

Trials in Absentia at the Special Tribunal for Lebanon

Incompatibility with International
Human Rights Law

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Abstract

The article assesses whether or not the provision for trials at the Special Tribunal for Lebanon (STL) to be held in absentia, in Article 22 of that Tribunal's Statute, is consistent with international human rights law binding on Lebanon. It is contended that unless there is an unfettered right to a retrial at the defendant's option, holding a trial in absentia violates internationally recognized minimum standards of fairness except in circumstances where the accused is: (i) ejected from the proceedings for causing serious disruption; or (ii) being aware of the proceedings, voluntarily waives the right to be present. In light of these principles, the authors conclude that the Statute of the STL is not compliant with these minimum fair trial standards. As an ad hoc institution, the STL cannot and does not effectively guarantee a retrial; yet notwithstanding this it purports to authorize — and indeed requires — trials to be conducted in absentia in a number of instances outside these narrow confines. The authors submit that such trials are unlawful and, moreover, will give rise to trials that will deprive an absent accused of an effective defence. The Statute of the STL should be amended to avoid trials in absentia, except in the limited circumstances outlined above, lest its implementation in its present form undermines the legitimacy of the Tribunal as a whole.

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1. Introduction

The Special Tribunal for Lebanon (the STL) is unique amongst the internationalized tribunals in that the applicable law is essentially national in character.¹ The STL shall apply provisions of the Lebanese Criminal Code relating to inter alia the prosecution of terrorism and crimes against life and personal integrity. Its international character stems from the mixed composition of the judiciary, composed of Lebanese and international judges, as well as an international prosecutor. Accordingly, the Statute of the STL provides that the Tribunal will adhere to due process of law, based on the highest international standards of criminal justice as applied in other international tribunals.²

Against this background, the express provision for entire trials at the STL to be held *in absentia*,³ set out in Article 22 of the Statute of the STL (the 'Statute'), is perplexing.⁴ This provision is unique amongst the international or internationalized, ad hoc and 'hybrid' UN tribunals.⁵ Express provisions of this nature have been noticeably absent at the international level since the days of the 1945 Charter of the International Military Tribunal in Nuremberg, which also allowed for trials to be held where the accused had not been detained.⁶

Article 22 of the STL Statute provides for trial *in absentia* in three situations, namely where the accused has: (1) expressly waived his or her right to be present; (2) not been handed over to the Tribunal by another state; or (3) absconded or cannot be found and 'all reasonable steps' have been taken to notify him or her of the proceedings (there is also provision for part of the proceedings to be held *in absentia* where an accused is found to have disrupted the proceedings, although this is not the focus of the present article).

This article seeks to identify the precise circumstances in which it is legitimate under international law for a court to proceed with a trial in the absence of the defendant, and then discuss whether or not Article 22 of the STL Statute purports to authorize *in absentia* trials in circumstances that fall outside these recognized limits. To this end, emphasis will be placed to the international provisions whereby a person charged with a criminal offence has a

1 On the STL, see the articles published as part of Current Events, in 7 *Journal of International Criminal Justice (JICJ)* (2009) 808–944 and in the Symposium entitled 'Special Tribunal for Lebanon — A Cripple from Birth', 5 *JICJ* (2007) 1061–1174.

2 *Factsheet: Special Tribunal for Lebanon*, available at: <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml> (visited 27 August 2009).

3 As a matter of definition, the authors consider proceedings are '*in absentia*' whenever they are conducted in the absence of the accused, whatever the reason or purported justification, see B. Garner, *Black's Law Dictionary* (9th edn., St. Paul Minnesota: West, 2009), at 1645; and J. Gray, *Lawyers' Latin* (London: Robert Hale, 2006), at 67.

4 On this provision, see P. Gaeta, 'To Be (Present) or Not to Be (Present): Trials *in Absentia* before the Special Tribunal for Lebanon', 5 *JICJ* (2007) 1165–1174.

5 See e.g. the 'right to be present' provisions of Art. 21(4)(d) ICTYSt.; Art. 20(4)(d) ICTRSt.; Art. 17(4)(d) SCSLSt. and Art. 63 ICCSt., which prohibit (or severely restrict) trials *in absentia*.

6 Nuremberg Charter (1945): Art. 16, and also Rule 2(d) of the Rules of Procedure.

right to be present at his trial⁷ and the limited circumstances and conditions under which such a right can be set aside. Commonly cited examples include cases where there is an unfettered right to a subsequent retrial; where the accused is expelled from the courtroom for seriously disrupting the proceedings ('abuse' of the right to be present); or where there is an express and unequivocal waiver of the right to be present.

The authors conclude that Article 22 STL Statute not only purports to authorize but in fact *requires* trials *in absentia* in circumstances that fall outside internationally recognized standards. Implementation of the Statute without amendment may well place Lebanon in default of its international obligations. There are strong and unsettling indications that the inclusion of Article 22 reflects a triumph of politics over fair trial standards, and that its true purpose is to attempt to circumvent the anticipated non-cooperation of certain states with the work of the Tribunal (principally Syria). However, the authors submit that, ultimately, holding trials *in absentia* will be counterproductive and legitimize non-cooperation. The *in absentia* 'trials', if they are permitted to proceed, will be demonstrably flawed and, thus, cast doubt on the legitimacy of the STL, undermining its credibility.

2. The Right to Be Present at Trial

The principle that a person charged with a criminal offence has a right to be tried in his or her own presences is encapsulated in Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), and is binding upon Lebanon.⁸ This right is expressed to be a *minimum guarantee* and applies at all stages of the proceedings.⁹ Notwithstanding the apparently mandatory language contained in Article 14(3)(d), there appears to be a consensus amongst states party to the ICCPR that the right is not absolute and may be subject to certain restrictions. As to the propriety of these restrictions, the UN Human Rights Committee (the HRC) opined in the *Mbenge v. Zaire*¹⁰ Communication that:

According to Article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.¹¹

7 Art. 14(3)(d) of the International Covenant on Civil and Political Rights.

8 Lebanon acceded to the ICCPR on 3 November 1972.

9 Art. 14(3) ICCPR.

10 *Mbenge v. Zaire*, HRC Communication No. 16/1977, reported at 78 ILR 18, 19, UNHR Comm. 1983.

11 *Ibid.*, § 14.1.

The critical question, then, is precisely when departure from the norm in the fulfilment of this objective is justified. There are three distinct situations in which states parties frequently (and, it is considered, lawfully) conduct *in absentia* trials. Each has a fundamentally different basis in principle, and it is crucial to distinguish between them: the first scenario in which it may be permissible to conduct a trial *in absentia* is where there exists an unfettered right of retrial.¹² One might query whether, as a matter of principle, the existence of a right of retrial actually has the effect of rendering the first trial legitimate, or whether it simply provides an effective remedy to a person convicted *in absentia*, thereby implicitly recognizing that the previous trial was procedurally defective and unfair. Furthermore, on the level of praxis, it might be thought that doubling the cost and court time consumed by a single criminal matter, as well as having witnesses testify twice, might not be the most expedient manner of administering justice. However little turns on this in the present discussion since, for reasons explained below, the authors submit that persons tried *in absentia* before the temporary jurisdiction of the STL do not enjoy an effective right of retrial, and so this ‘justification’ for *in absentia* trials is inapposite.

