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

THE APPEALS CHAMBER

Case No: **STL-18-10/MISC.2/AC**

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

Registrar: **Mr Daryl Mundis**

Date: **13 December 2019**

Original language: **English**

Classification: **Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH

DECISION ON "APPEAL AGAINST DECISION OF PRESIDENT CONVENING TRIAL CHAMBER II"

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Ms Dorothée Le Fraper du Hellen

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I. INTRODUCTION

1. The Appeals Chamber is seized with an appeal filed by Judge David Re, Presiding Judge of the first Trial Chamber of the Special Tribunal for Lebanon ("Tribunal"),[1] against an order of the President convening a second Trial Chamber.[2]

2. The Appeals Chamber is equally divided on the issue of whether it possesses jurisdiction to hear the Appeal. Consequently, the President's Order is affirmed and the Appeal is dismissed.

II. BACKGROUND

3. On 8 September 2011, the then President of the Tribunal Antonio Cassese convened the first Trial Chamber of the Tribunal.[3] That Trial Chamber is currently deliberating following the completion of the presentation of the case of *Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi and Assad Hassan Sabra* (*"Ayyash et al."*), Case No. STL-11-01.

4. Following the confirmation of a new indictment in the separate case of *Prosecutor v. Ayyash*, Case No. STL-18-10,[4] the Pre-Trial Judge issued, on 20 June 2019, a warrant of arrest for Mr Ayyash—including a transfer and detention request—directed to the Lebanese authorities,[5] and an international arrest warrant directed to all States.[6] Following unsuccessful attempts to effect personal service on Mr Ayyash, the President issued, on 24 September 2019, an order pursuant to Rule 76 (E) of the Tribunal's Rules of Procedure and Evidence

[1] STL, *Prosecutor v. Ayyash*, STL-18-10/I, F0001, Appeal Against Decision of President Convening Trial Chamber II, 26 November 2019 ("Appeal").
[2] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0056, Order Convening Trial Chamber II, 6 November 2019 ("President's Order").
[3] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PRES, F0044, Order on Composition of the Trial Chamber, 8 September 2011.
[4] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0003, *Version publique expurgée de la « Décision relative à l'examen de l'acte d'accusation du 14 décembre 2018 établi à l'encontre de M. Salim Jamil Ayyash » datée du 15 mai 2019*, 16 September 2019 ; STL, *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0015, Public Redacted Version of the "Decision on the 14 June 2019 Version of the Indictment and the Documents Filed Pursuant to the Decision of 15 May 2019", Dated 19 June 2019, 16 September 2019.
[5] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0017, Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Request, 20 June 2019.
[6] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0018, International Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Request, 20 June 2019.

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("Rules"), which set in motion the process of public advertisement of the indictment in the case of *Prosecutor v. Ayyash*.[7]

5. Following the confirmation of the indictment in the case of *Prosecutor v. Ayyash*, the United Nations ("UN") Secretary-General appointed Judge Bednarek as a Judge of the second Trial Chamber of the Tribunal ("Trial Chamber II") on an *ad hoc* basis until any proceedings assigned to Trial Chamber II reach the trial phase. The UN Secretary-General also appointed Judges Walid Akoum and Nicola Lettieri as Judges of Trial Chamber II, in addition to their current appointments as Alternate Judges of the first Trial Chamber seized of the *Ayyash et al.* case.[8]

6. On 6 November 2019, the President issued the Order Convening Trial Chamber II, comprising Judges Walid Akoum, Nicola Lettieri, and Anna Bednarek.[9] On 19 November 2019, the Pre-Trial Judge issued an order pursuant to Rule 105 *bis* (A) of the Rules seizing Trial Chamber II with the determination of whether to initiate proceedings *in absentia* against Mr Ayyash in Case No. STL-18-10.[10] Trial Chamber II scheduled a hearing on 13 December 2019 to hear submissions in relation to this determination pursuant to Rule 106 (A) of the Rules.[11]

7. On 25 November 2019, Judge Re filed an application before the President to revoke her Order.[12] The President dismissed the application on 29 November 2019 as inadmissible and frivolous, holding that "[n]o provision of the Agreement, Statute or Rules foresees any possibility of any third party challenging administrative orders of the President ."[13]

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[7] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0039, Order Pursuant to Rule 76 (E), 24 September 2019.
[8] President's Order, para. 4.
[9] President's Order.
[10] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0061, *Ordonnance de saisine de la Chambre de première instance II conformément à l'article 105* bis *a) du Règlement afin de statuer sur l'engagement d'une procédure par défaut*, 19 November 2019.
[11] STL, *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0068, Scheduling Order in Respect of Rule 106 of the Rules of Procedure and Evidence, 2 December 2019.
[12] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.1/PRES, F0001, Urgent Application to Revoke Order Convening Trial Chamber II, 25 November 2019.
[13] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.1/PRES, F0003, Decision on "Urgent Application to Revoke Order Convening Trial Chamber II", 29 November 2019, para. 12.

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8. On 26 November 2019, Judge Re filed the present Appeal before the Appeals Chamber seeking, *inter alia*, for the President's Order to be revoked and declared void.[14] On 2 December 2019, he filed further submissions in relation to his Appeal.[15]

9. On 29 November 2019, the Prosecutor, the Head of the Defence Office and the Registrar informed the Appeals Chamber that they did not wish to make observations in relation to the Appeal.[16]

III. DISCUSSION

A. Composition of the Appeals Chamber

10. The President submitted an Internal Memorandum in which she sought to "recuse" herself from sitting on the appeal on the basis that it relates to an order she issued in her capacity as President.[17] In light of the content of the Internal Memorandum, the Vice-President, acting under Rule 25 (F) of the Rules, treated the matter as a request for excusal under Rule 25 (B) of the Rules and designated a panel of three Judges to rule on her excusal ("Panel").[18] On 4 December 2019, the Panel granted the President's request to be excused from sitting on the appeal.[19]

11. According to the Statute of the Tribunal, the Appeals Chamber is composed of five Judges, including the President.[20] Following the excusal of the President, the Appeals Chamber is now composed of four Judges. There is no provision in the Statute for alternate Judges to sit on the Appeals Chamber.[21] Furthermore, the Statute does not provide for the

[14] Appeal, p. 8.
[15] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/AC, F0004, Further Submissions Relevant to Appeal against Decision of President Convening Trial Chamber II, 2 December 2019.
[16] E-mails to Senior Legal Officer of the Appeals Chamber, 29 November 2019 (with the Office of the Defence, the Office of the Prosecution and the Office of the Registrar, respectively, in copy).
[17] STL, *Prosecutor v. Salim Jamil Ayyash,* STL-18-10/MISC.2/AC, F0003, Internal Memorandum from the President, 27 November 2019, para. 2.
[18] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/PRES, F0002, Order Designating Panel Pursuant to Rule 25 (B), 28 November 2019.
[19] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/OTH/R25, F0005, Decision on Excusal of President Hrdličková, 4 December 2019.
[20] Art. 8 (1) (c) STL St.
[21] STL, *In the matter of El Sayed*, CH-AC-2010-01, F0025, Decision on the Application to Challenge the Order of the President of the Appeals Chamber to Stay the Order of the Pre-Trial Judge and to Call upon Amicus Curiae, 8 November 2010, para. 17.

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appointment of a Judge from another Chamber to serve on the Appeals Chamber to hear the Appeal.[22]

12. The Appeals Chamber previously held that the principle of necessity required the remaining four Judges to exercise the functions of the Appeals Chamber.[23] We will not depart from this course of action in this Appeal.

B. Jurisdiction of the Appeals Chamber

13. Before having regard to the merits of the Appeal, the Appeals Chamber must first determine, as a preliminary matter, whether it has jurisdiction to hear the Appeal.

14. Judges Riachy and Chamseddine consider that the Appeals Chamber lacks the jurisdiction to hear the Appeal. Their reasons are set out in their Joint Opinion, which forms an integral part of the decision of the Appeals Chamber. Judges Baragwanath and Nsereko take the opposite view and consider that the Appeals Chamber has jurisdiction to hear the Appeal. Their reasons are set out in their respective Opinions, which also form an integral part of the decision of the Appeals Chamber.

15. Consequently, the four Judges who compose the Appeals Chamber for the determination of this Appeal are equally divided in relation to the question of whether the Appeals Chamber possesses the jurisdiction to hear this Appeal.

C. Equal division of the Appeals Chamber

16. Article 23 of the Statute and Rule 188 (B) of the Rules require that a judgment of the Appeals Chamber be rendered by a majority of the Judges of the Appeals Chamber. Neither the Statute nor the Rules expressly contemplates circumstances in which the Judges of the Appeals Chamber are equally divided on a matter requiring determination in order to dispose

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[22] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1178, Decision on Application by Counsel for Messrs Badreddine and Oneissi against President's Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013 ("Composition Appeal Decision"), para. 8.

[23] STL, *In the matter of El Sayed*, CH-AC-2010-01, F0025, Decision on the Application to Challenge the Order of the President of the Appeals Chamber to Stay the Order of the Pre-Trial Judge and to Call upon Amicus Curiae, 8 November 2010, paras 14-15 (*referring to* Grant HAMMOND, *Judicial Recusal, Principles, Process and Problems*, 1st ed. (Hart Publishing 2009), in which, based on the principle of necessity, the author asserts on page 99 that "*[...] there cannot be a litigation system in which it is impossible to litigate a given case*". He then states that: "*Whether the rule of necessity can be resorted to in final courts depends very much on the structural arrangements of that court [...]*" (see p. 99)); Composition Appeal Decision, para. 8; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.10, F0013, Decision on Interlocutory Appeal Against the Trial Chamber's Decision Regarding the Conditions of Assignment of Defence Expert Consultant, 3 May 2016, para .12.

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of an appeal. Such a circumstance could not occur with the usual composition of the Appeals Chamber comprising five Judges. Moreover, the Appeals Chamber has not previously faced a situation in which it was equally divided on an issue affecting the disposition of an appeal.

17. It does not appear that an Appeals Chamber of any other international criminal court or tribunal has found itself equally divided on an issue affecting the disposition of an appeal. International judicial institutions apply different procedures, by virtue of their own legal regime, to deal with the occurrence, or the potential occurrence, of an equally divided court.

18. The Judges of the International Court of Justice have been equally divided in the determination of a case on numerous occasions.[24] In such circumstances, the Statute of that Court expressly provides for the President or the Judge who acts in his place to use a casting vote.[25]

19. The Court of Justice of the European Union has adopted a mechanism according to which, where there is an even number of Judges participating in deliberations, the most junior Judge shall generally abstain from taking part in the deliberations.[26]

20. Certain domestic jurisdictions have adopted legislation to deal with situations in which Judges are equally divided on an issue which would affect a court's disposition. In Lebanon, legislation provides for the use of a casting vote in certain very limited circumstances. For example, the President of the *Assemblée Plénière de la Cour de Cassation* possesses the casting vote in case of an equally divided court.[27] In France, the President of the *Conseil constitutionnel* possesses a casting vote.[28] In the United Kingdom, provision is made for a case to be re-heard in the criminal division of the Court of Appeal when it had been heard by an equal number of Judges who fail to reach a majority determination.[29]

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[24] *See for example*, ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 856, para. 59(1); ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 139, para. 126(1)(b); ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 266, para. 105(2)(E).
[25] Art. 55 (2) ICJ St.
[26] Court of Justice, Rules of Procedure of the Court of Justice, Art. 33; General Court, Rules of Procedure of the General Court, Art. 32. According to these Articles, if the most junior Judge is Judge-Rapporteur, the Judge immediately senior to him shall abstain from taking part in the deliberations.
[27] Lebanon, *Loi sur l'Organisation judiciaire (Décret-Loi 150 du 16 septembre 1983 et ses amendements)*, Art. 30 (*relatif à la composition et au vote de l'Assemblée Plénière de la Cour de Cassation).*
[28] France, Constitution, Art. 56.
[29] United Kingdom, Senior Courts Act 1981, s. 55 (5).

