RULES OF PROCEDURE AND EVIDENCE
(as of 10 June 2009)

EXPLANATORY MEMORANDUM
by the Tribunal's President

I. INTRODUCTORY COMMENTS

1. The Rules of Procedure and Evidence (RPE or Rules) must be based on and consistent with the Statute of the Tribunal. Article 28(2) of the Statute mandates the Judges to adopt the RPE and, in doing so, to be guided by the Lebanese Code of Criminal Procedure (LCCP) and other "reference materials" reflecting the highest standards of international criminal procedure.

   The notion of "other reference materials" clearly refers to the Rules of Procedure and Evidence of other international criminal tribunals and courts such as the ICC, the ICTY and the ICTY, and of mixed tribunals such as the Special Court for Sierra Leone (SCSL), the Timor Leste Special Panels and the Extraordinary Chambers in the Courts of Cambodia. Hence, when drafting the Rules, the Judges took into account the RPE of those tribunals and courts and the LCCP. They also carefully considered the emerging procedural practice of these other courts and tribunals, and the lessons learned from their experience in conducting international criminal proceedings.

2. Accordingly, while the RPE must not be inconsistent with the Statute, where the Statute either does not regulate a specific procedural matter, or provides a regulation that is unclear and therefore subject to varying interpretations, or contains provisions that appear to be contradictory, the RPE may innovate by drawing upon:

   (i) the spirit of the Statute;
   (ii) the Lebanese procedural system; and
   (iii) the RPE and practice of other international criminal tribunals.

   The aim of any innovation is to ensure that criminal proceedings are: (a) absolutely fair, the rights of the defence being fully safeguarded; (b) expeditious, establishing the innocence or guilt of an accused person as rapidly as possible so as to avoid excessive or prolonged legal uncertainty for him or her; and (c) take into account the rights of victims by, among other things, enabling them to participate in proceedings under the scrutiny of the Pre-Trial Judge or the Chambers.

3. In regulating criminal proceedings before the Tribunal, two procedural models must be considered: the Lebanese civil law system and the model adopted in the international criminal tribunals. These models are not irreconcilable. After all, the ICTY, ICTR and SCSL procedural system – although initially based almost

exclusively on the adversarial model – has evolved to include several significant elements that are closer to the inquisitorial model (for instance: the Pre-Trial Judge; the admission of written evidence; the possibility for an accused to make a statement during trial; the use of non-bifurcated proceedings for establishing the guilt or innocence of an accused and any sentence that may be imposed).

This has undoubtedly been a healthy development, since the unique characteristics and the proper role of international criminal justice demands a more inquisitorial (or less adversarial) approach: prosecution and punishment of international crimes is not a business of two contestants; it is premised upon a public interest in justice and implicates the whole international community (otherwise why should the UN intervene and establish international or mixed tribunals?). Furthermore, while the adversarial system indisputably tends to better protect the rights of the parties to the proceedings, the inquisitorial model has the distinct advantage of being more expeditious during the trial phase. No one doubts that there is an increasing need for international criminal proceedings to be less lengthy, less cumbersome, and less costly. Finally, the right to an expeditious trial is part and parcel of fundamental human rights standards.

4. The procedure outlined in the Tribunal's Statute, although substantially based on the adversarial system (i.e., there is no investigating judge proper (*juge d'instruction*); each party is responsible for gathering evidence in support of its own case), also substantially acknowledges the inquisitorial system, in particular that prevailing in Lebanese law: (i) the Pre-Trial Judge is not a member of the Trial Chamber but is a neutral body distinct from both Chambers, dealing with all pre-trial matters and ensuring that trial proceedings are brought to a start quickly and efficiently; (ii) victims are entitled to play a significant role; (iii) trials *in absentia* are allowed, albeit subject to important safeguards; (iv) evidence may be admitted in written form, subject to strict limitations akin to those in the ICTY system; (v) an accused may make statements in court at any stage of the proceedings; (vi) unless otherwise decided by the Trial Chamber, examination of witnesses commences with questions from the Judges, followed by questions from the Prosecutor and the Defence.