The second scenario is where a disruptive defendant is removed from the courtroom, the justification being that the person has *abused* the right to be present. In doing so, the court is actively restricting the accused right on the basis that its exercise carries with it attendant responsibilities.¹³ Put simply, the right contained in Article 14(3)(d) is thought not to include the right to filibuster one’s own trial.¹⁴ The court may, subject to the provision of appropriate safeguards,¹⁵ be justified in continuing, providing that the disruption is sufficiently severe and persistent.¹⁶

The third scenario in which trials *in absentia* are generally permissible is where the accused has voluntarily waived the right to be present. Although it

12 *B v. France*, ECtHR Application No. 10291/82, reported at (1994) 16 EHRR 1.

13 It has been pointed out that excluding the accused is clearly preferable to using force such as gagging, restraining or subduing the defendant through the use of calming drugs. Such action would probably be ineffective, and would greatly erode the dignity of the defendant. See S. Treschel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 253.

14 Authority for this proposition may be found in the decision of the European Commission on Human Rights in *X v. United Kingdom*. Application 8386/78, and reported at (1978) 21 DR 126.

15 An example of a possible safeguard that has been employed is the provision of facilities for the accused to continue to follow proceedings via video link. However, it is suggested that this arrangement would only be appropriate in a case where the accused is represented, and is able to communicate with her lawyer on an ongoing basis.

16 Some jurisdictions, such as South Africa, only permit *in absentia* proceedings in this limited circumstance. Art. 35 of the Constitution of the Republic of South Africa provides that: ‘Every accused person has a right to a fair trial’, which includes the right ‘... to be present when tried’. The removal of the defendant for disrupting the trial is the only exception, even in times of national emergency (Constitution, Art. 37). Even where this exception applies, the trial may continue only if the accused is legally represented, and the accused must, when she returns to the courtroom, be afforded the opportunity to put questions to any witness who testifies during her absence. See ss 158–160, South African Criminal Procedure Act of 1977.

is accepted that this forms a legitimate basis for proceeding *in absentia*, there has been much debate about when it is permissible to infer that the accused does in fact intend such a voluntary waiver.

The starting point in this debate, so far as Article 14(3)(d) of the ICCPR is concerned, is the decision of the HRC in *Mbenge v. Zaire*.¹⁷ The facts of that case were that the author of the communication had fled his native Zaire for Belgium where he had been granted refugee status. In his absence the author was twice convicted of various offences (once in 1977 and again in 1978) and sentenced to death on each occasion. Before the HRC, it was not disputed that the author had learnt of the trials through the press only after they had taken place. Furthermore, the respondent state did not adduce any evidence that it had even attempted to serve summons on the author, despite the fact that his address in Belgium was known (it appeared in the 1977 judgment). The HRC found that a clear violation of Article 14(3)(d) was made out (as well as other breaches that are not relevant for present purposes). It reasoned that:

The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. ... The State party has not challenged the author's contention that he had known of the trials only through press reports after they had taken place. ... [N]o indication is given of any steps actually taken by the State party in order to transmit the summonses to the author.¹⁸

It is respectfully submitted that while the HRC plainly reached the correct result on the facts of the case, it was wrong to suggest (*obiter*) that a trial *in absentia* might be lawful in a case where, notwithstanding that the state had exercised 'due diligence' (whatever that is supposed to mean in this context) in attempting to notify the accused of the proceedings, it nevertheless had not succeeded in actually notifying him. Fortunately, the HRC took the opportunity to revisit this dicta in its decision in *Maleki v. Italy*,¹⁹ concluding that a showing of due diligence was insufficient to justify proceeding in the absence of the author.²⁰ Suffice to say, that this was the correct approach. It is impossible to draw an inference that the accused voluntarily intends to waive his right to be present unless it is first demonstrated that, at the very least, he had actual knowledge of the proceedings against him. Where the evidence adduced establishes only that 'reasonable steps' were taken to inform the accused but not actual knowledge, this establishes nothing more than constructive knowledge of the proceedings on the part of the accused person. An inference that a defendant intends to waive the right to be present is, when based upon constructive knowledge, in fact not an actual waiver at all. A mere constructive waiver, it is contended, is insufficient in principle, and

¹⁷ *Supra* note 10.

¹⁸ *Ibid.*, § 14.2.

¹⁹ *Maleki v. Italy*, HCR Communication No. 699/1996.

²⁰ *Ibid.*, § 9.4

therefore no amount of 'due diligence' and no number of 'reasonable steps' will suffice. This conclusion is logical, and is supported by the jurisprudence of the European Court of Human Rights (ECtHR), which has considered the issue of actual notice on numerous occasions in relation to Article 6(3) of the European Convention on Human Rights (ECHR). In *Colozza v. Italy*²¹ the ECtHR held that:

... the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question.²²

...

the resources available under domestic law must be shown to be effective and a person 'charged with a criminal offence' who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure.²³

The issue arose again in *Sejdovic v. Italy*.²⁴ As in *Colozza*, the Applicant (a murder suspect) could not be located and was presumed to have fled with a view to evading justice. The trial court appointed an official defence counsel and proceeded to trial, at which the Applicant was convicted and sentenced to 21 years and 8 months' imprisonment.²⁵ The Applicant was subsequently arrested in Germany, which refused to extradite him on the ground that the requesting country's domestic legislation did not guarantee that the applicant would have the opportunity of having his trial reopened. The Government of Italy argued before the ECtHR that, on the facts of the case, it had been entitled to treat the Applicant as having waived his right to be present and that he therefore had no entitlement to a retrial. The supposed bases for drawing this inference were that the Applicant had: been implicated by multiple eyewitnesses; given no plausible reason why he had suddenly left his usual place of residence immediately after the killing; and had not sought a retrial upon his

21 *Colozza v. Italy* ECtHR Application No. 9024/80, reported at (1985) 7 EHRR 516. The prosecuting authorities had been unable to locate the applicant. The trial court, following consistent authority from the Court of Cassation, held that an intention to evade justice was to be presumed since 'adequate' searches failed to locate the suspect. Mr Colozza was on this basis tried and convicted *in absentia*. When he later discovered the existence of the conviction, the applicant sought a retrial on the basis that he had had no knowledge of the proceedings, also pointing out that all along the Rome police and judicial authorities had been able to locate him at his current address in relation to other criminal matters. He was denied a retrial, since the only remedy available under the relevant laws was an appeal restricted to points of law. The Applicant argued that this violated his right to a fair trial under Art. 6 ECHR.

22 *Ibid.*, § 28.

23 *Ibid.*, § 30.

24 *Sejdovic v. Italy*, ECtHR Application No. 56581/2000, judgment of 1 March 2006, reported at [2008] ECHR 620.

