Tadić Revisited

The Ayyash Decisions of the Special Tribunal for Lebanon

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Abstract

The article discusses the recent splintered decision of the Special Tribunal for Lebanon (STL)’s Trial and Appellate Chambers in the case of Ayyash and others, triggered by defence motions fundamentally challenging the jurisdiction and legality of the Tribunal. Comparing the STL decision to the groundbreaking Tadić judgment of the International Criminal Tribunal for the former Yugoslavia 17 years ago, the author is highly critical of the Appeal Chamber’s finding that the Tribunal does not have the power to engage in ‘judicial review’ over the United Nations Security Council. In the author’s view, the Appeal Chamber’s refusal to engage in politics, and affirmation that the Security Council is unbound by law, seems to be motivated less by the law than by timidity and fear, thereby putting in doubt the inestimable legacy of Tadić.

1. Introduction

Readers of the Trial and Appellate Chambers’ respective responses to fundamental challenges to the jurisdiction and legality of the Special Tribunal for Lebanon (STL) are likely to suffer a powerful sense of déjá vu, so closely do those 2012 decisions track the arguments canvassed at the jurisdictional stages of the International Criminal Tribunal for the former Yugoslavia’s (ICTY) first proceeding against Duško Tadić back in 1995.1 The four defendants

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1 Compare ICTY: Decision on the Defence Motion on Jurisdiction, Tadić (IT-94-I-T), Trial Chamber, 10 August 1995, and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Tadić (IT-94-I-AR72), Appeals Chamber, 2 October 1995, to STL: Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, Ayyash and others (STL-11-01/PT/TC), Trial Chamber, 27 July 2012 (henceforth ‘Ayyash and others, Trial Chamber’) and Decision on the Defence Appeals Against the Trial Chamber’s Decision on the Defence Challenges to
at the Lebanon Tribunal have once more raised first-order questions about the power of criminal tribunals to question the propriety of their own establishment, and incidentally, to examine the legality of actions taken by the United Nations (UN) Security Council — just as Tadić did with respect to the ICTY. Once more an ad hoc tribunal has had to address whether its own rules, or its inherent compétence de la compétence, permits it to engage in ‘judicial review’ over the Security Council. Once more judges tasked with applying very specific criminal law to a narrow set of defendants are being asked to go beyond their comfort zone and engage in tasks seemingly more suited to those on the International Court of Justice (ICJ). Once more international criminal judges have been put in the uncomfortable posture of choosing between two seemingly ‘absolute values’: not interfering with a Chapter VII decision taken by the Security Council versus evaluating a defendant’s right to a fair trial by a tribunal established by law. And once more, this clash of values leads to splintered decisions between a tribunal’s trial and appellate chambers and among its appellate judges. But this time around, the results are essentially the reverse of what occurred in the ICTY. In Tadić, a wise Appellate Chamber, led by the late Nino Cassese, engaged in the full-scale review of the legality of the Tribunal demanded by the defence, thereby overcoming the timidity of that body’s trial chamber (which had sought to duck the jurisdictional questions posed by resorting to the political question doctrine). In the Lebanon Tribunal, however, the postures of the respective trial and appellate chambers have been reversed. In the Lebanon case, it is the trial judges who fully examine the defendant’s fundamental challenges, and its appellate judges, over the dissent of Judge David Baragwanath, who bury their heads in the sand by finding that they have no power to engage such ‘political’ questions. The results are not likely to please those who look for the progressive development of international criminal law through iterative case law.