This blending of two procedural models may raise problems, both of internal consistency and for the future management of proceedings. Accordingly, the RPE tries to integrate or combine them to the maximum extent feasible by opting – where there is room for choice – for the procedure that best fulfils the demands of international justice.

5. In addition, the RPE are conceived so as to provide solid safeguards to the fundamental rights of the suspects and the accused. As emphasised by the eminent German criminal lawyer, Franz von Liszt, when writing on the theoretical justification for the *nullum crimen sine lege* principle: "[h]owever paradoxical it may sound, the Criminal Code [as well as, we could add, the code of criminal procedure, in our case the RPE] is the criminal's Magna Charta. It certifies the right to be punished only in accordance with statutory requirements and only within the statutory limits" ('Die deterministischen Gegner der Zweckstrafe, in 13 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1893), at 357).

The need to fully protect the rights of suspects and accused in the Tribunal's RPE is all the more pertinent since there is ample opportunity for the victims and their representatives to present their "views and concerns" in proceedings. To avoid

any undue imbalance in favour of the Prosecution and the victims, the rights of suspects and accused are therefore enhanced as much as possible. In this regard, it is notable that the rights granted to victims under Article 17 must be exercised "in a manner that is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial".

6. More generally, the RPE tries to resolve some ambiguities and problems raised by the Statute, such as: (1) the scope of the Tribunal's jurisdiction; (2) the role of the Pre-Trial Judge; (3) the status and role of victims as participants in the proceedings; (4) the role of the Defence Office; (5) the means of ensuring the cooperation of third States (i.e. States other than Lebanon); (6) the possibility for measures that are alternative to detention during the pre-trial and trial phases; (7) the conduct of hearings; (8) the role of an accused in court; (9) the right of an accused to self-representation; (10) the use of written evidence; (11) the need to protect sensitive information to be provided by various sources in an attempt to facilitate and encourage such sources to hand over such information; (12) the holding of trials *in absentia*; (13) the division of trial proceedings into proceedings designed to establish the guilt or innocence of an accused and sentencing proceedings.

   This Memorandum will briefly address how the RPE resolves these problems, and explains the rationale behind the solutions chosen.

7. This Explanatory Memorandum does not have any official status. It has not been adopted by the Judges, although its drafting has benefited by comments from a few of them. Since it is not intended to serve as an authoritative, let alone legally binding, interpretation of the RPE, it can in no way substitute for the interpretation of these Rules by the Judges. Its main purpose is to express the President's view as to the principal procedural problems likely to arise before the STL and the rationale underpinning their solutions in the RPE.

II. SURVEY OF THE MAIN PROBLEMS

1. The Scope of the Tribunal's Jurisdiction

8. Article 1 of the Statute divides the offences under the jurisdiction of the STL into three categories: (i) the attack of 14 February 2005 resulting in the death or injury of Hariri and others; (ii) other attacks having occurred between 1 October 2004 and 12 December 2005; and (iii) attacks which may have occurred at any later date.

   For attacks of the second category, the STL must determine whether or not they are (a) "connected" with the attack of 14 February 2005; and (b) of a similar nature and gravity. If so, the jurisdiction of the STL extends to these attacks. For the third category of attacks, the same criteria apply, with two additional requirements: a "decision of the Parties", namely the UN and Lebanon, and the "consent of the Security Council".

   The question is which organ of the STL should determine whether attacks of the second and third categories are sufficiently connected to the Hariri attack and are of a similar nature and gravity. In principle, the Prosecutor should decide what charges to bring. However, the jurisdiction of the STL depends on the answer to legal questions relating to the existence of a connection and the nature and gravity

of an attack. Thus, at a minimum, a decision by the Prosecutor should be subject to judicial scrutiny.

The answer in the RPE wisely takes account of both concerns. For the second category of attacks, the RPE provides that: (i) during his investigations and before submitting an indictment, the Prosecutor may request a ruling from the Pre-Trial Judge as to whether there is *prima facie* evidence that a case is within the jurisdiction of the Tribunal. The Pre-Trial Judge decides this issue on the basis of the three legal criteria in Article 1 of the Statute, namely: link, nature and gravity (**Rule 11 (A) – (B)**); and (ii) both the Prosecutor and the Head of the Defence Office may challenge the ruling before the Appeals Chamber (**Rule 11 (D) – (F)**).

