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The Concept of Trials in Absentia in International Criminal Law and the Special Tribunal for Lebanon: An Overview

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Abstract

Trials in absentia have always been quite a contentious source of controversies in international criminal law, especially given the nature of crimes that result into these trials and given the question regarding what can be an acceptable standard of legal due process that ought to be adhered to in course of such trials. Throughout this paper, the author has sought to present an overview of the concept as it is prevalent in the current domestic and international legal scenarios. An effort has also been made to portray the range and acceptability of the arguments that are advanced by the proponents and detractors of the notion of accepting this category of trials as a matter of course to combat international and domestic crimes. The varying approaches of common law and civil law jurisdictions vis-à-vis this subject-matter has also been examined, together with the practices prevalent in renowned international tribunals such as International Criminal Tribunal for the former Yugoslavia [hereinafter referred to as "ICTY"], the International Criminal Tribunal for Rwanda [hereinafter referred to as "ICTR"] and the International Criminal Court [hereinafter referred to as "ICC"]. Finally, the author has looked into the manner in which the question of the validity of such trials has once again come to the forefront owing to its acceptance by the Special Tribunal for Lebanon.

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Introduction

The expression 'trial in absentia' literally means a trial in the absence of the accused. Trials in absentia form a common feature of civil law jurisdictions and have been the subject of much controversy in both domestic and international arenas. International conventions such as the International Covenant on Civil and Political Rights [hereinafter referred to as "ICCPR"] and the European Convention on Human Rights [hereinafter referred to as "ECHR"] generally prohibit such trials. On the other hand, the International Military Tribunal [hereinafter referred to as "IMT"] at Nuremberg had allowed for trials in absentia if the accused "has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."[1] The Tokyo Tribunal has also been known to have occasionally allowed for trials in absentia. However, international legal practice has since then moved away from the endorsement of such trials, with the International Criminal Tribunal for the former Yugoslavia [hereinafter referred to as "ICTY"], the International Criminal Tribunal for Rwanda [hereinafter referred to as "ICTR"] and the International Criminal Court [hereinafter referred to as "ICC"] explicitly requiring the accused to be present at his or her trial.[2]

In the light of such notority faced by this category of trials, it came as quite a surprise, when the Special Tribunal for Lebanon [hereinafter referred to as "SLT"] incorporated provisions for holding trials in absentia. This move has resulted in resurrecting the debate surrounding the legality of such trials. In this paper, the

[1] Charter of the International Military Tribunal, United States, Provincial Government of the French Republic, United Kingdom and the Government of the Union of the Soviet Socialist Republics, art. 12, 1945, 82 U.N.T.S. 279.

[2] *See respectively* The Statute of the International Criminal Tribunal for the former Yugoslavia, art. 21(4)(d); The Statute of the International Criminal Tribunal for Rwanda, art. 20(4)(d); The Rome Statute, art. 63(1).

author seeks to present an overview of certain developments that have taken place regarding trials in absentia in both municipal as well as international criminal law as well as the validity of such trials with special reference to the SLT.

Trials in Absentia: An Understanding

As has already been stated, the term "trial in absentia" literally means a trial in the absence of the defendant. There can be two different circumstances giving rise to such trials, where the defendant's presence may not be entirely taken for granted. The first is wherein the accused has been present in the arraignment and indictment stages and then absconded. In this case, it can be proven that the accused has been properly served and informed of the charges against him and he did have the opportunity to avail of legal services to prepare his defense. The resulting failure to attend can be construed as a conscious decision or choice on his part to be absent; a prima facie waiver of the right to be present.

The second situation is when the accused has not been present at any stage of the proceedings. Under such circumstances, it is debatable whether the accused has been properly served and whether he is aware of the charges leveled against him and the nature of such charges. Not surprisingly, a trial in absentia in the second scenario is not acceptable to a majority of states. Thus, it is submitted that unless a clear waiver by the accused of the right to be present can be proven, trials in absentia can be challenged as an infringement of human rights.