2. The Establishment of the Special Tribunal for Lebanon

The Special Tribunal for Lebanon, like the ICTY and International Criminal Tribunal for Rwanda (ICTR), is the product of Chapter VII action by the Security Council. It too resulted from a UN commission investigation, attempts to secure the agreement of the government where the crimes were committed, and ultimately directives by the Security Council to the UN Secretary-General to assist in establishing an international tribunal charged with adjudicating a specific set of temporally and geographically delimited crimes. But the

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Lebanon Tribunal differs from those prior tribunals in so far as it was charged with trying a much more specific set of crimes, namely those associated with the 2005 explosion that killed former Lebanese Prime Minister, Rafik Hairiri and a number of others (that is, an act of terrorism); because it is a 'hybrid' tribunal that incorporates Lebanese law to some extent, a Lebanese deputy prosecutor, and four Lebanese judges; and because it came about only after a UN brokered agreement and statute for this tribunal had been negotiated but failed to secure the approval of the Lebanese Parliament. The UN Security Council passed Resolution 1757 which contained the Draft Agreement as an annex and provided that it would come into force on 10 June 2007, with or without the final approval of Lebanon.\(^2\) The Special Tribunal’s Statute, applicable law, composition, and most importantly, its establishment under the authority of the Security Council, accordingly differ in significant ways from those earlier ad hoc tribunals. Nor was the posture of states in which the crimes were committed the same. While the ICTY and ICTR tribunals struggled, particularly in their early years, with the indifference or overt hostility of those national authorities, the Lebanon authorities took all the actions required of them under the draft Agreement even though that treaty was never formally concluded.\(^3\)

3. The Jurisdictional and Legality Challenges in Ayyash

The unusual procedural posture of the Tribunal helps to explain some of the defence motions in the Ayyash cases. The four defendants in these cases challenged the jurisdiction and legality of the Tribunal (and sought to quash the arrest warrants as null and void) on the grounds (1) that the Tribunal violated Lebanese sovereignty since it was established contrary to the consent demanded by the Vienna Convention on the Law of Treaties; (2) the UN Security Council had acted illegally in so far as there had not been a real threat to international peace and security, had adopted an ‘inappropriate’ or unauthorized remedy (namely establishing a tribunal), had illegally ‘imposed’ the draft agreement on Lebanon, had failed to respect the Lebanese constitution or other Lebanese law and had abused its authority by adopting this ‘selective’ and ‘discriminatory’ remedy; and (3) the Tribunal’s operative rules and creation violated the defendant’s fundamental human rights to a fair trial by a tribunal ‘established by law’ and the principle of *jus de non evocando*.\(^4\)

At the outset, both the Trial and Appellate Chambers had to address the basic problem that the Tribunal’s rules did not anticipate this kind of

\(^2\) See e.g. *Ayyash and others*, Trial Chamber, §§ 5–12.


jurisdictional challenge and there was a serious question about whether either the trial or appellate chamber had authority to address it. Under the Tribunal’s Rule 90(E), the only motions challenging jurisdiction which are anticipated are those that challenge indictments on the grounds that they do not relate to the subject-matter or the temporal or territorial jurisdiction of the Tribunal.5 Faced with this hurdle, the four defendants disagreed as to how to get around it. The Ayyash motion posited its challenge not as a jurisdictional one under Rule 90(E), but as an undefined preliminary motion permitted under Rule 126.6 The other defendants argued, following the Appellate Chamber in Tadić, that a challenge to the legality of the Tribunal was jurisdictional in nature but one that could not be barred by the seemingly exhaustive terms of Rule 90(E); it was nonetheless within the tribunal’s incidental jurisdiction pursuant to its inherent compétence de la compétence. The Trial Chamber disagreed with the latter contention and the conclusion reached in Tadić. It found, as does the Appellate Chamber even more emphatically, that ‘legality’ and ‘jurisdiction’ are distinct concepts. Both chambers affirm that the applicable rule governing jurisdictional challenges, Rule 90(E), had been adopted to emulate Rule 72(D) of amended rules of the ICTY and ICTR and that both sets of rules had been introduced in 2000, post-Tadić, precisely to prevent comparable challenges to legality designed as challenges to jurisdiction.7 But while both chambers find the defence challenges not to be permissible jurisdictional challenges under Rule 90(E), they nonetheless agreed to consider them as admissible challenges to legality. The Trial Chamber agrees to address these challenges, and to certify them for appeal, ‘in the interests of justice and the expeditious disposition of the matter to deal with this fundamental question of international human rights law to do justice to the Parties now (Encore, litiis), rather than at a later point.’8