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21. In Australia and New Zealand, the issue of an equally divided court has also been dealt with by legislation.[30] In the United States of America, it is dealt with by case-law.[31] In these jurisdictions, the result of an equally divided appellate court is the affirmation of the impugned decision.

22. In the legal regime of the Special Tribunal for Lebanon, there is no provision for an appeal to be re-heard because of an equally divided court nor for the use of a casting vote by any Judge of the Appeals Chamber. Rather, according to Rule 30 of the Rules, except as otherwise provided in the Rules, "all Judges are equal in the exercise of their judicial functions". As is the case with certain other international courts and tribunals,[32] the Rules of the Tribunal only provide for the use of a casting vote in the event of an equality of votes in relation to decisions taken at a plenary meeting of Judges. [33]

23. The result which must follow from an equally divided Appeals Chamber, within the existing legal regime of the Tribunal, is the affirmation of the impugned decision. The rationale leading to this result is the failure of the appellant to convince the required majority of Judges that the appeal should be upheld.

24. Given that the Appeals Chamber is equally divided on the issue of whether it possesses jurisdiction to hear the Appeal, it cannot proceed to hear the Appeal and the President's Order is affirmed. Accordingly, the Appeal is dismissed.

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[30] In relation to the High Court of Australia, *see* Judiciary Act 1903, Art. 23; in relation to the Supreme Court of New Zealand, *see* Senior Courts Act 2016, s. 85 (2).

[31] *See for example*, United States of America, Supreme Court, *Durant v. Essex Company*, 74 U.S. 107, 1 December 1868; United States of America, Supreme Court, *Neil v. Biggers,* 409 U.S. 188, 6 December 1972. For more recent cases in which the Supreme Court has issued decisions that the lower court decision is "affirmed by an equally divided court" *see*, United States of America, Supreme Court, *Washington v. U.S.*, 584 US __, 11 June 2018; United States of America, Supreme Court, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 23 June 2016, 579 US __.

[32] *See* Rule 27 (B) IRMCT RPE; Rule 26 (C) RSCSL RPE; Rule 41 (4) ICC RPE.

[33] Rule 42 STL RPE. The use of a casting vote in the *Assemblée Plénière de la Cour de Cassation* is exceptional for Lebanese courts. The Tribunal cannot, in application of Rule 3 (A) (iv) of the Rules, apply the casting vote in proceedings before the Appeals Chamber by virtue of the procedure applicable in the *Assemblée Plénière de la Cour de Cassation*.

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IV. DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER;

AFFIRMS the Order of the President Convening Trial Chamber II, and

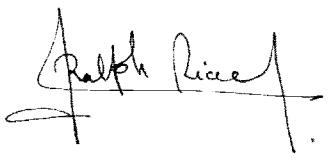
DISMISSES the Appeal.

Judges Riachy and Chamseddine append a Joint Opinion, which forms an integral part of this decision.

Judges Baragwanath and Nsereko append their respective Opinions, which form an integral part of this decision.

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

Dated 13 December 2019
Leidschendam, the Netherlands



Judge Ralph Riachy
Presiding

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JOINT OPINION OF JUDGES RALPH RIACHY AND AFIF CHAMSEDDINE

1. While respecting the views of Judges Baragwanath and Nsereko expressed in their Opinions, we find that the Appeals Chamber lacks jurisdiction to hear the Appeal against the President's Order Convening Trial Chamber II of 6 November 2019 for the following reasons.

I. PRELIMINARY REMARKS

2. Given the unprecedented character of the matter before the Appeals Chamber, we seek to make some preliminary remarks to place our discussion below in proper context.

3. Judge Re termed his challenge to the President's Order an "Appeal". Never before has a Judge of an international criminal tribunal lodged an appeal against an order of the President of that tribunal.[1] Issues of the jurisdiction of the Appeals Chamber to entertain such a novel challenge to an order of the President, as well as the standing of Judge Re to lodge his Appeal, loom large.

[1] There have been at least two other instances when an order of a President of an international court or tribunal has been considered, to at least some extent, by an Appeals Chamber, following action taken by a Judge of that court or tribunal. First, Judge Antonio Cassese, when he was President of the Tribunal, issued an order referring a "*Recours*" against two of his own decisions, taken as President, to the Appeals Chamber (STL, *In the matter of El Sayed,* CH/PRES/2010/04, Order Referring Matter to the Appeals Chamber, 12 October 2010). The Appeals Chamber determined that it had authority to rule on the application challenging the order of President Cassese (STL, *In the matter of El Sayed,* CH-AC-2010-01, F0025, Decision on the Application to Challenge the Order of the President of the Appeals Chamber to Stay the Order of the Pre-Trial Judge and to Call Upon Amicus Curiae, 8 November 2010). However, in that case Judge Cassese did not file an appeal against an order of the President (a position he then held). Rather, he referred the determination of a challenge of his order to the Appeals Chamber. Moreover, the Appeals Chamber treated the referral by President Cassese as a "grant of leave to reconsider [Judge Cassese's order], as provided for by Rule 140 of the Rules" (para. 18). Second, Judge Theodor Meron, then President of the International Residual Mechanism for Criminal Tribunals ("the Mechanism") assigned Judges to the Appeals Chamber of the Mechanism to consider a matter which indirectly touched upon an order Judge Meron had made as President (IRMCT, *Prosecutor v. Karadžić,* MICT-13-55-A, Order Assigning Judges to the Appeals Chamber to Consider a Matter, 17 October 2018). The original order of the President which fell to be considered by the Appeals Chamber had involved Judge Meron, following his own withdrawal from the bench of the Appeals Chamber in *Karadžić*, replacing himself with Judge Ivo Nelson de Caires Batista Rosa by means of an Assignment Order. However, while the Appeals Chamber of the Mechanism mentioned President Meron's order assigning Judge Rosa, its disposition concerned only a motion brought by the Prosecution, indirectly connected to the original order by Judge Meron (IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on Prosecution Motion to Strike Karadžić's Second Motion to Disqualify Judge Theodor Meron, Motion to Disqualify Judge William Sekule, and for Related Orders, 1 November 2018).

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4. In examining these matters, Judge Re's own characterisation of his challenge as an "Appeal", on the same footing as an appeal lodged by a party to the proceedings before the Tribunal, is not determinative.

5. Having taken into consideration the views of Judges Baragwanath and Nsereko, we will discuss the jurisdiction of the Appeals Chamber to hear the challenge of Judge Re. Furthermore, we will adopt, for consistency with the decision of the Appeals Chamber in this matter, the term "Appeal" in reference to the challenge by Judge Re of the President's Order.

II. SCOPE OF THE APPEAL

6. In the Appeal, Judge Re sought relief from the Appeals Chamber in relation to the President's Order.[2] Specifically, he sought a stay of "any ancillary matters relating to implementing the President's decision", a declaration that the President's Order is void in law, and for the President's Order to be revoked.[3] He also sought for the President to be required "to engage in proper consultations […] with the Trial Chamber" and "to consult the Council of Judges".[4]

7. In the Appeal, Judge Re made an allegation that, at a meeting, "the President informed the three Trial Chamber judges that she had *herself* requested that the Secretary-General of the United Nations appoint a second trial chamber".[5] He submitted that this request to the Secretary-General, as well as the President's Order, infringed principles of administrative law[6] and were "wrong in law".[7]

8. However, no request by the President to the Secretary-General to appoint a second Trial Chamber is before the Appeals Chamber in this Appeal. Nor is such a request mentioned in the President's Order. In assessing whether the Appeals Chamber has jurisdiction to hear the Appeal, we cannot take into account the allegation by Judge Re that such a request was made and that it is unlawful. To do so would be to impermissibly enter into the merits of the Appeal.

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[2] Appeal, p. 8.
[3] *Ibid.*
[4] *Ibid*; *see also id.*, para. 26.
[5] *Id.*, para. 11 (emphasis in original).
[6] *Id.*, para. 14.
[7] *Id.*, para. 24.

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9. The only decision that is before the Appeals Chamber and that we will consider in our discussion as to jurisdiction to hear the Appeal is the President's Order. In any event, it is not within the powers of the Appeals Chamber to hear challenges against requests made by the President to the Secretary-General in the exercise of her administrative functions in accordance with the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon ("Agreement"), and the Statute of the Tribunal.

III. JURISDICTION

10. The Appeals Chamber must first determine whether it has jurisdiction to hear the Appeal. The merits of the Appeal should not be considered at this preliminary stage.

11. We recall that the statutory basis for the Appeals Chamber's jurisdiction is contained in Article 26 of the Tribunal's Statute, which reads as follows:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision;
>
> (b) An error of fact that has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

12. The Appeals Chamber also enjoys jurisdiction under Article 27 of the Statute to review a judgment of the Trial Chamber or the Appeals Chamber in certain circumstances. Moreover the Rules provide for the Appeals Chamber to hear interlocutory appeals brought by the parties in certain circumstances.

13. Judge Re considered that "the Appeals Chamber has the jurisdiction to hear [the Appeal]"[8] and invoked the inherent jurisdiction of the Appeals Chamber and the "principles enunciated by the Appeals Chamber in *El-Sayyed* [sic]".[9] He described the task of the Appeals Chamber in the Appeal as "performing judicial review of a quasi-judicial administrative decision".[10]

[8] *Id.*, para. 3.
[9] *Ibid.*
[10] *Ibid.*

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14. Judge Re does not invoke any provision of the Statute or the Rules to found the jurisdiction of the Appeals Chamber to hear the Appeal. It does not appear to be in dispute that neither the Statute nor the Rules expressly endows the Appeals Chamber with jurisdiction to hear an appeal, or any other type of challenge, of an order of the President convening a Trial Chamber of the Tribunal.

15. In his "Decision on Defence Motion for Reconsideration and Rescission of Order Composing the Trial Chamber", former President David Baragwanath found a decision of the President composing a Trial Chamber to be an administrative decision not subject to challenge.[11] On this basis, he rejected a motion by counsel to reconsider an order he issued as President, on 10 September 2013, re-composing the first Trial Chamber following the resignation of its Presiding Judge. In rejecting the motion, he relied on the lack of provision in the Statute and the Rules allowing the parties to challenge actions of the President in the exercise of his administrative functions.[12] He also turned to international jurisprudence which upheld the principle that decisions by a President determining the compositi on of a bench are administrative matters,[13] challenges of which the President has no authority to entertain.[14]

16. Following an "Application Alleging Abuse of Authority against the Order of the President of the Tribunal of 10 September 2013" filed by Defence counsel, the Appeals Chamber concurred with Judge Baragwanath's 2013 Reconsideration Decision and found that "an order of the President composing [...] a bench of the Tribunal is a purely administrative matter and not subject to challenge by the parties".[15]

17. We see no reason in this Appeal to depart from the reasoning adopted by the Appeals Chamber in the Composition Appeal Decision. The underlying reasoning adopted in that decision, according to which an order of the President composing a Trial Chamber is a

[11] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, F1132, Decision on Defence Motion for Reconsideration and Rescission of Order Composing the Trial Chamber, 4 October 2013 ("2013 Reconsideration Decision").
[12] 2013 Reconsideration Decision, para. 13.
[13] *Id.*, para. 14, *referring inter alia to* ICTR, *Prosecutor v. Kanyabashi*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 19; ICTY, *Prosecutor v. Lukić et al*, IT 98-32/1-AR11*bis*.1, Decision on 'Motion to Disqualify President and Vice-President from Appointing Appeals Chamber and to Disqualify President Judge and Judge Meron from Sitting on Appeals Chamber', 4 May 2007, p. 1; ICTY, *Prosecutor v. Delić et al*, IT-96-21-A, Order on the Request to the President on the Composition of the Bench of the Appeals Chamber, 12 February 1999.
[14] 2013 Reconsideration Decision, para. 15.
[15] Composition Appeal Decision, para. 9. The President of the Tribunal has also determined that his "order to re-compose the Trial Chamber was not a judicial decision": 2013 Reconsideration Decision, para. 11.