25 Meanwhile, one of the Applicant's co-defendants was sentenced *in absentia* to 15 years and 8 months' imprisonment for the same offences, while the three others, who were all present at trial, were acquitted.

capture in Germany but rather resisted extradition. The Court rejected these arguments and reached the following conclusion:

The Court considers it unnecessary to speculate as to what caused the applicant to leave his home and travel to Germany. It reiterates that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 § 3 (a) of the Convention. Vague and informal knowledge cannot suffice.²⁶

Consequently, even supposing that the applicant was indirectly aware that criminal proceedings had been opened against him, it cannot be inferred that he unequivocally waived his right to appear at his trial. It remains to be determined whether the domestic legislation afforded him with sufficient certainty the opportunity of appearing at a new trial.²⁷

...

The Court reiterates that, ... a person convicted *in absentia* who cannot be deemed to have unequivocally waived his right to appear must in all cases be able to obtain a fresh determination by a court of the merits of the charge. The mere possibility that there might have been a waiver, subject to the submission of evidence by the prosecuting authorities or by the convicted person regarding the circumstances in which he was declared to be a fugitive, cannot satisfy the requirements of Article 6 of the Convention.²⁸

The Court thus took the view that actual knowledge of the proceedings was required before a waiver of the right to attend could be inferred.²⁹ It is submitted that the Court's reasoning is sound: once it is appreciated where the burden of proving the accused's knowledge lies — that is, on the prosecution — it becomes plain that any argument based on informal knowledge or constructive knowledge is bound to fail.³⁰ Thus, as indicated by the Court in the above extract, the accused must at a minimum be served with a summons (or equivalent) if the prosecution is to discharge its burden.³¹

To sum up, the case law of both the HRC and of the European Court affirms that — absent a right of retrial — actual notice of the proceedings on the part of the accused is a necessary condition for those proceedings to be compliant with Article 14(3)(d) of the ICCPR or Article 6 ECHR.³² Therefore, under the relevant rules of international law binding upon Lebanon, absent an unfettered right of retrial, it is impermissible to commence a trial in the absence of

26 *Sejdovic v. Italy*, *supra* note 24, § 35.

27 *Ibid.*, § 36.

28 *Ibid.*, § 39.

29 In this respect, the *Sejdovic* case must be distinguished from *Medenica v. Switzerland* (*Medenica v. Switzerland*, ECtHR Application no. 20491/92, reported at (2001) ECHR 395. For the relevant finding of the Court, see § 59), in which the Applicant actually knew of the proceedings against him and of the date of his trial.

30 Except perhaps to the very limited extent that the personal service of a written summons on a person able to understand its contents could be construed as constructive knowledge of its contents.

31 The summons must indicate that a possible consequence of failing to appear is the trial going ahead *in absentia*.

32 *Poitrimol v. France*, ECtHR Application No. 14032/88, reported at (1994) 18 EHRR 130.

the accused unless it can be demonstrated that, at the very least, the defendant had actual and direct knowledge of the proceedings.

A second issue less commonly arising is whether or not it is permissible to complete a trial where the defendant ceases to attend midway through the proceedings. A number of jurisdictions — including the US federal criminal jurisdiction³³ — do allow trials to continue if the accused disappears during the proceedings.³⁴ US Courts do not really regard such proceedings as being *in absentia* since the maxim '*semel praesens semper praesens*' (to be present once is to be present always) is applied.³⁵ However, even in these cases where the trial does continue *in absentia*, although there is no automatic entitlement to a re-trial, a conviction will still be set aside if it can be shown that, due to the accused's absence, there was a real possibility of prejudice.³⁶

In sum, Article 14(3)(d) of the ICCPR, read in light of the subsequent practice concerning trials *in absentia* in many jurisdictions, indicates that (subject to re-trial at the accused's option) a court may not commence or proceed with a trial in the accused's absence unless the prosecutor is able to establish that the accused possessed actual knowledge of the proceedings and intended to waive his right to be present.

3. Trials *in Absentia* under the STL Statute

A. Article 22 against the Background of the Right of the Accused to be Present under International Law

Article 22 STL Statute, entitled '*trials in absentia*', provides as follows:

- (1) The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
 - a. Has expressly and in writing waived his or her right to be present;
 - b. Has not been handed over to the Tribunal by the State authorities concerned;
 - c. Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.
- (2) When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
 - a. The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
 - b. The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;

³³ This rule does not apply at all in capital cases since it is thought that the presence of the accused is so critical as to be indispensable.

³⁴ Federal Rules of Criminal Procedure, Rule 43.

³⁵ *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963); C. Wright, *Federal Practice and Procedure: Criminal* § 723 at 199 (1969, Supp.1971).

³⁶ *Estes v. United States* (1964, CA5 Tex) 335 F.2d 609.

- c. Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.
- (3) In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

First, Article 22(1) provides that trials *in absentia* are not merely permitted but are *mandatory*. Article 22 is unequivocal on this point: where any one of the three circumstances set out in Articles 22(1)(a)–(c) is present, ‘the Special Tribunal *shall* conduct trial proceedings in the absence of the accused...’ The crucial issue is whether or not those three circumstances fall within one of the accepted categories discussed above.

Subsection 22(1)(a) deals with the situation where the accused expressly waives the right to attend proceedings in writing. Presuming the defendant’s decision is taken freely and that appropriate legal advice has been available, there can be little objection about this provision. However, the same cannot be said of Articles 22(1)(b) and (c).

As regards Article 22(1)(b), it is difficult to see the relevance of the fact that ‘the State authorities concerned’ may have ‘failed’ to hand over the accused, and how this fact alone can create a lawful foundation for a trial to proceed *in absentia*. There are three principal problems with this provision. First, it may not be at all clear precisely *which* state authorities are ‘concerned’ since the whereabouts of the defendant might well be unknown. Second, as a matter of public international law, states are under no obligation whatsoever to extradite suspects for trial in another state³⁷ — in fact, it is arguably *unlawful* to do so in the absence of an extradition treaty providing a basis in law for such an extradition.³⁸ It can hardly be permissible to forfeit an individual’s right to appear at his own trial on the basis that some third state has not done a thing it is under no obligation to do. Third, and most importantly, the fact that a state may have refused to extradite an accused person is immaterial when it comes to the critical question of whether the accused himself knew of the proceedings against him and voluntarily elected not to attend.

Under these circumstances, even assuming that such a person was willing to attend the Tribunal to contest the charges, common sense dictates that the state may not make efforts to inform the accused about the charges — let alone issue an exit permit or physically permit that accused person to leave for the proceedings in the Hague. Therefore it must be concluded that, without more (i.e. cogent evidence of actual knowledge of the proceedings and voluntary waiver of the right to be present) Article 22(1)(b) is not based on the deliberate decision of the individual to waive the right to be present. Thus, Article 22(1)(b) does not appear to be a lawful basis on which to conduct proceedings in the absence of the accused.

³⁷ *Lockerbie case (Libya v. United Kingdom)*, 1992 ICJ Rep. 3, at 24.

³⁸ See the discussion of the House of Lords in *R v. Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42.

