

# The Special Tribunal of Lebanon: With Reference to Absentia Judgments Models

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*The present research examines the fairness of the liability of 'total' in absentia trials within three specific circumstances. First: the accused is given sufficient notice of the trial and their right to decline to be present. Second: the accused must have a defence counsel advocating them in the trial. Third: the accused's absolute right to re-trial should be protected once the judgment has been passed in absentia. The main research question to discern the hypothesis is that the accused can be tried in absentia under international criminal tribunals. Therefore, the focus is on answering which procedural scenarios could be counted as "an absence of the defendant." The present research questions will be analyzed by examining the practice of the Special Tribunal for Lebanon (STL), its theoretical safeguards enshrined in the Statute, and the legal standards from human rights bodies' jurisprudence.*

## Keywords

Special Tribunal for Lebanon, International Criminal Law, In Absentia Trial, Human Rights, International Military Tribunal, ICCPR

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## I. Introduction

Since the International Military Tribunal at Nuremberg after World War II, the Special Tribunal for Lebanon (STL) has become the first case to allow the use of total “in absentia” trials. This has, of course, attracted a great deal of criticism as it is considered a breach of the accused’s right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR), as well as Article 6 of the European Convention of Human Rights (ECHR).

This study aims to clarify the concept of absentia trials in the STL, identifying the circumstances in which such trials are permitted. Additionally, it examines the rights of the accused under such trials. It will present an analysis of previous cases, namely, the Nuremberg Trials and the STL. The present research will consider the legal standards formed through the United Nations Human Rights Committee and the jurisprudence of the European Court of Human Rights. This paper will further provide information and analyze the relevant international legislation pertaining to the rights of persons charged with criminal offences, during the absentia trials. How successfully these rights are enforced at trial will be a concern in this regard. More concretely, it will address the following four questions: (1) Defining the concept of total absentia trials in the international criminal jurisdiction and its significance with special references to the current practice of STL; (2) Identifying the safeguards afforded under the principle of total absentia; (3) Identifying whether the trials in total absentia are compatible with international human rights standards, and looking at the fundamental justifications for total absentia trials; and (4) Identifying the future of trials in total absentia before the ICC.

The nature of the subject requires analytical research consisting of the Constitution of Lebanon, the STL Statute, the ICCPR Articles 14, and the Rome Statute 1998. In addition, previous cases tried in the STL and the Nuremberg Tribunals will also be explored.

## II. Creation of the Special Tribunal for Lebanon

The STL was established in 2005 due to an incident during which the former Lebanese Prime Minister, Rafiq Hariri was killed, alongside 23 civilians. In response, the UN Security Council (SC) called on the Lebanese Government to bring to justice

the perpetrators of the act.<sup>1</sup> The UN Secretary-General embarked on a mission to ascertain information pertaining to the root cause of the attack.<sup>2</sup> In 2005, the Lebanese Government successfully requested the UN to establish a tribunal of an international character and an International Independent Investigation Commission (UNIIC) to investigate the incident.<sup>3</sup>

The agreement for the STL was drafted through negotiations with Lebanese officials and judges, following the advice from former presidents of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>4</sup> The agreement established a tribunal of international character based on the highest standards of global justice.<sup>5</sup> Unfortunately, the agreement between the Lebanese Government and the UN Secretary-General was blocked by the Lebanese parliament via Nabil Berry, even though the majority of parliamentarians were in favor of the agreement.<sup>6</sup> Another issue was the enforcement of a Chapter VII Resolution by the Security Council.<sup>7</sup> This raised constitutional issues concerning the validity and legality of the tribunal. It was alleged that the Tribunal breached Article 20 of the Lebanese Constitution.<sup>8</sup> However, this was dealt with quickly, as it was highlighted that the Security Council's Resolutions are binding on all ICC signatories, including Lebanon, thereby solving the matter.<sup>9</sup>

## A. The Rights of the Accused in Absentia Trial

The accused's legal rights are essential and protected by the Statutes of the Special Tribunal for Lebanon. The protection afforded to the accused includes the following.

The accused has the right to be equal before the STL under Article 16 (1). All people must have equal access to the Tribunal - both the defence and prosecution- and be

<sup>1</sup> Timeline of events, Special Tribunal for Lebanon, <http://www.stl-tsl.org/en/about-the-stl/creation-of-the-stl>.

<sup>2</sup> *Id.*

<sup>3</sup> Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon (Nov. 15, 2006), <https://digitallibrary.un.org/record/586942>.

<sup>4</sup> Bardo Fassbender, *Reflections on the International Legality of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1093 (2007).

<sup>5</sup> Prosecutor v Ayyash, Case No. STL-11-01/I Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging 62 (Feb. 16, 2011), <https://opil.ouplaw.com/view/10.1093/law-icl/933st11.case.1/law-icl-933st11>.

<sup>6</sup> Fassbender, *supra* note 4.

<sup>7</sup> U.N. Doc. S/RES/2324 (2016).

<sup>8</sup> The Lebanese Constitution of 1926 with Amendments through 2004, [https://www.constituteproject.org/constitution/Lebanon\\_2004.pdf?lang=en](https://www.constituteproject.org/constitution/Lebanon_2004.pdf?lang=en).

<sup>9</sup> U.N. Doc. S/RES/1757 (2007).

treated without discrimination. The right to access first procedures is preferable to the right to appeal and its consequences.<sup>10</sup> The accused can have legal assistance whenever they are not present to appoint a counsellor if they cannot afford it.<sup>11</sup> Accordingly, the STL is obligated to protect the accused's rights to conduct the proceedings in a particular independent and impartial manner.<sup>12</sup>

## B. The Right to a Fair Hearing in Public

Article 16 (2) of the STL Statute and the ICCPR Article 14 (1) states:<sup>13</sup>

the accused has the right to a fair and public hearing, depending on an independent and impartial judiciary; an assessment of the entire trial to evaluate whether the trial was fair and adhered to the accused's rights and whether it was free from pressure, undue influence, intimidation or intrusion from any side with any motive.

If the accused is guilty following the STL Rules of Procedure and Evidence (RPE), the prosecutor and the defense counsel may display any pertinent information that would support the Trial Chamber in deciding an appropriate sentence.<sup>14</sup> The prosecutor is obliged to ensure that all evidence brought before the trial is available to the defense counsel.<sup>15</sup> Following Article 16 (4)(f) of the STL Statute and the RPE both ensure that the prosecution permits the accused, or the representing counsel, to disclose any exculpatory material.

## C. Allegations and the Accused's Rights should be Informed.

Article 16 (4)(a) & (f) of the STL Statute and the RPE, along with Article 7 provides:

The prosecution permits the accused, or the representing counsel, to disclose any exculpatory material. The accused's rights should be communicated to them, as well as the allegations against them, in an understandable language. The accused

<sup>10</sup> Communication No. 450/1991, I.P. v. Finland, 6.2, <http://hrlibrary.umn.edu/undocs/html/450-1991.html>.