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"purely administrative matter and not subject to challenge",[16] holds true when considering the Appeal filed by Judge Re. The Appeals Chamber should reaffirm, in the matter at hand, that a decision of the President composing a Trial Chamber, regardless of the identity of the appellant, is not subject to challenge. It is a purely administrative decision.

18. Judge Re has sought to distinguish the Composition Appeal Decision on two bases.[17] First, he argues that in the Composition Appeal Decision "the Appeals Chamber held [...] that the applicants, namely, counsel for the Accused, Mr Mustafa Amine Badreddine and Mr Hussein Hassan Oneissi, had not taken the primary route available to challenge [the impugned decision]".[18] He points out that the "primary route" for the applicants in that case would have been "by challenging the matter directly before the Trial Chamber and, if unsuccessful, seeking to have it certified for interlocutory appeal".[19] As part of his Appeal, Judge Re quoted a passage from the *El Sayed* Decision in which the Appeals Chamber held that it may exercise its inherent jurisdiction "in particular [...] when no other court has the power to pronounce on [...] incidental legal issues".[20]

19. Judge Re has failed to develop his first argument in favour of distinguishing the Composition Appeal Decision. If his submission is that, unlike the applicants in that case, he does not have another "route" through which to challenge the President's Order, this would not in itself render the Order open to appeal. The unavailability of another form of recourse for an appellant is not sufficient to render a decision appealable. Rather, the absence of an alternative form of recourse will be one aspect for the consideration of the Appeals Chamber in determining whether it may exercise its inherent powers and consider an appeal outside the scope of the Statute and the Rules.[21]

20. In the *El Sayed* Decision, the Appeals Chamber recognised that international courts, including this Tribunal, may have to exercise inherent jurisdiction to an extent larger than any

[16] Composition Appeal Decision, para. 9.
[17] Appeal, para. 4.
[18] *Ibid.*
[19] *Ibid.*
[20] STL, *In the matter of El Sayed,* CH/AC/2010/02, F0026, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 ("*El Sayed* Decision"), para. 45, *referred to* in Appeal, para. 2.
[21] *See* Composition Appeal Decision, para. 11, in which the Appeals Chamber held, referring to the *El Sayed* Decision, para. 54, that any consideration of appeals or other applications outside the scope of the Rules would be only in exceptional circumstances.

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domestic court.[22] We defined "inherent jurisdiction" as "the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction".[23] The primary jurisdiction of the Tribunal is provided for by Article 1 of the Statute and comprises jurisdiction "over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons". The primary jurisdiction of the Tribunal, as defined in Article 1, also comprises other attacks that occurred in Lebanon in certain circumstances set out therein.

21. While the inherent jurisdiction of the Tribunal was broadly defined in the *El Sayed* Decision, it was not unlimited. In the *El Sayed* Decision, we recognised that inherent jurisdiction can be exercised "only to the extent that it renders possible the full exercise of the court's primary jurisdiction [...] or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice".[24] The Appeal, however, bears merely a tangential link with the matters falling under the primary jurisdiction of the Tribunal. It in no way concerns the "interests of fair justice" in the proceedings before the Tribunal.

22. In the *El Sayed* Decision, the Appeals Chamber stated that it possesses limited inherent jurisdiction to consider an appeal "where a situation has arisen that was not foreseen by the Rules, and it is alleged that [...] injustice may result if such an error as is alleged were left uncorrected".[25] In the Composition Appeal Decision, we specified that the authority of the Appeals Chamber to entertain appeals outside of the Rules must remain exceptional and that "any exercise of inherent jurisdiction would have to address a lacuna in our legal regime".[26]

23. In this instance, there is no lacuna in the legal regime of the Tribunal. Rather, the Agreement between the UN and Lebanon, the Statute and the Rules explicitly contemplate situations in which the President may convene a second Trial Chamber and do not provide for

[22] *El Sayed* Decision, para. 44.
[23] *Id.*, para. 45.
[24] *Id.*, para. 48.
[25] *Id.*, para. 54.
[26] Composition Appeal Decision, para. 11.

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such a decision to be challenged.[27] We recall that "there can be no right of appeal if it was the express intention of the drafters to exclude it".[28]

24. Judge Re also relied on a passage from the *El Sayed* Decision in which the Appeals Chamber held, *inter alia*, that:

> inherent jurisdiction is [...] ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.[29]

In connection with this passage, he insisted that "[t]he Trial Chamber was affected by the President's decision, taken without consultation with its judges [and] I am one of the three judges of that chamber".[30]

25. Judge Re did not identify what rights he holds which may have been negatively impacted by the President's Order. His situation stands in stark contrast to that of Mr El Sayed, whose case the Appeals Chamber was contemplating when it made the above comment. Mr El Sayed was detained for almost four years by the Lebanese authorities in connection with a case now before the Tribunal and was seeking access to evidence held by

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[27] Article 2 (2) of the Agreement provides that:

> The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

Article 17 (b) of the Agreement provides that:

> Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

Article 10 (1) STL St. establishes that:

> The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

Rule 32 (B) STL RPE states that:

> [The President] shall coordinate the work of the Chambers and be responsible for the effective functioning of the Tribunal and the good administration of justice.

[28] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("2013 Decision on Appeal by LRV"), para. 11.
[29] *El Sayed* Decision, para. 45, *referred to* in Appeal, para. 2.
[30] Appeal, para. 3.

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the Tribunal in order to pursue civil remedies for his detention.[31] In this Appeal, we cannot determine that Judge Re has suffered damage to a right as a result of the President's Order.

26. Second, Judge Re seeks to distinguish the Composition Appeal Decision on the basis that the President's Order "concerns the *creation* of a second Trial Chamber, as opposed to its composition".[32] The distinction is misconstrued. In the Order of 6 November 2019, the President "convene[d] Trial Chamber II", having noted "the Secretary-General's appointment of Judges Akoum, Lettieri and Bednarek to a second Trial Chamber".[33] The judges of Trial Chamber II had all previously been "appointed by the Secretary-General" as per Article 9 (3) of the Statute, and were only convened by the President's Order to perform their duties when required.

27. Other international tribunals have recognised very limited circumstances in which an administrative decision of a President may be challenged before an Appeals Chamber. In such cases, jurisdiction to review was only established when the challenges related to "the fairness of proceedings".[34] "Fairness of proceedings" refers to fair trial rights of the parties to the proceedings, including respect for the principle of equality of arms and the right to effective participation in the proceedings.[35] This limited exception does not apply in the circumstances of this matter because the President's Order convening a second Trial Chamber does not impact on the fairness of proceedings. In any event, any issue of fairness

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[31] *See El Sayed* Decision, paras 60, 63.
[32] Appeal, para. 4 (emphasis in original).
[33] STL, *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0056, Order Convening Trial Chamber II, 6 November 2019, p. 3.
[34] Composition Appeal Decision, para. 12, *citing* ICTR, *Nahimana et al.* v. *Prosecutor,* ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 9. *See also* IRMCT, *Prosecutor v. Karadžić*, MICT-13-55, Decision on Motion for Disqualification and Motion Challenging Jurisdiction, 28 October 2019, para. 11; IRMCT, *Prosecutor v. Mladić,* MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, 4 December 2018, paras 12-16 (in which case the Appeals Chamber determined that it could assert jurisdiction over matters raising issues related to the proper functioning of the Mechanism, but only when the litigation raised questions as to the Mechanism's jurisdiction and fairness of proceedings, or when it was apparent that the litigation impacted clearly defined rights of a party, victim and/or witness); ICTR, *In Re. Ntagerura,* ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, paras 12-13.
[35] *See* ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), Updated on 31 August 2019. *See also* ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, para. 38; Situation in Uganda, ICC-02/04-01/05-90-US-Exp, Decision on Prosecutor's Applications for Leave to Appeal dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006, 10 July 2006, para. 24.

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of proceedings related to the composition of a Trial Chamber is a matter for the parties to those proceedings, and not a Judge in a separate case, to raise.

28. In sum, the Order of the President convening Trial Chamber II was a purely administrative decision not open to challenge before the Appeals Chamber. In our view, the Appeals Chamber lacks jurisdiction to hear the Appeal and the Appeal must therefore be dismissed.

IV. STANDING

29. Having found that the Appeals Chamber lacks jurisdiction to hea r the Appeal, it is not necessary to examine Judge Re's standing to lodge the Appeal. The Appeal could be dismissed on the basis of lack of jurisdiction alone. Nevertheless, we seek to emphasise that no provision in the Statute and the Rules grants Judges of the Tribunal standing to challenge orders of the President. Moreover, while Judge Re argues that he possesses the necessary standing to bring the Appeal pursuant to the principles enunciated in the *El Sayed* Decision,[36] in our view these principles have no application in the present Appeal. Judge Re is not a participant in the proceedings in *Prosecutor v. Ayyash*, Case No. STL-18-10. Furthermore, Judge Re has failed to identify what rights he holds which may have been negatively impacted by the President's Order. There is consequently no corresponding right to seek relief for a wrong caused by that Order.[37] To conclude, Judge Re's lack of standing to lodge the Appeal is an alternative basis on which this Appeal should be dismissed.

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

Dated 13 December 2019
Leidschendam, the Netherlands

Judge Ralph Riachy

Judge Afif Chamseddine

[36] Appeal, para. 3.
[37] *See El Sayed* Decision, paras. 60, 63.

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OPINION OF JUDGE DAVID BARAGWANATH

I. INTRODUCTION

1. The Presiding Judge of the Trial Chamber of this Tribunal appeals against a decision of the President of the Tribunal convening a second Trial Chamber comprising three members, including the two alternate judges of the Trial Chamber and a further judge, but excluding the three members of the Trial Chamber.[1] The President, who normally chairs the Appeals Chamber, has appropriately recognized she is therefore disqualified from sitting on the Appeal, which must be determined by the other four members of this Chamber. [2]

2. Two members of this Chamber, Vice-President Riachy and Judge Chamseddine, are of opinion that it lacks jurisdiction to entertain the Appeal. They describe the present Appeal as unprecedented, emphasising that never before has a Judge of an international criminal tribunal lodged an appeal against an order of the President of that Tribunal.[3] They propose of their own initiative to dismiss it without further procedure. Judge Nsereko and I are of the contrary opinion, reasoning that all of us must comply with the law. Since there is no

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[1] Appeal.

[2] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/AC, F0003, Internal Memorandum – Appeal against Decision of President Convening Trial Chamber II, 2 December 2019; STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/OTH/R25, F0005, Decision on Excusal of President Hrdličkovà, 4 December 2019.

