Trials in absentia at the Special Tribunal for Lebanon: an Effective Measure of Expediency or an Inconsistency with Fair Trial Standards?

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Article 22 of the Statute of the Special Tribunal for Lebanon (STL) represents a very interesting feature proper to the STL. It gives the Tribunal the ability to hold trials without the presence of an accused; in other words, trials in total absentia. This feature is unique since it distinguishes the STL as the only tribunal that conducts trials in which a hearing may start and end without the accused ever being present before the court. Trials in absentia have generated debates between the national traditions of the common law and civil law systems. Many scholars have criticised Article 22 for not being compliant with fair trial standards. This Article, however, seeks to prove that the provisions of Article 22 respect the right of the accused to be present as well as the right to retrial, both of which are major components of fair trial standards. This Article will further demonstrate that the in absentia practice represents a measure of expediency in international criminal law. Indeed, this practice could, on the one hand, be interpreted as a solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures; and on the other hand, a measure to avoid delays in proceedings.

I. INTRODUCTION

On 13 December 2005, the Government of Lebanon requested that the United Nations (UN) establish an international tribunal to try the perpetrators of the bomb attack of 14 February 2005 that cost the lives of former Lebanese Prime Minister Rafiq Hariri and 22 others.¹ Three years after the assassination of

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Hariri, the UN Security Council, under Resolution 1757 (2007), established the Special Tribunal for Lebanon (STL) to prosecute responsible persons. The decision was taken under Chapter VII of the Charter of the United Nations (UN Charter) of 1945 after determining that the bomb attack constituted a threat to international peace and security.

The legitimacy of the STL has been the subject of many controversies that will be mentioned further in this Article. This Article will tackle a characteristic unique to the Tribunal, which is its ability to hold trials in absentia, found in Article 22 of its Statute. Indeed, this ‘very special tribunal’ has the capability to prosecute accused persons in their absence under specific circumstances. This practice has not occurred since the Nuremberg Tribunal and the only defendant tried in his absence before the International Military Tribunal (IMT) at Nuremberg was Martin-Bormann, who was convicted in 1946 for war crimes and crimes against humanity. This unique provision is very much specific to the STL and differentiates it from the International Criminal Court (ICC) and other ad hoc tribunals. The in absentia principle has generated numerous debates among international criminal and human rights lawyers. Notwithstanding, the STL held its first trial in absentia in January 2014, marking the second time that such a trial was held in the history of international criminal law.

This Article will therefore evaluate whether the practice of trials in absentia is an effective measure of expediency at the STL, or rather a violation of internationally recognised fair trial standards and thus a violation of international human rights law. After introducing the conceptual background of trials in absentia in Section II, this Article will discuss the general framework in which the principle of in absentia can be placed. The purpose of this discussion is to examine whether the STL Statute is compliant with minimum fair trial standards and international human rights law, and whether Article 22 meets the requirements of legality. It will be argued that in the case of the STL, the in absentia procedure is compliant with the right to be present and the right

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International Tribunal to try those responsible for the bombing attack against former Prime Minister Hariri.


3 Ibid art 22.


5 Paola Gaeta, ‘Trial In Absentia Before the Special Tribunal for Lebanon’ in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), The Special Tribunal for Lebanon: Law and Practice (OUP 2014) 229, 231.
to a retrial. In Section III of this Article, I will argue that the practice of trials in absentia in the case of the STL is not only the ultimate solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures, but it is also a measure to avoid delays in proceedings.

II. CONCEPTUAL BACKGROUND: THE COMMON LAW VERSUS CIVIL LAW SYSTEMS AND ARTICLE 22 OF THE STL STATUTE

Trials in absentia have been the subject of many debates in domestic and international jurisdictions. At the national level, the discussion regarding this practice revolves around the different practices found in common law and civil law systems, which implement different mechanisms used in the quest for justice. The practice of holding trials in absentia is accepted only in specific circumstances in common law systems, namely when a defendant voluntarily waives his/her right to be present after having attended the start of the trial.6 In the civil law tradition, the in absentia principle has been adopted by some countries as part of their criminal systems (depending on the national law of the state).7 For example, Germany does not admit the practice of trials in absentia at all, but other states in the European Union such as France, Italy, Belgium and the Netherlands do, with certain safeguards. Other countries such as Lebanon, Egypt and Tunisia allow trials in absentia without any kind of reservation.

