d] in matters which are essentially within the jurisdiction of [Lebanon]" and cannot rely on the second clause of Principle 7—"the application of enforcement measures under Chapter VII" – because: (i) there was no basis for determining the existence of any threat to international peace (Article 39); alternatively there was abuse by the Security Council of its Article 39 powers which were used for an unauthorized purpose; and (ii) there was no basis under Article 41 for recourse to an international criminal tribunal. It will be necessary in answering the submission to consider the further critical question: how would such an assessment of acts by the Security Council be performed?

51. Much discussion on this topic before the Appeals Chamber has turned upon the case-law of other, especially (but not only) international, criminal tribunals.[34]

52. In *Tadić* the present point was determined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in favour of a certain authority to review incidentally a Security Council resolution. The Prosecutor had disputed such authority. At first instance the Trial Chamber accepted his submission. On appeal the majority judges wrote:

> This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try this case. What is this if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal?[35]

Furthermore:

> All these dicta ... address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it.[36]

[34] Badreddine Appeal, paras 35 ff.
[35] *Tadić* Jurisdiction Decision, para. 6.
[36] *Tadić* Jurisdiction Decision, para. 21.

53. That decision was followed by the Appeals Chamber of the Special Court for Sierra Leone in *Kallon*.[37] A Trial Chamber of the International Criminal Tribunal for Rwanda also took judicial notice of the events in Rwanda around the genocide as justifying the creation of that *ad hoc* tribunal,[38] while ostensibly stating that the question of the existence of a threat to international peace and security was "a matter to be decided exclusively by the Security Council".[39]

54. In *Kadi*, the Grand Chamber of the European Court of Justice found it necessary to determine that the effects of a Security Council resolution did not conform to fundamental European Union law. It stated:

> [...] it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.[40]

55. The decision can of course be said to be distinguishable, on the basis that for the Court it was European Union law rather than the United Nations Charter that was treated as fundamental. But the point is that its own "fundamental law" did not permit even such a powerful norm as a Security Council resolution to infringe it. Here, both for the Security Council and for this Tribunal, the fundamental law is the UN Charter, in particular its Purposes and Principles. So the case affords some authority for the notion that a Security Council resolution which infringes those Purposes and Principles can be challengeable.

56. In *Nada,* the Grand Chamber of the European Court of Human Rights found that Switzerland could have done more to alleviate the applicant's situation within the scope of Security

[37] SCSL, *Prosecutor v. Kallon et al* , Case No. SCSL-2004-15-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para. 37.
[38] ICTR, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997, paras 19-22.
[39] *Id.* para 21.
[40] CJEU, *Kadi et al v. Council of the European Union et al.*, Case Nos C-402/05 P & C-415/05 P, Judgment, 3 September 2008 ("*Kadi* Judgment"), paras 299-300.

Council resolutions which imposed on it an obligation to take measures capable of breaching human rights.[41] Judge Malinverni, concurring, stated:

> ...Of course, under Article 25 of the United Nations Charter, the member States are required to accept and apply its decisions. Moreover, Article 103 of the Charter stipulates that in the event of any conflict between the obligations of United Nations members under the Charter and their obligations under any other international agreement, the Charter obligations will prevail. And according to the case-law of the International Court of Justice, that primacy is not limited to the provisions of the Charter itself but extends to all obligations arising from binding resolutions of the Security Council.
>
> But do those two Charter provisions actually give the Security Council *carte blanche*? That is far from certain. Like any other organ of the United Nations, the Security Council is itself also bound by the provisions of the Charter. And Article 25 *in fine* thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council "in accordance with the present Charter". In Article 24 § 2 the Charter also provides that in discharging its duties "the Security Council shall act in accordance with the Purposes and Principles of the United Nations". Article 1 § 3 of the Charter reveals that those purposes and principles precisely include "respect for human rights and for fundamental freedoms". One does not need to be a genius to conclude from this that the Security Council itself must also respect human rights, even when acting in its peace-keeping role.[42]

57. That opinion took a harder line than did the leading speech in *R (Al-Jedda) v Defence Secretary of State for Defence* (2007). There, the House of Lords was faced with a conflict between the appellant's right to liberty guaranteed by Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms scheduled to the UK Human Rights Act 1998, and Security Council Resolution 1546 of 8 June 2004 adopted under Article 42 of the Charter. By that Resolution, a multi-national force was authorized to operate in Iraq and to undertake internment where this was "necessary for imperative reasons of security."

58. Lord Bingham provided the following analysis:

> Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to "any other international agreement" leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice [...] give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments[43] [...].

[41] *ECtHR, Nada v Switzerland*, App. No. 10593/08, Judgment, 12 September 2012 ("*Nada* Judgment"), paras 172 ff.
[42] *Nada* Judgment, Separate Opinion of Judge Malinverni, paras 14-15.
[43] Emphasis added.