[3] As to the "Scope of the Appeal", the Joint Opinion states:

> 8. [N]o request by the President to the Secretary-General to appoint a second Trial Chamber is before the Appeals Chamber in this appeal. Nor is such request mentioned in the President's Order. In assessing whether the Appeals Chamber has jurisdiction in the Appeal, we cannot take into account the allegation by Judge Re that such a request was made and that it is unlawful. To do so would be to impermissibly enter into the merits of the Appeal.
>
> 9. The only decision that is before the Appeals Chamber and that we will consider in our discussion as to jurisdiction to hear the Appeal is the President's Order. In all events, it is not within the powers of the Appeals Chamber to hear challenges against requests made by the President to the Secretary General in exercising her administrative functions in accordance with the Agreement between the United Nations and Lebanon and the Statute.

The recognition by the Joint Opinion of "the allegation by Judge Re that such a request was made and that it is unlawful" refers to his pleading at para. 11 of the Appeal recounting the meeting of 5 November 2019, which adds that "the President informed the three Trial Chamber judges that she had *herself* requested that the Secretary-General of the United Nations appoint a second trial chamber" because "they 'lacked the capacity' to deal with a possible pre-trial motion […]".
Such pleading in my respectful opinion clearly placed the allegation before this Chamber. Certainly it was not on oath. But the appropriate occasion for filing affidavits as to what was said at the meeting, which para. 11 of the Appeal pleads, was attended by the Registrar as well as the President and the three Trial Chamber judges, is not in my opinion, at the stage of filing the Appeal which originates the proceeding. They would be filed only with leave of this Chamber, given as part of the directions given by the Appeals Chamber at a subsequent procedural conference. Such conference should now be convened to deal with that and other procedural matters, including – importantly – the notification to the Secretary-General of the Appeal so he can decide whether to participate.

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majority in favour of our exercising jurisdiction, the Appeal will be dismissed. But it remains my responsibility to advise the reasons for my opinion.

3. The issues for determination are:

> Does this Chamber possess, and if so should it exercise, what the cases term "inherent jurisdiction" to consider whether the President of the Special Tribunal for Lebanon has complied with the law, first when allegedly advising the Secretary-General to authorize, and then in giving effect to, the creation of a second Trial Chamber?

4. We have no express authority from the Statute constituting this Tribunal to deal with such a case. But the international criminal tribunals, including this Special Tribunal, have found it necessary in order to ensure their statutory functions are properly performed, to exercise "inherent" or implied authority, or "jurisdiction". The essential question for this Appeal is how it is to be characterised. Does it raise issues of a kind and of sufficient importance to warrant the intervention of this Chamber?

5. Constituting legislation of the Tribunal contemplates its application of the highest standards of international criminal justice/procedure. In my opinion this Chamber, as the senior court of the Tribunal, must exercise its inherent authority (its "jurisdiction") to allow consideration of the merits of this case.

Summary of reasons

6. My reasons are in summary:

The facts

(1) the Tribunal has received by Resolution of the Security Council responsibility to try certain major Lebanese criminal cases considered to require resources beyond Lebanon's capacity;

(2) such trials are to be conducted by the Trial Chamber of the Tribunal;

(3) a second Trial Chamber may be created if the Secretary-General of the United Nations or the President of this Tribunal so requests;

(4) the President shall consult the other members of the Council of Judges on all major questions relating to the functioning of the Tribunal;

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(5) the President allegedly requested the Secretary-General to appoint a second Trial Chamber to try a second indictment, not including the three judges of the Trial Chamber which is finalizing its decision in its first case, because they lacked the capacity to deal with an interlocutory issue relating to the second indictment;

(6) the Appeal alleges that such judges in fact had the capacity to deal with such issue;

(7) it is alleged the President did not consult the other members of the Council of Judges in relation to her request to the Secretary-General;

(8) the Secretary-General appointed a second Trial Chamber not including the three judges of the Trial Chamber, who are finalizing the decision, but including its two alternate judges, who are required to be present at every stage of a trial and to be present, but shall not vote, during any deliberations;

(9) the Presiding Judge of the Trial Chamber has challenged on appeal two decisions taken by the President: first, her alleged request to the Secretary-General to create the second Trial Chamber without consulting the Council of Judges, of which he is a member; and second, her order convening the second Trial Chamber following the Secretary-General's appointments;

(10) he seeks a declaration that the President's order convening Trial Chamber II, made following appointments to it by the Secretary-General following her request, is void in law.

7. The Appellant's basic concern is that the Secretary-General received from the President incorrect information – that he and two colleagues lacked the capacity to deal with an interlocutory issue relating to the second indictment – and thus they were wrongly assumed by the Secretary-General to be ineligible to handle the new indictment.

8. I am of the view that the duty of the President under Rule 37 (B) of the Rules to "consult the Council of Judges on all major questions relating to the functioning of the Tribunal" arguably embraces proposals to:

(1) give the Secretary-General advice as to the capacity of the Trial Chamber to handle a new indictment; and

(2) both create a second Trial Chamber and select its membership.

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9. Whether:

(1) the giving of such advice and making of such proposals; and subsequently convening Trial Chamber II warrants exercise of the Appeals Chamber's inherent jurisdiction; and

(2) the judicial appointments made by the Secretary-General of the members of Trial Chamber II are adversely affected by the principle "the fruit of the poisoned tree"

are in my view of sufficient moment to justify this Chamber's:

- giving notice to the Secretary-General of the Appeal;
- making interlocutory orders to factually confirm or correct the allegations contained in the Appeal and seek response to it from the President.

10. Accordingly, the Appeal by the Presiding Judge of the first Trial Chamber in respect of such advice and decision should not be struck out at this threshold stage. Its determination should follow the conventional procedural steps required to ensure due process.

11. A facet of due process requires recording that the following observations of law and fact, on which the Summary is based, are made by way of interim evaluation which should, if necessary, be reviewed following receipt of relevant evidence and submissions.

II. BACKGROUND

A. Context of the appeal

12. The Special Tribunal for Lebanon was established by Resolution 1757 (2007) of the Security Council.[4] It was created under Chapter VII of the Charter of the United Nations as a tribunal of an international character to try persons alleged to be responsible for certain terrorist crime.[5] The Resolution recites the Council's request for the Secretary-General to negotiate an agreement with the Government of Lebanon "aimed at establishing such a tribunal *based on the highest standards of criminal justice*".[6]

[4] SC Res. 1757, UN Doc. S/RES/1757, 30 May 2007 ("SC Res. 1757").
[5] *Ibid.*
[6] *Id.*, p. 1 (emphasis added).

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13. The Statute of the Special Tribunal created by Resolution 1757 provides for three Chambers of judges: a Pre-Trial Judge; a Trial Chamber; and an Appeals Chamber.[7] In some circumstances, discussed further below, a second Trial Chamber may be established. [8]

14. The express statutory jurisdiction of the Appeals Chamber is two -fold and criminal:

Appellate proceedings

- to hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the grounds of error of law invalidating the decision, or error of fact that has occasioned a miscarriage of justice;[9]

Review proceedings

- where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and that could have been a decisive factor in reaching a decision, it may consider and determine an application for review of the judgment. [10]

15. Like judges of other international criminal tribunals, the judges of the Special Tribunal have found that the delivery of justice also requires the exercise of inherent jurisdiction.[11] This appeal concerns the scope and application of our inherent jurisdiction and the procedures required to achieve justice.

16. As the Tribunal's first trial, in the case of *Prosecutor v. Ayyash et al.*, Case No. STL-11-01, approaches its conclusion following completion last year of some four and a half years' of evidence, the judgment is being finalized by the judges of the Trial Chamber (Trial Chamber I). They are Judge Re, Presiding, Judges Nosworthy and Braidy, together with the alternate judges, Judge Akoum and Judge Lettieri.

17. On 6 November 2019, the President of the Special Tribunal, Judge Hrdličkova, convened to hear and determine a second indictment - in Case No. STL-118-10 - a differently

[7] Art. 7 STL St.
[8] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Annex to SC Res. 1757 ("Agreement"), Art. 2 (2).
[9] Art. 26 STL St.
[10] Art. 27 STL St.
[11] *El Sayed* Decision, para. 44-49.

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constituted Trial Chamber (Trial Chamber II), to be composed of the two alternate judges of Trial Chamber I together with a new judge, Judge Bednarek.[12]

18. On 26 November 2019, the Presiding Judge of Trial Chamber I, Judge Re, filed this Appeal. It challenges two decisions of the President as infringing principles of administrative law and acting in violation of Rule 37 (B), which requires the President to consult the Tribunal's Council of Judges "on all major questions relating to the functioning of the Tribunal".[13]

19. The Appeal challenges first an alleged decision by the President, on a date unknown, to request the Secretary-General to appoint the three judges to a second Trial Chamber, and secondly, the President's order convening Trial Chamber II.[14]

20. The relief sought urgently by the Appellant is for this Chamber to:

a. stay any ancillary matters relating to implementing the decision of 6 November 2019;

b. declare such order void in law and revoke it;

c. require the President to engage in proper consultations – and in writing – with Trial Chamber I as to its capacity to deal with pre-trial motions in case STL-18-10 while finalizing the draft judgment in case STL-11-01; and

d. require the President to consult the Council of Judges as Rule 37 (B) mandates, after first consulting Trial Chamber I.[15]

B. The legislation

21. The issue of inherent jurisdiction turns on analysis of the legal architecture of this Tribunal, against a background of legal principle. So the relevant legislation is set out in some detail.

22. It begins with the Security Council Resolution, incorporating both an Agreement between the United Nations and Lebanon, and the Statute of the Tribunal.[16] The fourth recital of the Resolution recalls that the Council's request for the Secretary General to negotiate an

[12] President's Order.
[13] Appeal, paras 14-15.
[14] *Ibid.*.
[15] *Id.*, p. 8.
[16] SC Res. 1757.

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agreement with the Government of Lebanon is "aimed at establishing [...] a tribunal based on the highest international standards of criminal justice".[17]

1. The Agreement

23. Article 2 of the Agreement provides (emphases are added):

> **Composition of the Special Tribunal and appointment of judges**
>
> [...]
>
> 2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if [...] the Secretary-General or the President of the Special Tribunal so requests.
>
> [...]
>
> 5. [...] (c) The Government and the Secretary-General shall consult on the appointment of judges;
>
> [...]
>
> 7. *Judges* shall be appointed for a three-year period and *may be eligible for reappointment for a further period* to be determined by the Secretary-General in consultation with the Government.
>
> [...]

24. By Article 17, before taking office judges may be convened on an ad hoc basis to deal with organisational matters and serving, when required, to perform their duties.

2. The Statute of the Tribunal

25. Article 8 of the Statute of the Tribunal created by the Resolution specifies:

> 1. The Chambers shall be composed as follows:
>
> [...]
>
> (b) three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;
>
> [...]
>
> (d) two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

26. Article 9 of the Statute reiterates Article 2(7) of the Agreement :

[17] *Id.*, p. 1.

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3. *The judges* […] *may be eligible for reappointment for a further period* […].

27. Article 10 of the Statute states:

> **Powers of the President of the Special Tribunal**
>
> The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

28. Article 28 of the Statute requires the judges of the Special Tribunal to adopt Rules of Procedure and Evidence:

> 1. […] *for* the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other *appropriate matters* and may amend them, as appropriate.
>
> 2. *In so doing, the judges shall be guided*, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other *reference materials reflecting the highest standards of international criminal procedure*, with a view to ensuring a fair and expeditious trial. (Emphases added)

The Article recalls with greater specificity the fourth recital of the Resolution of the Security Council.