This solution respects the Prosecutor's discretion to make appropriate choices in light of the existing evidence while providing judicial and appellate review of that decision.

9. Another question is whether there should be any judicial power to scrutinize the Prosecutor's decision that an attack of the second category does not satisfy the criteria of the Statute. Should the practice of the ICTY and the ICTR be followed, leaving that negative decision entirely in the Prosecutor's discretion? Or is it desirable to allow the Pre-Trial Judge some measure of scrutiny over that negative decision, similar to the role of the Pre-Trial Chamber in Article 53(3) of the ICC Statute?

Rule 11 opts for the first alternative, leaving the Prosecutor broad prosecutorial power. Indeed, it was felt that the Prosecutor is best positioned to decide on the basis of the evidence if the crime cannot satisfy the necessary criteria, whereas the Pre-Trial Judge would not be in a position to verify whether that decision is sound. Further, the situation which gave rise to Article 53 (3) of the ICC Statute (providing that the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed and request him to reconsider that decision) was due to the ICC's unique referral mechanism. The need for such a review of the ICC Prosecutor's decision not to proceed arose because State Parties and the Security Council may refer situations to the Court – accordingly, the Rome Statute's drafters opined that, if the Prosecutor decided not to proceed on a referred situation or case, he should provide reasons to the Security Council or the State Party referring the matter, which could then ask for that decision to be reviewed. By way of contrast, the ICC Pre-Trial Chamber has no power to review negative decisions when the Prosecutor has decided to initiate investigations *proprio motu*. In that case, if the Prosecutor decides not to investigate or prosecute a particular case, his decision is final.

10. Matters are more complicated for the third category of attacks. The question is which of the Tribunal's organs should ask the UN Secretary-General and the Government of Lebanon for their "decisions" (i.e. acceptance or agreement), and the Security Council for its "consent."

The drafters thought it advisable for the Prosecutor to scrutinize the relevant material and decide whether an attack should be subject to the Tribunal's jurisdiction, provided that the relevant parties have reached an agreement on the matter. Therefore, the Prosecutor must inform the Tribunal's President of his conclusions. The President, in turn, through the Registrar, will transmit the "reasoned conclusions" of the Prosecutor to the UN and the Government of

Lebanon so that an agreement can be reached between the UN and the Government of Lebanon, with the consent of the Security Council, on whether or not to grant the Tribunal jurisdiction over the crime at issue (**Rule 12**).

2. The Role of the Pre-Trial Judge

11. Like the ICTY Pre-Trial Judges, the STL Pre-Trial Judge is vested with managerial powers over cases; his main task is to organize and speed up pre-trial proceedings. However, unlike the ICTY Pre-Trial Judges, who are members of the Trial Chamber assigned to a particular case, under the Statute of the STL, the Pre-Trial Judge is not a member of the Trial Chamber, but rather a separate and autonomous Judge, who cannot sit on the Trial Chamber (see Article 2 of the Agreement and Articles 7(a) and 18 of the Statute). While the equivalent body in other tribunals must avoid being "contaminated" by contact with the evidence, the Pre-Trial Judge of the STL is free to deal with the evidential material submitted by the parties and may take a more active role during the initial stages of proceedings.

Nevertheless, under the Statute the STL Pre-Trial Judge does not have the role nor exercise the powers of an investigating judge, such as the *juge d'instruction* in the LCCP (Articles 51-127, 129). As pointed out above, under the procedural system outlined in the Statute, evidence must primarily be gathered by the two parties to the trial, the Prosecution and the Defence. Hence, in the ordinary course, the Pre-Trial Judge does not *proprio motu* gather evidence. However he may, if the interests of justice so require and at the request of a party, exceptionally collect evidence on behalf of a party when that party has been unable to do so (**Rule 92**).

12. In identifying the powers of the Pre-Trial Judge, the drafters drew largely upon the Lebanese experience and the LCCP, short of assigning him the powers of a *juge d'instruction*.

The RPE therefore broadens the Pre-Trial Judge's powers to enable him to: (a) expedite the pre-trial proceedings to the maximum extent feasible; (b) organize the evidentiary material so as to facilitate the task of the Trial Chamber; and (c) assist the parties to collect evidence.