Article 22(1)(c) is similarly incompatible with the minimum guarantee contained in Article 14(3)(d) of the ICCPR. Where the accused 'otherwise cannot be found', the taking of 'reasonable steps' will not be sufficient unless there is a right of retrial.³⁹ Since the burden is on the prosecution to establish actual knowledge of the proceedings, no number of 'reasonable steps' can establish a voluntary waiver, unless they result in the accused demonstrably acquiring the required knowledge.

Despite the mandatory language of Article 22(1) (*shall* conduct trial proceedings in the absence of the accused') Article 22(1) must be read alongside Article 22(2). The words 'shall ensure' in Article 22(2) deprive the court of jurisdiction to proceed in the absence of the accused unless and until the subsections have been satisfied. Pursuant to subsection 22(2)(a), the court shall ensure that '[t]he accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality.' The first two methods by which this subsection may be satisfied — notification or service of the indictment — are unobjectionable. However, the remainder of subsection 22(2)(a) raises interpretational and fair trial issues. It might be argued that the most 'natural' meaning of these remaining words is as follows: 'the requirement is met when evidence is adduced demonstrating any one of the following: (1) media publication has occurred; or (2) the indictment has been transmitted to the State of residence; or (3) the indictment has been transmitted to the State of nationality.' However, it is submitted that this interpretation must be rejected. Implementing the provision in this fashion would result in the Statute being in breach of the minimum guarantee, since none of these three methods of notice guarantee that *actual notice* is achieved.⁴⁰

It is submitted that the proper approach to be taken by the STL to the interpretation of Article 22(2)(a) — and indeed to its Statute generally — requires the Tribunal to presume a legislative intention to comply with Lebanon's and the United Nations' international obligations. This general principle of statutory construction presumption must be applied with particular vigour where fundamental human rights — such as, in the present context, the right to a fair trial — are engaged. Put another way, Article 22(2)(a) is not to be interpreted in such a way as to derogate from this fundamental human right unless the language is incapable of sustaining any other construction. However, this is not the case. When proper emphasis is given to the words '*notice has otherwise been given*', it is clear that mere evidence of publication or

39 See the holdings in the *Maleki* case, *supra* note 19 clarifying the previous *dictum* in *Mbenge*.

40 In fact, in the present circumstances, scepticism as to the effectiveness of the proposed methods would appear more than justified. If a state is refusing to hand over a suspect for trial — or even allow them to voluntarily attend — it hardly seems likely that it would courteously pass on a copy of the indictment on the court's behalf. As to media publication, it might be fairly observed that countries such as Syria (by way of example) would be unlikely to allow the Tribunal to use its media for the purpose of some form of substituted service — to say nothing of the likelihood of the available media actually reaching an accused person.

transmission of notification to the relevant states will not suffice. The subsection is satisfied only when the evidence adduced demonstrates that *notice has been given* through one of the methods stipulated. That is to say, what should be required is evidence that actual notice was achieved by the employment of one of the three stipulated methods. In fact, this construction avoids undue violence to the language of subsection 22(2)(a), even if it might be said that the alternative interpretation discussed above is ‘more natural.’ This latter construction brings subsection 22(2)(a) of the Statute in line with the minimum guarantee.

B. Accused Prevented from Attending by State

The remaining, and arguably insuperable, concern is that which arises in circumstances where an accused is prevented from attending the trial against his wish. This scenario is particularly likely to be an issue in relation to persons allegedly associated with Syrian intelligence. Thus, even in a case where 22(1)(b) applies (the accused ‘has not been handed over to the Tribunal by the State authorities concerned’) and 22(2)(a) (‘actual notice’) have been satisfied, it may nevertheless be the case that the necessary unequivocal, voluntary waiver is lacking. This is a factual scenario that, to the authors’ knowledge, has not arisen for consideration by the ECtHR or the HRC. It is difficult to see how, in light of the mandatory language of Article 22(1), this provision could be interpreted in such a way as to avoid a trial *in absentia*. Article 22(1) requires the court to perpetrate an unfair trial upon an accused person in breach of the right to be present under Article 14(3)(d), even where it is plain that the defendant is prevented from exercising the right to attend.

There are worrying indications emanating from the Judges of the STL that such trials have already been considered and impliedly approved. Rule 106(B) (concerning the ‘Determination of the Intention to Avoid Trial or of the Impossibility to Attend’) RPE states that:

Where the accused is not present on account of the failure or refusal of the relevant State to hand him over, before deciding to conduct proceedings *in absentia*, the Trial Chamber shall: (i) consult with the President and ensure that all necessary steps have been taken by the President with a view to ensuring that the accused may, in the most appropriate way, participate in the proceedings; and (ii) ensure that the requirements of Article 22(2) of the Statute have been met.

In other words, it would appear to be the case that Rule 106 permits the holding of trials *in absentia* in precisely the circumstances in which we have identified as being unlawful. Nothing in this rule would permit the court to elect not to proceed in a case where it was actually known that the accused wanted to participate in the proceedings against her but was being prevented from doing so. There is no requirement that actual effective participation be achieved; only that those steps that were taken were those that *could* have ensured participation.

C. Failure to Guarantee Retrial

According to ECtHR jurisprudence, it is permissible to try an accused person in his absence providing that a right of retrial is guaranteed by law. Article 22(3) of the Statute purports to express this necessary guarantee ('shall have the right to be retried in his or her presence before the Special Tribunal'). However, as a moment's reflection reveals, this 'guarantee' is specious at the STL. The STL is an ad hoc court and not a permanent institution. Any right opposable to the Tribunal — be it a right of retrial or otherwise — is good only for as long as the tribunal actually remains open for business. Once the Tribunal has shut its doors, the right of any person convicted *in absentia* to a retrial is extinguished.

Furthermore, there is no possibility of a retrial before the regular Lebanese courts either. Article 5(1) of the Statute, entitled '*Non bis in idem*' provides that: 'No person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.' Although it might be arguable that, in general, the *non bis in idem* principle is inapplicable to judgments not of a final character (such as those rendered *in absentia*), the wording of the rule itself removes any doubt that it does in fact bar the retrial of a person convicted *in absentia* by the STL. The prohibition simply applies if a person 'has already been tried by the [STL]', and not only where she has been tried and finally convicted. Therefore, even if one could say that a person convicted *in absentia* by the STL has not been made the subject of a final judgment, it can hardly be argued that he has not 'already been tried'. The highest the point could be put would be to advance the (admittedly strained) interpretation that a trial *in absentia* involves a trial of the accused's *case* — as opposed to the accused herself — but obviously this argument is less than convincing. Furthermore, it is significant that any argument on this issue would fall to be considered not by the STL itself, but by the regular Lebanese courts once the Tribunal ceased to operate.

It would be pointless to speculate on exactly how many years the Tribunal is likely to remain in business — it could be fewer than 5 years or more than 10.⁴¹ As a matter of principle it makes no difference: the doors must at some point close. When they do, any right of retrial on the part of persons convicted *in absentia* expires. Since the possibility of a retrial is effectively time-barred, there can be no reliance upon the rule in *B v. France*⁴² — namely that a guarantee of a retrial renders *in absentia* proceedings permissible even where there has been no waiver of the right to be present.

