BEFORE THE TRIAL CHAMBER

SPECIAL TRIBUNAL FOR LEBANON

Case No:	**STL-11-01/PT/TC**
Before:	**Judge Robert Roth, Presiding** **Judge Micheline Braidy** **Judge David Re** **Judge Janet Nosworthy, Alternate Judge** **Judge Walid Akoum, Alternate Judge**
Registrar:	**Mr. Herman von Hebel**
Date:	**23 May 2012**
Filing Party:	**Sabra Defence**
Original Language:	**English**
Classification:	**Public with Confidential Annexes**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

SABRA MOTION FOR RECONSIDERATION OF THE TRIAL CHAMBER'S ORDER TO HOLD A TRIAL IN ABSENTIA

Office of the Prosecutor:
Mr. Norman Farrell

Defence Office:
Mr. François Roux

Counsel for Salim Ayyash:
Mr. Eugene O'Sullivan
Mr. Emile Aoun
Counsel for Mustafa Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones
Counsel for Hussein Oneissi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan
Counsel for Assad Sabra:
Mr. David Young
Dr. Guénaël Mettraux

1. The trial of Messrs Ayyash, Badreddine, Oneissi and Sabra is the first international criminal trial to be ordered to proceed *in absentia* since post-World War II war crimes prosecutions. The litmus test of the value and validity of such an order as a reasonable exercise of international judicial authority is the ability of the Tribunal to ensure that the fundamental rights of the accused can be protected throughout the proceedings despite the defendants' absence. Then President, Judge Cassese, declared that proceedings before the Special Tribunal would be "based on the highest fair trial standards".[1] The decision by the Trial Chamber to initiate a trial *in absentia*, and all subsequent decisions will be measured against those standards.[2]

I. MOTION TO LIFT *EX PARTE* CHARACTER OF DOCUMENTATION USED FOR THE PURPOSE OF *IN ABSENTIA* DECISION

2. The present submissions are informed to the extent permitted by the material that the Defence has been granted access to. Much of the information considered by the Trial Chamber to determine the necessity, permissibility and desirability of a trial *in absentia* has not been provided to the Defence. This has deprived the accused from participating effectively and on an equal status with the Prosecution (insofar as the Prosecution has had access to all or most of the relevant material).[3] For these reasons and pursuant to Article 22 of the Statute, the Defence requests the Trial Chamber to (i) provide the Defence with all the material received, reviewed or relied upon by the Chamber to come to the decision that the trial should proceed *in absentia*; and (ii)

---

[1] *In the matter of El Sayed,* Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, par. 52, "in answering this question the Appeals Chamber bears in mind its obligation to apply the highest standards of justice." Statement from the STL President Judge Antonio Cassese, 1 April 2009 (available at: http://www stl-tsl.org/en/media/press-releases/statement-from-the-stl-president-judge-antonio-cassese); STL Factsheet. "The Special Tribunal's standards of justice, including principles of due process of law, will be based on the highest international standards of criminal justice as applied in other international tribunals:"; Security Council Resolution 1664, S/RES/1664 (2006), 29 March 2006 and Resolution 1757 (using the phrase "highest international standards of criminal justice"); Preamble of the *Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*; and Article 28 of the Statute referring to "the highest standards of international criminal procedure". *See also* Press Release, OTP, OTP did not breach ethical or religious norms, 29 October 2010, pursuant to which the Prosecution claims to be applying "the highest international standards on human rights".

[2] The following submissions are without prejudice to the Defence's position in relation to the legality of this Tribunal and lawfulness of the proceedings against Mr. Sabra.

[3] In this regard, the Defence notes the approach of the Pre- rial Judge with regards to the Prosecution's request for redactions filed before Defence Counsel was assigned, in which he ordered the Prosecution to disclose documents to the Defence "So as the Defence may formulate, with full knowledge of the facts, its observations." *See,* 24 January Order, par. 6.

grant the Defence a reasonable amount of time to consider whether that material calls for additional submissions.

II. ON THE LAWFULNESS AND PROPRIETY OF ORDERING *ABSENTIA* PROCEEDINGS IN THE PRESENT CASE

(1) The Trial Chamber misinterpreted Article 22(1)(C) of the Statute

3. Article 22 provides for a number of distinct scenarios where proceedings may be ordered to proceed *in absentia*. The Trial Chamber properly disregarded scenarios provided in Article 22(1)(A) and (B), which are irrelevant here. Article 22(1)(C) in turn provides that –

> [The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:] has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

4. The Trial Chamber found that Mr. Sabra had absconded and that all reasonable steps had been taken to secure his appearance before the Tribunal and to inform him of the charges confirmed by the Pre-Trial Judge.

5. The Chamber's reliance on the "absconded" section of that provision was erroneous. First, as a matter of common legal usage, "absconding" refers to the situation where an accused has been brought before a Court and, subsequently, escapes or fails to re-appear before that court after having been validly arraigned.[4] That this was the intended meaning of that phrase for the purpose of Article 22 STL Statute has been duly noted in the legal literature:

> "The second [scenario where the STL can exercise its jurisdiction in the absence of the accused under Article 22(1)(c) of the Statute] concerns the defendant who has 'absconded'. The term 'absconded' usually refers to an individual who is on bail or interim release and who does not appear as required. This form of *in absentia* is unexceptional even in common law countries."[5]

6. This interpretation is also the only one consistent with the regime applicable to individuals charged by an international(ised) tribunal such as the STL. Neither customary international law, nor the Statutes of these tribunals, provide for an

---

[4] *See e g.* Section 6, Bail Act 1976, UK which sets out the Offence of absconding by person released on bail. See, e.g., B. Emmerson et al, *Human Rights and Criminal Justice* (2nd ed), in particular, 13.32-13.36; Clayton and Tomlinson, *The Law of Human Rights* (2nd ed, Volume I), at 10.230.

[5] W. Schabas, "*In Absentia* Proceedings Before International Criminal Courts", in Sluiter & Vasiliev, *International Criminal Procedure: Towards a Coherent Body of Law*, 2009, p. 378. (footnotes omitted) ("Schabas, *In Absentia* Proceedings")

obligation on the part of an accused person to surrender to an international(ised) tribunal. Instead, a duty is placed on *States* to detain and transfer them.[6] An accused could not, therefore, be said to have legally "absconded" until that time when he has been brought before the Tribunal and becomes subject to its authority to issue binding orders against him. Only then could he "abscond" if he, for instance, fails to comply with conditions set by the Tribunal to his provisional release.[7] "Absconded" or "en fuite" in Article 22(1)(C) can therefore only validly be interpreted as referring to a case where the accused, having been brought before the Tribunal, later evades the Tribunal's jurisdiction.