3. The Rules of Procedure and Evidence

29. Relevant Rules are as follows:

> **Rule 27**
>
> **Alternate Judges**
>
> (A) An alternate judge shall be present at every stage of a trial […] to which that Judge has been assigned.
>
> (B) An alternate judge may pose any questions that are necessary to the alternate Judge's understanding of the trial […]
>
> (C) An alternate Judge shall be present, but shall not vote, during any deliberations in a trial […]
>
> (D) In plenary meetings of the Judges, alternate judges have the same rights as the other Judges.

30. Pursuant to Rule 40, such plenary meetings of the Judges:

> (i) adopt and amend the Rules […];
>
> (ii) *decide upon matters relating to the internal functioning of the Chambers and of the Tribunal*; (emphasis added)
>
> (iii) determine and supervise the general conditions of detention; and

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(iv) exercise any other function provided for in the Statute or in the Rules.

31. In indicating the importance of settled procedures for the functioning of both the judges and the Tribunal, the Rule parallels the obligations imposed on the President by further Rules.

32. The functions of the President are set forth in Rule 32, providing in relevant part:

> **Rule 32**
>
> **Functions of the President**
>
> (B) [The President] *shall coordinate the work of the Chambers* and be responsible for the effective functioning of the Tribunal and the good administration of justice. (Emphasis added)

33. The italicised words are additional to those of Article 10 of the Statute.

34. Of central importance is what is provided for by Rule 37:

> **Rule 37**
>
> **Council of Judges**
>
> (A) The Council of Judges shall be composed of the President, the Vice-President, the Presiding Judge of the Trial Chamber and the Pre-Trial Judge.
>
> (B) *The President shall consult the other members of the Council on all major questions relating to the functioning of the Tribunal*. (Emphasis added)
>
> (C) A judge may draw the attention of any member of the Council to issues that the Judge considers ought to be discussed by the Council or submitted to a plenary meeting of the Tribunal.

C. The facts

35. At present we have before us only the allegations contained in the Appeal. The Prosecution, the Defence Office and the Registrar have stated they do not wish to be heard on this Appeal. But fundamental to due process is that, of the persons whose conduct is challenged and the challenger, the Appellant has not yet received leave from this Chamber to put before it evidence in support of the allegations pleaded in his Appeal, and the President has had no opportunity to reply. There has been no consideration of whether and, if so, how the interests of those parties should be assisted or represented or of whether other parties should be notified of the proceedings. I would have preferred that this Chamber adopt the conventional course of directing an early conference to consider these and any other procedural considerations relating to the just and efficient determination of the appeal. But in

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view of the urgency of the case, I will conclude Part III of this interim decision with proposals for procedural orders.

36. The President's Order Convening Trial Chamber II of 6 November 2019 does not record her request to the Secretary-General alleged by the Appellant to precede the events stated in its fourth paragraph:

> The United Nations ("UN") Secretary-General has now appointed Judge Anna Bednarek as a Judge of Trial Chamber II [...] until any proceeding assigned to the second Trial Chamber reach the trial phase. The UN Secretary-General has also appointed Judges Walid Akoum and Nicola Lettieri as Judges of Trial Chamber II, in addition to their current appointment as Alternate Judges to the Trial Chamber which is seized of [...] Case No. STL-11-01.[18]

37. Paragraph seven stated:

> I consider it appropriate to convene the second Trial Chamber for the purposes of hearing any future proceedings before the Trial Chamber in [Case No. STL-18-10].[19]

38. No reasons for the Order are given.

39. According to the Appeal:

> 10. [...] on Tuesday 5 November 2019, [the President] called a meeting with the three Trial Chamber Judges [Judges Re, Nosworthy and Braidy]. In the meeting she informed [them]–in the presence of the Registrar– of her decision to convene Trial Chamber II. Up until that moment, the three Trial Chamber judges were unaware that the President was contemplating this course. Her order, at footnote 4, states that Judges Akoum and Lettieri had already accepted their appointments, on Monday 4 November 2019. This was the day *before* the President informed the three Trial Chamber Judges that she was convening Trial Chamber II.
>
> 11. In the meeting on 5 November 2019, the President informed the three Trial Chamber judges that she had *herself* requested that the Secretary-General of the United Nations appoint a second trial chamber. In response to a question as to 'why' she had done this, the President informed the three Trial Chamber judges that they 'lacked the capacity' to deal with a possible pre-trial motion in relation to a second trial *in absentia* against Mr Ayyash [Case No. STL-18-10], while finalizing the judgement in *Prosecutor v Ayyash, Nerhi, Oneissi and Sabra* [Case No. STL-11-01].
>
> 12. The three Trial Chamber judges pointed out to the President that (a) she had not consulted them about this and (b) saying that they lacked the capacity to deal with a trial *in absentia* motion was inaccurate, as the Trial Chamber did in fact have this capacity.
>
> 13. The President also declined, upon being asked, to inform the three Trial Chamber judges whether she had informed the Secretary-General of these two facts. Both would have been highly material to his decision to make the appointments. She also declined to say whether she had consulted the two alternate judges about the appointment of a second Trial Chamber or

[18] President's Order, para. 4. Judge Bednarek accepted her appointment on 5 November 2019. Judge Akoum and Judge Lettieri accepted their appointments to Trial Chamber II on 4 November 2019.
[19] *Id.*, para. 7.

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> when. However they accepted their appointments on 4 November 2019, and it is obvious that they had been consulted about their anticipated appointments well in advance of that date. [...]
>
> 17. The Trial Chamber has already twice issued decisions on holding trials *in absentia*, [including] that of Mr Hassan Habib Merhi, which the Trial Chamber made on 20 December 2013 while in preparation for the commencement of [Case No. STL-11-01] on 16 January 2014. [...]
>
> 18. Moreover, the judgement in STL-11-01 will be issued far in advance of the referral to a Trial Chamber of the case STL-18-10 for trial [...] And, of further relevance is that the two alternate judges, now assigned [as Trial Judges] to the case of STL-18-10, must also be present at all stages of [the case] STL-11-01, including judgement, and if relevant, sentence.

40. It may arguably be inferred from paragraph 11 of the Appeal that the President gave to the Secretary-General the same reason of "incapacity" for her requesting the creation of Trial Chamber II that she later gave the Trial Chamber judges, and that he accepted and acted upon her advice, thus empowering her to make the challenged Order Convening Trial Chamber of 6 November 2019.

III. DISCUSSION

A. The facts and the law

41. The creation of a new Trial Chamber of the Special Tribunal and appointments to it are events of profound public importance. They concern not only the Prosecution, Defence Office, and authorized Victims, who will participate in the trial, but public confidence in the administration of international criminal justice by this Tribunal, particularly as seen by:

- the people of Lebanon, whose Courts' customary authority over a major criminal trial is to be exercised by that Chamber;
- the international community, represented by the Secretary-General of the United Nations and the Security Council as well as the States Members of the United Nations.

42. The creation of a second Chamber and appointment of its judges go to the character and composition of the Tribunal; so does the preparation for, and accuracy of, any request made to the Secretary-General by the President on the topic.

43. Before adjudicating, this Chamber should have identified the relevant parties and received submissions on both the facts and the law. Yet at this initial stage we have no submissions from counsel or the present parties on what may be a central issue of law:

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whether the appointments made by the Secretary-General of the three members of Trial Chamber II immunize the process of appointment from legal challenge to the President's alleged infringement of Rule 37 (B), to which I next turn.

44. According to *Adages du Droit Français*, there is a principle "*d'ancienne jurisprudence*" "*[j]ura novit curia: La Cour connaît la loi*".[20] Whatever the modern scope of that principle, it cannot fairly be applied to issues where there is serious debate about the nature and application of the law, in particular of principles both of inherent jurisdiction and concerning "the fruit of the poisoned tree" (see paragraph 80 below). Rather, each requires careful submissions on behalf of the competing parties preceding the Chamber's evaluation.

45. Rule 37 (B) may appear to present less difficulty. Verbally a Presidential request for the creation of a second Trial Chamber under Article 2 of the Agreement and an order convening such new Chamber under Article 17 of the Statute concern the basic structure of the Tribunal and so in my view clearly fall within the remit of Rule 37 (B):

> The President shall consult the other members of the Council [of Judges] on all major questions relating to the functioning of the Tribunal.

46. Since any document must be read in context, one also looks to see if there is any limitation to be inferred from other parts of the Special Tribunal's legislative architecture.

47. While Article 2 (5) (c) of the Agreement states that "[t]he Government and the Secretary-General shall consult on the appointment of judges", that says nothing about the role of the President.

48. Article 2 (2) of the Agreement does address that topic:

> […] a second Trial Chamber [is] to be created if […] the Secretary-General or the President of the Special Tribunal so requests.

49. The architecture of the legislation requires that provision to be read in context, and therefore together with the contemporaneously enacted Article 10 of the Statute:

> The President […] shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

50. It is not evident why a request by the President under Article 2 (2) of the Agreement does not fall within her responsibility for the Tribunal's effective functioning and good

[20] Henri Roland and Laurent Boyer, *Adages du Droit Français*, 4th ed. (Litec 1999), p. 363.

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administration of justice. It is surely of greater importance than the "matters relating to the internal functioning of the Chambers" which may be decided upon under Rule 40 (ii).

51. Is Rule 37 (B) valid? Or is it *ultra vires* as imposing constraint upon an unfettered power under Article 2 (2) of the Agreement? That has not been suggested.

52. Analysis of the term "consultation" suggests the former. Rule 37 (B) may be said to emphasize, to give full effect to, the Presidential obligation to "be responsible" for the Tribunal's "effective functioning and the good administration of justice". So read, far from removing from the President the power to make a request for the creation of a second Trial Chamber, it may be seen to support the quality of such request, requiring that it be made properly, in accordance with the carefully drafted and demanding procedures prescribed by the Tribunal's legal architecture.

53. Specifically, "consult" (as used in Rule 32 (B)), is a powerful term that carries legal weight and significance. In the much cited case *Port Louis Corporation v Attorney-General of Mauritius*, Lord Morris outlined the requirements of consultation:

> The [consultees] must know what is proposed; they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties; they must be free to say what they think.[21]

54. And in *R v. Secretary of State for Social Services,* ex parte *Association of Metropolitan Authorities*, Webster J spelled out its implications:

> […] it must go without saying that to achieve consultation sufficient information must be supplied by the consulting party to enable it to tender helpful advice […] [that is] sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party […][22]

55. If, as pleaded by the Appellant, the Secretary-General was misinformed of a "lack of capacity" on behalf of the Trial Chamber judges, it may be contended that these judges were deprived of the opportunity to be considered for appointment on Trial Chamber II. In that case, the Secretary-General was similarly deprived of the opportunity to consider the potential contributions of those judges in making any decision regarding Trial Chamber II's creation and/or appointments thereto.

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[21] United Kingdom, Privy Council, *The Mayor and Corporation of Port Louis v. Attorney-General of Mauritius,* [1965] AC 1111, 27 April 1965, 1124.
[22] United Kingdom, Queen's Bench Division, *R v. Secretary of State for Social Services,* ex parte *Association of Metropolitan Authorities,* [1986] 1 All ER 164, 21 May 1985, 167.

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56. So there is force in the Appellant's argument that if, as he claims, the President has advised the creation of a new Trial Chamber and the appointment of two alternative members of a prior Trial Chamber thereto and exclusion of the other three from consideration for inaccurate reasons, that entails breach of Article 37 (B). There would also be breach of Article 7 of the Agreement stating that judges "may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government."

57. Importantly, on the material before us the alleged decisions of the President may give rise to concerns about:

- the effective functioning of the Tribunal and the good administration of justice (see Article 10 (1) of the Statute);
- compliance with the *audi alteram partem* obligation of natural justice owed to the judges of the Trial Chamber who were not consulted.