41 The agreement between the Lebanon and the UN is expressed to be in force for a period of 3 years from the date of the commencement of the functioning of the STL, subject to possible extension: see Art. 21(1) of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Annexed to Security Council Resolution 1757 (2007), S/RES/1757 (2007), 30 May 2007.

42 *Supra* note 12.

D. Another Problem with Article 22

Moreover, there are other issues that raise fundamental questions in relation to the wisdom of this provision. Article 22(3) creates a very real risk that any miscreant accused will use it to play tactical games with the court. The subsection provides that the sole criterion for a right of retrial is the defendant's failure to appoint counsel. The obvious strategy for an absent defendant would be to rely upon the Defence Office to appoint counsel to defend her at trial, safe in the knowledge that if she is convicted and later apprehended, she will be entitled to a second bite at the cherry (presuming, of course, that the STL is still in operation). Such a defendant could even go so far as to actually provide instructions to the Defence Office-appointed counsel (who would be duty-bound to follow them) on the conduct of the defence, since, as long as it was the Defence Office that designated counsel, the right of retrial would be preserved. The fact that the Statute has provided such obvious means by which mischief might arise indicates a further weakness inherent in Article 22.

4. Addressing the Supposed Justifications for *in Absentia* Trials

A. *Hamlet without the Prince: A Hamstrung Defence*

It is submitted that the rule that a person charged with a criminal offence has a right to be present at his or her trial has a sound basis both in principle and in praxis. As a matter of principle, the right is not given effect to by the mere appointment of defence counsel. In this regard, the Appeals Chamber of the International Criminal Tribunal for Rwanda in *Zigiranyirazo*⁴³ (where the accused's right to be present during the testimony of one witness was found to be infringed) aptly held that:

the attempt to give full respect to both the right to counsel and the principle of equality of arms do not compensate for the failure to accord the accused what is a separate and distinct minimum guarantee: the right to be present at his own trial [t]he ... [Accused's] ... sense of being wronged in such circumstances is well-understandable.⁴⁴

This is not to deny that there does exist some apparently attractive (although, as explained below, superficial) policy arguments for conducting trials *in absentia*. Indeed, in cases where the defendant has absconded or their absence is simply unexplained, there may be great pressure on the prosecuting authority — or even on the court itself — to press ahead with the trial. Witnesses and victims, who may have been severely inconvenienced by

⁴³ Decision on Interlocutory Appeal, *Zigiranyirazo* (ICTR-2001-73-AR73), Appeals Chamber, 30 October 2006.

⁴⁴ *Ibid.*, § 21.

protective measures, associated preparation, travel and the inevitable anxiety that comes with participating in trials, have a legitimate expectation of getting their day in court without suffering interminable delay. Equally, any co-accused may also have been waiting patiently for their trial to commence. At considerable expense and inconvenience, the court and its judges, counsel and staff will have made time in otherwise crowded diaries. Significant amounts of time, resources and public money may be wasted by the postponement of a scheduled hearing. In cases of a political nature, there may well be (undue) pressure to 'get results'. Within the international sphere, donor countries will have an understandable expectation of seeing trials commence within a reasonable timeframe.

Moreover, at a general level, it is an unavoidable facet of litigation that the quality of evidence depreciates over time: witnesses die, memory fades, and physical exhibits are lost.⁴⁵ In some European states, a structural reason for trials to be held *in absentia* is that the statute of limitations sets a shorter period for the commencement of criminal proceedings than for the execution of sentence,⁴⁶ and prosecuting authorities will therefore want to try to obtain a conviction before the limitation period bites (although one might think that a more appropriate solution to this would be to amend the statutes of limitation).

Thus, in cases where the defendant does not appear at trial and cannot be apprehended, in the face of these pressures the prosecuting authority and the court may well be confronted with a great temptation to proceed. However, while the primary duties of criminal courts are set by the political body establishing those courts, one of the fundamental responsibilities of criminal courts is carrying out their responsibilities with due regard to the rights of the accused and conducting a fair trial. The defendant is, and must always be, the central figure in a criminal trial. The prosecuting authority will have prepared its case and be convinced that it represents a reasonable prospect of establishing the guilt of the accused. The trial is the *accused's* opportunity to challenge that evidence, and to present his account. For this simple reason, to conduct a trial without the defendant is to stage *Hamlet* without the Prince; even with the finest actors in supporting roles (such as defence counsel) it cannot be billed as an original or accurate narrative.

On a practical level, it is difficult to overstate the impact that the accused's absence for the entirety of the trial has on the defence's ability to resist the prosecution case — especially where defence counsel has had no opportunity to take instructions.⁴⁷

45 See *Colozza v. Italy*, *supra* note 21: 'The impossibility of holding a trial by default may paralyze the conduct of criminal proceedings, in that it may lead, for example to dispersal of evidence, expiry of time limits for prosecution or a miscarriage of justice.'

46 See e.g. Austrian Penal Code, §§ 57 and 59; German Penal Code, §§ 78–79; Swiss Penal Code, Arts 70 and 73.

47 See A. Gilligan and E. Imwinkelried, 'Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia', 56 *South Carolina Law Review* (2005) 509, at 524, who clarified that '[in] the typical (adversarial) case, the accused's

Put simply, the defence is hamstrung in both obvious and less obvious ways by the absence of the accused. The larger and more complex the case, the greater the handicap will be; concomitantly, the more the safety of any conviction must be in doubt. To make good this point on the impact that the defendant's non-participation has upon the ability to resist the prosecution case, it is instructive to consider the approach that has been taken in international cases where the mental fitness of the accused is in issue. In such situations, the International Criminal Tribunal for the former Yugoslavia (ICTY) has sensibly approached the matter by taking an overall assessment of the potential for effective participation on the part of the accused, bearing in mind the extent to which the accused and his counsel are required to work together. Whether or not the trial should commence (or continue) is judged as a practical matter with due weight being afforded to, amongst other things, the ability of an accused to instruct counsel and to testify on her own behalf⁴⁸ combined with the skills of professional counsel.⁴⁹

In the related context of the accused's right to self-representation (i.e. where defence counsel is imposed against the wishes of the accused) much attention has been placed upon the key role of counsel and the sorts of contributions professional counsel can make to a trial even without the cooperation of the accused.⁵⁰ The President of the ICTY (in affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, *Milošević* (IT-02-54), 7 February 2005) has pointed out that there is a 'breadth of activities'⁵¹ that can be carried out by counsel in the face of a non-cooperative (or absent) accused. Counsel can, even without instructions: 'make submissions on fact and law that they deem it appropriate to make; ... seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused's case properly,

absence makes it easier for the prosecution to obtain a conviction. First, the accused's absence will reduce the amount of evidence potentially available to the defense because the accused's absence necessarily deprives the defense of the accused's personal testimony. Second, the accused's absence deprives the defense and the factfinder access to the accused's knowledge about the case. If the accused has exclusive knowledge of the existence of a potential defense witness, that witness may never appear on behalf of the defense. Moreover, the accused will not be present to furnish the defense counsel with investigative leads" and "[hence], rather than reducing the prosecution's ability to establish the accused's guilt beyond a reasonable doubt, in most instances the accused's absence will make it easier for the prosecution to achieve a guilty verdict' (at 526).