> I do not think that the European Court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law [...].
>
> The appellant is, however, entitled to submit, as he does, that while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. On repeated occasions in recent years the UN and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards such as those which the Convention exists to protect. He [the appellant] submits that it would be anomalous and offensive to principle that the authority of the UN should itself serve as a defence of human rights abuses. This line of thinking is reflected in the judgment of the European Court in *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para 67 [...].
>
> Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.[44]

59. In short, *Kadi* would subordinate any Security Council resolution to a competing fundamental principle of its own constitutional document. Judge Malinverni in *Nada* suggests that human rights may predominate over the operation of such a resolution. *Al-Jedda* considers that "binding Security Council decisions taken under Chapter VII supersede all other treaty commitments" and limit competing rights, albeit to the minimum extent practicable.

60. It is not necessary on this appeal to choose between the reasons given by Lord Bingham and those of Judge Malinverni in the case of *binding* resolutions. This case concerns a Security Council resolution that is said to be *not binding* because it is *ultra vires* the United Nations Charter.[45]

[44] UK, House of Lords, *R (Al-Jedda) v Defence Secretary of State for Defence* (2007), [2007] UKHL 58, paras 35-39.
[45] Compare *Individual opinion of Committee member Sir Nigel Rodley (concurring)*, pages 36-37 in Human Right Committee, Communication No. 1472/2006, CCPR/C/94/D/1472/2006, 29 December 2008.

61. Here the fundamental provision of law is the Charter, which binds both the Security Council and also, as a purported creation of the Council under Chapter VII, this Tribunal. In principle, an inconsistency between a resolution of the Security Council and the Charter should receive the same legal analysis as in *Kadi*: the Charter must prevail.

62. The *raison d'être* of the Tribunal is to respond to alleged breaches of the rule of law. It would be a singular paradox if it were itself to infringe that rule – usurping a jurisdiction it does not possess by sitting when it has no jurisdiction.

63. It follows from the very office that a judge must determine at the first opportunity whether he or she possesses authority to try the case. That may involve a double question: am I personally disqualified? What is my warrant to sit?

64. As it happens, both questions potentially arise here. Since the decision whether the Tribunal may continue is one on which its judges are interested, if there were any alternative they would pass that decision to another tribunal. So had there been a reference to the International Court of Justice, that would no doubt have provided the answer to a further question: what is the most appropriate forum to undertake the review? [46] But since, as occurs not infrequently in domestic litigation, there is no such alternative tribunal available, the necessity principle applies and the Tribunal judges must sit.

65. The second question depends on the answer to the Defence challenge. If it is substantiated we may no longer continue to exercise authority over the accused. The Defence are entitled to an answer to it.

66. The rule of law requires that the legality of the conduct of any body lacking plenary authority be subject to judicial review. That principle is of special importance where it concerns a political power's conduct which affects fundamental human rights, including the right of liberty and the absolute right of fair trial. Here it is, in my opinion, the task of this Tribunal to perform such review.

[46] Dame Rosalyn Higgins has recalled "the Security Council should ...take into account that legal disputes should as a general rule be referred to the International Court of Justice", cited in Sir Michael Wood, *The UN Security Council and International Law*, Hersch Lauterpacht Memorial Lecture, 7 November 2006, p. 5, para. 15 But since that did not occur the question, analogous to those discussed by Campbell McLachlan (in *Lis Pendens in International Law*, Collected Courses of the Hague Academy of International Law, Vol. 336, The Hague, 2009), has not arisen and we must deal with the matter.

67. That is not to assert that all issues are necessarily within the competence of the Tribunal to evaluate. The role of the Tribunal, like that of a court of general jurisdiction, having accepted authority to review a challenged decision, is then to make a judicial evaluation of whether and, if so, with what degree of intensity, it should examine it.[47]

68. But to be meaningful, the *jus cogens* character of fair trial,[48] accepted by the Security Council in Article 16(2) of our Statute, must expose the Resolution, on which the existence of the Tribunal depends, to assessment of its compliance with the fundamental norms of the Purposes, Principles and Article 24(2) of the Charter. Not to do so could be seen as abdicating the judicial responsibility to ensure the "highest standards of international criminal procedure" stipulated in Article 28(2) of the Statute. That a judicial decision could render nugatory the will of the Security Council as expressed in Resolution 1757 is no justification for withholding judicial review of whether the expression of that will was within its powers conferred by the Charter. On the contrary, a major purpose of judicial review is to ensure that powerful decision-makers comply with the law. The relevant law is the expression of the will of the member States who, when adopting the Charter, chose to create the Security Council not as a body having plenary authority but as one limited by law.

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[47] The notion that cases involving high issues of state are beyond consideration by the court was flatly rejected by the Supreme Court of Canada in *Operation Dismantle v The Queen* [1985] 1 SCR 441. In that case the Supreme Court rejected the contention that such argument in relation to the decision of the Canadian government to permit the United States to test its cruise missiles in Canada was non-justiciable. Having cited the passage from *Chandler* reproduced at fn 24 above Wilson J stated at 54:

> I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.

At 61, she cited and emphasised a passage from Lord Devlin's speech in *Chandler* (at 811): "It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative". She continued:

> It seems to me that the point being made by Lord Devlin ... is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power (at 62) [...] I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so." (at 64)

The decision better represents the "highest standards of international ... procedure", *a fortiori* when applied to a criminal case, than domestic authorities which wholly decline to embark upon judicial review.