58. It is well arguable that the legislation entitles the Secretary-General to accurate information resulting from the effective enquiry as to the basis for his evaluation and decision which the consultation required by Rule 37 (B) and fair process might provide.

59. It is not possible, and would be wrong, to offer any comment on what are the actual facts when no party has had the opportunity to present evidence and, in the case of the President and of course the Secretary-General, submissions upon whatever might be the opposing arguments. It would however be equally wrong to assume that the allegations made must lack substance.

B. Jurisdiction[23]

[23] As to *Jurisdiction* the Joint Opinion reasons:

> 10. The Appeals Chamber must first determine whether it has jurisdiction to hear the Appeal. The merits of the Appeal should not be considered at this preliminary stage.

The legal rules as to "jurisdiction" are discussed at paragraphs 60-83 of the present Opinion. Para. 69 demonstrates that my judgment on the topic of a Presidential Order Composing the Trial Chamber was dealing with a case where I was performing a purely mechanical administrative act, with no power or discretion to refuse to appoint an alternate judge to replace a judge who had resigned. That is what the architecture of the legislation requires in such a case. Yet my decision, and the decision of this Chamber on the unsuccessful appeal, are cited in the Joint Opinion at paragraphs 15-17 as supporting rejection of the present Appeal, where the facts are the opposite. Here, the President was not compelled by the legislation to make any request to the Secretary-General for the creation of a second Trial Chamber, let alone one after failing to consult the Council

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60. There is no dispute that the instant Appeal does not fall within the express jurisdiction of the Appeals Chamber articulated in the Statute. International criminal law, however, developed both by other international criminal tribunals and by the Special Tribunal, recognizes the essential need for the exercise of inherent jurisdiction beyond such explicit authority. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has recently recognized:

> The Appeals Chamber may [...] assert jurisdiction over matters raising issues related to the proper functioning of the Mechanism [here Tribunal] [...].[24]

61. Most of the decided cases concern conduct within a particular trial and go to issues of fairness within the proceedings themselves. But the structural requirements of the Tribunal's architecture must also be protected.

62. When serving as judges making Rules under Article 28 of the Statute, members of this Chamber have previously recognized that we are not strictly limited by our express statutory jurisdiction in respect of basic structures protecting due process. Hence our creation of a crime of wilful interference with the administration of justice[25], carrying heavy penalties of imprisonment and fine; and the provisions for interlocutory appeal under Rule 126 following certification and on questions raised by the Pre-Trial Judge under Rules 68 (G) and 176 *bis*. Each is designed to ensure proper functioning of the Tribunal. Other criminal tribunals have done the same.

63. And as this Chamber has recognized, inherent jurisdiction has been exercised to (i) ensure the fair administration of justice; (ii) control the process and proper conduct of the proceedings; and (iii) safeguard and ensure the discharge by the court of its judicial functions,

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of Judges. It is not the law, as suggested in paragraph 28 of the Joint Opinion, that an administrative decision – whether or not it is "purely administrative" - is immune from exercise of the inherent jurisdiction of the Appeals Chamber to correct error. On the contrary, as observed by Lord Bingham in his celebrated text, *The Rule of Law*: "'Judicial review' [...] emphasizes that the judges are reviewing the lawfulness of administrative action taken by others." (Penguin 2011), p. 61.
At paragraph 21, the Joint Opinion cites from the *El Sayed* Decision, to which I refer at paragraph 68, our:
[...] authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.
Those interests are discussed at paragraphs 60-68 of this Opinion. The absence of specific authority to protect them is the lacuna mentioned at paragraphs 22-23 of the Joint Opinion.

[24] IRMCT, *Prosecutor v. Mladić* , MICT-13-55, Decision on Motion for Disqualification Appeal of the Acting President's Decision of 13 December 2018, 4 December 2018, para. 12, citing IRMCT, *Prosecutor v. Tolimir,* MICT-15-95 and MICT-15-85, Decision on Request for Access to Confidential Material in *The Prosecutor v. Zdravko Tolimir* Case Presented by Vujadin Popović, 17 May 2017, para 12.

[25] Rule 60 *bis* STL RPE.

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with the "general goal of remedying possible gaps in the legal regulation of the proceedings".[26]

64. By providing specific instances of its use, past decisions cast light on the scope of the inherent jurisdiction and its limits. Appellate judges will not lightly claim more than the limited specific authority conferred on them by the Statute. But where exercising inherent jurisdiction, it is necessary to fulfil the purposes set forth above; where the gravity of breach of the principles of the rule of law requires intervention, we must not shy away from exercising such authority.

65. In each case that has come to my attention where the inherent jurisdiction has been employed there has been a breach of the principles of the rule of law which they evaluate as of such gravity as to require intervention.

66. As an international court we look to the Statute of the International Court of Justice, Article 38 of which locates principles of international law in several places, including "the general principles of law" recognized by nations, and also "judicial decisions" as subsidiary means for the determination of rules of law.[27]

67. The Special Tribunal has been created to deal with Lebanese cases of special concern, requiring investigative and other resources unavailable in Lebanon. Charged with responsibilities normally the responsibility of the Courts and other institutions of Lebanon, the references in the Security Council's Resolution and Article 28 of the Statute to "the highest standards" of international criminal justice and procedure require the Tribunal's executive and judicial personnel, including this Chamber, to make every reasonable effort to meet those standards.

68. In the case of *El Sayed* the legislation provided no remedy for a man who had been imprisoned for three and a half years without being told of his charge, let alone given the right of trial, then released by this Tribunal on the application of the Prosecutor.[28] He sought access to Governmental files held by the Special Tribunal. In the first phase we exercised jurisdiction. In the second we held that general principles of law, defined as the right to justice and the right of access to official information concerning one's legal status,

[26] *El Sayed* Decision, para. 48.
[27] Art. 38 (1) ICJ St.
[28] *See El Sayed* Decision.

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cumulatively required, subject to certain conditions to protect others, that he receive access to relevant documents.

69. At the other extreme is this Chamber's *Decision on Application by Counsel for Messrs Badreddine and Oneissi against President's Order on Composition of the Trial Chamber of 10 September 2013*,[29] which requires further mention below. In that case I, as President, had considered myself bound by the architecture of the legislation to replace the resigned international judge of the Trial Chamber by the alternate international judge.[30] The Appeals Chamber dismissed the appeal, in which the appellants asserted I should have heard the parties. But the legislative scheme providing alternative judges requires the President to perform a purely mechanical task – to replace a departed judge with the alternate judge previously appointed to deal with that very contingency. That is the reason why the Statute requires alternate judges; and why the President must make an immediate, and unreviewable, decision to make the appointment designed to avoid hiatus in the work of the Trial Chamber. Had there been Presidential failure to act in this way it would have been the duty of this Chamber, in exercise of inherent jurisdiction, to order such result.

70. Selection of the demanding term "consult" in Rule 37 (B) suggests it was created to assist the discharge by the Presidency of its heavy burdens, by requiring it, in relation to *all* major questions relating to the function of the Tribunal, to seek and take seriously the advice of the other three senior judges.

71. Few exercises of public authority exceed the importance of advising the Secretary-General as to the exercise of his uniquely burdensome responsibilities. He is entitled to expect that such advice will as far as reasonably possible be accurate. It is well arguable that the mandatory obligations of the President of this Tribunal under Rule 37 (B) extend to the consultations at issue in this case: to ensure the proper advice to the Secretary-General that a request for the creation of an additional Trial Chamber surely requires. An obvious source of information on such topic is the Presiding Judge of the Trial Chamber.

72. It is axiomatic that justice must be both done and seen to be done and, arguably, not least in respect of a proposed change of the structure of the Tribunal by creating a new Trial Chamber.

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[29] Composition Appeal Decision.
[30] 2013 Reconsideration Decision.

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73. The obligations under Rule 37 (B) are therefore not an optional extra which may be disregarded; but a vital element of the constitutional architecture of the Special Tribunal, designed to ensure the lawful performance of the President's functions in respect of major questions, and which it is the duty of this Chamber to enforce, if necessary by exercise of this Chamber's inherent jurisdiction.

74. The inherent authority of the judges of the Appeals Chamber necessarily includes responding to allegations as to breach of lawful procedures within their Tribunal, particularly when such procedures relate to matters fundamental to the Tribunal's character and composition. Such authority, it may surely be contended, extends to include allegations of both non-compliance with a mandatory Rule which may have misinformed the Secretary-General when making decisions whether to create a second Trial Chamber and appointing its members; and also the decision of the President to convene Trial Chamber II.

75. The President's task is an onerous one entailing heavy pressures of many kinds. That is arguably why the rule-making judges have decided that weight of the President's load, in matters of such importance as to fall within Rule 37 (B), requires other minds to consider it and other shoulders to help carry the burden. Failure of this Chamber to exercise jurisdiction in this Appeal would in my view constitute acquiescence as to the alleged breach of the Rule in a matter going to the very structure of the Tribunal.

76. I have reflected on whether it can be said that, in the event, there is no major problem warranting recourse to the inherent jurisdiction. The Secretary-General has made three judicial appointments; they include two alternate judges with experience of the complex facts to which we have referred. The appointment of a new judge of two decades' experience will have followed the recommendation of a selection panel comprising two current or retired judges of an international tribunal and the representative of the Secretary-General, as required by Article 2 (5) (d) of the Agreement.

77. It is not this Chamber's function to pronounce on whether and if so what appointments should be made – of a new Trial Chamber or its judges. There will be obvious consequences for judges whichever decision the Secretary-General ultimately makes – for three judges of Trial Chamber I if the appointments to Trial Chamber II stand; and for the different three judges of Trial Chamber II if their appointments are set aside. The decision in the end is that of the Secretary-General.

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78. But it is arguably our task to deal with allegations of errors of law within this Tribunal: that the Presidency of the Special Tribunal has failed to comply with a mandatory obligation to consult, and has both misinformed the Secretary-General and caused a convening of the second Trial Chamber that is unlawful.

79. The Secretary-General of the United Nations will have written letters of appointment to the three judges of Trial Chamber II. Can that conduct by the highest authority make good such alleged shortcomings in the Presidential request to him under Article 2 of the Agreement?

80. If the Secretary-General was indeed misinformed, as impliedly alleged, the letters of appointment issued to the judges of Trial Chamber II are arguably "fruit of the poisoned tree". If so, the decision of the Secretary-General, if based on inaccurate information from the President may, although does not necessarily, taint a subsequent decision – such as, in this case, the creation of the second Trial Chamber and appointment of its judges: *A (FC) v. Secretary of State for the Home Department*.[31] This is not the occasion to discuss that important topic, which requires both evidence and submissions .

81. Of present relevance, it is a topic on which the Secretary-General can speak with ultimate authority. That is a basic reason why there is need to notify him of the current Appeal, the ultimate fate of which should turn on his decision. Ours is the humbler but essential task of ensuring systemic due process in this Tribunal. Contrary to the suggestion made by our colleagues for its immediate dismissal, this Appeal calls for careful examination by this Chamber in exercise of the profound responsibility we h ave accepted as judges.

82. Notably, there has been no conference to determine such procedures as to what persons should be notified of the Appeal and what interlocutory directions should be given, such as what evidence parties might wish and should be permitted to place before this Chamber. The Appellant has suggested that this Chamber should obtain from the President a copy of her letter to the Secretary-General in which she allegedly requests the creation of a second Trial Chamber, and advises that informal notes of a meeting between the President and Judges Re, Nosworthy and Braidy on 5 November 2019, attended by the Registrar, are available if required.