48 Decision Re the Defence Motion to Terminate Proceedings, *Strugar* (IT-01-42-T), Trial Chamber, 26 May 2004, §§ 24 and 36.

49 Decision on Motion Re Fitness to Stand Trial, *Stanišić* (IT-03-69-PT), Trial Chamber, 10 March 2008, § 63.

50 See e.g. Decision on Assigned Counsel's Motion for Withdrawal, *Milošević* (IT-02-54-T), Trial Chamber, 7 December 2004; Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, *Šešelj* (IT-03-67-PT), Trial Chamber, 9 May 2003; and Decision on Defence Counsel Motion to Withdraw, *Barayagwiza* (ICTR-97-19-T) Trial Chamber, 2 November 2000.

51 Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, *Milošević* (IT-02-54-T), President, 7 February 2005, § 13.

including the issuance of subpoenas; [... and must] act throughout in the best interests of the Accused.⁵²

However, the question is not whether this 'breadth of activities' is better than nothing — so much is obvious — but rather whether such activities are an acceptable or meaningful substitute for an accused-led defence. The authors submit that it plainly is not. In the context of the prosecution of complex crimes, the prosecution case will consist of hundreds of specific factual and legal allegations. Mounting an effective defence requires more than a rudimentary testing of the prosecution case achieved by identifying *internal* inconsistencies; it requires specific answers and robust rebuttals of these allegations. Defence counsel cannot invent the defence on behalf of his client.⁵³ Even if this were permissible, '[t]he defence put forward by Counsel will not represent the [a]ccused's actual defence in the absence of cooperation and instructions from the [a]ccused.'⁵⁴ As the ICTR and the ICTY have acknowledged, counsel is under an obligation to 'take full instructions on the facts.'⁵⁵ This is a prerequisite to 'enabl[ing] the defence of the accused to be presented',⁵⁶ and for 'the purpose of cross-examining the Prosecution witnesses'.⁵⁷ However important the work of the professional lawyer it can never be a substitute; the armaments of a skilled defence advocate will always fall short without the ammunition supplied by an accused.

Despite the total lack of cooperation between client and defence counsel in cases where ad hoc Tribunals have imposed counsel against the will of the accused, those tribunals have unfortunately taken the view that such an unsatisfactory arrangement is nevertheless capable of 'ensure[ing] that the trial continues in a manner that is *both* fair and expeditious'.⁵⁸ However, there is little, if anything, in the jurisprudence to demonstrate that this underlying presumption has been based upon a careful assessment of the trial process and how overall fairness might be achieved. The problem was neatly summed up by counsel in the *Milošević* case (relying in part on the Trial Chamber's earlier denial of the Prosecution's request to have counsel imposed upon the accused),

52 Order on the Modalities to be Followed by Court Assigned Counsel, *Milošević* (IT-02-54-T), Trial Chamber, 3 September 2004.

53 If citation were needed for this principle, it may be found in: D.D. Ntanda Nsereko, 'Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client', 12 *Criminal Law Forum* (2001) 487–507, at 505.

54 Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, *Milošević* (IT-02-54-AR73.7), Appeals Chamber, 29 September 2004, § 93.

55 Decision on Ntahobali's Motion for Withdrawal of Counsel, *Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), Trial Chamber, June 2001, § 23.

56 Decision Re the Defence Motion to Terminate Proceedings, *Strugar* (IT-01-42-T), Trial Chamber, 26 May 2004, §§ 24 & 38.

57 Decision on Motion Re Fitness to Stand Trial, *Stanišić* (IT-03-69-PT), 10 March 2008, § 48.

58 Reasons for decision on the Prosecution's Motion Concerning Assignment of Counsel, *Milošević* (IT-02-54-T), Trial Chamber, 22 September 2004, § 65.

who were seeking to resist being assigned to represent the accused against his (the accused's) express wish:

*'[T]he transposition of the principle of assignment of counsel from the civil law tradition to the adversarial proceedings of the ICTY creates a plethora of fair trial issues. In particular, the imposition of counsel upon an accused who wishes to assert his right to self representation in adversarial proceedings 'would effectively deprive that accused of the possibility of putting forward a defence.'*⁵⁹ In the absence of instructions from the Accused, an imposed lawyer would not be in a position to positively advance a defence or contest evidence during the trial, i.e. put the Accused's case without instructions that reveal a positive defence. It is inevitable that the defence put forward will not fully represent the Accused's actual defence were he to present it. In essence, 'A fair trial is not possible by imposing counsel upon an Accused when the advocate has no instructions and has no communication from him as to how to conduct his case.'⁶⁰ (Italics in original.)

Earlier in the proceedings, the Trial Chamber had also recognized that the 'background' to the issue (of fairness)⁶¹ was the adversarial nature of the proceedings and the 'distinct roles for the Prosecutor and the Defence in the presentation of evidence.'⁶² The Trial Chamber observed that:

While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused would effectively deprive that accused of the possibility of putting forward a defence. In this connection, Article 21(4)(d) of the Statute⁶³ can be said to be reflective of the common law position.⁶⁴

These remarks underscore the centrality of the accused's presence in the effective exercise of the right to present defence, and the true extent to which Counsel is emasculated without full instructions. The process that must

59 Reasons for decision on the Prosecution's Motion Concerning Assignment of Counsel, *Milošević* (IT-02-54-T), Trial Chamber, 4 April 2003, §§ 24–25.

60 Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel, *Milošević* (IT-02-54-A), Appeals Chamber, 29 September 2004, § 66. See also for statement in quotation: Amici Curiae Submissions in Response to the Order of the Trial Chamber Concerning the Implications of the Accused's Health Dated 2003, 27 September 2003.

61 Reasons for decision on the Prosecution's Motion Concerning Assignment of Counsel, *Milošević* (IT-02-54-T), Trial Chamber, 4 April 2003, § 20.

62 *Ibid.*

63 Art. 21(4)(d) ICTYSt. reads: 'In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

64 Reasons for decision on the Prosecution's Motion Concerning Assignment of Counsel, *Milošević* (IT-02-54-T), Trial Chamber, 4 April 2003, § 24.

inevitably arise in the absence of the accused is but a shadow of the contest envisaged in an adversarial trial and essential to a meaningful and fair judgment.

B. STL Trial Procedure — Fundamentally Adversarial

It appears that the supporters of *in absentia* trials at the STL — including the Secretary-General⁶⁵ and the President of the STL⁶⁶ — proffer their support under the apprehension that the procedure adopted would be predominantly based on the civil law tradition. The argument would appear to be that in civil law jurisdictions the accused's presence is less central at the trial phase of the proceedings, since this, in the Continental tradition, is not predominantly party-driven; rather, it is led by judges working from an extensive, previously tested case file. Thus, arguably the extent to which assistance is required from the advocating parties may be substantially less than in an adversarial trial.⁶⁷

Aside from the fact that this view, in general, appears to disregard the Extraordinary Chambers in the Court of Cambodia (ECCC), which borrows extensively from both traditions, the conclusion that the trial procedure at STL will be other than adversarial in nature is not borne out by an examination of the Statute and the Rules of the STL. Curiously, in complete contrast to the

65 *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon* (hereinafter 'Secretary-General's Report'), UN Doc. S/2006/893, 15 November 2006 (made at the request of the Security Council in SC Res. 1644 (2005), at § 6), §§ 32–33.