Arguments against Trials in Absentia

The critics of trials in absentia derive their arguments from the human rights theory. The main argument against trials in absentia is that the right to be present at the trial is an integral part of the right to defend oneself and also an essential aspect of the right to fair trial.[3] It is submitted that the judicial process is vulnerable to

[3]*See* Amnesty International, Fair Trials Manual, 1998 ¶ 1.1,

http://www.amnesty.org/ailib/intcam/fairtrial/fairtrial.htm (last visited Feb. 17, 2012).

error and abuse as the defendant, if not present at the trial, shall be unable to examine witnesses or challenge the evidence put forth by the prosecution or plead mitigating circumstances either by himself or through his representative.[4] The right to be present at one's own trial is understood to be linked to the guarantee of being presumed innocent until proven guilty in a court of law. It has been argued that trials in absentia may tarnish this right.[5] In certain jurisdictions, courts have been known to mete out judgments in absentia in political cases for the purposes of public condemnation. It has been argued that these "show trials" diminish the authority of the court and are perceived as a sign of judicial weakness.[6]

Another fairly prevalent argument against trials in absentia is that they do not serve any realistic purpose, as the punishment imposed cannot be effected until the accused surrenders and such trials are therefore, ineffectual. Finally, it is argued that trials in absentia remove the police lax in locating and apprehending the accused.[7] This can be a real issue in countries where police resources are limited.

Arguments in Favour of Trials in Absentia

Trials in absentia largely constitute a feature of civil law jurisdictions-such jurisdictions extend the popular argument that such trials are necessary for the effective and efficient running of

[4] *See* R v. Hayward (John Victor), [2001] E.W.C.A. Crim 168 at ¶ 34.

[5] *Id.*

[6] *See* Hermann Schwartz, *Point/Counterpoint: Should the Indicted War Criminals Be Tried In Absentia? Only Convictions will Produce Justice*, The Human Rights Brief Vol. 4, no.1 Fall 1996, Washington College of Law, American University, http:// www.american.edu/TED/hpages/ human/ schwar41.htm (last visited Mar. 18, 2012).

[7] Dianne F. Orientlicher, *Taking Exception*, (1996) 4(1) H.R. Brief, American University Washington College of Law, http:// www.american.edu/ TED/hpages/human/orent41.htm (last visited Feb. 17, 2012).

the criminal justice system.[8] Other arguments in favor of such trials include the right of victims to have the accused brought to justice, the practical difficulties associated with obtaining and preserving evidence if the accused is not caught within a reasonable period of time and the lesser expenses involved. Proponents also argue that trials in absentia at least produce a "full airing of the evidence" and if the accused has retained or appointed counsel, then all the evidence may be properly tested in any event.[9]

It is submitted that the development of trials in absentia in civil law countries was not in contemplation of a rights-based approach to law but instead in consonance with the inquisitorial system.[10] However, it is submitted that the notion of fair trial measures and a rights-based approach to law have made a difference to the generally acceptable notions of trials in absentia.

Trials in Absentia in Domestic Courts

Trials in absentia have long been accepted as a matter of course in civil law jurisdictions, whereas it is restricted to extraordinary cases in common law countries. However, common law does not recognize trials in absentia in the ordinary course of events.[11] It is a requirement in common law countries such as the UK and Australia that the accused be present throughout his trial for a serious offence.[12] However, the right to be present is waived if, in the course of the trial and while on bail, the accused absconds or escapes while in custody. The judge then has the discretion to allow

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[8] Evert F. Stamhuis, *Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal System*, 32 V.U.W.L.R 715 (2001).

[9] R v. Hayward (John Victor), [2001] E.W.C.A. Crim. 168 ¶ 3 (*in this case Lord Justice Rose highlighted certain circumstances in which the judge may exercise his discretion whether a trial should continue in the absence of the defendant*).

[10] Stamhuis, *supra* note 8.