To contextualise the in absentia principle on the international level, this practice is not unfamiliar to some international criminal tribunals. In fact, as previously mentioned, the IMT introduced the concept of ‘total in absentia trials’8 with the accused, Martin Bormann, not taking part in any of the procedures. However, modern tribunals tend to admit only partial in absentia trials, where the accused appears at the beginning of the trial but not subsequently.9 Similarly, the Rome Statute allows the ICC to hold trials without the presence of the accused only if the defendant would be found disruptive.10

Although the in absentia practice has been dormant for many years now, it has been reinstated recently at the STL through the provision of Article 22 of the

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7 ibid 328.
STL Statute. There are three situations in which Article 22(1) authorises trials in absentia to take place. These are when the accused has:

(a) expressly and in writing waived his or her right to be present;
(b) not been handed over to the Tribunal by the state authorities concerned; or
(c) absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges.

Furthermore, in order for trials in absentia to be held, the STL has to fulfil certain requirements. It must ensure that the person accused:

(a) has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the state of residence or nationality;
(b) has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
(c) whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

Finally, Article 22 stipulates that in the case of condemnation, the defendant has the right to a retrial in the event where the accused was not represented at trial by counsel of their choice, unless the defendant consents to the judgment.

Article 22 makes the Tribunal unique because it distinguishes it as the only international tribunal today that conducts trials in which a hearing may begin and end without the accused ever being present before the court.

The following Sections will examine, first, the human rights debate on the practice and, second, the impact that such trials has on the international criminal justice system.

11 Statute of the Special Tribunal for Lebanon (STL), art 22(1).
12 ibid.
13 ibid art 22(2).
14 ibid art 22(3).
III. THE HUMAN RIGHTS ARGUMENT

Jordash and Parker have both argued that Article 22 ‘reflects a triumph of politics over fair trials standards’, contending that trials in absentia are a violation of internationally recognised minimum fair trial standards, and thus a violation of international human rights law.\(^\text{16}\) Additionally, critics maintain that such trials violate fair trial provisions of both international and regional human rights bodies, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR).\(^\text{17}\) Nevertheless, many scholars have challenged this argument.\(^\text{18}\) Accordingly, this Section argues that in absentia proceedings are not incompatible with the right to be present so long as certain safeguards are respected.

3.1 The Right to be Present

There are two doctrines that incorporate the right to be present at trial and these may be read to contest the principle of holding trials in absentia. Firstly, the ICCPR, which is monitored by the Human Rights Committee (HRC), in its Article 14 states that everyone shall be entitled ‘to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing’.\(^\text{19}\) Secondly, the ECHR, which is monitored by the European Court of Human Rights (ECtHR), only implies the right to be tried in one’s presence through its Article 6 that asserts the right to a fair trial.\(^\text{20}\)

In the case of the ICCPR, it could be argued that its Article 14 affirms the right to be present but does not absolutely prohibit trials to be held without the presence of the defendant. Shaw makes the distinction between the ‘obligation’ and the ‘right’ to be present at one’s trial, arguing that if Article 14 recalls that defendants cannot be forbidden from being able to attend trial and defend themselves, the Article neither explicitly nor implicitly conditions that their


\(^{17}\) Jenks (n 8); Jordash and Parker (n 16).


presence is absolutely required in order to hold it.\textsuperscript{21} The cases of \textit{Mbenge v Zaire}\textsuperscript{22} and \textit{Maleki v Italy}\textsuperscript{23} are both recurrent examples when arguing that trials \textit{in absentia} do not violate Article 14 of the ICCPR. These cases clearly acknowledge that a trial without the presence of the accused could take place in certain circumstances, including when the accused has properly been informed of the hearing and has waived his/her right to be present.\textsuperscript{24}

Comparable to the \textit{Maleki} case, the ECtHR in \textit{Sejdovic v Italy} also recognised that proceedings \textit{in absentia} do not contravene the right of the accused to be present at his/her own trial, provided that the accused has been properly notified of the proceedings taking place.\textsuperscript{25} On the authority of these principles, therefore, as long as the STL is able to prove that the defendant has knowledge of the charges and the proceedings taking place but still chooses not to appear in court, trials \textit{in absentia} at the STL do not violate international human rights standards of fair trial. Yet, the issue persists of ensuring that the accused has been properly notified of the charges. Jenks argues that it is not enough to prove that the court has taken all reasonable steps to notify the accused; rather, it must also be shown that the court has succeeded in informing the defendant.\textsuperscript{26} In the \textit{Mbenge} case, the HRC noted that even though Mbenge had heard of the charges through media coverage of the trial, the State itself had failed to inform the defendant of the proceedings and so it violated the rights of the accused.\textsuperscript{27} Jenks contends that the ‘notice-otherwise-given’ stipulation found in Article 22(2)(a) of the STL Statute, which deems notice to be given to the accused through the media or by notifying the State of residence or nationality, is a violation of the ICCPR’s notice requirements. The provision, according to this argument, fails to state the responsibility of the Tribunal to prove that an accused has been properly informed and is aware of the charges against him/her before conducting a trial \textit{in absentia}.\textsuperscript{28} Gardner argues that ‘by including the concept of notice, the drafters signalled an interest in the effect of the advertisement and transmittal of the indictment’.\textsuperscript{29} According to the latter, the