7. That interpretation of this phrase is also the only one capable of giving that expression a consistent meaning all through the Tribunal's regulatory regime. Rule 103(B) of the Rules, for instance, provides that – "Before ruling on the matter, at the request of the Pre-Trial or the Presiding Judge, as appropriate, the President shall seek the consent of the Host State pursuant to the Host State Agreement. He may decide to seek assurances from the State where the accused resides that, in the event the accused returns to his State, *it shall prevent him from absconding* or attempting to obstruct the administration of justice" (emphasis added). Likewise, Rule 108(D) provides that – "Once the in absentia proceedings have been terminated because of the appearance of the accused, the trial shall continue *whether or not the accused absconds*. The right to retrial may be exercised only once." (emphasis added)

Both of these provisions make it clear that the phrase is to be understood as referring to a case where the accused, *after being brought under the authority of the Tribunal*,[8] has evaded its authority.

8. This interpretation of "absconded" is also consistent with relevant international standards.[9]

---

[6] E.g. Article 29 ICTY Statute.

[7] *See* Rule 102(B).

[8] *See also* Rules 59(B)(iv), 67, 105*bis*(a) and 170 which all support this interpretation.

[9] E.g. Special Crimes unit In East Timor, section 5(1)-(2) and 48(2) of the Transitional Rules of Criminal Procedure, as contained in UNTAET Regulation 2000/30 of 25 September 2000. See also Regulation No 2000/15 on the establishment of Panels with exclusive jurisdiction over serious criminal offences, United Nations Transitional Administration in East Timor (UNTAET), U.N. Doc. UNTAET/REG/2000/15, 6 June 2000, available at http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf. Art 30 of Transitional Rules of Criminal Procedure requires presence of the accused at trial. Article 5(1) states that "[n]o trial of a person shall be held in absentia, except in circumstances defined in the present regulation". Article 5(2) provides that, if at any stage following the preliminary hearing the accused "flees or is otherwise voluntarily absent, the proceedings may continue until their conclusion". Art 48(2) provides that the court may order the removal of an accused if his conduct is disruptive. *See also* Human Rights Watch's letter to

9. The Trial Chamber's erroneous interpretation of Article 22(1)(C) is further evidenced by the fact that it has read the requirement of "reasonable steps" into both branches of Article 22(1)(C) ("absconded" *and* "otherwise cannot be found"). As noted by Professor Schabas, this requirement only applies to the second branch ("otherwise cannot be found").[10] Where, in contrast, an accused has appeared before the tribunal and then "absconded" (i.e., has escaped or failed to return in violation of a court order), the Tribunal would have no duty to establish that such steps have been taken and would be permitted to proceed in his absence since, by that stage, his release was conditioned on an obligation to return: *semel praesens semper praesens* [11]

10. The Chamber's error is significant. Considering that Mr. Sabra has not appeared before the Tribunal, the Trial Chamber could not lawfully and validly proceed to try him *in absentia* on the basis that he had "absconded" pursuant to Article 22(1)(C). The factual errors resulting from this are discussed below.

11. For these reasons, the Trial Chamber should set aside its finding that the accused absconded.

(2) Failure to consider whether Mr. Sabra is still alive

12. Rules 105*bis*(B) and 106 make it clear that the responsibility to verify that conditions for a trial *in absentia* are met belongs to the Trial Chamber and not the Defence.

13. One condition relevant to any sort of trial before the STL is that the accused is alive at the time of his trial. *Ratione personae*, the Tribunal only has jurisdiction over individuals who are still alive at the time when they are being tried.[12] There is no

---

the Secretariat of the Rules and Procedure Committee – Extraordinary Chambers of the Courts of Cambodia, 17 November 2006.

[10] Schabas, *In Absentia* Proceedings, p. 378 (footnote omitted): "The second [scenario where the STL can exercise its jurisdiction in the absence of the accused] also refers to the defendant who 'otherwise cannot be found'. In such a case, the Statute requires that 'all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge'."

[11] See e.g. A Cassese, *International Criminal Law*, 2nd ed, 389, noting that even in those domestic jurisdictions that do in principle prohibit trials in absentia, they permit trials to proceed where the defendant has absconded after initially appearing in his trial. See e.g. *Taylor* v. *United States*, 414 U.S. 17, 20 (1973), and *Crosby v. United States*, 506 U.S. 255, 8 (1993). See also *Human Rights Watch*'s letter to the Secretariat of the Rules and Procedure Committee – Extraordinary Chambers of the Courts of Cambodia, 17 November 2006) and references cited therein. See also *Colozza v Italy*, par. 28. See also Section 3(1) of the United Kingdom Bail Act 1976; Rule 43 of the US Federal Court Rules of Procedure.

[12] See, generally, Article 1 of the Statute. See also *Prosecutor v. Delic*, Decision on the Outcome of Proceedings, 29 June 2010, par 8 wherein the Appeals Chamber held that "the Appeals Chamber finds that, as a matter of principle, the appellate proceedings before this Tribunal should be terminated following the death of the appellant for lack of jurisdiction." *Prosecutor v. Samuel Hinga Norman et*

presumption to that effect – whether as a matter of statutory law, customary law or general principles – in the context of criminal proceedings.[13]

14. In the present case, the Trial Chamber has failed to verify if, in fact, Mr. Sabra was still alive at the time when ordering that his trial be held *in absentia*. It, therefore, exercised its jurisdiction without one of its basic conditions being demonstrably met.

15. Having had no access to the material relied upon by the Trial Chamber in support of its *absentia* decision, the Defence cannot ascertain whether that material contains any evidence that as of 1 February 2012, Mr. Sabra was still demonstrably alive. The Decision contains no indication that this could be established on the record of the proceedings.

16. In an effort to obtain relevant information, the Defence wrote to the Lebanese authorities.[14] The Lebanese authorities, to the present day, have not provided any information that Mr. Sabra was still alive (at the time of the *absentia* decision or at the present time).[15] In light of the fact that the Lebanese authorities' efforts to locate Mr. Sabra were found to be satisfactory by the Trial Chamber[16] an inference may be drawn: despite these efforts, it cannot be demonstrably shown that he was still alive at the time of the *Absentia* Decision and cannot therefore be tried for lack of jurisdiction *ratione personae*.