<sup>11</sup> *Id.* n. 9.

<sup>12</sup> *Id.*

<sup>13</sup> C. JALLOH & A. DiBELLA, *EQUALITY OF ARMS IN INTERNATIONAL CRIMINAL LAW* 259 (2013).

<sup>14</sup> Communication No. 263/1987, U.N. Doc. CCPR/C/40/D/263/1987 (Nov. 6, 1990); Miguel Gonzalez del Rio v. Peru, ¶ 5.2, [http://www.worldcourts.com/hrc/eng/decisions/1990.11.06\\_Gonzalez\\_del\\_Rio\\_v\\_Peru.htm](http://www.worldcourts.com/hrc/eng/decisions/1990.11.06_Gonzalez_del_Rio_v_Peru.htm).

<sup>15</sup> Communication No. 846/1999, Jansen-Gielen v. The Netherlands, ¶ 8.2; Communication No. 779/1997, U.N. Doc. A/56/40, Vol. II, at 158 (HRC 2001); Äirelä and Näkkäläjärvi v. Finland, ¶ 7.4, [http://www.worldcourts.com/hrc/eng/decisions/2001.04.03\\_Jansen\\_Gielen\\_v\\_Netherlands.htm](http://www.worldcourts.com/hrc/eng/decisions/2001.04.03_Jansen_Gielen_v_Netherlands.htm).

should be given adequate time to respond to the charges.<sup>16</sup>

## D. Innocent until Proven Guilty

As per Article 16 (3) of the STL Statute, the accused is innocent until proven guilty. The accused's arrest must be justified on relevant grounds. The prosecutor is responsible for proving the accused's guilt beyond reasonable doubt. Schomburg highlighted that a guilty judgment would never become final, until sufficient time after the proceedings has passed.<sup>17</sup> Additionally, the Trial Chamber has granted the victims the right to submit evidence demonstrating how they were impacted.<sup>18</sup>

## E. The Accused Rights to Defence

Following Article 16 (4)(d) of the STL Statute and Article 14 (3) (d) of the ICCPR, the accused has the right to defense with sufficient time to prepare their defense under Rule 58(A) of the RPE.<sup>19</sup> The Trial or Appeals Chamber within the STL should give sufficient time if the defense counsel's time is inadequate. As a result, the accused before the Tribunal might ask for a re-trial if needed, which would either affirm, reverse, or revise the judgment against them.

# III. In Absentia Trials

## A. The Challenges of In Absentia Trials

In the absence of the accused, a trial in absentia has attracted a great deal of debates. In 2016, the International Bar Association (IBA) held a round table forum, discussing a trial's theoretical and legal frameworks. The IBA then released a summarized report of those discussions addressing human rights and the standard fair trial in absentia. Here, Practical and ethical issues were put forward concerning representing a client

<sup>16</sup> ICCPR art. 14; ECHR art. 6.

<sup>17</sup> W. Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 1 Nw. J. Hum. Rts. 25-8 (2009).

<sup>18</sup> M. Fremuth, *Prosecutor v. Ayyash et al. (Special Trib. Leb.)*, 60(3) I.L.M. 357-447 (2021), file:///C:/Users/USER/Downloads/Prosecutor\_v\_Ayyash\_et\_al\_Special\_Trib\_Leb.pdf.

<sup>19</sup> How Does the Criminal Justice System Work?, Findlaw.com (Jan. 28, 2019), <https://www.findlaw.com/criminal/criminal-law-basics/how-does-the-criminal-justice-system-work.html>.

in absentia.<sup>20</sup>

In 1946, 12 members of the Nazi high command were sentenced to death at the International Military Tribunal (IMT) at Nuremberg for war crimes. One of the accused, Martin Bormann, was unavailable at the time of trial, so he was tried in absentia. Bormann's case was commenced invoking Article 12 of the IMT Charter, which allowed for trial in absentia if "[a defendant] is absent."<sup>21</sup> Most of the international legal community is against in absentia trials, as it might infringe upon the guarantee of the accused's rights in court. Accordingly, without fair trials, trust in governments and legal system collapses.<sup>22</sup>

## **B. The Guarantees of a Criminal Trial in Absentia before the International Criminal Court**

The ICC has jurisdiction over the aggressive crimes where the perpetrators must be punished. The effective prosecution of the perpetrators must ensure thorough measures taken at the national level to deter other potential perpetrators and to guarantee that current ones do not escape punishment.<sup>23</sup> The ICC's primary purpose is to achieve a more effective deterrent system that aims at preventing and punishing the most serious international crimes.<sup>24</sup>

## **C. The Trials in Absentia under the Standards of International Human Rights Law**

Trials in absentia can play an essential role for protecting the victims of international crimes, even in the defendant's absence. During the trial, victims are allowed to speak and tell their stories. For example, Douglas presented the testimony of surviving victims of the Holocaust at Eichmann's trial as "the strength to give tormented memory the force of legal evidence," which was "part of the unique project of spreading the spirit of life into a damaged people."<sup>25</sup> Article 63 of the Rome Statute states that the

<sup>20</sup> B. Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, 18 J. INT'L CRIM. JUST. 107-39 (2020), <https://doi.org/10.1093/jicj/mqaa020>.

<sup>21</sup> ABA, *Charter of the International Military Tribunal*, 31:9 A.B.A.J. 454-7 (Sept. 1945), <https://www.jstor.org/stable/25715331>.

<sup>22</sup> The Right to a Fair Trial, <http://www.fairtrials.org/right-fair-trial>.

<sup>23</sup> Rome Statute of the International Criminal Court, United Nations Preparatory Commission for the International Criminal Court, Document No. PCNICC, <http://legal.un.org/icc/prepcomm/report/prepreport.htm>.

<sup>24</sup> ICC, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, United Nations, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

<sup>25</sup> D. Lasok, *The Eichmann Trial*, 11 INT'L & COMP. L. Q. 355-74 (1962).

accused shall be present in the trial, except when being disruptive in the court.<sup>26</sup> Some domestic and international courts decline trials in absentia, while others, especially the traditional civil courts, allow for trials in absentia if specific protections are applied. One of those protections, particularly in the European context,<sup>27</sup> is that the nations hold trials for international law infringements with civil legal systems. The UN's temporary administration in Kosovo formally decided to forbid all trials in absentia there for violations of international humanitarian law.<sup>28</sup> Meanwhile, if the defendant's trial is in absentia and brought before the court, s/he has the right to be re-examined if requested.