[48] As recognized by the unanimous Appeals Chamber in Interlocutory Decision on the Applicable Law, para. 76.

69. The argument that the Tribunal cannot pretend to possess authority to supervise any of the organs of the United Nations overlooks the fact that the Security Council chose to create an independent international tribunal, which may be expected to apply the rule of law to all – whatever their authority: "[The judges] shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."[49] The Security Council would not expect its own work to be immune from the law.

70. Such conclusion is supported by both principle and practice.

B. The principle of judicial review

71. To assert that there is no judicial review of a decision-maker's decisions is to give it plenary authority. Nowadays in the great majority of States even the elected legislature is liable to have its statutes subjected to judicial review for breach of fundamental rights. There is no difference in principle between judicial review by a domestic court of decisions of an important domestic decision-maker with limited authority, and judicial review by an international court of decisions of an important international decision-maker with limited authority. The issue is not whether a court of law seized of the issue may review, but what should be the intensity of the review.[50]

72. There are many forms of judicial review. At one extreme is *de novo* consideration of decisions about personal liberty, in which the judges have specialist expertise and of which bail and *habeas corpus* are celebrated examples. At the other extreme, there are issues of high policy where the nature of the decisions, the political element, and the judges' own lack of relevant knowledge and expertise all require them to assume a minimal role.[51]

73. In France, the *recours pour excès de pouvoir* is an example of review operated by French administrative courts and specifically the *Conseil d'État*—the higher administrative court—on administrative decisions of officials, when these decisions violate a legal rule.[52] Under French law,

[49] Art. 9(1) STLSt.
[50] Such was the consensus of the 2010 Congress, in Sydney and Canberra, of the International Association of Supreme Administrative Court Jurisdictions attended by senior judges of more than 50 states, embracing each continent and the world's major legal systems. The former common law notion, that the statutes of an elected parliament are immune from judicial review for breach of fundamental rights, has been largely abandoned.
[51] *Operation Dismantle*, above, fn. 47.
[52] *See* G. Cornu, *Vocabulaire Juridique*, 7ème édition, Presses Universitaires de France, Paris 2005, where *recours pour excès de pouvoir* is defined as « Recours contentieux tendant à l'annulation d'une décision administrative et fondé sur la violation par cette décision d'une règle de droit ».

this *recours* is admissible even in the absence of a text because it ensures respect of legality.[53] The court will review and declare null administrative decisions of State authorities violating the law.

74. In England Laws LJ has stated :

> [T]he intensity of review in a public law case will depend on the subject matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification. In this context the following passage from the judgment of Sir Thomas Bingham MR in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 has often been repeated: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied ... that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."
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> [...]
>
> There is ... what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required. It is in the nature of the human condition that cases where, objectively, the individual is most gravely affected will be those where what we have come to call his fundamental rights are or are said to be put in jeopardy.[54]

75. In applying the sliding scale a number of considerations can be relevant. [55] Here they include:

(i) The subject-matter of Chapter VII of the Charter, which is to provide for effective response to threats to international peace.

(ii) Its scheme, which is that member States accord broad power on the Security Council to act promptly for that purpose.

(iii) The language of both Articles 39 and 41 already recorded. Each of these articles is expressed in subjective terms: "the Security Council shall determined the existence of any threat to the peace...", "Should the Security Council consider that measures provided for in Article 41 would be inadequate..." So too are Articles 40 and 42: "the Security Council may decide what measures not

[53] *See* the major decision of the *Conseil d'État, Dame Lamotte*, (CE Ass. 17 février 1950, Ministre de l'agriculture c. Dame Lamotte, Rec. 110), published in M. Long et al , *Les grands arrêts de la jurisprudence administrative*, 15ème édition, Dalloz, 2005, 1999, p. 406.
[54] UK Court of Appeal, *R (Mahmood) v Home Secretary*, [2001] 1 WLR 840, at 18-19.
[55] *Cf.* New Zealand, High Court, *Mihos v. Attorney-General* [2008] NZAR 177 (HC), para. 107.

involving the use of force are to be employed", "Should the Security Council consider..." While this does not prevent judicial review, it limits the scope for such a review. This is a situation with which the law is well familiar. In *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* (1977),[56] Lord Wilberforce gave the answer:

> The section is framed in a "subjective" form - if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. *Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment.* But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge...[57]

(iv) The implications of a decision to apply Articles 39 and 41, which are profound, arming the Security Council with powerful means to restore peace even at the cost of some involvement in the affairs of the State concerned.

(v) The particular expertise residing with the Council and not the Tribunal, encompassing the determination whether a threat to international peace exists and what measures should be taken to restore peace and to give effect to the Security Council's decisions. Although composed of experienced judges, and competent to assess broadly the nature and character of decisions under Articles 39 and 41, the Tribunal lacks both the experience and the access to specialist advice available from diplomatic and other resources within the Council and its members.

(vi) The context of the decision including the fact that civil law and common law alike presume that the law should be interpreted *in favorem libertatis*. This Chamber applied it in its Interlocutory Decision on the Applicable Law of 16 February 2011. The context also includes the important elements of international politics and an unprecedented breadth of discretionary authority.