17. In those circumstances, the Trial Chamber is required to stay proceedings against Mr. Sabra until that time when it is able to establish that he is still alive (if he is) and that it may, all other conditions being met, try him in accordance with its Statute.[17]

(3) No valid waiver of Mr. Sabra's right to be tried in his presence

18. At paragraph 111 of its Decision, the Trial Chamber found that Mr. Sabra had absconded and that he did not "wish" to participate in a trial. *If* this finding (and

---

al., Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007 and *Prosecutor v Kony et al.*, Decision to Terminate the Proceedings against Raska Lukwiya, 12 July 2007, p. 4 cited therein.

[13] Some countries provide for such a presumption (after a certain period of time) in the context of *civil* proceedings only. There is no general principle of criminal law of a presumption that a person is or remains alive for the purpose of trying him *in absentia*. The Defence has identified no jurisdiction where such a presumption exists in criminal proceedings.

[14] *See* Confidential Annexes A, B & C.

[15] *See* Confidential Annexes D, E & F.

[16] *Absentia* Decision, pars. 76, 110.

[17] *Prosecutor v. Lubanga,* Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, par. 93; *Case of Ieng Thirith,* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, par. 18.

similar findings contained in the Decision[18]) was intended to suggest that Mr. Sabra has unequivocally and validly waived his right to be present and thereby renounced his right to a re-trial, such a conclusion would be erroneous and would have grave prejudicial consequences for him.

19. Firstly, it would deprive Mr. Sabra of his otherwise unconditional right to a re-trial. Secondly, this would mean that a trial *in absentia* before the Trial Chamber would be the only trial to which he will ever be entitled and he will have no opportunity to have errors remedied. Thirdly, from the point of view of counsel, this might raise issues of their entitlement (as a matter of law and professional ethics) to represent a defendant in those circumstances. It might also affect the way in which they decide to contribute to the proceedings. For reasons outlined below, if a finding was made that Mr. Sabra waived his right to be present, such a finding would be erroneous. The Defence asks the Trial Chamber to clarify that point.

20. Under human rights law, the validity of a waiver of a right to be present is subject to stringent conditions commensurate with the importance of that right:[19] (i) it must be free; (ii) it must be unequivocal; (iii) it must be informed, in the sense of being done with full knowledge of its effect and consequences; (iv) it might require the adoption of additional safeguards, such as the nomination of counsel.

21. There is no basis on the record (as presently available to the Defence) which would allow for a finding that such a standard has been met:

(i) There is no evidence that Mr. Sabra freely took a decision not to attend. External factors could well have affected his free will.[20] It is significant that he has no legal duty to surrender to the tribunal or to participate in the proceedings.[21] There is also no evidence available to the Defence that from June 2011 onwards, Mr. Sabra was in a position to surrender to the Tribunal had he chosen to do so.

(ii) There is no basis on which a reasonable trier of fact could conclude that a waiver was "unequivocally" given.[22] Instead, the basis laid down in the

[18] E.g. *Absentia* Decision, pars. 3 and 110.
[19] E.g. *Prosecution v. Nahimana,* Appeals Judgment, 28 November 2007, par. 109 (and references) ("*Nahimana,* Appeals Judgment").
[20] See, e.g., *Prosecutor v Brima et al*, Transcript, 31 March 2006.
[21] See, above, par. 17
[22] See e.g. *Nahimana* Appeals Judgement, par. 109 and references. *See also Colozza v. Italy*, ECHR Application No. 9024/80, reported at (1985) 7 EHRR 516, par. 30 ("Colozza v. Italy") wherein the Court held that absconding did not constitute an unequivocal waiver and to presume that it did would place an unfair shift of the burden of proof on the accused. *See also, Prosecutor* v. *Krajisnik*, Reasons

Decision is, at best, inferential and ambiguous – which is insufficient as a matter of law.[23] No inference could be drawn from the fact that the accused did not surrender since he has no legal obligation to surrender – thereby creating a major difference with domestic legal regimes.[24] Furthermore, there is no indication of any attempt to arrest him, which he (successfully) evaded.[25]

(iii) There is no evidence that the possible consequences of a failure to attend were brought to his attention (such as a possible loss of right to a re-trial). This is a strict legal requirement and condition of a valid waiver.[26]

(iv) The absence of necessary safeguards is addressed further below.

22. Secondly, in a clear attempt to reinforce the right of the accused and to protect them against improper inferences, the Statute of the Tribunal restricts the possibility of a waiver through an express requirement that this could *only* be done "expressly" and "in writing" (Article 22(1)(A)). Neither of these conditions of form was met in the present case so that a valid waiver could not be made.

23. The Trial Chamber's position on that point – *if* indeed it made a finding of "waiver" – appears to be based on a misunderstanding. The Trial Chamber took the view that for a court to be permitted to order a trial to proceed *in absentia*, "[t]he accused must have waived the right to attend the trial by exercising their own free will or though their conduct."[27] *Sejdovic* does *not*, however, stand for such a general proposition. Instead, it provides for one of the scenarios where proceedings may occur in or despite the absence of the accused. In other words, as a matter of human rights law, a waiver is not a necessary condition precedent to absentia proceedings.[28]

---

for Oral Decision Denying Mr. Krajisnik's Request to Proceed Unrepresented by Counsel, 18 August 2005, par. 5. wherein the Chamber held that waiver of legal representation must be not be "unclear in meaning or intention; ambiguous."

[23] See e.g. *Maleki v Italy*, par. 9.4. See also *Monguya Mbenge et al v Zaire*, Communication No 16/1977 (25 March 1983), UN Doc GAOR A/38/40, par. 14.2.

[24] On the relevance of this obligation, see S. Trechsel, *Human Rights in Criminal Proceedings*, at 256.

[25] The general inquiries carried out by the Lebanese authorities do not allow for an inference that he sought to evade an attempt by them to arrest him on any one occasion.

[26] E.g. *Demebukov v Bulgaria*, par. 47.

[27] *Absentia* Decision, para 32 *citing Sejdovic v Italy* (par 86) in support.

[28] *See e.g. Colozza v. Italy*, par. 28 wherein the Court held that there was insufficient evidence that "Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice." This demonstrates that waiver and evading justice were separate concepts; also S. Trechsel, *Human Rights in Criminal Proceedings*, 253-256. The clear distinction between Article 22(A) (waiver) and (C) (absconding) has been duly noted in the literature. See, e.g., Schabas, *In Absentia* Proceedings, p. 378; W. Jordash and T. Parker, "Trial in Absentia at the Special Tribunal for Lebanon", 2010, *JICJ*, p. 499 ("*Jordash and Parker*").