\begin{thebibliography}{99}
\bibitem{Jenks2018} Jenks (n 18) 126.
\bibitem{Sejdovic2006} \textit{Sejdovic v Italy} App no 56581/2000 (ECtHR, 1 March 2006).
\bibitem{Mbenge2000} \textit{Mbenge v Zaire} (n 22).
\bibitem{Jenks2018} Jenks (n 8) 81.
\bibitem{Jenks2018} Gardner (n 18) 127.
\end{thebibliography}
The question thus arises as to how it can be proven that the accused has received notice of the indictment. It would create great uncertainty to expect an indicted individual to publicly acknowledge the receipt of their summons. In some cases, the court might therefore never know. In other cases, however, it seems that notice can be assumed. For example, Joseph Kony of the guerrilla group in Uganda and Omar al-Bashir of Sudan are both high-profile figures that have been indicted before the ICC. It would seem realistic to assert that these men have received notice of indictment, an assertion that would allow justice to prevail, instead of continuing to delay their trials as a result of the Court’s failure to capture them. The same assertion can be made for the four men indicted by the STL. In 2011, one of the men implicitly stated in an interview that he was well aware of the charges against him, and that if the Lebanese authorities wanted to arrest him, they would have done it already. The question now becomes what prevents proceeding with justice.

3.2 The Right to a Retrial

The question of whether an accused should have the right to a retrial has sparked many debates. It has been demonstrated in both the Maleki and Sejdovic cases that the HRC and ECHR allow trials to be held in absentia when an accused is granted the right to obtain a retrial if they did not waive their right to be present. In this situation, the right to a retrial operates as a remedy to any potential violations of the right to be present. With regard to the STL, retrial is possible under Article 22(3) of its Statute, which stipulates that in the case of condemnation, an accused has the right to a retrial if not represented at trial by the counsel of their choice. Gaeta makes an important distinction: in contrast to the aforementioned case law, the right to a retrial at the STL does not represent a remedy to a possible violation of the right of the accused to be present at trial caused by a lack of notice or otherwise. Instead, Article 22(3) provides the right to a retrial even when no such violation occurred, and it is interpreted as a

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30 ibid.
32 Jenks (n 8) 61.
33 Gaeta ‘Trial In Absentia Before the Special Tribunal for Lebanon’ (n 5) 247—48.
primary right of the accused that can be appealed once certain requirements are met.  

This provision has been identified as ‘controversial’ by Jenks, who highlights the risk that such retrial would not take place, since the tribunal is scheduled to end.  

Jenks rightly argues that:

for the in absentia trial provisions of the STL to comply with human rights norms, the tribunal would seemingly need to operate, or have the ability to reconvene, for as long as someone convicted in absentia has not been retried.  

Therefore, if a retrial were to take place when the Tribunal was no longer operational, Article 22 of the STL Statute would be inconsistent with international standards of fair trial. Nonetheless, even if the agreement between the Government of Lebanon and the United Nations to establish the STL initially scheduled for the Tribunal to ‘remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal’, the STL has received sufficient contribution to finance its establishment and operation for a longer period.  

Moreover, Article 5(1) of the STL Statute provides that once a person has been tried by the STL, he or she cannot be tried again for the same acts by the national courts of Lebanon. This provision therefore limits the possibility of retrial. It could be argued, however, that Article 22(3) ‘does not explicitly require the retrial to be conducted before the STL’. Thus, even if the STL was no longer operational, retrial would remain possible if the accused requested a new trial. Gaeta argues that the responsibility would be upon the Security Council to find an alternative. One possibility would be to hold a special ad hoc trial.  