76. Decisions of the Security Council will often entail issues of pure judgment with which Courts will not interfere. But if clear error of law is established, it is the duty of a court of law to say so.

[56] UK, House of Lords, Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside, [1977] AC 1014, 1047.
[57] Emphasis added.

C. The practice of international judicial review

77. In addition to the exceptional cases of challenges to legality related to their establishment, international criminal tribunals have on other occasions been called to consider the breadth and scope of Security Council resolutions. The ICTY Appeals Chamber, when faced with a Security Council resolution aimed at extending the term of office of certain judges, has carefully worded as follows the exercise it undertook:

> The Appeals Chamber recalls that the UN Security Council, acting under Chapter VII of the UN Charter as a legislator, has adopted the Statute and established the Tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintaining of peace in the former Yugoslavia. While the UN Security Council is not a judicial organ and is not provided with judicial powers, it exercises, in discharge of its functions, both decision-making and executive powers.
>
> *Without assuming competence to adjudicate on the validity of a resolution passed by the Security Council, the Appeals Chamber considers that the UN Security Resolution 1668/2006 was directed to administrative matters and did not interfere with the Tribunal's judicial function.*[58]

78. This approach appears to be sound: it is not that international tribunals created by the Security Council, as the STL, will conduct a general review of the validity of the Security Council's resolutions. It is rather that, when the Security Council decides to exercise its discretion by establishing a true and independent tribunal, the Council will proceed on the basis of the rule of law: that the defence will test the authority of such a tribunal against the fundamental provisions of the Charter and the relevant judicial authority will pronounce upon its legality. It is therefore expected that the Tribunal be called to consider its founding instruments and interpret them consistently with the rule of law, human rights standards, and their element of fair trial guarantees.

79. So in *Nottebohm* the ICJ held that "an international tribunal has the right to decide as to its own jurisdiction and has the *power to interpret for this purpose the instruments which govern that jurisdiction*".[59] Similarly, in *Namibia*, the ICJ stated that "in the exercise of its judicial functions and since objections have been advanced the Court, in the course of its reasoning, will *consider*

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[58] ICTY, *Prosecutor v Krajišnik*, Case No. IT-00-39-AR73.2, Decision on Krajišnik's Appeal against the Trial Chamber's Decision Dismissing the Defence Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in this Case, 15 September 2006, paras 15-16 (internal citations omitted; emphasis added).
[59] ICJ, *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953*, I.C.J. Reports 111 (1953), p. 119 (emphasis added).

these objections before determining any legal consequence arising from those resolutions."[60] While there can be no claim to any general power of judicial review of Security Council resolutions, their legality may require judicial determination within a specific context against competing norms.

80. When it decides to create a tribunal, the Security Council must be deemed to have endowed such a tribunal with not only the trappings of legality, but also implicit authority to consider whether the fundamental norms are duly respected.[61] It is inconceivable that the Security Council would itself accept any lower standard.[62]

81. Such particular consideration of a UN Security Council resolution does not lead to a general review of the legality of the resolution, but rather to a specific interpretation and an evaluation of the effects of such resolution, within the scope of the Tribunal's mandate to ensure a fair trial by an independent tribunal established by law.

VII. The power and purpose of the Security Council's acts: this case

A. Power

82. Drawing these themes together, the right of the accused to a fair trial demands application of the due process required by the high order legal system enshrined in our Statute. It follows that the Security Council Resolution 1757 is not beyond review by the Tribunal. But the difficulty and complexity of the Council's task, the extent of its resources and experience, and the scope of what

[60] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 16 (1971), para. 89 (emphasis added). An advisory opinion—though not binding by itself—states the law (which is itself binding).

[61] Thus, for instance, in S/RES/1966 (2010), the Security Council ensured a continuation strategy for the ICTY and ICTR, by "[r]*eaffirming* its determination to combat impunity ... and *reaffirming* the need to establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals, including the trial of fugitives ... after the closure of the Tribunals," instead of simply closing down the two institutions or passing verdicts itself.

[62] It may be noted that the States which abstained in the Security Council at the time of the adoption of S/RES/1757 (2007) considered the need for justice and fair trial as paramount. This supports the proposition that the Tribunal must act and be seen to act with justice at the forefront of its mission. *See* in particular the statements of South Africa ("South Africa fully supports the establishment of the tribunal and expects it to operate with impartiality and in accordance with Lebanese law and the highest international standards of criminal justice"), China ("We understand and support the request of all Lebanese parties for the establishment a special tribunal. We hope that that initiative will help to establish the truth as soon as possible, hold the perpetrators accountable and ensure justice for the victims"), Qatar ("The State of Qatar remains committed to helping Lebanon seek the truth, hold accountable all those involved in those crimes and bring them to justice"), Indonesia ("Impunity must not be tolerated; justice must prevail. Those who are found responsible for the assassination of the late Prime Minister Hariri and for other related assassinations must therefore be brought to justice"), Russian Federation ("The Russian Federation has consistently advocated establishing the truth with respect to the murder of Rafik Hariri. The perpetrators of that crime must be brought to justice. We fully share with the sponsors of the draft resolution their primary objective of preventing impunity and political violence in Lebanon"). *See* UN Security Council Verbatim Record, UN Doc. S/PV.5685 (2007).

is a matter of pure judgment must narrowly limit the scope of such review. As already noted, a judicial tribunal must withhold interference unless breach of the bounds of the Council's authority is clearly shown.