#### D. The Case before the Special Tribunal for Lebanon

Initially, the STL had four Lebanese generals who had been under arrest for several years without charge in Lebanon. Under RPE Rule 17 (b), the prosecutor had been required to apply for the continued detention or release of the accused. Once the STL took control over the generals, the judges immediately ended their detention according to the presumption of innocence principle. Furthermore, the judges undertook a rigorous stance against the prosecutor, as international human rights standards by the ICCPR, ECHR, the American and Inter-American human rights bodies required that the detained accused be presented promptly in front of the judges under the principle of *jus cogens*.<sup>29</sup> This highlighted the STL judges' willingness to adhere to human rights standards rather than becoming a politically biased trial from the offset.<sup>30</sup> In the *Ayyash et al.* case, before the STL in 2014, the charges were brought against Salim Jamil Ayyash, Mustafa Amine Badruddin, Hussein Hassan Oneissi, and Assad Hassan Sabra.<sup>31</sup> In February 2014, as Hassan Habib Merhi case was joined with the trial chamber's consent, the trial was postponed until June 18, 2014. As a result, the counsel for Merhi could compile a defence.<sup>32</sup>

<sup>26</sup> C. Benedik, *Trials in-absentia, International Criminal Law, and the Modern Human Rights Regime: Furthering or Hindering Victims and Societies*, 26 CRIM. L. F. 10-007, <http://www.academia.edu/8349773>.

<sup>27</sup> Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (civil limb), Eur. Ct. of Hum. Rts. (Dec. 31, 2021), [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf).

<sup>28</sup> C. Stahn, *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis*, 5 MAX PLANCK Y.B.U.N.L. 105 (2001), [https://www.mpil.de/files/pdf1/mpunyb\\_stahn\\_5.pdf](https://www.mpil.de/files/pdf1/mpunyb_stahn_5.pdf).

<sup>29</sup> Erika de Wet, *Jus Cogens and Obligations Erga Omnes*, in OXFORD HANDBOOK ON HUMAN RIGHTS (D. Shelton ed., 2013).

<sup>30</sup> *Id.*

<sup>31</sup> The Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra 2020, Special Tribunal for Lebanon (Trial Chamber), The Netherlands, STL-11-01/T/TC, <https://www.internationalcrimesdatabase.org/Case/3314/The-Prosecutor-v-Salim-Jamil-Ayyash,-Hassan-Habib-Merhi>.

<sup>32</sup> Hassan Habib Merhi, Ayyash et al. (STL-11-01), Indictment 2013, <http://www.stl-tsl.org/sites/default/files/>

## E. Charges Brought Against the Accused

The charges against the accused in the *Ayyash et al.* case, include conspiracy to commit a terrorist act, utilizing an explosive device with premeditation, and intentional homicide.<sup>33</sup>

## IV. The Primary Justifications for Absentia Trials and the Applications before the ICC

Following the “international due process” and “the generic principles of law” concerning trials in absentia, no punishment has been handed down in a judgment in absentia. Therefore, two topics are of concern as follows.

### A. The Rights of the Accused Trials in Absentia and their Safeguards

#### 1. Trials in Absentia and the Safeguards of the Rights of the Accused

It is not *prima facie* that the Rome Statute, when rendering a judgment in absentia against the accused, is first to ensure his/her physical attendance before the ICC. However, the individuals convicted in absentia are entitled to seek redress, including a re-trial in their presence, especially if they have not informed their trial or could not appear at the hearing for reasons beyond their control. In this context, if an arrested person is convicted after the trial in absentia, Amnesty International calls for the revocation of that sentence issued in absentia. Furthermore, it calls for holding a re-trial in entirely new and impartial proceedings before an independent tribunal.<sup>34</sup>

The accused’s presence during court proceedings is one of the primary safeguards for protecting his/her rights. It grants the accused an opportunity to examine and refute the adversary’s evidence, taking advantage of less severe circumstances or claim the benefit. It is essential to note that the prohibition on a person being tried twice for one offence does not prevent the re-trial of a person convicted in absentia if s/he requested a re-trial. Therefore, when the accused is tried in absentia, s/he has the right to demand new trial proceedings if: (1) the accused could prove that the competent authorities have not taken the necessary formal steps before the trial date;

documents/cis/Merhi\_Case\_Info\_Sheet\_EN.pdf.

<sup>33</sup> Fremuth, *supra* note 18.

<sup>34</sup> S. Sarygin & J. Selth, *Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code*, SING. J. LEGAL STUD. 170-88 (2005), <http://www.jstor.org/stable/24869556>.



(2) the accused has not been adequately informed; or (3) the absence is due to the reasons beyond his control or against their will.<sup>35</sup>

## 2. The Connotation of Criminal Trials in Absentia before the International Criminal Justice System

The term “in absentia trial” is not easy to understand as a superfine expression. Moreover, absentia proceedings might seem to mean various things to various people. Therefore, the element of the phrase “in absentia trial” should be divided into “in absentia” and ‘trial,’ in order to clarify the prosecution. “In absentia” refers to the lack of someone’s physical presence at the time of the trial as confirmed in international law. However, it is not yet easy to perceive, understand, or even interpret what the notion of absentia means and furthermore under what conditions the accused is entitled to have the legal status of being absent from the trial.<sup>36</sup>

The ICCPR is considered the first international instrument to deal with the accused’s presence as a right in a trial.<sup>37</sup> Article 14.3. of the ICCPR states:

In the judgment of any criminal charge against the accused, everyone shall be entitled to the following minimum safeguards in full equality ... (D):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.<sup>38</sup>

The negotiations on the Rome Statute, including absentee provisions in the ICC’s procedural law, were highly controversial due to the questioning of judgments in the absence of the accused. According to the Human Rights Committee’s General Comment on item No. 13, Article 14 stresses that the accused or his/her counsel is entitled to act without fear to resort to all available defences for the right to challenge the conduct in the case of an unfair trial.<sup>39</sup>

<sup>35</sup> International Commission of Jurists, Manual on the Monitoring of Trials in Criminal Procedure Cases: Practitioners’ Guide No. 5 (2009), at 99, <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-ara.pdf>.

<sup>36</sup> N. Pons, *Some Remarks on in-absentia Proceedings before the Special Tribunal for Lebanon in Case of a State’s Failure or Refusal to Hand over the Accused*, 8 J. INT’L CRIM. JUST. 1307 (2010).

<sup>37</sup> Claiming Human Rights, Equality before the Law: Definition, [http://claiminghumanrights.org/equality\\_before\\_law\\_definition.html](http://claiminghumanrights.org/equality_before_law_definition.html).

<sup>38</sup> ICCPR art. 14.3.(D).