[11] Winfield v. The Queen, [1999] H.C.A. 65.

[12] Lawrence v. The King, [1999] A.C. 699.

the trial to continue.[13] If he decides to do so, there must still be in practical terms no unfairness to the accused apart from that brought about by his waiver.[14]

In the USA, this common law position has been codified into federal constitutional guarantees of due process[15] and a constitutional right of the accused to confront witnesses.[16] Rule 43 of the Federal Rules of Criminal Procedure[17] states, however, that a defendant waives his right to be present if he is voluntarily absent after the trial has begun.[18] However, the trial cannot continue if the accused absconds during the pre-trial phase.[19]

In contrast, trials in absentia have long been a part of criminal law, such as in Italy, Netherlands and Greece. The French Code of Criminal Procedure[20] allows for trials in absentia in cases of felony but upon capture of the suspect, he has the right to a retrial.[21] It

[13] R v. McHardie, [1983] 2 N.S.W.L.R. 733.

[14] R v. Hayward (John Victor), [2001] E.W.C.A. Crim. 168 (*in this case Justice Rose laid down certain principles that the courts should follow in instances of trial in absentia to decide whether such trials would be valid in law and also to ensure that fairness to the defense is maintained at all stages of the proceedings*).

[15] U.S. CONT AMEND. XIV, http:// www.house.gov/ Constitution/ Amend.htm (last visited Feb. 17, 2012).

[16] U.S. CONST AMEND. VI, http:// www.house.gov/ Constitution/ Amend.htm (last visited Feb. 17, 2012).

[17] Federal Rules Of Criminal Procedure, 2009,

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR2009.pdf (last visited Feb. 17, 2012).

[18] Illinois v. Allen, (1970) 397 U.S. 337 at 338.

[19] Crosby v. U.S., 506 U.S. 255 (1993).

[20] About the French Legal System, http:// www.legifrance.gouv.fr/ Traductions/en-English/About-the-french-legal-system (last visited Aug. 17, 2012).

[21] French Code of Criminal Procedure, art. 627-632; *see also* Rachel K. David, *Ira Einhorn's Trial in Absentia: French Law Judging United States Law*, [22] N.Y.L Sch. J. Int'l & Comp. L 611(2003).

also states that if an accused is given proper notice but fails to appear, he can be tried as if he were present.[22] Germany is an exception to this practice, not allowing trials in absentia based on the argument that interrogation of the accused by the judge is an integral part of civil law criminal trials.[23] Many States in European Union allow for trials in absentia with similar safeguard as France. Despite these safeguards, the European Court of Human Rights [hereinafter ECHR] has disapproved of trials in absentia.[24]

Trials in Absentia under International Law

The right to be present at one's trial is generally accepted in international law. This principle finds support in many conventions as well as customary rules. The International Covenant on Civil and Political Rights [hereinafter ICCPR] is the foremost international instrument embodying the right to be present at one's trial. Art. 14(3)(d) of ICCPR states that the accused has the "right to be tried in his presence." Nothing in preceding or succeeding provisions provide an exception to this rule.

However, international courts and tribunals have interpreted Art. 14(3)(d) as being qualified rather than absolute. In *Mbenge v. Zaire*[25], one of the earliest cases addressing trials in absentia, the UN Human Rights Committee stated that Article 14(3) of the ICCPR and "other requirements of due process enshrined in the said Article, cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence."[26] The Committee acknowledged that in some

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[22] David, s*upra* note 21at 616.

[23] Schwartz, *supra* note 6 at ¶ 9.

[24] *See* Colozza v. Italy, (1985) 7 E.H.R.R. 516; *see also* Lala v. The Netherlands, (1994) 18 E.H.R.R. 586; Poitrimol v. France, (1993) 18 H.E.R.R. 130; Van Geyseghem v. Belgium, [1999] E.C.H.R. 5.