66 Explanatory Memorandum by the Tribunal's President (on the Rules of Procedure and Evidence as at 10 November 2009).

67 The Secretary-General commented to this effect, stating that in the view of his office (see Secretary-General's Report, *supra* note 65): 'The Special Tribunal for Lebanon is distinguished from other international tribunals established by the United Nations in two respects: (a) in the conduct of the trial process, more elements of civil law are evident than common law; and (b) the investigative process conducted by the Independent Investigation Commission ('IIC' or the 'Commission') constitutes, in fact the core nascent Prosecutor's Office. [§ 1] ... The Special Tribunal for Lebanon is the first UN-assisted tribunal to combine substantial elements of both legal systems. The applicability of the Lebanese Code of Criminal Procedure as a guiding principle alongside other reference materials reflecting the highest standards of international criminal procedure (Article 28), the enhanced powers of the tribunal to take measures to ensure expeditious hearing and prevent any action which may cause unreasonable delay (Article 21), and the introduction of trials in absentia (Article 22) are the most notable manifestations of civil law elements. [§ 8] ... The Special Tribunal for Lebanon is the first UN-assisted tribunal to combine substantial elements of both legal systems. The applicability of the Lebanese Code of Criminal Procedure as a guiding principle alongside other reference materials reflecting the highest standards of international criminal procedure (Article 28), the enhanced powers of the tribunal to take measures to ensure expeditious hearing and prevent any action which may cause unreasonable delay (Article 21), and the introduction of trials in absentia (Article 22) are the most notable manifestations of civil law elements. [§ 9] ... The judges of the Special Tribunal will take a more active role in the conduct of the trial process and the examination of witnesses. Under Article 20 of the Statute, unless otherwise decided by the Trial Chamber, examination of witnesses shall commence with questions posed by members of the Trial Chamber, the Prosecutor and the Defence. The Trial Chamber may also proprio motu decide to call additional witnesses and/or order the production of additional evidence. [§ 32(a)]'

Secretary-General's view, the President of the STL appears to accept that the ad hoc tribunals and the SCSL were valid comparators, but that the grounds militating against *in absentia* trials did not apply to any of international criminal trials because the procedures at such trials were 'not based on a full acceptance of the adversarial model'.⁶⁸

To our mind, there is very little to distinguish the procedural regime at the STL from the procedure at the ICTY, ICTR, SCSL and the gradually emerging procedure of the International Criminal Court (ICC), which all adopt an adversarial, party-led trial process. In reality, as a brief comparison with the process of the ECCC (which actually does adopt a predominantly civil law approach) demonstrates, the STL differs very little from the procedural regimes at the ICTY, ICTR and the SCSL.

At the investigative phase, the ECCC adopts a strongly civil law-based approach. The power to conduct substantive investigation is vested in the independent Office of the Co-Investigating Judges (OCIJ),⁶⁹ not the parties themselves. The role of the parties at pre-trial stage at the ECCC is very limited indeed.

The contrast with the investigative procedure at STL is considerable. As observed by the Secretary-General, the (initial) investigative process is being conducted by the IIC, which constituted the core nascent Prosecutor's Office. The evidence collated by the IIC (and the national authorities of Lebanon) will be 'received by the Tribunal' and the trial will essentially take place following an adversarial scheme.⁷⁰

Thus, while investigations conducted at ECCC are carried out in accordance with civil law principles, STL investigations are (almost) exclusively party-led. At the conclusion of an STL investigation, no case file exists containing the results of an impartial enquiry. Instead — as with the ad hoc Tribunals — the evidence will be tested for the first time at trial. This has been implicitly recognized in the STL RPE. The drafters, plainly anticipating an adversarial process, have retreated from the original position in Article 20(2) of the Statute. Article 20(2) (dealing with the conduct of trial proceedings) envisaged that the examination of the witnesses would '[u]nless otherwise decided' be conducted by the 'presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence'. Rule 145 however states that where the 'Trial Chamber considers that the file submitted by the Pre-Trial Judge is not such as to enable it to adopt the mode of proceeding envisaged by Article 20(2)' then the 'witnesses called before the Trial Chamber shall first be examined by the Party that called them, then cross examined by the other Party'. In light of the party-led nature of the investigations resulting in the presentation at trial of voluminous and entirely untested evidence, it is

68 Explanatory Memorandum, *supra* note 77, § 66.

69 Art. 23 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereinafter 'ECCCSt').

70 Art. 19 ECCCSt. and Rule 17 of the Rules of the STL.

difficult to see how this 'exception' could ever *not* apply. The drift to an increasingly adversarial process is manifest and will come to define the procedure at trial — with no doubt active pressure being applied by the parties seeking to exercise their rights and advance their respective cases.

Furthermore, even though the procedure followed at the ECCC pursuant to its RPE is largely inquisitorial in nature, the RPE prohibit trials *in absentia* except where the accused has physically been brought before the Trial Chamber (including by use of public force) and been notified of his 'inalienable' right to defend himself though counsel or in person.⁷¹

From the above, it can be properly argued that the approach taken by the Secretary-General's office — 'trials *in absentia* are acceptable because the process will be a civil law process' — is misconceived. Even if an argument could in principle be advanced that the absence of the accused is less detrimental to the defence interests in a civil law system (an argument that is open to question in any event), it does not advance the case for *in absentia* trials at the STL. None of the supposed protections of judge-led investigation apply; the parties fend for themselves. Given the enormous resources and the huge head start the Prosecution will enjoy in their investigations, coupled with a lack of clear and ongoing instructions, Defence Counsel will be left floundering and can hope to do nothing more than 'chase up' leads (if any) that may be apparent from the face of the Prosecution case. In short, it is a predictable facet of such litigation that the Defence will be drowned in a surfeit of unanswered allegations, deprived of the information that would allow the tools of effective representation to be usefully employed. Furthermore, witnesses may evince an (understandable) fear about the prospect of testifying against an accused still at large. This, in turn, will no doubt increase the pressure to allow witnesses to testify anonymously, which will hamstring Defence Counsel and investigators to an even greater extent.

In light of these considerations, there is an unfortunate inevitability that the defences advanced in the proposed trials *in absentia* before the STL will be unstructured and rudimentary; that the examination of witnesses and presentation of evidence will be unfocused, lengthy and ultimately ineffective expeditions and that the challenge to the prosecution case will be a shadow of what is required or otherwise possible. Ultimately, any resulting convictions will arguably be a long way from safe and even farther from any accurate or reliable historical truth.