<sup>39</sup> UN Human Rights Committee (HRC), General Comment No. 32, Article 14: Right to equality before courts and

In the process of drafting the Rome Statute, several views were expressed by the International Law Commission (ILC) regarding the possibility of trying defendants in absentia as follows.<sup>40</sup> The opinion that supports enabling the ICC to hold the trials in absentia of the accused supported by some members of the ILC and some countries, especially France, could be of substantial benefit. To uphold the principles of justice, the French Code of Criminal Procedure allows the trial to progress in the defendant's absence-but only in severe cases. The ICC should not act except in specific circumstances where judgments could be implemented and the imposition of penalties in absentia, without the possibility of implementing them, would undermine the Court's reputation. Furthermore, the victims and witnesses would not obtain a final judgment, with a chance of a further trial after the accused was arrested or handed over. Australia, for example, demanded to avoid lawsuits in absentia as they might not be adequate within the jurisdiction of its criminal court.<sup>41</sup>

Article (63)(1) of the Rome Statute states: "The accused shall be present during the trial." The accused's absence was never considered a reason to disrupt the procession of justice. It can be argued that the fugitive, in this way, shall be in a better legal position than the accused who has decided to confront his accuser to defend himself. The ICC's trial chamber authorized the expulsion of the indicted from trial hearings if they were trying to disrupt and obstruct the trial while providing all means, if necessary, to stay in communication with the accused, either by directing a counsel from outside the courtroom, or by using communications technology.<sup>42</sup> Following Article (63)(2) of the Rome Statute, the indicted might practice the right of defense, notwithstanding his/her presence outside the courtroom.<sup>43</sup> Hence, in essence, absentia trials violate the accused's legal rights under due standard procedures. Nevertheless, it can be considered the last resort to ensure that justice does not evade those who choose not to attend the court. Thus, the conviction in absentia is valid only if the accused chooses not to appear in court with an acceptable justification.<sup>44</sup>

tribunals and to fair trial (Aug. 23, 2007), U.N. Doc. CCPR/C/GC/32, <https://www.refworld.org/docid/478b2b2f2.html>.

<sup>40</sup> R. Wilson, *Criminal Justice in Revolutionary Nicaragua: Intimations of the Adversarial in Socialist and Civil Law Traditions*, 23 U. MIAMI INTER-AM. L. REV. 269-387 (1991), <http://www.jstor.org/stable/40176311>.

<sup>41</sup> *Id.*

<sup>42</sup> Human Rights in the Administration of Justice, A Facilitator's Guide on Human Rights for Judges, Prosecutors and Lawyer, Handout 7.1 (Key provisions of international and regional instruments), <http://www.ohchr.org/Documents/Publications/Handouts/Handout7-1.pdf>.

<sup>43</sup> Commentary on the Law of the International Criminal Court, art. 63(1): (509) Trial in the accused's presence, <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-6>.

<sup>44</sup> C. Wheeler, *Right or duty? Is presence at trial a right or a duty in international criminal law?*, 28 CRIM. L. F. 104

### 3. Trials in Absentia under International Human Rights<sup>45</sup>

The question that rightfully arises is whether the in absentia trials agree with international human rights standards. Answering this question is not easy given the divergence of views, notably under Article 14 of the ICCPR, which lists the accused's safeguards, including that he should attend and defend himself in person or by counsel of his choice. A fair trial is a basic and fundamental principle of international human rights law including the ICCPR which has guaranteed various human rights as a ratified agreement between countries.

As per Article 14(3)(d) of the ICCPR, in the determination of any criminal charge, everyone has the right, in full equality: to be tried in his physical presence and personally defend himself in person or with the legal assistance of his choosing. If having financial difficulties, he needs to be informed of his legal right to have legal aid assigned to him, whenever justice so requires and without payment by him. However, the European Court of Human Rights (ECtHR) have found that trials in absentia may occur under very restricted circumstances.<sup>46</sup> Human rights monitoring mechanisms, which consider that trials might initiate in absentia in exceptional circumstances, have stressed that greater vigilance must be exercised to ensure the defendant's rights in such cases. These rights include the right to counsel, even if the accused chooses not to attend the trial.<sup>47</sup>

### 4. The Quality of the Trial

Article 64(2) of the Rome Statute grants the Trial Chamber the obligation to secure the quality of the trial. Accordingly, the Trial Chamber fully respects the accused's rights; shows due consideration to victims; and protects witnesses. It is thus necessary to take specific steps during the criminal proceedings, such as:

1. The accused must have sufficient notice of the time, date, venue, and the presence of requisition for the trial;
2. The judiciary or the court must ensure they take the necessary steps to ensure the defendant's rights, mainly through a counsel's appointment and upholding a fair trial's basic requirements;
3. Allowing the accused to access witnesses' names and addresses while preparing their defence attracts some conflict of rights. The solution is to delay disclosing

(Mar. 2017).

<sup>45</sup> Human Rights Committee, General Comment No. 32, CCPR/C/GC/32 (Aug. 23, 2007), ¶ 36. *See also* ECHR art. 6(3), [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>46</sup> *Id.*

<sup>47</sup> S. Stavros, *The Right to a Fair Trial in Emergency Situations*, 41 INT'L & COMP. L. Q. 343-65 (1992), 351, <http://www.jstor.org/stable/760924>.

the names of the witnesses until just before the trial; and

4. Article 63M of the Statute of the International Criminal Court also authorised the trial in absentia if the accused acted to disrupt the hearing. In very tight situations, modern technology could hold the lawsuit without his attendance in the courtroom.<sup>48</sup>

## B. Three Practices relating to the Proceedings in Absentia

### 1. Position of In-Absentia-Principle in The International Criminal Law

There is a general framework in which trials in absentia play an essential role, as in the IMT case. The Nuremberg Tribunal has established several principles known as “Nuremberg Principles,”<sup>49</sup> that Article 12 of the Nuremberg Charter permitted trials in absentia whenever the Tribunal found them necessary in the interests of justice.<sup>50</sup> The most crucial point was to recognize the international criminal responsibility of an individual and the policy of codifying international crimes, such as crimes against peace and war crimes against humanity. It was established in Article 60 of the Nuremberg Tribunal Rules, excluding the international crime perpetrators’ immunity for their official status. Therefore, the Nuremberg Tribunal established international criminal responsibility without giving any consideration to their official status. Article 70 of the Nuremberg Tribunal Regulations stipulates: “The official positions of the accused, whether they are heads of state or senior officials, should never be considered an excuse or a reason for evading punishments or sentence commutation.” Although the Nuremberg trials had their own political and legal specificities, the trials were concluded and elapsed before the United Nations had witnessed a surge in human rights culture.<sup>51</sup>

### 2. Justifications and Basic Objectives of Trials in Absentia

Trials in absentia are acceptable in several countries, including Lebanon, Belgium, and Italy. Furthermore, the ECtHR and the jurisprudence of the UN Human Rights Committee have assured that trials in absentia shall maintain the same principles of justice. Bearing this in mind, providing a good range of safeguards shall be adopted

<sup>48</sup> Rome Statute of the International Criminal Court, art. 4.2, 2187 U.N.T.S. 38544 (2002), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>49</sup> Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, [https://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_1\\_1950.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf).