[25] Communication No. 16/1977 (Sept. 8, 1977), U.N. Doc. Supp. No. 40 (A/38/40) at 134, http://www.server.law.wits.ac.za/ humanrts/ undocs/session38/16-1977.htm (last visited Feb. 17, 2012).

26 *Id.*, at ¶ 14.1

cases, trials in absentia "are permissible in the interest of the proper administration of justice."[27] It is submitted that the *Mbenge case* makes it clear that trials in absentia do not violate the standards laid down in the ICCPR. They are allowed prima facie provided the rights of the accused are not infringed and/or the accused explicitly waives those rights.

The European Convention on Human Rights, 1950 does not specifically state that the accused has a right to be present at his trial. However, Art. 6 of the said Convention has been interpreted in *Colozza v. Italy*[28] by the European Court of Human Rights as having this meaning. The European Court of Human Rights stated that "the object and purpose of the Article taken as a whole is to ensure that a person charged with a criminal offence is entitled to take part in the hearing."[29] The court has also stated that in order to waive the right to be present, the waiver must be established in an unequivocal manner.[30]

In *Poitrimol v. France*[31,] the ECHR held that "minimum safeguards" implies that the court must hear the lawyer of the accused. The accused in the instant case was tried in absentia while being defended by an appointed counsel. However, his appeals to the local Court of Appeal and the Court of Cassation were rejected as those courts refused to hear his lawyer. This was held by the European Court of Human Rights to be a breach of Art. 6 of the European Convention on Human Rights.

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[27] *Id.*

[28] (1985) 7 E.H.R.R. 516.

[29] *Id.*

[30] *Id.*; *see also* Lala v. The Netherlands, (1994) 18 E.H.R.R. 586; Poitrimol v. France, (1993) 18 E.H.R.R. 130; Van Geyseghem v. Belgium, [1999] E.C.H.R. 5.

[31] (1993) 18 E.H.R.R. 130.

Trials in Absentia in International Tribunals

The International Military Tribunal (hereinafter referred to as IMT) was established by the Allied powers in 1945 to try Nazi and Japanese war criminals and their collaborators. Essentially a case of victors' justice, it is submitted, however, that the IMT or the Nuremburg Trials gave birth to international standards of justice that were later codified by the UN General Assembly. The Nuremburg principles balance these standards against the right of the accused to both a fair trial and to due process. It is further opined that the Nuremburg Trials served as the foundation of the modern conception of human rights tribunals by acknowledging the affirmative and unconditional responsibility of the international community to afford due process protection to all individuals accused of violations of international law.[32] Having said that, the IMT allowed for trials in absentia, if the accused "has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."[33]

It is submitted that the IMT's endorsement of trials in absentia cannot be regarded as the norm in international law. International practice has since moved away from this stance, as evidenced by the ICCPR and other international instruments and conventions that have been drafted and ratified following the closure of the IMT in 1946.

Neither the ICTY nor the ICTR allows trials in absentia. Art. 21(4)(d) of the statute of the ICTY states that the accused has the right "to be tried in his presence and to defend himself in person or

[32] Dennis J. Hutchinson, *Tribunals of War: A History Lesson in Mass Crimes*, CHI. TRIB., Nov. 18, 2001, § 1, at 21.

[33] Charter of the International Military Tribunal, *supra* note 1.

through legal assistance."[34] Art. 20(4)(d) of the statute of the ICTR is also set in identical terms.[35]

The Rome Statute of the International Criminal Court (hereinafter referred to as Rome Statute) specifically states that an accused must be present at his trial.[36] It then provides a very strict exception to this principle in Art. 63(2):

"If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required."[37] There is no exception if the accused flees. The only part of the court proceedings that the accused may waive his right to attend is the confirmation of charges.[38]

However, similar to the relevant provisions in the ICCPR, the bar on trials held in absentia is not absolute in the case of the ITCY and the ICTR as well. In absentia proceedings have been used in the context of the ICTY to try international criminals who fail to appear before the tribunal.[39] Although trials are not usually held before the

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[34] Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, 32 I.L.M. 1192, http:// www.un.org/ icty/legaldoc/ index.htm (last visited Feb. 17, 2012).