Finally, as long as the court succeeds in notifying the accused of his/her indictment, there is no reason to believe that trials conducted in absentia are not

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34 ibid.
35 Jenks (n 8) 62.
36 ibid.
37 ibid.
38 STL, art 21; Jenks (n 8) 62, 65. The STL was established on 1 March 2009.
39 Gaeta ‘To Be (Present) or Not To Be (Present)’ (n 15) 1169.
40 ibid 1173 (emphasis added).
41 ibid.
42 Gaeta ‘Trial In Absentia Before the Special Tribunal for Lebanon’ (n 5) 249.
fair. Consequently, Gaeta concludes that there is no reason they should have a right to retrial.\textsuperscript{13} After all, one could ask what would be the purpose in conducting a trial in the first place, if a retrial were so easy to obtain.

\textbf{IV. TRIALS IN ABSENTIA AT THE STL: A MEASURE OF EXPEDIENCY}

While it seems odd to conceive of a trial without the presence of the accused, scholars have argued that trials in absentia are nonetheless an effective measure of expediency in criminal justice, as long as certain safeguards are set and rules respected.\textsuperscript{44} If, in theory, trials held in the presence of the accused are more legitimate and assure better protection of the rights of the defendant,\textsuperscript{45} trials in absentia should not be ignored as a necessary and effective method in some situations.\textsuperscript{46} The final Section of this Article will argue that holding trials in absentia at the STL is the ultimate solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures, as well as a measure to avoid delays in the proceedings.

\textbf{4.1 A Solution to the Non-appearance of the Accused and the Non-cooperation of States in Handing over Indicted Figures}

The legitimacy and effectiveness of international justice and international criminal tribunals have been questioned many times when faced with the recurring problems that various international tribunals, such as the ICTY, the ICTR and the ICC, have faced at earlier stages. Said problems are, firstly, the non-appearance of the accused and, secondly, the problem of non-cooperation of States in handing over indicted figures.\textsuperscript{47} International criminal courts have often been criticised for their apparent failure to apprehend and try those charged with serious crimes.\textsuperscript{48} For example, Judge McDonald upholds that one of the main challenges of the ICTY is the ‘lack of direct enforcement powers on its efforts to function effectively when confronted with overwhelming non-

\begin{footnotesize}
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\item \textsuperscript{13}Gaeta ‘To Be (Present) or Not To Be (Present)’ (n 15) 1171.
\item \textsuperscript{44}Ralph Riachy, ‘Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenges or Evolution’ (2010) 8 Journal of International Criminal Justice 1295—97; Gardner (n 18).
\item \textsuperscript{46}ibid.
\item \textsuperscript{47}Gardner (n 18) 108.
\end{itemize}
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compliance by states’. Indeed, since the Security Council made the decision to create the ICTY under Chapter VII of the UN Charter, all States have had a binding obligation to cooperate with the Tribunal by virtue of Article 25, and to ‘take whatever steps are required to implement the decision’. However, it is not within the Tribunal’s capacity to ensure this cooperation; ultimately, only the Security Council can effectively enforce its decisions. This lack of enforcement mechanism has allowed several war criminals to escape justice. Ratko Mladić and Radovan Karadžić, former leaders of the Bosnian-Serbs, accused of having committed genocide and other serious crimes during the 1992 Bosnian War, spent 16 and 13 years respectively on the run before being captured and tried before the ICTY. Omar al-Bashir, who was indicted six years ago, remains free due to the continued non-cooperation of States in arresting and rendering him to the ICC.

The context in which the STL operates is very special and differs from other ad hoc tribunals. Since its creation, the STL has been dogged by disparagements on both legal and political grounds. While some perceive the STL as the only way toward reconciliation and a tool to end impunity for perpetrators, critics have denounced its highly selective justice and portrayed it as a foreign tool imposed on the country, labelling the Tribunal ‘not… an impartial justice process, but rather… an imposed western agenda targeting Lebanon’s foremost political

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52 McDonald (n 49) 559. It is in an attempt to remedy the problem of (non) cooperation of States that the ICTY included Rule 61 as an alternative to in absentia trials. Rule 61 was introduced allowing ‘Trial Chamber to receive evidence of the commission of crimes when an arrest warrant was not executed’.