4. The Trial Chamber’s Decision

Although it treated the defence motions as a direct challenge to the legality of the Tribunal and not as a jurisdictional challenge, the Trial Chamber nonetheless addressed the merits of all the defence claims and did so in ways that are reminiscent of the Appellate Chamber’s ruling in Tadić. It dismissed arguments based on the violation of Lebanese sovereignty or the Lebanese Constitution on the basis that the sole legal basis for the establishment of the

5 Ayyash and others, Trial Chamber, § 18.
6 Rule 124 provides that ‘after a case is assigned to the Trial Chamber, either Party may apply by motion for appropriate ruling or relief ...’
7 Ayyash and others, Trial Chamber, § 31; Ayyash and others, Appeals Chamber, §§ 11–18.
8 Ayyash and others, Trial Chamber, § 40. Ayyash and others, Appeals Chamber, §§ 21–23 (finding that it is vested with authority to consider the challenges of some of the defendants to the extent these are ‘other motions’ under Rule 126 that have been properly certified for appeal by the Trial Chamber, but rejecting Ayyash’s motions since that defendant had not sought certification).
tribunal was Council Resolution 1757, which, it noted, anticipated creation of the Tribunal under Chapter VII of the UN Charter and without the express consent of Lebanon. While it questioned whether individual defendants had standing to raise questions about the violation of state sovereignty (as had been suggested by the Appellate Chamber in Tadić), it found unnecessary to resolve that issue since Lebanon had never claimed that its sovereignty had been violated. Neither did the Security Council violate Lebanon’s sovereignty by unilaterally putting into force an international agreement but instead ‘integrated the provisions of the intended Agreement into Resolution 1757’.10

The Trial Chamber also addressed, at length, the alleged violations of fundamental human rights. Citing in support the Special Court for Sierra Leone’s (SCSL) ruling in Kallon, it affirmed that a tribunal is ‘established by law’ as is required by human rights where it is in accord with the rule of law, that is, it must have the mechanisms and facilities to dispense ‘even-handed justice’ and provide all the guarantees of fairness ‘in tune with international human rights instruments’.11 It affirmed that it would ‘be entitled to decline to exercise some or all of its jurisdiction if satisfied that it had not been established by law or that it could not provide all necessary fair trial guarantees, or if the Statute mandated the Chambers or organs of the Tribunal to perform an unlawful act or one contrary to international human rights law’.

While it declined power to examine the appropriateness of what the Security Council had decided to do as a measure authorized by Article 41 of the UN Charter, the trial judges noted that the measures establishing the Special Tribunal were ‘essentially similar’ to those establishing the ICTY, ICTR and the SCSL; it found that the UN, ‘like any national or domestic Parliament, may establish a court or tribunal with specified functions’ and therefore concluded that the Special Tribunal had indeed been ‘established by law’.13 It then examined whether the Tribunal’s procedures in fact complied with basic requirements of international human rights law, noting that the mere possibility that human rights law could be infringed by the Tribunal’s actions was not the appropriate test. It found that the Tribunal’s rules and procedures did comply with such requirements. Turning to the defendant’s invocations of the principle of *jus de non evocando*, the Tribunal rejected comparisons with Lebanese laws and evidentiary rules, finding that the only question was whether the Tribunal’s Statute and Rules provided accused persons with all relevant rights under international human rights law. It addressed the defendants’ precise human rights complaints with some specificity, noting, for example, that the absence of a *juge d'instruction* did not violate their rights so long as the principle of equality of arms was otherwise respected.14 Like the Appellate Chamber in

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9 *Ayyash and others*, Trial Chamber, §§ 47–50.
it concluded that the principle of *jus de non evocando* was not violated by transferring jurisdiction to an international tribunal so long as the requirements for a fair trial were satisfied. Finally, it rejected the defence's contentions that the Tribunal was impermissibly 'selective'. It noted that all the ad hoc international criminal tribunals have been, like the Nuremberg and Tokyo tribunals, necessarily limited in object and scope and that this was an 'unavoidable' aspect that 'contains no risk of discriminating' in violation of the International Covenant on Civil and Political Rights.