[35] Statute of the International Criminal Tribunal for Rwanda, 1994, 33 I.L.M. 1598, http://www.ictr.org/ENGLISH/basicdocs/statute.htm (last visited Feb. 17, 2012).

[36] Statute of the International Criminal Court, 1992, 2187 U.N.T.S. 90, http://www.un.org/law/icc/statute/romefra.htm (last visited Feb. 17, 2012).

[37] *See* The Rules of Procedure and Evidence of the International Criminal Court, r. 124-126, http://www.icc-cpi.int/ library/ basicdocuments/ rules(e).pdf (last visited Feb. 17, 2012).

[38] *Id.*

[39] *See generally* Sean D. Murphy, *Contemporary Practices of the United States Relating to International Law*, 94 Am. J. Int'l L 516 (2000).

tribunal unless the accused is present, yet under Rule 61 of the ICTY Rules of Procedure, if the accused fails to appear, a public hearing is held in which witnesses are called and evidence is presented in order to determine whether the indictment against the accused should be "confirmed" and an international arrest warrant issued.[40] Rule 61 was adopted in order to provide a forum for condemning defendant's actions, and voicing the allegations of his victims.[41] Prosecutors invoked Rule 61 in the cases of *Radko Mladic* and *Radovan Karadic*, two Bosnian Serbs who failed to appear before the ICTY.[42] Also, in the instance of the trial of former Yugoslavian President, Slobodan Milosevic, the ICTY conducted portions of the trial in the absence of the afore mentioned accused, as he was absent due to long periods of illness.[43]

In absentia proceedings have also featured in the ICTR, most notably in the case of the trial of Jean-Bosco Barayagwiza. In this instance, the counsel of the accused told the Trial Chamber of the International Criminal Tribunal for Rwanda that their client would not be attending the trial, and that he had instructed them not to represent him, all of this "based on his inability to have a fair trial

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[40] *See* Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), R. 61, U.N. Doc. IT/321 REV 21 (2001), http:// www.un.org/ icty/basic/rpe/IT32_rev32.html (last visited Feb. 17, 2012).

[41] Mark Thieroff & Edward A. Amley, *Jr., Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 Yale J. Int'l L. 231, 247 (1998) (*quoting Richard Goldstone, former Justice of the Constitutional Court of South Africa and a Chief Prosecutor of the Rwanda and Yugoslavia tribunals*).

[42] Anne L. Quintal, *Rule 61: "The Voice of the Victims" screams out For Justice*, 36 Colum. J. Transnat'l L. 723, 741 (1998) (*describing in absentia provisions in the criminal procedure codes of France, Italy, and the Netherlands*); *see also* Neil P. Cohen, *Trial in Absentia Re-Examined*, 40 Tenn. L. Rev. 155 (1973) (*arguing that many situations warrant trials in absentia*).

[43] Tiphaine Dickson, "*Substantial Disruption*" *at The Hague: Will Slobodan Milosevic be Tried In Absentia?* (Jun. 17, 2005), http:// www.globalresearch.ca/ index.php?context=va&aid=213 (last visited Feb. 17, 2012).

due to the previous decisions of the Tribunal in relation to his release." Barayagwiza personally issued a statement "refusing to associate himself with a show trial" and insisting that "the ICTR was manipulated by the current Rwandan government and the judges and the prosecutors were the hostages of Kigali."[44] The Trial Chamber of the ICTR adopted Rule 82 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda[45] to declare that "Barayagwiza was entitled to be present during his trial and had chosen not to do so, and the trial would proceed nonetheless."[46]

Although these cases highlight the possibility of conducting in absentia trials in international tribunals, the fact remains that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda largely prohibits such proceedings, only laying down very strict guidelines as to when an exception may be created. It is in the light of this that the provisions for in absentia trial in the Agreement for Special Tribunal for Lebanon assumes importance, for they signify a marked departure from previous international tribunals by allowing in absentia trials.