<sup>50</sup> ABDUL WAHAB HOMED, INTERNATIONAL ACTION 154 (1978).

<sup>51</sup> Rashid Hamad Al Anezi: Trial in-absentia in accordance with the Statute of the International Tribunal for Lebanon, Paper presented to the Arab Conference for the Study of the International Tribunal for Lebanon (Feb. 1-3, 2011), The Hague, at 3.

to protect the accused's interests as outlined in Article 22 (2) of the STL.

Although the accused has the right to attend the hearing sessions in some countries like the US, these trials are still constantly criticized and subjected to severe opposition. Moreover, the 'duelling' system between the litigants requires the accused's presence to direct his counsel. Besides, dictatorial regimes often resort to trials in absentia to hold the trial and conviction and then discard political opponents abroad. For example, in the United Kingdom, trials in absentia may be conducted if the accused has replied to the charge by non-recognition of liability under pre-trial proceedings.

### 3. The Future of the Trials in the Absence of the International Criminal Court

As reported in Article 63(1) of the Rome Statute, in absentia trials, the ICC does not acknowledge the accused has the right to be present during the trial.<sup>52</sup> As adopted through diplomatic negotiations, the ICC is a blend of different statutory instruments. The ICC established some civil law elements, such as the Pre-Trial Chambers ability to review the prosecutors issue decision not to investigate alleged crimes, the proceedings for the admission of guilt, and the confirmation hearing. Whenever the prosecutor has an essential role in initiating investigations and prosecutions, a confirmation hearing in the ICC allows the defence counsel to challenge the document containing the charges brought against the accused. The case enables a more streamlined opening of an issue. In the case of Lubanga, however, this system did not work as it lasted three years.<sup>53</sup> The ICC has legally adopted utmost judicial control over proceedings; the Pre-Trial Chamber, alongside streamlined cases, has the authority to investigate and facilitate communication between parties. The Trial Chamber can also adopt a civil law or typical style of trial dependent upon judicial questioning or party-driven questioning.<sup>54</sup> As the accused has the right to be present during the trial, and according to the guidelines of the Rome Statute, the ICC does not allow total absence in absentia trials. Under these circumstances, the ICC can conduct a procedure in absentia. In every civilized community, following the fundamental principle of the criminal law procedure, the accused's trial must take place in his presence, and the court's verdict

<sup>52</sup> Ali Selimi, *Rights of the Accused in the International Criminal Court Proceedings* (unpublished M.A. thesis, Kolegji AAG, Law Department, 2014), <https://core.ac.uk/download/pdf/143966724.pdf>.

<sup>53</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-AnxI, *Minority Opinion of Judge Wyngaert*, ¶ 320 (Mar. 7, 2014), <https://www.icc-cpi.int/drc/lubanga>.

<sup>54</sup> N. COMBS, *LEGITIMISING INTERNATIONAL CRIMINAL JUSTICE: THE IMPORTANCE OF PROCESS CONTROL* 331 (2012).

and sentence imposition must be announced in his sight, as well.<sup>55,56</sup> The confirmation charges can hold without the accused's presence. The confirmation hearing aims to control prosecutorial powers through judicial system due to the Pre-Trial Chamber's ability to monitor the prosecutor's actions. During the confirmation hearing, the court seeks the presumption of innocence to protect his rights until the prosecutor can prove otherwise. The hearing is used to establish evidence to determine sufficient grounds to believe the suspect has committed the crime. In addition, the mechanism is used to prevent the prosecution from bringing criminal and wholly unfounded charges against the accused. In the *Kenyatta* case, in order for them to carry out their duties as President and Deputy President away from the proceedings, the ICC allowed a conditional and partial in absentia trial. This demonstrated that the accused has the right to expressly waive their right to be present at the trial. However, this should be limited to encourage the accused presence during the parts of the trial the ICC deems necessary.<sup>57</sup> While all participants are closing their statements entirely and the victims are demonstrating their views personally, the accused ought to be present personally to hear the full delivery of the case's judgment.

## V. New Methods to Convict<sup>58</sup>

### A. Fair Procedure

In the case of the criminal procedure being characterized by conflict or opposition, and in the event of unfair trial, the lack of equality will be demonstrated by the burden of proof that guards against wrongful conviction. Accordingly, the judge should remain objective and dispassionate.

### B. Global Justice

The trial in absentia may help ensure accountability and combat impunity to obtain

<sup>55</sup> F. Cassim, *The accused person's competency to stand trial: A comparative perspective*, 45 CODICILLUS 78 (2004), <https://journals.co.za/doi/pdf/10.10520/EJC27428>.

<sup>56</sup> See The Right to Sufficient Water, Third Economic and Social Rights Report ch. 8, [https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter\\_8.pdf](https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20Report%20chapter_8.pdf).

<sup>57</sup> Prosecutor v. Katanga, ICC-01/04-01/07-3436-AnXI, Minority Opinion of Judge Wyngaert, ¶ 320 (Mar. 7, 2014), [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2014\\_02619.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2014_02619.PDF).

<sup>58</sup> A. Campbell-Tiech, Trial In-absentia: England & Wales: An Outline, <https://www.ecba.org/extdocserv/conferences/ams2008/iaj-2.pdf>.

the international criminal justice. If those who absconded are not prosecuted for the escape, the accused were thought to be rewarded by the international community.<sup>59</sup>

Meanwhile, trials in absentia could also support the victims' interests particularly when civil parties may participate in the court procedures and claim compensation. In addition, truth-seeking functions could be strengthened in the trial process. Whenever the defendant fails to comply with new procedures, the accused should be penalized; the defendant's silence should be considered as an inference of their guilt; and if s/he fails to prove the defence they are relying on during the trial, then inference of guilt which arises from any previous convictions should also be considered.