24. That state of affairs is reflected in the Statute of the Tribunal. Article 22(1)(A) provides that a trial may proceed in the absence of the accused where he has validly waived his right to be present.[29] Articles 22(1) (B) and (C) provide for three other situations where, all other conditions being met, a trial *in absentia* may be ordered.

25. The requirement of a *quasi*-waiver which seems to have been used by the Trial Chamber appears to be an undue import from some common law jurisdictions where trials may proceed despite the fact that the accused (*after initially being present before the tribunal*) has absconded.[30] Such a requirement does not form part of either human rights law, or Lebanese law. Nor does it apply to this case since the accused has never been brought before the tribunal.

26. Furthermore and to the extent that the Chamber found that Mr. Sabra has waived his right to be present and thus renounced his right to a re-trial, its finding would also violate Article 22(3) of the Statute whereby the only valid exceptions to an otherwise unqualified right to re-trial is where the accused has (i) designated a defence counsel of his or her choosing (*inapplicable here*) or (ii) accepts the judgement of the Tribunal (*no such acceptance has been given*). Considering that neither of these alternatives is met, the accused could also not be said to have waived his right to a re-trial.

27. The Defence submits that any finding prejudicial to the right of the accused must be arrived at clearly and unambiguously so as to satisfy the right of the accused to a reasoned opinion.[31] In light of the above, the Defence asks the Trial Chamber to –

(i) clarify whether or not it has made a finding that Mr. Sabra has waived his right to be present at trial; and

(ii) if so, clarify the basis on which it could come to the view that a valid and unequivocal waiver (as a matter of both international and statutory law) of that right could validly and reasonably be made; and

---

[29] The view that the requirement of a valid waiver of presence is only one of the possible situations where the trial may proceed in the absence of the accused, and is not a general requirement for all such cases, may also be garnered from the *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, 15 November 2006, S/2006/893, par. 33 "In introducing the institution of trials in absentia on the conditions that the accused has waived his or her right to be present, that he or she has not been handed over or absconded, or otherwise cannot be found" ("STL SG Report").

[30] See e.g. *R v Cornwell* [1972] 2 NSWLR 1 (New South Wales, Australia).

[31] On the right to a reasoned opinion as an aspect of the guarantee of fair trial, see, e.g., *Hadjianastassiou v Greece*, par. 33; *Furundžija* Appeal Judgment, par. 69; *Rutaganda* Appeal Judgment, par 228; *Musema* Appeal Judgment, pars. 18-21.

(iii) confirm that none of its findings in any way diminish, erode or qualify the automatic and unqualified right of the accused to a re-trial (subject only to the two exceptions provided for in Article 22(3) of the Statute).

28. The Defence reserves its position should the Trial Chamber decline to provide clarification on these issues.

(4) The Trial Chamber failed to verify that its Decision was consistent with relevant human rights standards

a) The impugned finding

29. The Trial Chamber said that "[i]nternational human rights law, however, imposes no obligations on State authorities, beyond taking these necessary notification steps, before a court may proceed to a trial *in absentia*".[32] That finding misrepresents the tenor of human rights law as regards the conditions under which *absentia* proceedings could be ordered. The Trial Chamber's failure to consider and establish that these conditions were met was in error and a violation of those guarantees.

b) Requirements for lawful absentia trials under human rights law

30. Human rights law subjects the validity of *absentia* trials to the following minimum safeguards, as summarized by Professor Cassese:[33]

> (i) the accused must have been formally notified of the charges against him; (ii) there is evidence that he is deliberately absconding or at any rate absenting himself from the proceedings; (iii) the accused must be granted the right to be defended in court by counsel (Lala and Pelladoah v. The Netherlands, pars 33-4, 40-1; Krombach v. France, pars 88-91); (iv) the accused has the right to appear in court at any moment and request that proceedings be commenced again, even if he has already been convicted; in other words, he has the right to obtain from a court that has heard his case 'a fresh determination of the merits of the charge' (Colozza v. Italy, par 29; Krombach v. France, pars 85, 87); indeed, 'the authorities have a positive obligation to afford the accused the opportunity to have a complete rehearing of the case in his or her presence' (Krombach v. France, par 87).

Because of the prejudicial effect of the absence of the accused onto the effective enjoyment of his rights, where *abstentia* proceedings are held, "strict observance of the rights of the defence is all the more necessary".[34] Where those standards have not or cannot be met, the resulting trial would constitute a violation of internationally

[32] *Absentia* Decision, par 32.
[33] See, generally, Cassese, *International Criminal Law*, at 390.
[34] HRC General Comment, par 11.

recognised human rights and thus be impermissible as a matter of international law.[35] Whilst counsel have all agreed to the possibility of representing an accused in his absence, none of them has agreed to representing an accused if and where a trial *in absentia* does not meet minimum international standards of due process.

31. In line with its duty to ensure fair proceedings,[36] and in tune with the promise of the "highest fair trial standards", the Trial Chamber was therefore required to set out and verify that these basic, minimum, requirements were met before ordering a trial *in absentia*. The Defence will address those in reverse order.

c) Right to a re-trial

32. In line with human rights standards, Article 22(3) of the Statute provides that subject to two situations provided in that provision, the accused has the unqualified right to re-trial if ever detained following an *absentia* trial.[37] Article 22(3) makes it clear that a re-trial of the accused must and can only validly take place "before the Special Tribunal".[38] This is consistent with a view that a second trial before any other jurisdiction would constitute, not a *re*-trial, but a *new* trial in violation of the *ne bis in idem* prohibition.[39]

33. The right of an accused to a re-trial is owed to him *as a matter of right* (both as a fundamental human rights recognized by international law and as a statutory entitlement).[40] It may not therefore be conditioned by any outside circumstances independent of the accused and must be "effective" and not illusory.[41]

34. In its present institutional framework, the Tribunal is incapable of guaranteeing that right or incapable of doing so effectively. Whilst the Statute provides for a right to re-trial, the Agreement between the UN and the Government of Lebanon subjects the life of the Tribunal to a 3-yearly *political* review process – with no guarantee that it will

[35] See also Prosecution's Submissions in Respect of Rule 106, 2 November 2011, par 1 ("Trials in absentia area lawful under international law provided that they adhere to international standards on human rights.").
[36] See, references above, in footnote 1.
[37] See also STL SG Report, par. 33.
[38] A subsequent trial before another jurisdiction would not constitute a re-trial, but a new trial and, therefore, a violation of the double jeopardy/*ne bis in idem* prohibition. See below par. 48.
[39] See below, par. 48.
[40] E.g. *Colozza v. Italy*, par. 29; *Sejdovic v. Italy*, par. 82; *Krombach v France*, par. 85; *Medenica v. Switzerland*, par. 55; *Poitrimol v France*, par. 31; *Maleki v. Italy*, par. 9.5.
[41] *Artico v Italy* judgment of 13 May 1980, Series A no. 37, p. 16, § 33. See e.g. *Colozza*, par 28; *Artico*, par. 37.

be renewed.[42] The eventual lifespan of the Tribunal is unknown and will be determined by a political body.