Thus, the Pre-Trial Judge is vested with the power to:

(i) rule on whether attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 other than the Hariri attack fall under the Tribunal's jurisdiction;
(ii) evaluate the charges brought by the Prosecutor in the indictment and, if need be, request the Prosecutor to reduce or reclassify such charges;
(iii) facilitate communication between the parties;
(iv) prompt the parties to streamline their collection of evidence;
(v) encourage the parties to narrow down their differences and limit the evidence to be presented at trial to the minimum indispensable;
(vi) rule on granting victims the status of victims participating in the proceedings;
(vii) rule on certain pre-trial motions (e.g. **Rule 90 (A)**);
(viii) issue summonses, warrants and other orders at the request of either party;
(ix) question anonymous witnesses (**Rule 93**);

(x) rule on the disclosure of information affecting security interests of States and other international entities (**Rule 117**), as well as on the disclosure of information provided on a confidential basis (**Rule 118**);

(xi) exceptionally gather evidence: (a) at the request of either party or a victim participating in the proceedings, when the requesting party or the victim demonstrates, on a balance of probabilities, that it is not in a position to collect the evidence, and the Pre-Trial Judge considers that doing so is in the interests of justice (**Rule 92 (A)**); (b) where a party or a victim participating in the proceedings is unable to collect "an important piece of evidence" and the Pre-Trial Judge deems that it is indispensable to the fair administration of justice, the equality of arms and the search for truth (**Rule 92 (C)**). In the latter case, the Pre-Trial Judge's intervention is contingent upon the parties or the victim being unable to gather the evidence themselves. Evidence collected by the Pre-Trial Judge in this manner must still be introduced by a party or a victim participating in the proceedings, and the participants in the trial remain free to refrain from doing so. This is another major difference from evidence gathered by a *juge d'instruction*, which normally become available to a trial court without any initiative of the parties or victims.

(xii) draw up a complete file for the Trial Chamber, which sets out the main differences between the parties on points of law and fact, and indicates his view on the main points of fact and law that arise in the case.

13. The Pre-Trial Judge thus acquires the role of an independent and neutral actor operating in the exclusive interest of justice. This contrasts with the adversarial model which is substantially based on the notion that a trial unfolds as a contest between two opposing parties. By the same token, the public interest in fair and expeditious justice is notably bolstered.

The above considerations have been taken into account in drafting **Rules 11 (A) and (B),** and **88-97.**

3. Status and Role of Victims Participating in the Proceedings

14. The STL Statute contains three references to the role of victims as participants in proceedings, as distinct from their role as potential witnesses in a case.

First, Article 17 provides that victims may present their "views and concerns" at various stages of the proceedings.

Second, Article 25 rules out the possibility for victims to claim compensation before the Tribunal, leaving the matter to national courts. Thus, the Statute excludes that victims may act as "*parties civiles*" (i.e. as private claimants having the right to set in motion criminal proceedings, to participate in such proceedings, whether or not initiated by them, and to claim compensation for the harm resulting from the crime). The Report of the UN Secretary-General S/2006/893 (15 November 2006), at paragraphs 31-32, clarifies this conclusion. These passages explain that the possibility for victims to present their views does not imply that they are recognized as "*parties civiles*," and that one of the "distinctive features" of civil law, namely "the participation of victims as '*parties civiles*'" is absent in the Statute. Thus, the

main *raison d'être* of "*parties civiles*", namely their participation in criminal proceedings for the purpose of seeking compensation, is removed.

Third, Article 25(1) provides that the Tribunal "may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal".

15. Notwithstanding that the trial proceedings in the Tribunal are not aimed at determining compensation but rather at establishing whether an accused is guilty or innocent, the drafters of the RPE deemed it fair and appropriate to grant extensive participation in proceedings to victims. Normally bringing a civil action before a criminal court pursues a two-fold purpose: contributing to the determination of the guilt or the innocence of the accused and obtaining compensation for the victims for the harm suffered. Nevertheless, as noted with regard to the French system, "the victim's action is not dependent on a claim for damages, and the admissibility of the civil action does not automatically imply that damages will be awarded to the victim" (V. Dervieux, "The French System", in M. Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures*, Cambridge: Cambridge University Press, 2002, at 227).