Special Tribunal for Lebanon

The Special Tribunal for Lebanon (hereinafter referred to as STL) was established by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664 of 29 March, 2006 and was endorsed by the United Nations

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[44] M. Momeni, *Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 I.L.S.A. J INT'L & COMP L 315, 315-316 (2001), http://humanrightsdoctorate.blogspot.com/2009/ 10/ karadzic-to-boycott-trial.html (last visited Feb. 17, 2012).

[45] Rule 82 provides that the trial may proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that: (i) the accused has made his initial appearance under Rule 62; (ii) the Registrar has duly notified the accused that he is required to be present for trial; and (iii) the interests of the accused are represented by counsel.

[46] Momeni, *supra* note 44.

Security Council acting under Chapter VII of the Charter of the United Nations, by Security Council Resolution 1757, on 30 May, 2007.[47] The mandate of the Tribunal is to try those suspected of assassinating former Lebanese Prime Minister Rafik Hariri, who was murdered, along with 22 others, on 14 February, 2005.[48] The STL is unique in nature and different from other international tribunals as it is concerned with the commission of a crime against a specific individual and within the national boundaries of a single nation state. Also, the STL provides for in absentia trials in a major procedural deviance from other international tribunals. The provisions relating to such trials in the ICTR and the ICTY have been discussed in the preceding section of the paper. Subsequently, in 2000, the United Nation's Transitional Administration in East Timor (hereinafter UNTAET) codified the partial in absentia practice in vogue with the ICTY and ICTR. The UNTAET Transitional Rules of Procedure allowed in absentia proceedings, where the accused is initially present and then flees, refuses to attend, or disrupts the proceedings.

The Special Court for Sierra Leone (hereinafter SCSL), a mixed national-international tribunal established in 2002, used similar language, incorporating the ICTY and ICTR right of the accused to be present at trial but qualified that right in situations where the accused flees or refuses to attend proceedings.[49] The Extraordinary Criminal Chambers of Cambodia also has provisions for trials in absentia where the accused is initially present then flees, refuses to attend or disrupts proceedings.[50] As is apparent, there has been a

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[47] *See* Special Tribunal for Lebanon, http://www.stl-tsl.org/action/home (last visited Feb. 17, 2012).

[48] *See* Special Tribunal for Lebanon, http:// www.un.org/ apps/ news/ infocus/lebanon/tribunal (last visited Feb. 17, 2012).

[49] *See* Chris Jenks, *Notice otherwise given: will Absentia Trials at the Special Tribunal for Lebanon violate Human Rights?* (2009) http:// works.bepress.com/ chris_jenks/2/ (last visited Feb. 17, 2012).

[50] *See* International Center for Transitional Justice, *Comments on Draft Internal Rules for the Extraordinary Chambers in the Court of Cambodia* Nov. 17, 2006, http://www.ictj.org/images/content/6/0/601.pdf (last visited on February 17, 2012); *Letter from Human Rights Watch to the Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia* Nov.

continued approach of the tribunal to allow partial in absentia under certain specific conditions but the STL makes a departure from the norm by providing for absolute trial in absentia.

The possibility of trials in absentia is expressly provided for in Art. 22, which distinguishes three situations: (a) the accused has expressly and in writing waived his right to be present; (b) the accused has not been handed over to the Tribunal by the state authorities concerned; and (c) the accused has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges against him.[51] Art. 22 also makes it clear that for trials in absentia to be held, the STL must ensure both that:

1. the indictment was served or notified to the accused or that it was made public through appearance in the media or communication to the state of residence or nationality; and
2. the accused has appointed a defense counsel of his choice or, when the accused fails or refuses to appoint a defense counsel, the STL must ensure that the Defense Office assigns him one, in order to fully represent his interests and rights.[52]