### C. The Conditions of Conducting a Special Tribunal<sup>60</sup>

The Special Tribunal shall conduct trials in absentia if the accused: (1) expressly in writing has waived their right to attend; (2) has not been extradited to the court by the state's authorities concerned; (3) has disappeared or cannot be found after taking all reasonable steps; (4) is not able to ensure their appearance before the court; (5) has been informed of the charges established by the Pre-Trial Judge; or (6) has been ejected from the proceedings for causing severe disruption.<sup>61</sup>

Meanwhile, the STL shall ensure the following: (1) The accused has been informed, notified, or handed over the indictment by communicating with him. This includes any adequate means in his country of residence or nationality; (2) The accused has appointed a counsel of their choice, where s/he or the court pays the fees if the accused cannot; (3) When the accused refuses or cannot appoint a counsel, the defense office appoints counsel from the court to ensure full representation of the accused's interests and rights; or (4) The accused might request a re-trial in his presence whenever he has not appointed a defence counsel of his own choice before the STL unless he accepts the sentence issued against him in case of a conviction in absentia.<sup>62</sup>

In case of release on bail, trial in absentia continues even if the accused is absent. However, these reasons, which justify objecting to trials in absentia, do not apply to international criminal trials, mainly when such trials are based on non-full acceptance of the 'duelling' system. Besides, international trials are conducted in full view and hearing; hence they are under scrutiny by the international community, which does

<sup>59</sup> R. Jalali, *Trial in Absentia: A Violation of the Right to a Fair Trial*, 2:2 PCL STUDENT J.L. 82-7 (2018).

<sup>60</sup> W. Jordash & T. Parker, *Article Navigation. Trials in Absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law*, 8 J. INT'L CRIM. JUST. 487-509 (2010).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

not tolerate any misuse of power, prejudice, or unfair treatment.<sup>63</sup>

#### **D. Future Considerations for Trials in Absentia before the International Criminal Court**

On June 8, 2016, the IBA and experts of the International Criminal Law Program held a round table on trials in International Criminal Justice at The Hague Institute of International Justice. The contributions made during the round table provided an overview of the law on trials in-absentia, where several important questions were raised for further study in the future. They may be summarized as follows.<sup>64</sup>

Trials in absentia, especially in the context of international criminal justice, should be viewed as part of the process and stated clearly in detail, leaving no room for confusion or doubt that bringing the accused to court custody must be ongoing. Long-term cooperation and planning with the concerned state(s) will be of utmost importance for the eventual arrest of the accused and implementing the main rules of procedure, including protecting witnesses and reparations to victims. Continuous attention should be given to the possibility that such investigations or fact-finding operations at the International Criminal Tribunal for Former Yugoslavia (ICTY) might be conducted as intermediate measures that permit evidence and fact-finding in the absence of the accused. In case of non-attendance of the accused at proceedings, this might raise concerns about whether this represents a ‘true trial with the required guarantees for the trials by having the availability of safeguards under international criminal law and human rights law. In addition, it must be considered whether the accused’s non-attendance has had the court’s permission or it is due to the accused being legally disabled and unable to appear in person in the court. Particular attention should be paid to whether the court has given permission for the accused to be absent from proceedings based on extraordinary public duties as in the ICC case (RPE quarter 134). The absent accused is entitled to have the provision of structural and institutional support for the appointed counsel and exercise the right to a re-trial, including financial support, if required. Trials in absentia present counsels with challenges, whose efforts should continue to harmonize counsels’ ethical considerations with the international and national contexts. It should be ensured that the individual is given complete information pertaining to their legal rights and legal representation concerning participating in proceedings. Courts should also keep the victims fully informed of trial developments, informing them about the legal process’ complexities and limitations. International institutions

<sup>63</sup> Rules of Procedure and Evidence, Explanatory Note by the President of the Special Tribunal for Lebanon 2009, <https://www.stl-tsl.org/en/documents/legal-documents/rules-of-procedure-and-evidence>.

<sup>64</sup> The International Bar Association (IBA), Report on the ‘Experts’ Roundtable on trials in-absentia in International Criminal Justice (2016), at 12-3, <https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia>.



should seek to redress the damage caused to victims to reflect total compensation for that damage. They should establish a trust fund to compensate the victims for their losses, including injury or pain. Institutions should seek to combine various compensation forms to reflect the damage suffered fully.

## VI. A Case Study: The Trials in Absentia in the Special Tribunal of Lebanon

### A. The Significance of the Lebanon Case<sup>65</sup>

The STL came into existence in 2007, as the only international tribunal whose statute gives authorization for trials in absentia.<sup>66</sup> Together with the Special Court for Sierra Leone (SCSI),<sup>67</sup> they are a third-generation of international criminal tribunals, illustrating an endeavor to be more streamlined and efficient in matters of justice.

Academic discussions have arose whether an opportunity has been missed to establish a separate and institutional framework defending the accused's rights because the ICTY and the ICTR ended with the impunity for the atrocities under those courts' mandates, leading to an institutional bias towards the prosecution plan.<sup>68</sup> The arms were unequal between the prosecution and defence; the defence counsel within the ICTY and the ICTR did not have the administrative support necessary to defend the accused virtually via an online portal.<sup>69</sup> The accused's rights enshrined within the statutes were not practically recognized in respect of defence counsel's ability to have the necessary resources to mount an effective defence. The entire defence is a fundamental right that contributes to the rules of law and must become entrenched in legal texts.<sup>70</sup> The lack of independence of the defence has led to inequality of arms. It could lead to criticisms of illegitimacy and credibility.<sup>71</sup>

<sup>65</sup> C. Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1107-24 (2007).

<sup>66</sup> U.N. Doc. S/RES/1757 (May 30, 2007) [the establishment of a Special Tribunal for Lebanon].

<sup>67</sup> A. Thompson & M. Staggs, *The Defense Office at the Special Court for Sierra Leone: A Critical Perspective* (2006), [https://handacenter.sites.stanford.edu/sites/g/files/sbiybj5951/f/publications/the\\_defence\\_office\\_at\\_the\\_special\\_court\\_for\\_sierra\\_leone\\_a\\_critical\\_perspective.pdf](https://handacenter.sites.stanford.edu/sites/g/files/sbiybj5951/f/publications/the_defence_office_at_the_special_court_for_sierra_leone_a_critical_perspective.pdf).

<sup>68</sup> *Id.* at 21.

<sup>69</sup> C. Jalloh, *The Special Tribunal for Lebanon: A Defense Perspective*, VAND. J. TRANSNAT'L L. 776 (2014).

<sup>70</sup> N. Davis, *The Special Tribunal for Lebanon: A Critical Analysis of Rights of the Accused, in absentia trials, and the Defense Office* 139 (unpublished LL.M. thesis, Bangor University, 2014), [https://www.academia.edu/19146273/The\\_Special\\_Tribunal\\_for\\_Lebanon\\_A\\_Critical\\_Analysis\\_of\\_Rights\\_of\\_the\\_Accused\\_in\\_absentia\\_trials\\_and\\_the\\_Defence\\_Office](https://www.academia.edu/19146273/The_Special_Tribunal_for_Lebanon_A_Critical_Analysis_of_Rights_of_the_Accused_in_absentia_trials_and_the_Defence_Office).