5. The Appellate Chamber’s Decision

While the Appellate Chamber accepted the admissibility of those defence motions that had been certified for appeal by the Trial Chamber, it went out of its way to disagree with virtually every holding by the *Tadić* Appellate Chamber while expressing sympathy with the views of the Trial Chamber in *Tadić*. It noted that the Appellate Chamber in *Tadić* was able to take a generous view of its ‘incidental’ jurisdiction to consider challenges to both its jurisdiction and legality only because it was operating under rules that did not define the term ‘jurisdiction’ and that later decisions by both the ICTY and ICTR had rejected those conclusions. It narrowed its review to only those ‘errors of law that have the potential to invalidate the decision of the Trial Chamber’. It found that the Trial Chamber had not erred when it held that the Tribunal was established by Resolution 1757 pursuant to Chapter VII and had not improperly ‘unilaterally’ enacted the draft Agreement between the UN and Lebanon; when it found that could not ‘review’ the underlying Council resolution; or when it refused to examine the Council’s determination that a breach of the peace had occurred or its choice of remedy for that breach.

Its affirmation that the Security Council’s actions cannot be judicially examined, even within the scope of the Tribunal’s incidental jurisdiction to consider whether the fundamentals of international criminal justice are being respected, was the emphatic and unconditional starting and ending point of its analysis. Since neither the Tribunal’s Statute nor the UN Charter authorizes judicial review over the Council, that is all that matters to these judges: the Council has ‘broad discretion’ to do what it likes and the Council’s

15 Ibid., §§ 82–85.
16 Ibid., §§ 86–87.
17 Ayyash and others, Appeals Chamber, § 14.
18 Ibid., § 10.
19 Ibid., §§ 24–31
20 Ibid., §§ 32–50.
21 Ibid., §§ 51–52.
22 To this extent, it carefully adhered to the arguments made by the Prosecutor in the case. See Prosecution Consolidated Response to Ayyash, Badreddine and Oneissi Defence Appeals of the Trial Chamber’s ‘Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal’, *Ayyash and others* (STL-11-01/PT/AC), 14 September 2012.
‘self-restraint’, along with the voting structure in the Charter provides the only ‘check’ on the Council’s exercise of its powers.\textsuperscript{23} The differing views expressed in the \textit{Tadić} Appellate Chamber relied, mistakenly in their opinion, on mere advisory opinions of the ICJ which would not have binding effects or on rulings by national administrative or constitutional courts that are explicitly vested with power to review the organs of a state. For the majority of the appeals judges, reliance on such decisions were inappposite — as are other decisions relied upon by the defence to demonstrate the assumption of incidental jurisdiction to review the Council, such as \textit{Kadi}, but which in fact do no such thing.\textsuperscript{24} For the majority of the appeals judges, the lack of authority to review the Council is supported by the ‘difficulty in establishing any meaningful standard of review’ given the absence of any legal criteria in the Charter, the ‘necessarily subjective’ nature of the Council’s findings, its reliance on a ‘plethora of complex legal, political, and other considerations’ and the speculative nature of any such determinations.\textsuperscript{25} Decisions as to the Council’s choice of measures under Article 41 are ‘essentially political’, ‘not amenable to judicial review’ and remain the Council’s ‘sole and exclusive prerogative’.\textsuperscript{26} For the majority of the judges on appeal, the only error committed by the Trial Chamber was to consider the other defence arguments challenging the legality of the Tribunal (that is the human rights challenges raised by the defence, including concerns over whether the Tribunal was ‘established by law’ or violated the principle of \textit{jus de non evocando}). They found that the Trial Chamber should not have proceeded to address those points once they had determined that they had no authority to review Security Council Resolution 1757 and accordingly the Appellate Chamber does not address such questions even in passing.\textsuperscript{27}