5. Conclusion

The provision for trials *in absentia* at STL represents a significant departure from the practice and procedure of all other international and internationalized tribunals. The justifications put forward for this departure are unconvincing. The rationale proffered by the Secretary-General in his Report to

71 ECCC RPE, Rule 81.

the Security Council is less than persuasive. The Secretary-General stated, *inter alia*, that:

The institution of trials in absentia is common in a number of civil law legal systems, including Lebanon's. In addition, in the present case, where the conduct of joint trials for some or all of the cases falling within the jurisdiction of the tribunal is likely, it would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused.⁷²

While there exist some apparently attractive policy arguments in favour of holding *in absentia* trials, even at the international level, this rationale is not one of them. Joint trials of accused facing common charges might superficially appear preferable as a matter of judicial economy; however, the absence of one accused need not prevent or delay proceedings against any of the others. It is not uncommon that co-accused persons are tried separately; indeed in some circumstances fairness *requires* separate trials in order to avoid prejudice to one or more accused.

Furthermore, the above statement of the Secretary-General represents a complete reversal of previously stated policy. At the time of the creation of the ICTY, there was clamour for the provision for *in absentia* trials. In the context of the ongoing Balkans conflict, it was thought that apprehending suspects and extraditing them to The Hague would prove impossible, or at least enormously difficult. The lack of defendants, it was said, would emasculate the Tribunal as an institution. Notwithstanding these very real concerns the Secretary-General resisted as matter of principle, stating in his Report to the Security Council that:

A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with Article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence ...⁷³

Arguably, the true motivation for the provision of trials *in absentia* in Article 22 of the Statute is to address the possible refusal by Syria to hand over suspected persons to the Tribunal.⁷⁴ The clearest indication of this lies in Article 22(1)(b), which provides that a person may be tried in her absence if she '[h]as not been handed over to the Tribunal by the State authorities concerned'. This is unprecedented as a legal basis upon which a trial may proceed *in absentia* — whether before international or municipal courts.

Even though, as discussed, Article 22 already fails to meet the requirements of legality, there are indications that the Judges at the Tribunal are prepared

⁷² Secretary-General's Report, *supra* note 65, § 32(b).

⁷³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 3 May 1993, § 101.

⁷⁴ B. Bjorn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly How Tailor-Made is the Special Tribunal for Lebanon', 21 *Leiden Journal of International Law* (2008) 529–538, at 537–538.

to continue to adapt its provisions and further impinge upon this fundamental right to be present. Rule 104 (concerning ‘Waiver of the Right to Attend Trial Proceedings’) is a salutary reminder of this ongoing encroachment:

Once an accused has appeared for trial before the Tribunal in person, by video-conference, or by Counsel appointed or accepted by him, without having expressly and in writing waived his right to be present at trial, the trial shall not be deemed to be a trial *in absentia* pursuant to Article 22 of the Statute.

This instrument purports to remove the right to a retrial (‘guaranteed’ in Article 22(3)) even from an accused person who, although initially present, is known to have been prevented from further participation, e.g. a defendant who had ‘appeared’ via video link, or who had appeared in person but was arrested upon returning home during an adjournment. An accused in this position ought to be entitled to a retrial even under the STL Statute, since she has been tried *in absentia* and has not appointed counsel of her own choosing. Yet, notwithstanding her unequivocal *non-waiver* of the right to be present, the trial *in absentia* would proceed and there would — according to Rule 104 — be no right to a fresh trial.

The promulgation by the Judges of the Tribunal of Rules 96(A) and (B), 104 and 106B RPE is evidence of a worrying trend whereby minimum guarantees contained within the Statute, the ICCPR and those crafted from lessons learnt at the ICTR and ICTY, are compromised in an increasingly aggressive judicial stance designed to ‘efficiently and effectively discharge’ the mandate of the Tribunal.

Experience from the other tribunals leaves the clearest of impressions that as long-planned trials come to fruition, international criminal tribunals become increasingly concerned about threats to mandates, the security of witnesses, expense and other associated pressures. Logic dictates that a gradual erosion of the accused’s rights will follow, threatening the overarching goal of the international criminal justice system — namely, the application of principles of law ‘based on the highest international standards of criminal justice.’⁷⁵ The signs emerging from the STL are not promising. As the rule drafting continues to illustrate, the STL judiciary appears increasingly zealous in its efforts to thwart the perceived threat to the trial process from the Syrian Government.⁷⁶

⁷⁵ *Factsheet: Special Tribunal for Lebanon*, *supra* note 2.

⁷⁶ Following the unanimous amendments to the Rules 16, 18, 77 and 96 of the Rules on 5 June 2009, described on the official STL website (<http://www.stl-tsl.org/action/home>) as ‘continued efforts to ensure that the Special Tribunal for Lebanon is suitably equipped with the required framework and instruments to efficiently and effectively discharge its mandate’, Rule 96(B), *inter alia*, was added. This astonishing addition states: ‘Any filing or order relating to (i) coercive investigative measures, including requests for search warrants, arrest warrants, or subpoenas; (ii) a request for confirmation of an indictment; or (iii) an application or notification under Rules 115–119 that is filed under seal by the Prosecutor shall remain under seal for as long as is necessary for the effective conduct of the investigation and/or the protection of any person.’ That this provision applies, *mutatis mutandis*, to the Defence (Rule 96(C)) does not alter the fact that it will be used to sanction an unprecedented level of secrecy throughout the trial

This trend does not bode well for a sensible implementation of Article 22 or recognition of its potential for further degrading fair trial rights.

Even setting aside all other objections, it ought not to be overlooked that, whatever the laudable aims and hoped-for benefits of the proposed trials *in absentia*, Article 22 remains premised on the faultiest of assumptions: that the resulting trials *in absentia* will be effective truth-finding mechanisms producing judgments possessing forensic and historical value — especially when it is appreciated that they are to take place in a fundamentally adversarial context. Nothing could be further from the truth. The physical presence of an accused before a court is one of the most basic and common precepts underpinning a fair criminal trial.⁷⁷ Trials *in absentia*, by their very nature, are unequal and incomplete. The results will justifiably be challenged as being unrepresentative, inaccurate and unsafe.

Furthermore, and perhaps as damaging, the reality of the missing accused and hamstrung defences will resonate throughout the proceedings. Defence Counsel are left to operate in some legal hinterland, endlessly spinning new narratives, struggling to represent the unknown interests of unknowing accused; courtiers without the ear of the prince. Paradoxically, the implementation of Article 22 may well be responsible for that which it was designed to avoid: by permitting avoidable unfair trials upon accused persons before the Tribunal, it may create the moral and political justification for reluctant states to withdraw cooperation from the Tribunal.

and alongside other provisions, such as those allowing anonymous witnesses (Rule 93), runs the risk of a considerable part of the evidence being concealed from the accused.

77 For example: Decision on Interlocutory Appeal, *Zigiranyirazo* (ICTR-2001-73-AR73), Appeals Chamber, 30 October 2006, § 11 and also see note 46, *inter alia*, expressing the view of the HRC under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 289/1988, Panama 8 April 1992, CCPR/C/44/289/1988 (Jurisprudence), § 6.6 ('The Committee recalls that the concept of a "fair trial" within the meaning of Article 14, paragraph I, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where, as in the present case, the accused is denied the opportunity to *personally attend the proceedings*, or where he is unable to properly instruct his legal representative.') (Emphasis added).