Based on the Tribunal's "identification", victims may later bring an action for compensation before a national court and, for the purpose of such "identification", the participation of victims in the criminal proceedings before the Tribunal may prove of enormous value.

The RPE also take into account the fact that the presence and active participation of victims during proceedings may be important in that the victims will be able to present views and concerns that may have been somewhat neglected by the Prosecution and the Defence.

16. In light of the above, the RPE draw upon the relevant provisions of the LCCP as much as possible (see for instance Articles 5, 7, 59, 67, 68-72, 151 of the LCCP), while keeping in mind that the Statute does not envisage the role and status of victims as "*parties civiles*."

Thus, victims participating in the proceedings are given extensive procedural rights and powers. These include the right to receive documents, to request the Trial Chamber to be authorized to call witnesses and to tender other evidence, as well as, under the control of the Trial Chamber, to examine or cross-examine witnesses and file motions and briefs. They may also exercise some procedural rights before the Appeals Chamber as provided for in **Rule 87 (D)**. However, they are not vested with the right to appeal against a judgement. Finally, victims can play a significant role in sentencing proceedings by assisting the Bench in assessing the personal impact of the crimes on them. (**Rule 87(C)**).

17. Three questions, however, arise: First, how to prevent victims from being too numerous and thereby "flooding" the Tribunal, making its proceedings cumbersome and slow, and at the same time impairing the balance that must exist between Prosecution and Defence? Second, at what stage of the proceedings should victims be allowed participate? At the stage of investigations (the system adopted at the ICC), at the stage of pre-trial proceedings, or at the stage of trial proceedings? Third, is it possible for a victim who participates in proceedings to give evidence in court as a witness?

18. On the first question, it was decided that, first, the notion of "victim" must be defined rather narrowly so as to include only those natural persons who have suffered material, physical or mental harm *as a direct result* of an attack within the jurisdiction of the Tribunal. Legal persons, as well as individuals who may have suffered indirect harm, are thus excluded. Second, victims who wish to participate in proceedings must be screened by the Pre-Trial Judge before they can do so. He may (i) exclude persons whose status as a victim is doubtful; (ii) limit the number of victims who may participate in proceedings; or (iii) designate one legal representative to act on behalf of multiple victims.

19. As regards the stage during which participation by victims is allowed, the RPE permits victims to participate in proceedings only after confirmation of the indictment (i.e. after the close of the investigations, or at least after the bulk of the investigations has been completed). This procedure is consistent with the aims of (i) avoiding confusion that might somehow hamper the actions of the Prosecutor, and (ii) preventing possible delay in the proceedings. In any case, their participation is not automatic, but, as pointed out above, subject to a screening procedure by the Pre-Trial Judge. Victims participating in the proceedings are allowed to take part in the trial, as well as in any sentencing proceedings. The above considerations have been taken into account in **Rules 86-87.**

20. The third question (whether a victim participating in the proceedings may also be a witness) is settled in Rule **150 (D)**, which provides that such victim "shall not be permitted to give evidence unless a Chamber decides that the interests of justice so require". The rule therefore provides that a victim must decide at the outset whether he or she wishes to be (i) a participant in the proceedings, or (ii) a witness. Nonetheless, since the situation may change and, for example, parties may realize later in the proceedings that a victim might be important as a witness, an application may be made to the appropriate Chamber to solve the quandary.

4. The Role of the Defence Office

21. The establishment of an independent and autonomous Defence Office assists in redressing the imbalance often observed in adversarial systems between the Prosecution and the Defence, the former generally being well-equipped and capable of counting on numerous competent investigators and prosecutors, the latter often being at a disadvantage with regard to manpower and equipment. Thus, the Defence Office serves to strengthen the principle of equality of arms. Accordingly, this Office must constitute a branch of the Tribunal similar and parallel to the Office of the Prosecutor.

The drafters of the RPE were faced with a choice: (a) assigning to the Defence Office the task of providing representation to suspects or accused, or (b) confining its role to providing only assistance to defence counsel (besides assigning defence counsel whenever needed). The drafters clearly felt that the latter option was preferable for it better ensured the neutrality and impartiality of the Defence Office without infringing on the right of each accused to choose his or her counsel and strategy.