Finally, Article 22 provides that in the event of conviction, the accused has the right to a retrial; however, the right to be retried only applies to cases where the accused was not represented at trial by counsel of his own choice, unless the accused accepts the judgment delivered in absentia.[53]

It has been argued that the protection served to the accused under Art. 22(1) of STL Statute is inadequate and that such trials in absentia in the STL would be in violation of principles of natural justice as well as incongruous with Art. 14 of the ICCPR. The case

17,2006, http://www.hrw.org/en/news/2006/11/17/extraordinary-chambers-courts-cambodia (last visited Feb. 17, 2012).

[51] Statute of the Special Tribunal for Lebanon, art. 22(1).

[52] Statute of the Special Tribunal for Lebanon, art. 22(2).

[53] Statute of the Special Tribunal for Lebanon, art. 22(3).

of *Malenki v. Italy*[54] (hereinafter *Malenki)* is used to critique the in absentia trial provisions in the STL. In this case, an Italian court conducted in absentia proceedings against Malenki, an Iranian citizen, where he was represented by a court appointed counsel, in 1988. Subsequently, he was arrested in Italy. It was argued that notice of the trial had not been sent to Malenki and although a court appointed counsel had represented him at the trial, the counsel had no contact with the accused. Therefore, the ECHR held that a trial in absentia would be compatible with the ICCR only when the accused had been summoned in a proper manner and informed of the proceedings. It was therefore incumbent on the court trying the case to verify that the accused had been informed of the proceedings pending against him before holding the trial in absentia. Also, on the issue of the right of the accused to a retrial, the ECHR stated that a trial in absentia should necessarily be followed by an absolute right of retrial when the accused is apprehended and not by a qualified or conditional retrial.[55] These arguments assume importance in the context of the STL as Art. 22 of STL Statue provides for giving notice to the defendant by means of public media or through communication with his country of origin or residence. In light of the observations made in *Malenki*, the burden on the court trying the case is to ensure that the accused has been informed of the proceedings pending against him and it is argued that the burden has not been discharged in Art. 22 of the STL. Further, while the STL provides a right for retrial, it does not specify the nature or location of such trial, after the term of the STL terminates. It is possible that many accused proceeded against in the STL may only be apprehended after the projected three year period of existence of the STL is over. There is much confusion therefore, over the manner in which the retrial of such defendants would be conducted in such cases.

[54] Communication No. 699/1996, U.N. Doc. C.C.P.R./C/66/D/699/1996 (Jul. 27, 1999).

[55] Jenks, *supra* note 49.

Conclusion

The wide possibility of holding trials in absentia by the STL may certainly be criticised. The foremost criticism is that there is a great risk of them being used as a powerful political tool within a delicate historical context. However, the presence of stringent conditions for the legitimacy of such trials proves that the drafters of the STL strove to uphold international human rights case law. The wording of Art. 22 of STL Statute may be unsatisfactory, in particular with regard to the necessity to endow the convicted person with the right to retrial. Apart from this defect, Article 22 of the STL Statute is laudable for combining respect for the legal traditions of civil law countries such as Lebanon, and for compliance with international standards crafted by institutions such as the ECHR to ensure that, even when the accused is absent, he is given a fair trial.

Unfortunately, these international standards can still appear suspicious to those countries, which adhere to the principle whereby a trial cannot commence without the presence of the accused in the court and admit very limited exceptions to this principle. These countries, although they may be willing to cooperate with the STL, may find themselves in a legal quandary, unable to transfer a person convicted in absentia by the STL for the purpose of executing his sentence. One hopes that in due course of time the STL will overcome such obstacles and other possible difficulties in the field of judicial cooperation with third-party states by concluding ad hoc agreements, whereby it is recognized that - as far as the STL is concerned - trials in absentia are compatible with the notion of fair trial and, as long as the convicted person under the STL Statute has the right to be retried, there is no obstacle to extradition or prisoner transfer.