<sup>71</sup> *Id.*

The SCSL did not have a defence organ drafted initially into the primary document when establishing the court. However, it later adopted Rule 45 (a) which directed the Registrar of the SCSL to “develop, establish and maintain a defence office.” The Office of the Principal Defender (OPD) was established by the Registrar with a mandate to protect suspects and accused persons which represented an innovative stance on international criminal justice.<sup>72</sup> In reality, conversely, the structure of OPD was inefficient, as the reliance upon the Registry of the SCSL led to an unclear mandate, inadequate staffing, and disinterest.<sup>73</sup> The OPD aims to the equality of arms. Yet, the inability to gain independence from the Registry and insufficient means to fulfill their mandate prevented the OPD from protecting the accused’s rights effectively. Following Article 22 of the STL Statute, the Tribunal can hold trials in absentia. In August 2011, the Lebanese Public Prosecutor of Court submitted a cancellation report to the Tribunal detailing the Lebanese authorities’ unsuccessful attempts at arresting the accused.<sup>74</sup>

In October 2011, the Pre-Trial Judge ordered the Trial Chamber to convene, mainly to consider whether proceedings in absentia against the four accused should be initiated.<sup>75</sup> In November 2011, a hearing was held, where the statements on the matter by the Prosecution and the Defense Office were read. In February 2012, the Trial Chamber confirmed the trial of the four accused in their absence. In May 2012, the defence counsels formally asked for the decision to be reconsidered. In July 2012, the Trial Chamber rejected the motion because no new facts or evidence demonstrated an error in legitimate reasoning that would allow the court to reconsider the decision to try the case. The STL applied the Lebanese criminal law considering the offences related to terrorism, life-threatening attacks, personal safety, illegal relations, and failure to report crimes and violations. One of the STL’s unique features is to grant the victims of terrorism the right to participate in judicial proceedings. Therefore, the STL is one of the few international judicial institutions that offer the victims a platform to be recognized and their voices heard.

<sup>72</sup> Rule 45 of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (2021 revision), <http://www.rscsl.org/Documents/RSCSL-Rules.pdf>.

<sup>73</sup> Jalloh, *supra* note 69, at 789.

<sup>74</sup> O. Kavran, *The Special Tribunal for Lebanon and its Outreach Programme*, 20 J. INT’L CRIM. JUST. 22 (2022), <https://doi.org/10.1093/jicj/mqac010>.

<sup>75</sup> L. Jreissati, UPDATE: Researching the Special Tribunal for Lebanon (STL), NYU Hauser Global Law Program (2022), [https://www.nyu-lawglobal.org/globalex/Special\\_Tribunal\\_Lebanon1.html](https://www.nyu-lawglobal.org/globalex/Special_Tribunal_Lebanon1.html).

## B. The Role of the Judges

The role of judges entails organizing and carrying out the hearings and approving the possibility of trials in absentia. These responsibilities are in line with all characteristics of Romano-Germanic criminal systems. However, it also reflects the determination to draft a more effective international criminal procedure. As regard the re-trial under the STL Statute, Kofi Annan, the former UN Secretary-General stated that “the founding instruments of the treaty-based United Nations courts contained more common-law elements, but the Lebanese court was the first to benefit significantly from the civil law system.”<sup>76</sup> He further argued that the adoption of trials in absentia in Article 22 of the STL Statute addressed Syria’s possible refusal to hand the defendants over to the court.<sup>77</sup> Article 22 (b) was also considered a solution to deal with this problem, mainly when there is no legal obligation on the countries other than Lebanon to cooperate with the STL or enable it to prosecute a person of another nationality.<sup>78</sup> It is well-known that Syria has refused to hand over the suspected accused persons to the Tribunal as addressed by Article 22. In this case, however, Article 22(b) was considered a solution to overcome this problem. Article 22(b) becomes effective when there is no legal commitment upon other states to collaborate with the STL, allowing the Tribunal to try persons of other nationalities.

In his statement, Kofi Annan contradicted the Secretary-General’s previous position contained a report to the Security Council at the time of the invention of the ICTY. He stated that the trial should not proceed until the accused person is physically present before the International Tribunal.<sup>79</sup> Article 22 has thus adopted a confirmed terminology, which indicates that holding trials in absentia is not entirely permitted, but it can be mandatory in specific cases.<sup>80</sup>

Rule 105 *bis* (a) of the STL Statute builds a temporal framework to execute this duty, referred to in Rule 76 *bis*. The Pre-Trial Judge shall demand the Trial Chamber commence within 30 calendar days when the accused is not under the Tribunal’s authority. The pre-trial provision in absentia may achieve certain global legal safeguards. Under Articles 22 and 23 of the STL Statute, regardless of whether the accused has expressly

<sup>76</sup> J. Trent & L. Schnurr, *Promoting and Protecting Human Rights, in A UNITED NATIONS RENAISSANCE: WHAT THE UN IS, AND WHAT IT COULD BE* 98-123 (J. Trent & L. Schnurr eds., 2018), <https://doi.org/10.2307/j.ctvd03xp.9>.

<sup>77</sup> *Id.*

<sup>78</sup> W. Jordash & T. Parker, *Trials in-absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law*, 8 J. INT’L CRIM. JUST. 57-60 (2010).

<sup>79</sup> Report of the Secretary-General according to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704/Add.1 (May 19, 1993), at 101, <https://digitallibrary.un.org/record/166299>.

<sup>80</sup> *Id.* art. 1.

waived his right to appear or not, a second trial will be allowed for the accused. Unlike those who have appointed counsels without waiving their right to attend, those who explicitly waive their right to appear before the court have renounced their right to a re-trial, because they had the opportunity to defend themselves, but rejected it. Therefore, it is unreasonable to offer a re-trial in such cases as it may imply that the court is not discouraging them to do such actions. If the trial's outcome is against the accused, s/he might request a re-trial as a right afforded to them.

### C. The STL's Decision

The first panel of the STL concentrated on the comprehension of trials in absentia concerning human rights law and the judicial process. It addressed the human rights and fair trial standards closely connected to trials in absentia and examples from common and civil law systems and international tribunals.<sup>81</sup> The closing arguments were delivered on September 21, 2018 by the Prosecution, Defence and the representatives of the victims. The conclusion of the trial was not as expected, because the judges withdrew to deliberate on whether the prosecution had proved its case beyond reasonable doubt.<sup>82</sup> Under Rule 94 of the STL RPE, the Pre-Trial Judge shall convene a status conference within eight weeks until the case is ready for trial. Those coincide with the Trial Chamber's decision to proceed with a trial even if the accused is absent.<sup>83</sup>

### D. Critical Questions

It was under the STL that an accused could be re-tried before the same court. Although several people have been sentenced in absentia, the following questions may arise in this regard.

1. What would happen if the duration of the STL elapsed?
2. What would the consequences for sentenced people be then?
3. Would they be tried in Lebanese Courts or private Courts?