83. Security Council Resolution 1757 recited the Security Council's "strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004" and reaffirmed "its determination that this terrorist act and its implications constitute a threat to international peace and security." The Statute of the Tribunal which was appended sought to give it the jurisdiction already mentioned over persons responsible for the attack of 14 February 2005 and also over persons responsible for other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, which were found to be relevantly connected with the former attack. There is provision for similar jurisdiction in relation to any subsequent attacks that are similarly connected if Lebanon, the Security Council and the United Nations agree.

84. A major theme of the Defence submissions was that as at May 2007 there was no "threat to international peace" but only serious political trouble of only a national scope.[63] The Tribunal was created with the task of applying not international but domestic Lebanese criminal law.[64] It was submitted that there could be no valid determination under Art 39 of existence of a threat to international peace unless there was some precedent decision of the Security Council accepted by the General Assembly or otherwise as customary law; otherwise, there must be international crimes, war crimes, genocide, crimes against humanity: international crimes that have been accepted as such; none existed here.[65] The charges of terrorism that can be brought against individuals pursuant to the Statute do not stem from international law, but rather from domestic Lebanese criminal law; the 14 February 2005 attack took place in Lebanon targeting a local political figure and there was no international crime that might have constituted a threat to international peace and security.[66]

85. It was further submitted for the Defence that the Security Council response in the case of Benazir Bhutto (27 December 2007), being of a different kind because it was by way of

[63] Appeals Hearing, p. 17.
[64] Appeals Hearing, p. 17.
[65] Appeals Hearing, p. 23.
[66] Appeals Hearing, pp. 24, 34.

Presidential Statement and did not give rise to a special tribunal,[67] was not a relevant precedent.[68] The Defence has made much of the fact that even in cases of terrorism, never has the measure of an international tribunal been adopted (except of course in the present case).[69]

86. I do not accept that submission. First of all, it has been long recognized that "non-military sources of instability [...] have become threats to peace and security".[70] More specifically, over the past decade, the Security Council has been entrusted by United Nations member States – including Lebanon – with a wide competence to deal with terrorism, even domestic terrorism, in the recognition that this type of attacks poses a threat to international peace and security. Various Security Council resolutions have referred to incidents of *domestic* terrorism as *threats to international peace and security*.[71] The Security Council, while Lebanon was a member thereof, also made various general statements according to which terrorism in all its forms and manifestations constitutes a threat to international peace and security.[72]

87. The theme "[t]he Security Council reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security", expressed in the case of Ms Bhutto, in language adopting earlier Presidential Statements,[73] is one which clearly embraced the circumstances of the attack of 14 February 2005. The fact that the *Bhutto* Resolution post-dated the attack by 15 months does not alter that conclusion. In construing treaties there shall be taken into account any subsequent practice in the application of the treaty which establishes the

[67] Appeals Hearing, p. 164.
[68] Appeals Hearing, pp. 157- 158.
[69] Badreddine Appeal, para. 65.
[70] UN Doc. S/23500 of 31 January 1992, p. 3 (referred to by LRV Observations, para. 15).
[71] *See, e.g.*, S/RES/1515 (2003) (Middle East); S/RES/1516 (2003) (Turkey); S/RES/1465 (2003) (Colombia); S/RES/1530 (2004) (Spain), S/RES/1611 (2005) (United Kingdom); *see also* S/RES/1618 (2005) in relation to attacks in Iraq, without labelling them "international" terrorism. Moreover, *see* UNSC Presidential Statements S/PRST/2004/14, S/PRST/2004/31 (Russian Federation); S/PRST/2005/55 (Jordan); S/PRST/2006/30 (India); S/PRST/2009/22 (Indonesia); S/PRST/2007/50, S/PRST/2008/19, S/PRST/2008/35 (Pakistan); S/PRST/2007/10, S/PRST/2007/32, S/PRST/2007/45, S/PRST/2008/31 (Algeria).
[72] *See, e.g* , UNSC Presidential Statement S/PRST/19/2010). Since 2003, therefore, the Security Council has been broadening the scope of terrorist acts falling within Chapter VII by omitting "international" from Resolutions and Presidential Statements condemning such acts.
States have also argued that the difference between domestic and international terrorism is only an academic distinction: "[a]ll terrorism is one and the same despite its thousand different faces" (UN Security Council Verbatim Record, UN Doc S/PV.4752 (2003)). In correspondence with the Security Council, for instance, Tunisia has referenced its efforts "to become involved in the *global system* against terrorism and [has] supported international efforts in this regard." (*Report to the Counter-Terrorism Committee* (Tunisia), 4 February 2005, S/2005/194, at 3). Iran announced that "the Islamic Republic of Iran attaches great importance to the implementation of the United Nations Security Council Resolutions, particularly Resolution 1373 (2001)" (*Report to the Counter-Terrorism Committee* (Iran), 27 December 2001, S/2001/1332, at 1).
[73] *See, e.g.*, above, fn.71.

agreement of the parties regarding its interpretation.[74] The *Bhutto* attack is closely analogous to the 14 February 2005 attack and illustrates the standard adopted by the Security Council.