6. Judge Baragwanath’s Separate and Partially Dissenting Opinion

Judge Baragwanath’s illuminating and well-argued separate and partially dissenting opinion points out the serious flaws in his appeals colleagues’ approach. Relying heavily on Nino Cassese’s insights not only in the Appellate Chamber’s decision in \textit{Tadić} but in his contribution to the Special Tribunal’s own previous decision in the \textit{El Sayed case},\textsuperscript{28} Baragwanath argues that courts like the Special Tribunal, which exist on their own and are the only forum

\textsuperscript{23} \textit{Ayyash and others}, Appeals Chamber, §§ 38–39 (noting that not even the ICJ has the power of judicial review over the Council and that since the Special Tribunal is an independent institution outside of the UN system it ‘must necessarily be much more limited than that of the ICJ’).

\textsuperscript{24} \textit{Ayyash and others}, Appeals Chamber, §§ 42–50.

\textsuperscript{25} Ibid., § 51.

\textsuperscript{26} Ibid., § 52.

\textsuperscript{27} Ibid., § 54.

\textsuperscript{28} Decision on Appeal of the Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, \textit{El Sayed} (CH/AC/2010/02), Appeals Chamber, 10 November 2010.
able to consider whether the standards of international criminal justice are satisfied, must consider and determine all arguable defences, including those of basic fairness and human rights, whether or not these lead to the incidental or indirect review of the Council’s authority. Baragwanath accordingly berates his colleagues for not addressing all the defence motions, including those of the uncertified appeal by Mr Ayyash, even though, on the merits, he concludes that appellants have not shown that the tribunal was unlawfully established or that it fails to respect the principles ensuring a fair trial by an independent tribunal established by law.

Baragwanath’s starting point, as was the case for presiding Judge Cassese in both Tadić and the El Sayed case, is the Tribunal’s ‘inherent’ power to determine its own jurisdiction and address contentions about fundamental injustice — a power which, in his view, cannot be fettered by seemingly explicit rules to limit such power (including Rule 90(E)) but which must be interpreted in light of broader concerns as is suggested by the Tribunal’s Rule 3, which directs that all rules be interpreted in accordance with international standards on human rights as well as the general principles of international criminal law and procedure.29 For him, as was the case for both this Tribunal in El Sayed and the Appeals Chamber in Tadić, this criminal tribunal necessarily has the competence to address whether the Council has the power to establish it and therefore to determine whether it has the legal right to exist and to claim authority over the accused. Such power, he asserts, is inherent in the rule of law and the raison d’être of the Tribunal. Baragwanath points out that the Council’s power is not unfettered but must adhere to the principles and purposes of the Charter; that the injunction against interfering with the Council cannot prevent consideration of whether the rule of law has been satisfied; that even if Council resolutions are entitled to a presumption of legality, a challenge to that presumption must necessarily be able to be heard by the only body before it can be brought; that the mere fact that a judicial decision could render nugatory the will of the Council is no justification for withholding judicial review since the purpose of such review is precisely to ensure that decision-makers comply with the law; and that to assert the absence of judicial review is to lodge plenary authority in the executive decision-maker.30

As is suggested by the decisions rendered in the Lockerbie cases by the ICJ, the Kadi decision of the European Court of Justice (ECJ), or a number of national court decisions, Baragwanath argues that judicial review is not the dichotomous inflexible doctrine suggested by his colleagues but takes many forms and is subject to the application of sliding scales where a number of considerations can be weighed.31 He concludes that the Council, when it creates an independent judicial body subject to the rule of law, must anticipate that this body will examine compliance with the rule of law: ‘When it decides to create

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30 Ibid., §§ 31–69.
a tribunal, the Security Council must be deemed to have endowed such a tribunal with not only the trappings of legality, but also implicit authority to consider whether the fundamental norms are duly respected.... Such particular consideration of a UN Security Council resolution does not lead to a general review of the legality of the resolution, but rather to a specific interpretation and an evaluation of the effects of such resolution, with the scope of the Tribunal's mandate to ensure a fair trial by an independent tribunal established by law. 32