As for the Head of the Defence Office, his main task is to assist accused and counsel as much as possible, including through the assignment of a duty counsel whenever the accused urgently needs legal advice and counsel of his choosing is not immediately available.

The Head of the Defence Office can also play a special role in relation to cooperation with States, in a way similar to that of the Prosecutor. Under **Rule 15,** he "may seek cooperation […] from any State, entity or person to assist with the defence of suspects and accused before the Tribunal". At times, accused persons and their legal associates might find it hard to receive meaningful cooperation from domestic judicial authorities. Plainly, the action of the Head of the Defence Office may prove of crucial importance in ensuring the assistance of a State or other entity directed to enable a suspect or accused to make his case before the Tribunal. Furthermore, under **Rule 22,** the Head of the Defence Office may be consulted by the President, the Pre-Trial Judge or a Chamber when it comes to cooperation with Lebanon or third States; once again, he can play a crucial role in ensuring assistance of States for the purpose of enhancing the rights of suspects or accused.

The above considerations have been taken into account in **Rules 15, 22** and **57-59.**

5. Cooperation of States

22. State cooperation is crucial to the successful accomplishment of the tasks of any international criminal court. Such cooperation is even more crucial in the case of the STL, since third States (*i.e.* States other than Lebanon) are not bound by the Statute and the relevant Security Council resolutions. In addition, some of these third States which wield some form of control over persons of interest for the Tribunal (such as witnesses or suspects) may regard the Tribunal with suspicion.

Another important factor is that the constitutions and domestic legislation of some countries within the region include a provision prohibiting – although with somewhat loose terminology – the extradition of nationals.[1] This may make the handing over of nationals to the Tribunal legally complicated from the viewpoint of their national law. The RPE therefore:

(i) provide for agreements on judicial cooperation to be entered into by the STL with States other than Lebanon;

[1] For example, Article 51 of the 1971 Constitution of **Egypt** (as amended in 1980, 2002 and 2005) provides that "[n]o citizen shall be deported from the country or forbidden from returning to it." Article 33 (1) of the 1973 Constitution of **Syria** provides that "[a] citizen may not be deported from the homeland." Article 38 of the 2002 Constitution of **Qatar** stipulates that "[n]o citizen shall be deported from the country or forbidden from returning to it." Article 21(1) of the 2005 Constitution of **Iraq** states that "[n]o Iraqi shall be surrendered to foreign entities and authorities." Instead, Article 42 of the 1992 Basic Law of Government of **Saudi Arabia** stipulates that "[t]he state shall grant the right to political asylum when the public interest demands this. Statutes and international agreements shall define the rules and procedures governing the extradition of common criminals."

(ii) envisage means of ensuring cooperation other than arrest and extradition of nationals (for instance, gathering testimonies, enabling witnesses to testify through video-conference, providing for house arrest of suspects or indictees, etc.);
(iii) envisage the possibility for the Prosecutor to make "arrangements" with States for the purpose of facilitating his investigative and prosecutorial activities (similar arrangements may also be made by the Head of the Defence Office).

23. The RPE also contemplate certain measures designed to expose the failure of Lebanon and third States to cooperate, while at the same time envisaging a set of measures that might, to some extent, assuage their fears of undue encroachment on their sovereignty (see below, at Section 6). In this respect, a distinction has been made between three categories of States:

(i) Lebanon, which is legally bound, under the Agreement with the UN and Security Council Resolution 1757, to cooperate with the Tribunal;
(ii) Third States that have entered into a cooperation agreement with the Tribunal or have an obligation to cooperate on any other basis (for example, domestic legislation passed specifically for this purpose); and
(iii) Third States that have either expressly refused to make such an agreement or, in any case, have in fact refrained from doing so.

In the event of non-compliance with Tribunal requests or orders by Lebanon (category (i)), the rules provide for a response in three stages. First, the President will consult with the relevant Lebanese authorities with a view to prevailing on them to cooperate. Second, in the event of persistent refusal to cooperate, the Trial Chamber (or the Pre-Trial Judge, since the matter may not yet be at the trial stage) may make a judicial finding of non-cooperation. Third, the President reports this judicial finding to the Security Council, for appropriate action.