88. It has been noted that there were further attacks to 12 December 2005 over which the Tribunal will have jurisdiction if connection is established and Article 1 recognises the possibility of subsequent "connected cases". During the whole period from 14 February 2005 until the creation of the Tribunal the United Nations had maintained close supervision of the enquiry; it was clearly open to the Security Council to find that the threat was still smouldering. The various resolutions dealing with the United Nations International Independent Investigation Commission and the Tribunal are under the heading "Situation in the Middle East" – the Security Council perceived these events through their impact on the region.

89. The choice of means utilized by the Security Council vis-à-vis these different terrorist attacks has varied widely, from mere condemnation to imposition of treaty obligations upon United Nations member States,[75] to the requirement that states impose administrative sanctions on individuals,[76] to the establishment of a Special Tribunal.[77] The fact that this is the first such tribunal is no more an impediment to its validity than the novel creation of an international criminal tribunal in 1993 was an impediment to the work of the ICTY.[78]

B. Purpose

90. It is evident, from the conduct of the Security Council at the time of the Resolution and since, that the Security Council has been concerned to bring to justice those who killed and injured the victims. I am satisfied that there is no basis to support the contention that the Security Council acted for an improper purpose and not for the purposes of Chapter VII of the Charter.

C. Conclusion on power and purpose

91. For these reasons I am satisfied, contrary to the approach of the Trial Chamber, that it is the Tribunal's responsibility to contextualise Resolution 1757; and, having done so, that the Appellants

[74] Vienna Convention on the Law of Treaties (1980), 1155 U.N.T.S. 331, Art. 31(3)(b).
[75] S/RES/1373 (2001).
[76] *See, e g.*, S/RES/1267(1999), S/RES/1333 (2000), S/RES/1390 (2002) and following ones.
[77] S/RES/1757 (2007).
[78] *See also* VLR Observations, para. 11.

have failed to establish that the Security Council acted beyond its authority under Article 39 in passing the Resolution.

92. Nor, in terms of Article 41 of the Charter, can the establishment of the Tribunal be said to be beyond the Council's lawful authority. A tribunal of an international character – a special tribunal *for* Lebanon, applying Lebanese law and with a strong judicial Lebanese component – is an appropriate means of responding to a threat, according to the Security Council, where the practical alternative is impunity.

VIII. Creation of a selective and *ex post facto* tribunal

93. No judge views with equanimity a situation where some major crimes are prosecuted and others are not. The principle that all are to be treated alike is a fundamental precept of fairness.[79]

94. Here however it cannot accurately be said that the creation of the Tribunal is discriminatory so as to be unlawfully selective. This Tribunal has no interest in Lebanese or any other politics. It is concerned solely with the law and any evidence that tends to prove or disprove the commission of crimes within its jurisdiction. At the time it was established, the identity of the 14 February 2005 killers was unknown except by the participants and perhaps those close to them. That is still not known: who they were can only be a matter of speculation unless and until there is a judicial finding that the Prosecutor has rebutted the presumption of innocence of any accused who are brought to trial. The Statute does no more than try to bring Lebanese criminal law to bear in an effective manner to ensure due investigation and fair trial of persons alleged to have committed the attacks over which the Tribunal has jurisdiction.

95. While it is greatly to be preferred that all who commit criminal conduct are brought to justice, failure to meet that standard does not as a rule afford a defence to any who are brought to trial. Their right is to fairness of their trial, not to a discharge on the ground that others have not, or not yet, been charged. The latter will continue to face the prospect that in time they too will be

[79] Ayyash Appeal, para. 25. In *AXA General Insurance Ltd v HM Advocate* UK Supreme Court, [2011] UKSC 46, para. 97 Lord Mance stated:

> [t]here can be decisions – to take a familiar extreme example, a blatantly discriminatory decision directed at red-headed people – where, irrespective of any limitation on the purposes for which the decision-maker might act, a court would regard what has been done as irrational, because of the way in which the decision operated. If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment.

tried. Human rights law does not *per se* bar *ex post facto* establishment of criminal tribunals, as long as the guarantees of independence and fair trial are effectively ensured.[80] Fairly construed, Security Council Resolution 1757 complies with essential provisions of human rights law, which the UN Security Council must have taken into account when resolving to establish the Tribunal.

96. In my view, the Defence fails to show any error in this respect.

IX. Conclusion

97. It follows that each ground raised on appeal fails and the appeals should be dismissed.

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

Dated 24 October 2012,
Leidschendam, the Netherlands

Judge David Baragwanath

[80] "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials." (UN Human Rights Committee, *General Comment No 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, UN Doc. CCPR/C/GC/32 (2007), para. 22). The European Court of Human Rights focuses on independence and impartiality enshrined in the rules applicable to the tribunal in question, rather than on selectivity and special status within the system. *See, e.g.*, ECtHR: *Findlay v United Kingdom*, App. No. 22107/93 (1997); *Ari v. Turkey*, App. No. 29281/95 (2001); *Selçuk Yıldırım v. Turkey*, App. No. 30451/96 (2001). While the Inter-American Court of Human Rights has adopted a stricter approach to special courts and tribunals ("[i]n respect of the prosecution of civilians, this requires trial by *regularly constituted courts* that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and *generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians*", Reports of the Inter-American Commission on Human Rights on Terrorism and Human Rights: Exec. Summary and Recommendations. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., paras 18, 230, 261 (22 October 2002) (emphasis added)). Even under this regime, *ex post facto* jurisdictions are not completely proscribed, if they are established as independent and impartial.