35. It is entirely possible, therefore, that an accused first tried *in absentia* by the Tribunal could be detained *after* the Tribunal has closed down. If this were to happen, the accused could not be tried "before the Special Tribunal". In other words, whilst defendants have a *theoretical* right to a re-trial, there is no guarantee that they would *actually* benefit from it in practice.[43]

36. The suggestion, if ever made, that the Secretary-General (or the Security Council) could always resurrect the Tribunal is un-satisfactory. It would subject the enjoyment of a right to the non-reviewable and hypothetical decision of a political body and violate the principle that the accused must have that possibility as a matter of right, not as a consequence of a preliminary (and only hypothetical) political decision.

37. Nor would the suggestion of a re-trial in a different jurisdiction be permissible. First, as a matter of statutory law, the re-trial may only validly occur "before the Special Tribunal".[44] Secondly, a trial before any other jurisdiction would be an impermissible violation of the general prohibition against *ne bis in idem*. This is clear, *inter alia*, from Article 5(1) of the Statute and from the fact that an *absentia* judgment, just like a *regular* judgment, is *res judicata*.[45] Thirdly, a re-trial in Lebanon would expose the defendants to the death penalty, a punishment widely condemned by the United Nations.[46]

---

[42] Article 21 of the Agreement between the UN and the Government of Lebanon establishing the Special Tribunal for Lebanon.

[43] See *Jordash and Parker*, p. 12.

[44] Article 5(1) and 22(3) of the Statute. Professor Schabas has noted that "Article 5(1) of the Statute prevents a person who has been tried by the Special Tribunal from proceedings in the Lebanese national justice system for the same offences" and rejecting (footnote 187) any suggestion that a possibility of re-trial before any other jurisdiction (pointing to the phrase "the right to be retried in his or her presence *before the Special Tribunal*". Schabas, *In Absentia* Proceedings, p. 379.

[45] Thus, the European Court of Justice has made it clear that a conviction entered *in absentia* can and will become final once all relevant appeals are exhausted and that such a decision will therefore trigger the application of the *ne bis* prohibition. See, e.g., Judgment of the ECJ, C-297/07, Bourquain, judgment of 11 December 2008 (and Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 8 April 2008, Case C-297/07, in particular pars 59-65). See, also, Expert Opinion, Max-Planck-Institut fur auslandisches und Internacionales Strafrecht filed in those proceedings (Staatsanwaltschaft Regensburg v Klaus Bourquain) and supporting that view.

[46] Report of the Secretary General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, par 112 ("ICTY 808 UNSC Report"). The United Nations cannot condone that one person which it helped try be *re*-tried pursuant to its initial effort with the possibility of a death sentence as an indirect result of its initial effort. It is significant in that regard that, when creating the ICTR, the United Nations insisted that Rwanda should suspend its death penalty (which it did). In this regard see Rule 11*bis*(C) of the ICTR Rules of Procedure and Evidence, which only allowed for transfer of cases from the ICTR to national authorities where "the accused will

38. Therefore, before ordering a trial *in absentia* that is consistent with minimum human rights standards, the Tribunal must seek the amendment of its own Statute whereby a (*residual*) judicial authority would be available and competent to order a re-trial unless the accused "accepts the Judgment" at the time of his arrest. Ordering a trial *in absentia* absent that safeguard would violate international standards of human rights. Without a formal undertaking from the United Nations (and Lebanese Government) to that effect, the Trial Chamber would be required to stay proceedings before the STL.

d) *Assignment of counsel and effective representation*

39. As noted above, one of the conditions for lawful *absentia* proceedings is the appointment of counsel to represent the accused. As with any other right of the accused, that right must be effective, not merely illusory.[47]

40. In this case, counsel have been appointed to represent all four defendants.[48] The Trial Chamber has taken no step, however, to verify that representation could, even theoretically, be effective in the peculiar circumstances of this Tribunal. Considering those peculiarities (see below) and the untested nature of the Tribunal, effective representation cannot be taken as a granted particularly in *absentia* proceedings. In light of this, that the Trial Chamber should verify and ensure that –

(i) The Lebanese authorities are willing and able to fully cooperate with the Defence (including providing all relevant information and ensuring that the Defence is able to carry out any necessary investigation in Lebanon). Thus far, none of the information sought has been provided by the Lebanese authorities.

(ii) Potential information-providers who are likely to have in their possession information of relevance to the Defence are demonstrably willing to assist the Defence in the preparation and investigation of its case. Thus far, none of the RFAs have resulted in the Defence receiving information sought.

(iii) The Prosecution fully understands its own case and will provide full and detailed information to the Defence on the relevance and scope of each piece of evidence it discloses.[49]

---

receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out."

[47] See S. Trechsel, *Human Rights in Criminal Proceedings*, 286-290 and references cited therein See, in particular, *Artico v Italy*, par. 33.

[48] *Prosecutor v. Ayyash*, Commission d'Office de Conseils aux fins de la procédure par défaut tenue en application de l'article 106 du règlement, 2 February 2012.

[49] *See* Confidential Annexes G & H.

(iv) The Prosecution has now reviewed all documents in its possession and has identified all exculpatory material and is ready to disclose it without delay.[50]

(v) In line with its duty to contribute to the search for truth,[51] the Prosecution has taken all necessary and reasonable steps to verify the reliability, authenticity and credibility of the evidence which it intends to use at trial.[52]

(vi) The Prosecution has taken all necessary steps to secure the agreement of information-providers which have provided relevant information pursuant to Rule 118 so that it might be disclosed to the Defence if exculpatory in nature or if requested by the Defence.[53]

(vii) The Defence will have enough time and resources to adequately and effectively prepare and present its case,[54] especially in light of the 4-year investigation conducted by the IIIC and the subsequent 3-year investigation of the OTP and the extensive resources that were granted to both.