7. Concluding Comment

The legitimacy of the Special Tribunal is fragile enough without such an unnecessary self-inflicted wound. One hopes that apart from its semantic distinction between 'jurisdiction' and 'legality' and its odd reticence about acknowledging that it is in fact engaging in judicial review, the Trial Chamber's decision in this case will be the most remembered and followed — as well as, of course, Baragwanath's ringing dissent on appeal. To be sure, the majority Appellate Opinion relies on the 'letter of the law' when it finds that Rule 90(E) bars this type of legality challenge, as does the absence of explicit permission to engage in 'judicial review' in any relevant instrument. But a decision by the ICTY not to rehear *ad infinitum* Tadić-type jurisdictional challenges (if that is what it did by adopting a rule comparable to Rule 90(E) for itself in 2000) says nothing about how the STL should interpret Rule 90(E) in the first such challenge to its legality. The *Ayyash* defendants surely had the right to have their arguments heard and considered on the merits, particularly when these were not simply a rehash of those asked and answered by the *Tadić* Tribunal. They had a right to ask whether the Council had in this instance improperly conflated a treaty negotiation with Chapter VII action, whether acts of terrorism can trigger Chapter VII action of this kind, whether this Tribunal's unique mélange of international and national law departed from fundamental rules of either international or Lebanese criminal procedure — and whether any of these supposed flaws meant that the tribunal had not been 'established by law' or violated the principle of *jus de non evocando*. But for the Trial Chamber's supposedly 'erroneous' engagement with such questions, such fundamental issues, essential to any assessment of the Tribunal's credibility and legitimacy, would not have been examined at all. If it had been up to the Appellate Chamber, these questions of legality would have been barred by Rule 90(E) or by the apparently insurmountable rule against 'reviewing' the political actions of the Council. Baragwanath is surely right as well to affirm the defendants' rights to have these fundamental challenges heard, including on appeal, and not only if they have been given explicit leave to do so by the Trial Chamber.

32 *Ayyash and others*, Appeals Chamber, Baragwanath Opinion, §§ 80–81. Judge Baragwanath also addresses the practice of the Council and how this justifies treating acts of terror as threats to the peace: *ibid.*, §§ 84–89.
The ironies in the Appellate Chamber’s decision should not be overlooked. Whereas the unique nature of ad hoc international criminal courts drove Cassese and his colleagues on both the Tadić and El Sayed cases to invoke their own inherent compétence de la compétence to embrace such questions, these same features (e.g. absence of hierarchical structure) lead the Appeals Judges here to distinguish their capacities from those of more empowered ‘constitutional’ courts. This is a decision, ostensibly based on the letter of the law, that seems motivated less by the law than by timidity and fear. Fears of the supposed absence of judiciable standards combined with the apparently unimaginable possibility of impugning the Council’s actions even in part, drove the majority of these judges to avoid ‘politics’ and engage only in the application of law. Although the Appeals Judges here do not rely explicitly on the political question doctrine that was deployed by the Trials Chamber in Tadić, that is essentially their claim — even though no such political abstention doctrine has been endorsed by any international court. To this end, they rely on exceedingly cramped interpretations of the law, including their own Tribunal’s decision in El Sayed, the distinguishing of ICJ advisory opinions, and excessively narrow readings of other judgments, from the ICTR’s decision in Kanyabashi to the ECJ’s decision in Kadi. But their refusal to engage in even the ‘incidental’ review of the Council leads them, ironically, to adopt a view of the Tribunal that suggests that it is, as Baragwanath notes, a mere ‘creature’ of the Security Council rather than an independent court of law. In their haste to avoid judicial review, they adopt a strikingly controversial interpretation of the UN Charter that is their own (unacknowledged) version of judicial review. Thus, we learn in the course of this decision that the Council has ‘plenary’ authority and that its power to establish courts is not the result of ‘customary development’ of the Charter influenced by, among other things, an ICJ Advisory Opinion affirming the power of the General Assembly to establish such a body, but is an inherent political power unconstrained by any legal guidelines whatsoever. The Appellate Chamber’s decision to ‘not engage in politics’ leads to a decision that is entirely dictated by politics, including the fear of giving offence to the Council. Along the way, the judges seem to be saying that any court, national or international, which engages in even incidental review of the Council’s edicts or their effects under national law is engaged in improper ‘mere speculation’ since there is no ‘meaningful standard’ with which to engage in such review. Their ostensible refusal to engage in politics results in a decision that empowers the powerful while disempowering the rule of law and judges.