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[31] United Kingdom, House of Lords, *A (FC) v. Secretary of State for the Home Department* [2005] UKHL 71, 8 December 2005, paras 34, 51, 59, 88, 120, 161.

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83. It is my conclusion not only that this matter is arguably within the jurisdiction of this Chamber, but that there should at once be made the procedural orders required to process it fairly and according to law.[32]

84. I would therefore order:

(1) That the Registrar forthwith notify the Secretary-General of the Appeal.

(I add the respectful suggestion that he might consider appointing a representative, perhaps the Registrar, who in addition to performing functions under the Statute is a member of his staff.)

(2) That the Appellant file forthwith the "[i]nformal notes of the meeting with the President on 5 November 2019" referred to in paragraph 27 of the Appeal and any affidavit supporting the Appeal.

(3) That the President file forthwith any correspondence to the Secretary-General, together with an affidavit providing any further communication to the Secretary-General requesting or supporting any request by her for the creation of Trial Chamber II and judicial appointments, and other information she may consider material.

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[32] As to the rights and standing of Judge Re as the Appellant (paras 24-25 and 29 of the Joint Opinion), prior to the alleged request by the President for the creation of a second Trial Chamber, he was protected by Article 9 (3) of the Statute, repeating Article 2 (7) of the Agreement, providing he "may be eligible for reappointment". If as is implicitly alleged, the Secretary-General was erroneously advised that he was in fact ineligible, he must have standing to complain.
Judge Re has made such complaint by this Appeal. He pleads at paragraph 11 that at the meeting of 5 November 2019, the President informed the Trial Judges that she had herself requested that the Secretary-General appoint a second trial chamber, giving as her reason that they "lacked the capacity" to deal with a pre-trial motion in the new case while finalizing the judgment in the initial case. He pleads that she did not consult them about the decision to make the request, and that they did in fact have the capacity. If such allegations can be established by the evidence, I have noted that should be filed not at this stage but following a customary procedural conference with the parties. Following such evidence, there would be arguably be a case for application of the "fruit of the poisoned tree" principle cited at para. 80 above. If so, it would be sufficient in terms of both pleading and standing for the Appellant to rely on his present Appeal.
It will be recalled that in *Miller v The Prime Minister*, the 11 member Supreme Court of the United Kingdom granted relief where the plaintiff sued the Prime Minister, on whose advice Her Majesty the Queen acted, rather than joining the Sovereign herself or the Privy Council over which she presided by which "An Order in Council was made ordering that 'the Parliament be prorogued [...]'" (United Kingdom, Supreme Court, [2019] UKSC 41, 24 September 2019. I have noted that it may arguably be inferred from paragraph 11 of the Appeal that the President gave to the Secretary-General the same reason of lack of "capacity" for her requesting the creation of Trial Chamber II that she later gave the Trial Chamber judges, and that he accepted and acted upon her advice, thus empowering her to make the challenged Order Convening Trial Chamber of 6 November 2019. In any event, the principles of disclosure in both civil and criminal international law arguably entitle Presiding Judge Re to be informed by the President as to what she said to the Secretary-General in support of her request affecting him and the judges of his Chamber. (*See* Antonio Cassese, *The Oxford Companion to International Criminal Justice*, (Oxford University Press 2009), p. 299).

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(4) Reservation of leave to apply for further or other directions. These might include provision of legal advice or assistance to both the Appellant and the President, each of whom has current urgent responsibilities to discharge.

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

Dated 13 December 2019
Leidschendam, the Netherlands

Judge David Baragwanath

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OPINION OF JUDGE DANIEL DAVID NTANDA NSEREKO

I. BACKGROUND

1. The Tribunal was established following a request by the government of Lebanon to the United Nations. The Agreement between the UN and Lebanon was not ratified, and the UN brought its provisions as well as the provisions of the Tribunal's Statute, attached to the Agreement, into force through UN Security Council Resolution 1757 (2007).

2. As for the composition of Chambers, Article 2 (2) and (3) of the Agreement states that:

> 2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.
>
> 3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:
>
> (a) A single international judge shall serve as a Pre-Trial Judge;
>
> (b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;
>
> (c) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;
>
> (d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and
>
> (e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

3. Similarly, Article 8 (1) of the Statute provides that:

> The Chambers shall be composed as follows:
>
> (a) One international Pre-Trial Judge;
>
> (b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;
>
> (c) Five judges who shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges;
>
> (d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

4. Regarding the appointment of Judges, Article 2 (5) of the Agreement requires that:

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(a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

5. In turn, Article 9 (3) of the Statute provides that:

> The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

6. I refer to the procedural background as set out in the "Decision on 'Appeal Against Decision of President Convening Trial Chamber II'". As indicated therein, before addressing the merits of the Appeal, the Judges considered a preliminary point *in limine litis* as to whether the Appeals Chamber had jurisdiction to entertain the Appeal. The Judges were unable to arrive at a decision by majority, as they were equally divided on the issue. The Appeal was therefore dismissed.

7. I hold the view that the Appeal is admissible and that the Appeals Chamber has jurisdiction to hear it. In the following paragraphs, I set out my views.

II. DISCUSSION

8. As a general rule, the Appeals Chamber will hear appeals only when provisions of the Statute or the Rules specifically confer on it the power to do so. This Appeal does not fall under the Statute or the Rules.[1] Nevertheless, the Appellant contends that the Chamber has jurisdiction to hear the Appeal on the basis of the "inherent jurisdiction" doctrine. He relies on the decision of this Chamber in the *El Sayed* case in which the Chamber acknowledged the notion of inherent jurisdiction and applied it to the circumstances of that case to admit an appeal that was not envisaged by the Statute or the Rules. In doing so, the Chamber stated

[1] Art. 26 STL St. and Rule 176 STL RPE.

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that it may, in limited and exceptional circumstances, exercise inherent jurisdiction with "the general goal of remedying possible gaps in the legal regulation of the proceedings."[2] It explained thus that:

> [Inherent jurisdiction] serves one or more of the following purposes: (i) *to ensure the fair administration of justice*; (ii) to control the process and the proper conduct of the proceedings; (iii) *to safeguard and ensure the discharge by the court of its judicial functions* (for instance, by dealing with contempt of the court). It follows that inherent jurisdiction can be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction (as is the case with the competence de la competence), or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.[3]

9. The Appellant contends that the circumstances of this Appeal fall within the purposes articulated in the above passage and warrant the Chamber's exercise of jurisdiction, particularly "to ensure the fair administration of justice" as well as "to safeguard and ensure the discharge by the court of its judicial functions".[4]

10. The decisions over which the Appeals Chamber may exercise its inherent jurisdiction are not limited to those of a decision-maker acting in a judicial capacity. They include decisions of a decision-maker, for instance, as here, the President of a tribunal, acting in an administrative capacity. The jurisprudence of other international tribunals, which is of persuasive authority, amply supports this view. It shows that an appeals chamber may, in exceptional circumstances, admit an appeal where a situation has arisen that was not foreseen by their statutes or rules but that nonetheless requires judicial intervention. [5]

11. For instance, in the *Ntagerura* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") recalled that "[t]he Appeals Chamber […] has inherent jurisdiction to review decisions issued by the President of the Tribunal in certain

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[2] *El Sayed* Decision, para. 48.
[3] *Ibid.* (emphasis added).
[4] *Ibid.*
[5] *See,* e.g. ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 322; ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, paras 45-47, 62; ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, paras 49-52; ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 26; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T, ICTR-97-29-T, ICTR-96-15-T & ICTR-96-8-T, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, 10 July 2001, para. 19; SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(ii), 23 June 2005, paras 9; ECCC, *Prosecutor v. Kaing,* 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, paras 9-12.

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circumstances, including where such decisions are closely related to issues involving the fairness of proceedings before the Appeals Chamber."[6]

12. In the *Nahimana* case, the same ICTR Appeals Chamber reiterated its view that it had "inherent power to review decisions of the Tribunal's President [...] where such decisions are closely related to issues involving the fairness of proceedings on appeal [...]."[7]

13. Similarly, in the *Karadžić* case, a Panel of Three Judges of the Mechanism declared that "the propriety of any given administrative decision taken by the President is reviewable where it impacts on the fairness of a proceeding."[8]

14. Finally, in the *Mladić* case, the Appeals Chamber of the Mechanism, in line with the views cited above by other benches, similarly declared that "[t]he Appeals Chamber [...] has inherent jurisdiction to review decisions of the President that are closely related to the fairness of proceedings on appeal. The Appeals Chamber may also assert jurisdiction over matters raising issues related to *the proper functioning of the Mechanism* or that are of general significance to its jurisprudence."[9]

15. The ultimate decisions taken in each of these cases depended on the peculiar circumstances at hand. What is significant for present purposes is their recognition of and readiness to invoke the doctrine of inherent jurisdiction to review an administrative decision of the President of a tribunal where the fairness of the case and the proper functioning of the tribunal so warranted.

16. My Brothers Judges Riachy and Chamseddine base their view that this Appeal is inadmissible by characterising the President's "Order Convening Trial Chamber II"[10] as an administrative decision which is not amenable to appeal. They anchor their view on this Chamber's "Decision on Application by Counsel for Messrs Badreddine and Oneissi against President's Order on Composition of the Trial Chamber of 10 September 2013" of

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[6] ICTR, *In Re. Ntagerura,* ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 12 (footnote omitted).
[7] ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 9 (footnote omitted).
[8] IRMCT, *Prosecutor v. Karadžić*, MICT-13-55, Decision on Motion for Disqualification and Motion Challenging Jurisdiction, 28 October 2019, para. 11 (footnote omitted).
[9] IRMCT, *Prosecutor v. Mladić,* MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, 4 December 2018, para. 12 (footnotes omitted and emphasis added).
[10] President's Order.

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25 October 2013.[11] In that decision, we stated that "an order of the President composing or re-composing a bench of the Tribunal is a purely administrative matter and not subject to challenge by the parties."[12] It is thus manifestly evident that that decision was restricted to the President's administrative decision composing or re-composing a bench of the Tribunal by way of replacing a resigning sitting judge with an alternate judge already appointed by the UN Secretary-General.[13] The learned Judges also rely on the related decision issued on 4 October 2013 by Judge Baragwanath as President of the Special Tribunal on the "Defence Motion for Reconsideration and Rescission of Order Composing the Trial Chamber".[14] Judge Baragwanath's decision related to a motion for reconsideration of his administrative decision assigning an alternate judge to the Trial Chamber to replace a judge who had resigned. In his decision, the learned Judge concluded that "the President has no authority to entertain a request for reconsideration or rescission of administrative decisions *of the type challenged in this case*."[15] His action was merely a ministerial act, not involving the exercise of discretion or judgment that would render his action subject to judicial review. He was simply implementing a provision of the Statute.

17. Unlike those cases, the present Appeal does not relate to the composition or re-composition of a Chamber or the choice of judges to be appointed to a Chamber. Instead, it relates to the *creation* of a second Trial Chamber[16] and to the process that preceded that action. Those decisions do not therefore support the view t hat the Appeal is inadmissible.

18. In my view, the conduct, if proved, that the Appellant complains about and which forms part of the President's Order of 6 November 2019, is the type that falls under our inherent jurisdiction, as we said in the *El Sayed* case and as complemented by decisions of other international tribunals. The conduct arguably affects "the fair administration of justice", "the proper discharge of its judicial functions" and more particularly "the proper functioning" of the Special Tribunal.

19. In the Appeal, the Appellant avers:

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[11] Composition Appeal Decision.
[12] *Id.*, para. 9.
[13] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, F1099, Order on Composition of the Trial Chamber, 10 September 2013.
[14] 2013 Reconsideration Decision.
[15] *Id.*, para. 15 (emphasis added).
[16] Appeal, para. 4.