(viii) There will be no restriction on access to material relevant to its preparation, regardless of the entity in possession of that material.

41. These are basic, although *non*-exhaustive, assurances necessary for representation to be theoretically *capable* of being effective. The Trial Chamber is required to verify that these basic conditions are met prior to ordering a trial *in absentia* so as not to engage in a process where representation is bound to be ineffective in violation of international standards.[55]

42. Finally, it is counsel's understanding that nothing done by counsel for an absentee (investigation; cross-examination; calling of witnesses; etc) may legally be imputed to the accused. In that sense, and in accordance with Rule 108(B), the transcript of testimony of any witness heard in *absentia* proceedings would be inadmissible in subsequent proceedings before the Tribunal (or any other tribunal) against Mr. Sabra

---

[50] At this point, the prosecution has disclosed none of the material which the Defence specifically requested to receive. Nor has it responded to the Defence request for disclosure of exculpatory material.

[51] Rule 55(C).

[52] See *Prosecutor v. Lubanga*, Trial Judgment, 14 March 2012, par. 482, on the consequences of the Prosecution's failure to do so.

[53] *See* Confidential Annexes I & J.

[54] In this regard, the Defence notes the obligation of the Defence Office to ensure "that the representation of suspects and accused meets internationally recognised standards of practice" under Rule 57(G). It is further noted Article 31 of the Code of Professional Conduct for Defence Counsel appearing before the Special Tribunal for Lebanon, 23 February 2012 provides an extensive list of obligations for Defence Counsel.

[55] The Defence reserves its right to raise any issue pertaining to the effectiveness or otherwise of representation in the course of proceedings.

unless Mr. Sabra consented thereto.[56] If this understanding is incorrect or if there are exceptions to that general rule, the Defence asks the Trial Chamber to clarify this matter. This is likely to affect the manner in which the Defence will present its case to the Trial Chamber. Without such guidance, the Defence may have to decide not to take any step which might otherwise affect the rights and position of the accused.

e) Notification of charges

43. The existence of an indictment against Mr. Sabra has been publicized in Lebanon. There are no indications, however, that such notification was formally and lawfully carried out outside of Lebanon. To infer that such information must have reached the accused, the Trial Chamber therefore had to rely on a fiction that the accused must have remained at all relevant times in Lebanon.[57]

44. This "fiction" is unsatisfactory for several reasons. First, it eliminates or impermissibly shrinks the burden on the Chamber to establish all facts relevant to permitting *absentia* proceedings.[58] The fact that no records of the accused's movements in and out of Lebanon were "found" does not meet the requisite standard. The Chamber must positively exclude that the accused left Lebanon as it is for the Chamber to ensure that notification is capable of reaching and has in fact reached him.[59] Secondly, the fiction is directly contradicted by some of the information upon which the Chamber relied and which suggests that the accused could easily have left the country unnoticed.[60] Thirdly, it is contrary to President Cassese's instructions that the accused should be located and that notification should occur in those places where the accused might be, abroad if necessary.[61] The record available to the Defence suggests that no such steps were taken by the Tribunal's organs.[62] Finally, this fiction of presence in Lebanon is contrary to the clear and accepted view that the accused

---

[56] In particular, any cross-examination of a Prosecution witness could not be imputed to the absent defendant or in any way be said to reflect his position.

[57] *Absentia* Decision, par. 100.

[58] On the responsibility of the judicial authorities to verify that the conditions are met, see, e.g.: *Colozza v Italy*, par. 28; *Maleki v Italy* (699/96), pars. 9.3-9.4, noting *inter alia* that it was "incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial in absentia".

[59] It is significant in this context to note relevant international precedents whereby the status of a person as a "fugitive" would not be sufficient to infer a waiver of presence on his part. See, e.g., *Sejdovic*, par. 87; *Colozza*, par. 28.

[60] Absentia Decision, par. 116.

[61] Order of 18 August 2011, page 12: "to consider other means of disseminating the indictment in Lebanon *as well as in other countries, if appropriate*, and of calling upon the accused to submit to the Tribunal's jurisdiction." see also PTJ's Order of 17 October 2011, par. 10.

[62] *See* Confidential Annexes K & L.

could not be located.[63] The Trial Chamber itself acknowledged that it has "no confirmation as to the whereabouts of any of the four Accused".[64] If Lebanese authorities could not locate them for the purpose of arresting them, it would be unreasonable to claim that their general whereabouts were sufficiently known for the purpose of giving them notice of the charges, but not for the purpose of arrest.

45. In light of the above, the Trial Chamber appears to have two options:

(i) It can attempt, with the assistance of the Lebanese authorities (or other national authorities), to locate the accused and advertise the charges in those places where they could be residing at the time of notification; or

(ii) If the Chamber cannot locate them, it can act upon a mere "fiction" of notification.[65] In such a case, however, no inference could be drawn that the accused do not "wish" (whatever the practical effect of such a finding) to attend the proceedings or that they waived their right to be present.

(5) Failure to provide a reasoned opinion on the exercise of its discretion to order that the trial should proceed in absentia

46. As is clear from the law of those countries where *absentia* proceedings are allowed, the decision to proceed *in absentia* is a discretionary one.[66] The exercise of judicial discretion must, in turn, be explained and reasoned.[67] The Trial Chamber's failure to provide reasons for exercising its discretion in this manner was in error. It constitutes a breach of the right of the accused to receive a reasoned opinion.[68]

---

[63] Order Pursuant to Rule 76(E), par. 12.

[64] *Absentia* Decision, par. 25. See also Prosecution's Submissions in Respect of Rule 106, 2 November 2011, par. 13.

[65] Schabas, *In Absentia* Proceedings, p. 378. "Thus, it is possible here to proceed even when there is no certainty that the accused person has been informed of the proceedings". The Defence notes, in that regard, that whilst the Trial Chamber outlined many instances of publications in the media of these notifications, it could not establish that a single one of them was actually seen by the accused. The same is true of the mukhbar's notices.