The monstrous consequences of following, like Captain Vere in Billy Budd,35 the letter of the law should have given even these positivist judges

33 See the memorable passage in Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, El Sayed (CH/AC/2010/02), Appeals Chamber, 10 November 2010, §§ 39–49.
34 Cf. Ayyash and others, Appeals Chamber, Baragwanath Opinion, § 48.
significant pause. Under the dichotomous view of permissible review taken by the appeals judges, the Security Council could, tomorrow, pass a Chapter VII resolution granting immunity to anyone previously subject to the Special Tribunal’s jurisdiction or it could direct that tribunal (or any other) to consider secret evidence to which only the Council has access or require international judges to otherwise violate the equality of arms without possibility of redress since, after all, all such matters are within the Council’s ‘sole’ discretion subject only to the Charter’s internal ‘political’ constraints. Of course, we have no need to consider hypotheticals when we have reality. At the moment, the Council has deployed its power to refer situations to the International Criminal Court (ICC) in two instances, the Sudan and Libya. In both instances, it has deployed the kind of selective approach that the majority of the appeals judges in Ayyash tell us can never be examined before any judicial body capable of issuing a binding order, including the ICJ. It has referred these specific situations only as from a particular date, limited the ICC’s purview to only certain nationals, refused to issue any subsequent Council orders enforcing the ICC’s actions, and imposed the costs of any such proceedings on Rome Statute parties and not the UN itself (in apparent violation of the Rome Statute itself).36 As is well known, these Council referrals have led to indictments of two sitting heads of states, notwithstanding the immunity those individuals would otherwise have enjoyed as citizens and officials of non-Rome party states. Prior to the Ayyash appellate decision, most of us would probably have assumed that all these aspects of the Council’s referrals, if challenged before the ICC in subsequent proceedings, could be judicially examined and reviewed for consistency not only with the Rome Statute and its rules but with the rule of law itself, including but not only the principles and purposes of the UN Charter. That was the inestimable legacy of judicial empowerment left by the Tadić jurisdictional decision — one that has been implicitly affirmed (and not rejected as the Appellate Chamber here tries to suggest) by a number of later judicial developments in both international and national courts, from Kadi to Al-Jeddah.37 That legacy is regrettably put in doubt by the Ayyash decision.

This is a strikingly odd time for a retrograde decision affirming that the Council is unbound by law. The international community has learned, since the Council has been re-activated at the end of the Cold War and particularly since 9/11, that the Council does not always act in conformity with the rule of law and that not all courts are willing to acquiesce in any and all of its actions. A time when the Council is still attempting to react to post-Kadi challenges to its authority is a strange time for an ‘independent’ court to affirm that, because it is not part of the UN system, it is somehow bound to affirm whatever the Council does, even if it violates the rights of the person

37 See Ayyash and others, Appeals Chamber, Baragwanash Opinion, §§ 31–81.
to whom it owes justice.\(^{38}\) No court, least of all a criminal one charged with responsibility over personal liberty, should feel compelled to delegitimize itself by failing to consider the fundamental fairness of what it does and by whose authority it acts. The Ayyash majority on appeal did just that.

\(^{38}\) Compare *Ayyash and others*, Appeals Chamber, § 39.