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> The day before [the President's Order], on Tuesday 5 November 2019, [the President] called a meeting with the three Trial Chamber Judges. In the meeting, she informed Judges Re, Nosworthy and Braidy—in the presence of the Registrar—of her decision to convene Trial Chamber II. Up until that moment, the three Trial Chamber judges were unaware that the President was contemplating this course. Her order, at footnote 4, states that Judges Akoum and Lettieri had already accepted their appointments, on Monday 4 November 2019. This was the day before the President informed the three Trial Chamber judges that she was convening Trial Chamber II.
>
> In the meeting on 5 November 2019, the President informed the three Trial Chamber judges that she had *herself* requested that the Secretary-General of the United Nations appoint a second trial chamber. In response to a question as to 'why' she had done this, the President informed the three Trial Chamber judges that they 'lacked the capacity' to deal with a possible pre-trial motion in relation to a second trial *in absentia* against Mr Ayyash, while finalizing the judgement in *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*.
>
> The three Trial Chamber judges pointed out to the President that (a) she had not consulted them about this and (b) saying that they lacked the capacity to deal with a trial *in absentia* motion was inaccurate, as the Trial Chamber did in fact have this capacity.
>
> The President also declined, upon being asked, to inform the three Trial Chamber judges whether she had informed the Secretary-General of these two facts. Both would have been highly material to his decision to make the appointments. She also declined to say whether she had consulted the two alternate judges about the appointment of a second Trial Chamber or when. However, they accepted their appointments on 4 November 2019, and it is obvious that they had been consulted about their anticipated appointments well in advance of that date. [17]

20. The Appellant further avers that:

> The Trial Chamber has already twice issued decisions on holding trials *in absentia*, the most pertinent being that of Mr Hassan Habib Merhi, which the Trial Chamber made on 20 December 2013 while in preparation for the commencement of the trial of *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra* on 16 January 2014. Objectively, it therefore cannot be true that the Trial Chamber lacks the capacity to deal with a motion to hold a second trial *in absentia* against Mr Ayyash, while finalizing the draft of a judgement. It has already done precisely the same thing before in the analogous situation of dealing with a similar motion in relation to Mr Merhi while engaged in other (pre-trial) work.
>
> Moreover, the judgement in STL-11 -01 will be issued far in advance of the referral to a Trial Chamber of the case STL-18-10 for trial, thus negating any suggestion that the Trial Chamber would be expected to conduct two trials at the same time. And, of further relevance is that the two alternate judges, now assigned to the case of STL-18-10, must also be present at all stages of the first *Ayyash* trial, STL-11 -01, including judgement, and if relevant, sentence. [18]

21. The gravamen of the Appellant's grievance is that the President failed to consult the Judges of the Trial Chamber and the Council of Judges and that, for that reason, reached an uninformed and incorrect view that the Trial Chamber "lacked capacity" to deal with the matters in the new case. Consequently, the Appellant contends, the President made a request to the UN Secretary General to create the second Trial Chamber on the basis of such

[17] *Id.*, paras 10-13 (footnotes omitted).
[18] *Id.*, paras 17-18 (footnotes omitted).

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uninformed and incorrect premises. As to the accuracy of the Appellant's account of what transpired at the alleged meeting, he says that he kept informal notes of the meeting, which he is ready and willing to share with the Appeals Chamber.[19] He also suggests that the Appeals Chamber obtain from the President a copy of her letter to the UN Secretary General requesting him to create the second Trial Chamber.[20]

22. In his "Further Submissions Relevant to Appeal against Decision of President Convening Trial Chamber II" of 2 December 2019, the Appellant points out that in the President's "Decision on "Urgent Application to Revoke Order Convening Trial Chamber II" she did not challenge the facts as he had recited them in the dismissed Application.[21] He suggests that this may be interpreted as tacit acceptance of the accuracy of his account.[22]

23. Nonetheless, in accordance with the *audi alteram partem* principle, the Chamber must order that: (i) the Appellant be allowed to submit to the Chamber his notes in the form of an affidavit and (ii) the President be similarly invited to respond by way of an affidavit and (iii) the President produce to the Chamber the letter to the UN Secretary General by which she made the request to create the second Trial Chamber. Such information will serve to fully inform and assist the Chamber when dealing with the Appeal on the merits. In the meantime, we must deal with and dispose of the preliminary issue as to the ju risdiction and admissibility of the Appeal. I must emphasise here, though, that my views on this issue do not prejudge the ultimate outcome of the Appeal on its merits.

24. Both the UN Secretary General and the President may initiate the establishment of a second Trial Chamber. Article 2 (2) of the Agreement reads as follows:

> The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with *a second Trial Chamber to be created if*, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, *the Secretary-General or the President of the Special Tribunal so requests*. (Emphasis added)

25. In my opinion, this provision must be read in conjunction with other relevant provisions of the Statute and Rules and with general principles of justice charting the President's responsibilities. Those provisions and principles set out the *modus operandi* that

[19] *Id.*, para. 27.
[20] *Ibid.*
[21] STL, *Prosecutor v. Ayyash*, STL-18-10/MISC.2/AC, F0004, Further Submissions Relevant to Appeal against Decision of President Convening Trial Chamber II, 2 December 2019 , paras 3-4.
[22] *Id.*, paras 5-6.

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the President must follow in exercising her mandate, both generally and particularly with respect to the creation of a second Trial Chamber.

26. The relevant provisions include (i) Article 10 (1) of the Statute, which provides that "[t]he President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice"; (ii) Rule 32 (B), which provides that the President "shall coordinate the work of the Chambers and be responsible for the effective functioning of the Tribunal and the good administration of justice"; (iii) Rule 37 (B), which requires that "[t]he President *shall* consult the other members of the Council [of Judges] on *all major* questions relating to the functioning of the Tribunal" (emphases added); and, lastly, (iv) a general rule of justice requiring that, before making any decision, a decision-maker must give any person affected by the decision an opportunity to be heard – *audi alteram partem*.

27. The general tenor of these provisions require the President to consult individuals and the organs of the Tribunal concerned before exercising her mandate or responsibilities. For instance, the very responsibility of coordinating the work of the Chambers necessarily calls for such consultation with the judges of the Chambers or at least the Presiding Judges. According to the Oxford English Dictionary, the word "coordinate" means "to cause (things or persons) to function together or occupy their proper place as parts of an interrelated whole order". Of particular significance is the obligation of the President to consult the Council of Judges on *all major* questions relating to the functioning of the Tribunal. By establishing the Council and requiring the President to consult it on all such questions, the drafters of the Rules sought to ensure that when making decisions or taking initiatives of such magnitude, the President does not act in the solitude of his or her office, but in council. In my view, the creation of a second Trial Chamber is a major question on which the President must consult judges of the Trial Chamber and, more importantly, members of the Judicial Council before requesting the UN Secretary General to create it and to appoint its judges. Consultation with judges of the existing Trial Chamber would be part of the President's duty to coordinate the work of the Chambers. Moreover, as they are about to finalise their work in the case of *Prosecutor v. Ayyash et al.*, STL-11-01 ("*Ayyash et al.* case"), the Judges presumably do have "capacity" and may possibly have an interest to continue to serve the Tribunal as trial judges. The input of the members of the Council of Judges prior to the creation of the new Chamber is also vital because such Chamber might involve deployment of human resources, cost, and relations with other organs of the Tribunal. Most importantly, the Council was put

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in place as a reservoir of ideas and views, which the President must tap on all major questions relating to the functioning of the Tribunal.

28. Although consultation does not necessarily oblige the decision-maker to agree with the views of the consultees, it at least helps to ensure that his or her ultimate decision is informed or has benefited from the input of the views of the consultees and thus minimises the risk of bad decisions. In the present case, the President's alleged failure to consult, if true, might have led her (i) to form a flawed or uninformed view that the judges of the Trial Chamber "lacked capacity" to deal with a possible pre-trial motion in relation to a second trial *in absentia* against Mr Ayyash (in the connected case), while finalising the judgement in the *Ayyash et al.* case; and (ii) to base her request to the UN Secretary General to establish the second Trial Chamber on such uninformed view or incorrect information, and this view may well have been a significant basis for his decision to create the second Trial Chamber. It is monumentally important that the UN Secretary General, who must necessarily rely on information supplied by the President, be provided correct information.

29. It is a general principle of administrative law that the failure to consult before taking any administrative action, when consultation is required as in this case, vitiates the action taken.[23] Consequently, the President's Order convening Trial Chamber II might be said to have been tainted with illegality. The Order was, figuratively speaking, "the fruit of a poisonous tree", i.e. the President's alleged request to the UN Secretary General to create Trial Chamber II was based on incorrect information or an uninformed view. The President's Order and her request made to the UN Secretary General to create Trial Chamber II are inextricably entwined and inseparable. By seeking to set aside the President's Order, the Appellant is in essence challenging the flawed and uninformed request to the UN Secretary

[23] *See*, for example, H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 8th ed. (Oxford University Press, 2000) at p. 229, *citing* United Kingdom, House of Lords, *Grunwick Processing Laboratories ltd.* v. *ACAS* [1978] AC 655, 14 December 1977; United Kingdom, Queen's Bench Division, *Agricultural etc. Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190, 22 October 1971; United Kingdom, Queen's Bench Division, *R.* v. *Camden LBC ex p. Cran*, The Times, (1996) 94 LGR 8, 25 January 1995; United Kingdom, Privy Council, *Re Union of Benefices of Whippingham and East Cowes, St James'* [1954] AC 245, 30 March 1954; United Kingdom, Privy Council, *The Mayor and Corporation of Port Louis v. Attorney-General of Mauritius,* [1965] AC 1111, 27 April 1965. For a codification of obligations to inform and consult on the part of administrative decision-makers *see* Germany, Law of 25 May 1976 (*VwVfG)*, § 28; Spain, Law n. 30 of 26 November 1992, Art. 85; Italy, Law n. 241 of 7 August 1990, Artt. 7, 9, 29. For jurisprudence recognising the existence of obligations to inform and consult in administrative matters *see* France, *Conseil d'État,* sections I and VI, n. 267251, 11 January 2006; Italy, *Consiglio di Stato*, VI, n. 5105, 1 October 2002; ECJ, *Transocean Marine Paint Association v Commission of the European Communities*, Case 17-74, Judgment of 23 October 1974; ECJ, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, Judgment of 13 February 1979.

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General that gave birth to it. Moreover, it bears recalling that there would be no other means of reviewing the request by the President to the UN Secretary General other than by appealing her Order implementing it.

30. For these reasons, the President's Order must be subject to review by the Appeals Chamber. The Order was a major question that affects the proper functioning of the Tribunal and the good administration of justice and one which, according to our decision in the *El Sayed* case and to the jurisprudence of sister international tribunals, is amenable to review by the Appeals Chamber.

31. It is true that the Appeals Chamber stated in the *Ayyash et al.* case that "there can be no right of appeal if it was the express intention of the drafters to exclude it."[24] However, there is no indication that the drafters of the Statute and Rules expressly intended to exclude an appeal against a President's administrative decision when the Appeals Chamber is exercising its inherent jurisdiction and where, as here, the interests of justice demand it.

III. CONCLUSION

32. The Appeals Chamber should exercise its inherent jurisdiction and admit the Appeal.

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

Dated 13 December 2019
Leidschendam, the Netherlands

Judge Daniel David Ntanda Nsereko

[24] 2013 Decision on Appeal by LRV, para. 11, *referring to* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, para. 17.

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