<sup>81</sup> Application to Reclassify from Confidential to Public Urgent Application to Revoke Order Convening Trial Chamber II of 25 November 2019 (Nov. 29, 2019), <http://www.stl-tsl.org/crs/assets/Uploads/20191129-F0002-PUBLIC-Judge-Re-App-Reclass-Urgent-Appli-Revoke-Order-Conven-TCII-Filed-EN-LW-Web.pdf>.

<sup>82</sup> Coalition for the International Criminal Court, Trials in-absentia and International Criminal Justice (Oct. 5, 2016), <https://www.coalitionfortheicc.org/news/20161005/trials-absentia-and-international-criminal-justice>.

<sup>83</sup> STL Media Advisory - Pre-Trial Judge schedules fourth Status Conference in the Ayyash Case STL-18-10 on 16 December 2020, <https://www.stl-tsl.org/en/media/press-releases/stl-media-advisory-pre-trial-judge-schedules-fourth-status-conference-in-the-ayyash-case-stl-18-10-on-16-december-2020>.

#### 4. Would the trial in such a case be a second one for the same act?

However, Article 21 of the United Nations Agreement for the Establishment of the STL stipulates that the duration of the court is restricted to three years.<sup>84</sup> This period is substantially short for the court to complete its work; it should be taken into consideration that the idea of time extension is quite challenging, because the funding is limited.

Pursuant to Article 22 (part 1) of the STL Statute, some questions would be raised as follows: (1) Will the individual be entitled to request a second trial before the Lebanese Courts?; and (2) Will the Lebanese Courts abide by the STL Statute or apply its own Rules?<sup>85</sup>

According to Article 5(1) STL Statute, re-trials could be held for the accused persons to be sentenced in absentia before the Lebanese Courts. However, no one shall be tried before a national court of Lebanon because the STL has already tried him. In cases where a national court has tried an accused person for the same crime or the case was not prosecuted in national courts, the STL will ensure that a form of punishment becomes mandatory for a person found guilty. In addition, if the accused is already serving or has served a prison sentence for the same crime, this will be taken into consideration by the STL.

## VII. Conclusion and Recommendations

Under criminal law and the principle of deterrence to discourage criminal actions through instilling doubt or fear of the consequences, the validity of deterrence is based on sufficient, non-disincentive, standard reasons to prevent what is against the law. Criminal law strictly serves as a normative authority. The ICC Statute still requires some amendments that meet the international community's aspirations for the international justice. In international criminal law, meanwhile, international human rights doctrines from the ICCPR and the ECHR would outline some of the significant conditions under which an absentia trial will be considered legitimate. The following are significant questions in this regard.

<sup>84</sup> Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, <https://treaties.un.org/pages/showDetails.aspx?objid=080000028005e0e7>.

<sup>85</sup> N. Dajis, *The Special Tribunal for Lebanon: A Critical Analysis of Rights of the Accused, in absentia trials, and the Defence Office* (unpublished LL.M. thesis, Bangor University, 2014).

1. When the accused is summoned to appear in court and unequivocally waives his right to be present?;
2. When an effective legal representation has been provided throughout the trial of the accused?;
3. When the accused is offered an absolute right to the re-trial once he has been apprehended?; and
4. When the defence counsel has effectively broadcast the summons in the Lebanese territory via the media?<sup>86</sup>

Looking at the aforementioned conditions, Lebanon has largely ignored them as it has failed to notify the accused of the proceedings or even appoint a representation counsel for them personally.<sup>87</sup> The defence counsel reported that the Lebanese authorities were in conflict with the proceedings' fairness; the accused's practical defence was prohibited within the *Ayyash et al.* case. For an essential fair trial, the defence counsel could not have all the available material for an effective defence. Also, the accused was not present to consult with the defence counsel. The essential part of conducting a 'total' in absentia trial is the communication between the defence counsel and the accused. In addition, the Lebanese authorities were reluctant to cooperate with the prosecution.<sup>88</sup>

Finally, it is indicated that the STL has not fully achieved all three necessities required for holding an absentia trial. The first two requirements could be remedied if: (1) The STL has not given the accused the possibility of a re-trial, while the trial is still in progress; or (2) the Lebanese Court and the STL would be considered in violation of the principle in absentia. Three following conditions will guarantee a fair trial in the ICC: (1) The availability of the accused's right to a re-trial; (2) the right of the accused to appear in person before the tribunal; and (3) the unchanged notification to allay criticisms of not formally notifying the accused.<sup>89</sup> An independent defence office of the court similar to the STL is permanent if an international criminal tribunal adopts absentia trials. In the Rome Statute and Additional Protocol I, if the state is unable or unwilling to arrest and surrender the appropriate individuals to the ICC, the prosecutions cannot happen.<sup>90</sup>

Trial in absentia is at the core of international criminal justice. The trial is a

<sup>86</sup> *Id.*

<sup>87</sup> See Vietnam: IP rights enforcement manual, Gov.uk (June 14, 2021), <https://www.gov.uk/government/publications/trading-overseas-ip-enforcement-manuals-by-country/vietnam-ip-rights-enforcement-manual>.

<sup>88</sup> STL Media Advisory, *supra* note 83.

<sup>89</sup> *Id.*

<sup>90</sup> P. Hobbs, *The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals*, 31 CRIM. L. F. 345-76 (2020).

mechanism that aims to judge the accused's innocence or guilt following the fair legal procedure. Any accused is eligible to be tried being present unless otherwise requested. The accused's absence should not disrupt judgment and penal sentences. This type of trial reasonably addresses crimes and criminals, creating a desirable balance between providing defence to defendants and punishments for offenders.

The International Criminal Justice System (ICJS) includes crucial elements such as investigation, trial, sentencing, and the execution of those sentences. The ICJS should be advanced and improved continuously without being interfered by international politics, which can have adverse consequences limiting an individual's legal rights. The ICC has added terrorist offences to its substantive jurisdiction. As institutions such as the STL are non-permanent institutions, the Tribunal mandates may cease in some cases even before the accused is apprehended. This is a drawback that needs to be addressed.

Regarding the decision to conduct the absentia trial, the Trial Chamber should not ignore personal notification principles. Although the accused should face a fair trial, they should personally be notified of the proceedings or appointed counsel to represent them in the trial. The access of information from the prosecution and the Lebanese authorities should be compatible with the fairness of the proceedings as the trial could disclose evidence inadequately. The trial might be considered illegitimate if the defence counsel has faced obstacles when representing the accused. Independently, the right to re-trial can be requested if the accused reappears during an ongoing trial before its conclusion. The Trial Chamber should have the capability of reconvening whenever the accused physically attends before STL. The concurrent jurisdiction between the Lebanese Court and the STL for a judgment in absentia will be neither final nor breach the principle of *non-bis idem*. The notification issue should allow a more extended period for the accused to appear before the Tribunal.

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