party: Hizbollah’. While this Article does not focus on whether the STL is a legitimate institution, it is worth noting that the four accused of the 2005 Lebanon bombing attack have been reported to be directly affiliated with Hezbollah, the primary detractors of the STL and who have assiduously refused to cooperate with it since its creation. Moreover, according to the first report of the Independent International Investigation Commission (IIIC) – the fact-finding mission that was sent to Lebanon after Hariri’s assassination – high-ranking Syrian security officials were reported to be implicated in the attack. While the STL has the capacity to indict a Syrian official without the official’s presence, Syria has no responsibility to cooperate and surrender the accused, since under international law the only State obliged to cooperate with the Tribunal is Lebanon. Some would qualify trials in absentia as mere ‘show trials’ since the Tribunal ‘would not be able to impose and enforce any sentence on an absent defendant upon conviction’. This peculiarity highlights once again a weakness of trials in absentia: a verdict without the capability of enforcement is useless. This inability, in turn, undermines the credibility of the international criminal justice system. However, one could sustain the argument that the in absentia provision represents instead a kind of proactive justice that attributes more credibility to the STL in judging defendants, as it is more credible to have a Tribunal that would take measures to impose justice than a passive Tribunal that ‘waits and hopes for its accused to be apprehended

56 Are Knudsen and Sari Hanafi, ‘Special Tribunal for Lebanon (STL): Impartial or Impaired International Justice?’ (2013) 31(2) Nordic Journal of Human Rights 176, 178. Hezbollah is a political and military party that is part of the current Lebanese government coalition.
61 Göran Sluiter, ‘Responding to Cooperation Problems at the STL’ in Alamuddin, Jurdi and Tolbert (eds) (n 5) 137, 151.
by third party actors over whom it has no control’. Kersten advocates that the problem of non-appearance of the accused is actually an issue of politics and not law, the source of the problem being the lack of enforcement of international instruments. He states that:

The courts rely on states to hand over indictees and it is in this mechanism that there is failure — states often protect those with ICC arrest warrants, until it is politically inconvenient. The solution lies in politics rather than law and the focus should be on getting states to engage and cooperate with international courts in order to arrest the accused.

4.2 Avoid Perpetual Delays in the Proceedings

Another argument put forward in favour of the in absentia practice that supports the previous discussion is that trials in absentia are a means of preventing continuous delays in proceedings. Indeed, one of the main criticisms on the efficacy and efficiency of the ICC and other international criminal courts has been that ‘(pre)-trial proceedings are quite time-consuming and do not deliver swift justice.’ As previously mentioned, the STL is far from an ordinary international tribunal for many reasons, one being the fact that it is concerned with the case of the 2005 bombing only. The work of the Tribunal is therefore limited to the investigation of this particular event and its proceedings would be left suspended if no accused were present in the hearings. In that respect, the Tribunal’s in absentia principle would constitute a remedy to trials being constantly deferred due to the non-appearance of defendants. As Kersten states, ‘delays frustrate justice.’

Leaving trials in suspension would also jeopardise necessary evidence in cases where defendants are not captured within a reasonable period of time and would also mean losing considerable amounts of money, time and effort. As Thieroff and Amley highlight:

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64 Shaw (n 21) 138.
66 ibid.
67 Shaw (n 21) 138.
68 Knoops (n 6) 324.
69 Kersten (n 65).
70 Shaw (n 21) 139.
There are a variety of... pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.\(^\text{71}\)

Holding trials in absentia would be advantageous in terms of helping to collect evidence and testimony, thereby increasing the chances of a successful prosecution.\(^\text{72}\)

**IV. CONCLUSION**

Article 22 of the STL Statute represents a very interesting feature of the STL. Indeed, the STL has the ability to hold trials without the presence of an accused or, in other words, trials in total absentia. This feature is very unique since it distinguishes the STL as the only tribunal that conducts trials in which a hearing may start and end without the accused ever being present before the court.

Trials in absentia have generated debates between the national traditions of the common law and civil law systems. Although many scholars have criticised Article 22 for not complying with fair trial standards, this Article has sought to prove that its provisions respect not only the right of the accused to be present but also the right to a retrial, both of which are major components of fair trial standards.

This Article has further demonstrated that the in absentia practice represents a measure of expediency in international criminal law. Indeed, this practice could be interpreted both as a solution to the problem of the non-appearance of the accused and the non-cooperation of States in handing over indicted figures, as well as a measure to avoid delays in proceedings.

As Pons has stated, there is a need to find a solution to ‘reconcile the right of the accused to be present at trial and the interest of the judicial system in pursuing


\(^{72}\) ibid.
accountability'.73 It seems today that the exception of Article 22 of the STL Statute is actually a way of ensuring that the STL is not thwarted by its deficiency of enforcement capabilities and will thus continue to serve justice.

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