[66] French Code of Criminal Procedure: art. 270 and 379-2, Belgian Code of Criminal Procedure: art. 185§2, German Code of Criminal Procedure (Strafprozessordnung): section 230, §1. This is the case also in common law jurisdiction which allow for *quasi*-absentia proceedings (where the accused absconds in the course of proceedings): *States v. Sanchez* 790 F.2d 245, 12 May 1986, par. 15; *States v. Reed*, 639 F.2d 896, 903-04 (2d Cir.1981); Pastor, 557 F.2d at 934-39; *Tortora*, 464 F.2d at 1210; *Regina v. Jones* [2001] 3 WLR 125, at pp. 135-136, par. 22; *Jones v. United Kingdom*, 30900/02. The Prosecution even concedes that a trial in absentia is a " a discretionary proceeding of last resort " *See Prosecutor v. Ayyash,* Prosecution's Submissions in Respect of Rule 106, 2 November 2011, par. 1.

[67] On the right to a reasoned opinion see again *Hadjianastassiou v Greece*, par. 33; *Furundžija* Appeal Judgement, par. 69.

[68] See e.g. *Furundžija* Appeal Judgement, par. 69, referring to *Ruiz Torija v Spain*, par. 29.

47. The discretion to commence a trial in the absence of the accused "should be exercised with the utmost care and caution".[69] The Defence submits that, when considering how to exercise that discretion, the Trial Chamber should consider and address the following factors and considerations:

(i) ***Absentia* proceedings have been acknowledged to be unsuited for international proceedings**. ICTY Chief Prosecutor, Justice Goldstone, characterized the decision of the Security Council to reject *absentia* trials for the ICTY as a "wise" decision and explained his opposition to this mode of trial:[70]

> Such trials tend not to satisfy calls for justice and create an impression of being "show trials". The evidence is untested and any conviction and sentence that may follow are empty shells and would be so perceived. If the person "convicted" is later arrested and brought for trial the earlier proceedings would have to be disregarded and a trial would begin de novo.[71]

(ii) What Professor Schabas has called "genuine" *absentia* proceedings,[72] i.e., cases where the accused has never appeared before the Tribunal, is an institution of the civil-law tradition.[73] The reason why this sort of case is unsuited to common law jurisdictions is the fact that criminal trials in legal orders of that tradition are adversarial in nature and counsel requires guidance (or "instructions") from their clients for the purpose of preparing (including: investigating) and presenting a case.[74] It is also because, contrary to the civil-law system, there is no judicial process of investigation *à charge* and *à décharge* – which somewhat *compensates* for the absence of the accused. Whilst the STL procedural regime has adopted a few civil-

---

[69] *Jones* (Anthony) [2003] 1 AC, par. 13.

[70] *Prosecutor v Dragan Nikolic*, Transcript, 9 October 1995, at 53-55.

[71] This view appears to be shared among a majority of states. See, e.g., M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol I, 501-502 (footnote omitted): "the prevailing view of States with respect to the Yugoslavia Tribunal was that such trials should not be permitted for the following reasons. The Yugoslavia Tribunal was to be established for the purpose of prosecuting and punishing the persons responsible for the atrocities committed in the former Yugoslavia. There were concerns that trials *in absentia*, if permitted, might become the rule rather than the exception. This possibility could arise if the State concerned refused to hand over the alleged perpetrators for trial. Thus, the Yugoslavia Tribunal could become merely a 'paper tiger' used only as a forum for 'show trials' which would diminish its authority by creating the image of a powerless institution issuing nothing more than 'hollow judgments' without any effect in terms of punishment or deterrence. This would undermine the credibility of the international community, in general, and the United Nations Security Council, in particular, in terms of the determination to bring the perpetrators to justice and to enforce the rules of international humanitarian law." Also D. Mundis, "Improving the Operation and Functioning of the International Criminal Tribunals", 94 *AJIL* 759 (2000), at 762.

[72] Schabas, In Absentia Proceedings, p. 336.

[73] Some common law jurisdictions know of cases of trials in the absence of the accused (as, for instance, where an accused who was initially present has jumped bail and absconded).

[74] *Crosby v. United States*, 506 U.S. 255 (1993) where the U.S. Supreme Court held unanimously that Federal Rule of Criminal Procedure 43, strictly applied, does not allow the trial *in absentia* of a defendant who is absent at the start of the trial.

law features (in particular, limited victims' participation), it is "essentially adversarial" in nature.[75] As explained by Professor Cassese, **adversarial proceedings are un-suited to *absentia* trials**: "it proves crucial for the fair conduct of proceedings that the accused be present when the fundamentals of the adversarial model are upheld".[76]

(iii) **The possibility of a fair international trial in the absence of the accused is highly questionable**. As the UN Secretary-General pointed out – "A trial should not commence until the accused is physically present before the International Tribunal. There is widespread perception that trials in absentia should not be provided for in the Statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence".[77]

(iv) **The reliability and credibility of the record of proceedings will be significantly undermined by the accused's absence from the proceedings**. International practice suggests that in a trial held in the absence of the accused "it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused".[78] That authoritative pronouncement suggests that the value of an international verdict reached *in absentia* will be, *at best*, minimal.

(v) **The duty of potential information-providers is narrow and for the most part unenforceable**. The absence of the accused will deprive counsel of perhaps the most important source of information to prepare for trial: his client. The absence of this primary source of information is compounded, in the case of the STL, by the fact that only Lebanon is legally required (at least on the face of the Statute) to cooperate with parties to the proceedings. No other state or organization has an *express* statutory duty to cooperate. This might result in the Defence having no access to relevant sources of

---

[75] STL SG Report, par. 32.

[76] Cassese, *International Criminal Law*, 393.

[77] ICTY 808 UNSC Report , par. 101 (footnote omitted). See also e.g, C. Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions", 3 *Duke Journal of Comparative and International Law* 235 (1993), at 280: "This right [to be tried in one's presence] is also designed in part to avoid trial in absentia, which is, in many respects, inherently unfair because it does not allow a defendant to effectively participate in the trial and present an adequate defense." See also *Jordash and Parker*, p. 496; F. Terrier, "The Procedure before the Trial Chamber", in Cassese, The Rome Statute of the International Criminal Court: A Commentary, Volume II, 1277, at 1283: "*in absentia* proceedings are in absolute contradiction with the recognized fundamental right of the accused to be present at the trial". See also, for a less absolute position, Cassese, *International Criminal Law*, 392-393. See also, *contra*, Zappala, *Human Rights in International Criminal Proceedings*, p. 126.

[78] *Nahimana* Appeals Judgement, pars. 97.

information. This state of affairs is not merely theoretical: experience from other international(ised) criminal tribunals suggest that (i) information provided by states is essential to the Defence, that (ii) cooperation is not always forthcoming and that (iii) the ability of the court to compel cooperation is often essential to ensuring the fairness of proceedings. Again, this affects the very possibility of a fair trial. Thus far, no State/organisation has proved able to provide the information sought by the Defence.