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE RIACHY

1. I concur with my colleagues that the appeals must be dismissed. However, I consider that all three appeals must be admitted as of right. I also offer additional reasoning that in my view supports the Appeals Chamber's conclusion that this Tribunal cannot review the actions of the Security Council.

I. Right to appeal

2. I disagree with the view of my colleagues regarding Rule 126 and its application in the present case. Our Rules are designed in a logical sequence. The interpretation adopted by the Majority does not, in my view, take that logic into account. Rule 126 has a limited scope. It is designed to be applied to motions "other than preliminary motions".[1] But a challenge to the legality of this Tribunal can only be entertained, if entertained at all, as a preliminary motion. It is essentially a preliminary matter that must logically – and exceptionally – be addressed *in limine litis*, before the start of the proceedings proper. Therefore, in my view, the characterization of a motion challenging legality as "other motion" under Rule 126 is incorrect.

3. I turn to the question of whether counsel had a right to appeal the Impugned Decision. The question of the legality of the Tribunal is not specifically mentioned in our Rules.[2] Counsel have considered that the issue falls within the scope of Rule 90 and should be considered a preliminary motion challenging jurisdiction. A decision on such a motion is appealable as of right, pursuant to Rule 90(B)(i). However, in the Impugned Decision, the Trial Chamber has rejected counsel's assertion. Counsel have appealed the findings of the Trial Chamber, considering that their appeals were based on Rule 90(B)(i). The matter brought before the Appeals Chamber is whether the challenges to legality fall within the scope of a motion challenging jurisdiction.

[1] *See* Rule 126(A).
[2] Our Rules of Procedure and Evidence allow parties to bring two types of appeals before the Appeals Chamber: (i) appeals as of right; and (ii) certified appeals. Certification is contemplated in Rule 126 and Rule 90(B)(ii) for preliminary motions other than those challenging jurisdiction. Appeals of right are otherwise addressed in specific rules.

4. In determining whether a particular matter is jurisdictional in nature, other international tribunals have given straightforward answers based on their Rules. These answers have determined whether the appeal lodged before them was admissible or not.[3] Should this approach be followed in the present case, our Chamber would be required to give a definitive answer to the question of whether a challenge to the legality of the Tribunal is comprised within the challenges listed under the Rules. As a consequence, the appeals would be dismissed outright or, alternatively, we would address the merits.

5. In the present case, counsel dispute the Trial Chamber's assertion that legality is not encompassed in jurisdiction. In counsel's view, our Tribunal has no jurisdiction to try the Appellants because it was illegally established. Legality as such becomes a fundamental question of merit, as it not only relates to the admissibility of the appeals before our Chamber but also to the admissibility of the motions before the Trial Chamber. If the Tribunal cannot review the legality of its own establishment, logically, counsel cannot procedurally raise this challenge.

6. Thus, a question which is intrinsically linked to the merits impacts the admissibility of the appeals before our Chamber. This problem, in my view, does not have a clear answer in our Rules. Construction of the Rules is thus required. Rule 3 of the Rules provides:

> (A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.
>
> (B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstance then under consideration.

These provisions offer avenues to facilitate the construction of all other Rules. In my opinion, the first three avenues of interpretation do not provide a clear and explicit solution to the issue

[3] *See* ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR72.2, Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009, paras 11-12.

before us. Consequently, the most relevant avenue to be explored is Lebanese law and the way in which it would address the matter.

7. Under Lebanese law, in the absence of clear language to the contrary, the admissibility of an appeal is determined by the nature of the dispute brought before the court. The decision of the court of first instance does not preclude a party from bringing forward an appeal, when that party disputes the characterization given by the lower court.[4] In the present case, the dispute relates to the question of whether or not the challenge made to the legality of the Tribunal is jurisdictional in nature. It follows that, if we interpret our Rules in the light of Lebanese law, as directed by one of the prongs listed in Rule 3, the appeals must be admitted on the basis of Rule 90(B)(i) to allow us to discuss, in the merits, whether legality is encompassed under jurisdiction. In addition, this interpretation is also the most favourable to the accused as it allows us to admit all three appeals.

8. On this basis, the three appeals of Messrs Ayyash, Badreddine and Oneissi are, in my view, admissible at this stage.

II. Merits

9. First, the issue of whether a challenge to legality is jurisdictional in nature must be addressed. To that extent, I agree with the views advanced by my colleagues in paragraphs 12 to 16 of this Decision. For reasons that follow, I consider that a challenge to legality does not fall within the ambit of jurisdiction. This is a direct consequence of the distinctive nature of the two concepts and of the clear limitative wording of Rule 90(E).