(vi) As noted by prominent scholars[79] and human rights organizations,[80] ***absentia* trials are likely to undermine the credibility of an international Tribunal.**[81] The STL was created on the basis that it would be able to do what the Lebanese authorities could not: to bring to justice those allegedly responsible for these attacks. An *absentia* trial fails that promise and raises questions about the justification for displacing the competence of Lebanese authorities.

(vii) **There are clear uncertainties as regard the possibility of a re-trial for any accused tried *in absentia* before the Tribunal.**[82] If any of the accused were convicted *in absentia*, he may have to live (*if still alive*) with the stigma of a conviction with no genuine opportunity to have the matter re-tried. This situation could arise if the accused becomes available to be tried at some time after the Tribunal's mandate has ended, in circumstances where there is no practical or effective possibility of re-trial, and no recourse to effectively appeal a conviction.

(viii) **Trying a case in the absence of the accused would render "effective representation" a more theoretical, than realistic, guarantee.**[83] The IMT's findings in relation to Bormann are illustrative of that problem.[84]

---

[79] See e.g. T. Meron, "Answering for War Crimes: Lessons from The Balkans", 76 *Foreign Affairs* 2, at 4 (1997) discussing a proposal to provide for trials *in absentia* before the ICTY: "Failure to obtain custody of a significant number of those indicted has encouraged suggestions that the tribunal resort to in absentia trials. Tempting as they may be, such trials would challenge the generally accepted interpretation of the tribunal's statute, raise concerns regarding due process of law, and be inherently vulnerable to error and abuse-thus risking the tribunal's credibility, its most precious asset. Recognizing those dangers, the tribunal has wisely resisted the temptation."

[80] See, e.g., Human Rights Watch report of 17 November 2006 on "Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia", commenting upon draft Rule 79(1) of the ECCC Draft Internal Rules and noting that "allowing trials in absentia would seriously undermine the work of the Extraordinary Chambers by casting doubt upon the credibility of the process itself" (page 1).

[81] See, also, D. Mundis, "Improving the Operation and Functioning of the International Criminal Tribunals", 94 *AJIL* 759 (2000), at 762.

[82] See above pars. 43-50.

[83] See above, pars. 51-57.

[84] IMT Judgement, p. 528. ("[Bormann's] counsel, who has laboured under difficulties, was unable to refute this evidence. In the face of these documents which bear Bormann's signature it is difficult to see how he could do so even were the defendant present. Counsel has argued that Bormann is dead and that

(ix) **No transfer of Lebanon's duty to arrest onto the defendants**. Trying the accused in their absence would effectively pass the responsibility of Lebanese authorities to locate and arrest the accused onto the accused to surrender to the Tribunal. If the accused may not be found, the responsibility for that failure should befall those responsible to do so – rather than the accused.

(x) **Ability of the Tribunal to guarantee the publicity of proceedings in an *absentia* trial**. A trial *in absentia* is likely to undermine (further) the publicity of the proceedings to a point where any residual value that might have existed in holding such a process will be lost. The Prosecution will no doubt claim that publicizing the identity of witnesses (and other categories of evidence) whilst the accused are at large is likely to compromise their security so that this evidence should be heard behind closed doors. If this were to happen (*and the Prosecution could readily dispel the Defence's concern on that point in its response to the present motion*), any trust that the public might have in the record of these proceedings is likely to be further undermined and the value of the proceedings reduced to Justice Goldstone's "empty shells".

III. CONCLUSIONS AND RELIEF SOUGHT

48. In light of the above, and for the reasons given, the Defence of Mr. Sabra requests the Trial Chamber to–

(i) Correct the above errors; and

(ii) Stay its order to proceed *in absentia* of the accused pursuant to Article 22; and

(iii) Request the President of the Tribunal to seek an amendment of the Tribunal's Statute (from the Security Council) pursuant to which the Secretary-General would be obliged to *re-activate* the Tribunal at any time if and when one of the accused who has been tried in his absence is apprehended after the Tribunal has been closed – unless he accepts the initial judgment of the Tribunal; and

(iv) Request the Lebanese authorities to establish whether Mr. Sabra is in fact still alive; and

---

the Tribunal should not avail itself of Article 12 of the Charterwhich gives it the right to take proceedings in absentia. But the evidence of death is not conclusive, and the Tribunal, as previously stated, determined to try him in absentia. If Bormann is not dead and is later apprehended, the Control Council for Germany may, under Article 29 of the Charter, consider any facts in mitigation, and alter or reduce his sentence, if deemed proper.").

(v) Order adequate and effective notice inside and outside Lebanon of (i) the existence of the charges, (ii) the right of the accused to be present at his trial and (iii) consequences of a failure to attend; and

(vi) Verify and ensure that, *despite the institutional peculiarities of the STL and the security/political situation in Lebanon*, the Defence would have a real and credible opportunity to prepare an effective defence including the effect of the lack of legal obligation or willingness on the part of information-providers to assist the Defence in its preparation.

(vii) Clarify that it has not made an express or implicit finding that Mr. Sabra has waived his right to be present as would result in the loss of a right to a re-trial.

49. Further, if the Trial Chamber rejects this application to stay the *absentia* proceedings, Counsel for Mr. Sabra respectfully request that the following minimum basic human rights safeguards be implemented, namely –

(i) An unambiguous clarification that, under a revised regime, the accused would be guaranteed an automatic and unconditional right to a re-trial before the Special Tribunal if he were ever to be convicted having been tried in his absence, then subsequently detained; and

(ii) A confirmation that such a re-trial would meet all relevant requirements of due process, as recognized, *inter alia*, in the ECHR and ICCPR; and

(iii) An explanation or reasoned decision as to why it is a reasonable use of its discretion to order a trial *in absentia* despite the above considerations;

(iv) A clarification that, if it decides to proceed *in absentia*, based on the information presently available to the Chamber, that it could not proceed other than on a finding that the accused "otherwise cannot be found" and that this in no way amounts to or implies a waiver of the accused's right to a re-trial.

Respectfully submitted, 23rd of May 2012

Mr. DAVID YOUNG
Lead Counsel for Mr. Sabra

Dr. GUÉNAËL METTRAUX
Co-Counsel for Mr. Sabra

(Word count: 9,613)