[4] This is a general principle under Lebanese law. A concrete application of this principle appears in both the Lebanese Code of Criminal Procedure and the Lebanese Code of Civil Procedure (applicable to criminal proceedings pursuant to its Article 6). Pursuant to Article 303 of the Lebanese Code of Criminal Procedure, the prosecution is allowed to appeal "on points of law" (*pourvoi en cassation*) before the Court of Cassation a decision by the Court of Appeal, whereby the latter considered the crime committed to be a petty offence, and the prosecution considers it to be a misdemeanour. This is an exception to the principle that "appeals on points of law" cannot be brought before the Court of Cassation in matters of petty offences. In other words, the basis on which the decision can be appealed is determined by the grounds submitted by the party and not by the characterization given by the lower court. Articles 62 and 640 of the Lebanese Code of Civil Procedure are also an application of this general principle: the right to appeal in civil procedures in Lebanon is determined by the value of the dispute. If a lower court decides that the value is less than what is appealable by law, but the party disagrees with this finding, the matter remains appealable, i.e. the grounds submitted by the party determine whether the appeal is admissible or not. *See* Ahmad Abou el Wafa, *Ousoul al mouhakamat al madaniya* [Civil Procedure], 4th edition, 1989 p. 288. *See also*: arts 4 and 536 of the French Code of Civil Procedure referring to the same principle.

10. The question of whether Resolution 1757 was legal is an evaluation of the instrument that created the Tribunal. On the other hand, jurisdiction relates to the ability of a court to hear a certain matter.[5] In addressing the jurisdiction of a court, there is an underlying assumption that this court was legally constituted.[6] The result of an illegal constitutive instrument is that a court's decisions are invalid and the court must be considered to be non-existent. In contrast, a challenge to a court's jurisdiction, if successful, will only limit the scope of its powers. As a result, questions of jurisdiction and legality are not similar and one cannot be subsumed in the other. This justifies the narrow scope and limitative nature of Rule 90(E).

11. However, if it is not jurisdictional, can a challenge to legality be considered to be a different kind of preliminary motion subject to our authority? To answer that question, we must turn to the instrument that has established this Tribunal. I concur with the views adopted in the Decision. We are constituted by Security Council Resolution 1757 (2007) and we have no power to review the actions of the Security Council to that end.

12. I add the following: in my view, and for reasons that follow, Security Council resolutions enjoy a presumption of legality.

13. As noted in paragraph 37 of the Decision, the Security Council can make determinations as to the existence of a threat to international peace and security, but only to the extent that it is in conformity with the Purposes and Principles of the United Nations.[7] As such, they are the legal boundaries for the Council's discretion.

14. In turn, the resolutions of the Security Council are presumed legal, i.e. in conformity with the Purposes and Principles of the United Nations Charter, and indeed with the Charter as a whole, because of the following considerations:

(i) An overarching commitment to justice and international law: Article 1(1) of the Charter defining the Purposes of the United Nations indicates that member states of

[5] G. Stefani, G. Levasseur et B. Bouloc, *Procédure pénale*, Dalloz, 16ème édition, 1996, p. 403, para. 395.
[6] United States, Court of Appeals of North Carolina, *Pinner v Pinner*, 234 S.E.2d 633 (1977): "Jurisdiction is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties."
[7] *See* Arts 1 and 2 of the UN Charter.

the United Nations express their commitment to the principles of justice and international law when maintaining peace and security.[8]

(ii) A body mandated by law to take actions: Under Article 24 of the Charter, the member States of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf," i.e. the Security Council is the appropriate body, as determined by the Charter, to undertake actions aimed at maintaining international peace and security.[9]

(iii) The need to ensure a "prompt and effective action"[10]: This requirement results from the urgency that sometimes characterizes the actions of the Council. Questioning these actions defeats the purpose of promptness and effectiveness.

(iv) An internal system of checks: The Security Council is a politically heterogeneous body. Fifteen different sovereign states, with different political wills, are represented. The voting process, with a requirement of nine votes and the existence of veto powers, is very strict. Thus, the composition and voting regime of the Council ensure that its decisions may be presumed legal.

15. This presumption of legality of the Security Council resolutions may in theory appear rebuttable, i.e. compliance of the Security Council's actions with the Purposes and Principles of the Charter can be verified. However, in practice, a review of such actions is not possible. For one, there is no mechanism that would vest authorization in any institution to do so. Moreover, any review would encounter various obstacles such as the impossibility of assessing the appropriateness of the Council's actions and the fact that such a review might hamper these

[8] The International Court of Justice has held that "[...] when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization", *see* ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, 20 July 1962, I.C.J. Reports 1962, p. 168.

[9] *See also Tadić* Appeal Decision, para. 44:

> It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. [...] the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

[10] *See* Art. 24 of the UN Charter.

actions. The same applies to the Security Council's decision regarding the measures it applies once it has found that such a threat exists.

16. In sum, the actions of the Security Council benefit from a presumption of legality, which may appear to be rebuttable, but in practice is not. For this reason and those mentioned in the Decision, I concur with the majority's view that any review of the Security Council's actions by the Tribunal is therefore impossible.

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

Dated 24 October 2012,
Leidschendam, the Netherlands

Judge Ralph Riachy