In contrast, with regard to the second category of States (those which are legally bound to cooperate on the strength of a cooperation agreement), it is stipulated that resort shall be had to the mechanisms for the settlement of disputes provided for in the relevant Cooperation Agreement.

As for the third category of States (those that are not legally bound to cooperate), it is provided that the President will consult with the relevant authorities of the State, with the purpose of prompting them to cooperate.

The above considerations have been taken into account in **Rules 13-23.**

6. Measures Alternative to Detention

24. The RPE envisage the possibility for a suspect or an accused *not* to be arrested and *not* to be held in custody in The Hague during pre-trial proceedings and the trial itself. In the interests of justice, suspects or accused may be summonsed to appear, with the consequence that they are not held in custody in the Tribunal's detention facility (and they may be allowed to be released on bail in their national State). This, of course, does not exclude the possibility for a defendant who is arrested, brought before the STL, and ordered to be detained, to request provisional release under the

appropriate rules. Provisional release, being the exception, may only be refused under strict circumstances. If granted provisional release, an accused may return to his country and, if allowed to remain there, may attend the trial proceedings by video-conference. If his conditions of provisional release require him to return to the seat of the Tribunal, he would attend trial proceedings while being detained in the Tribunal's detention facility.

25. It should be emphasised that the ICTY, while it initially insisted (probably too much, one could perhaps say in hindsight) on the need for defendants to be detained before and during trial, now tends to grant provisional release to many accused who have been arrested and handed over to the Tribunal. It is worth mentioning in this regard the holding of the Inter-American Court of Human Rights in *Acosta-Calderón* v. *Ecuador* ("The Court considers that it is essential to point out that preventive detention is the most severe measure that can be applied to the person accused of a crime, reason for which its application must have an exceptional nature, since it is limited by the principles of legality, the presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society. […] [P]reventive detention is a precautionary measure, not a punitive one […]" (Judgement of 24 June 2005, §§74-75)).

    Under the RPE, accused persons can be held in custody only on satisfaction of strict criteria (danger of escape, risk that they may tamper with evidence, in particular by intimidating potential witnesses, or engage in similar criminal conduct).

26. The drafters of the RPE therefore thought it warranted, in principle, to conduct trials against accused who are not detained. This need is all the more acute in the case of the STL because of the unique difficulties it will face in having accused arrested either in Lebanon or in other countries, and subsequently handed over to the Tribunal. Presumably third States will be less reluctant to cooperate with the Tribunal if they know that their nationals may stand trial without being held in detention.

    In some cases, to prompt third States to cooperate as much as possible, the Tribunal may grant (with the consent of the Host state) a safe-conduct permitting suspects or accused to come to The Hague to be interviewed or to make the initial appearances before the Trial Chamber, and then return to their own countries.

    These measures enable trials to be conducted where the accused is not necessarily present but may nevertheless instruct his defence counsel after initially appearing at trial. Thus, facts could be established and the possible culpability or innocence of the defendants determined without resorting to the conduct of trials *in absentia* proper.

    The above considerations have been taken into account in **Rules 78, 81, 102-105, 124-125.**

7. The Conduct of Hearings

27. Article 20(2) of the Statute envisages a mode of hearing witnesses along the lines of inquisitorial systems; questions are first put by the Presiding Judge and the other judges, then by the parties. This, however, presupposes that the Trial Chamber is

provided with a complete file (*dossier de la cause*) enabling it to be familiar with the evidence collected both against and in favour of the defendant, as well as with all the legal and factual problems that arise. However, in practice, the STL Pre-Trial Judge may be unable to compile such an exhaustive file.

Whenever this is the case and the Trial Chamber does not therefore possess an exhaustive file of the case, **Rule 145 (B)** envisages a return to the adversarial mode of conduct. However, it leaves open the possibility of applying Article 20(2) literally.

8. Role of the Accused

28. Article 16(5) of the Statute grants an accused a role typically found in inquisitorial systems. The RPE follow this pattern, making it possible for an accused to answer questions of the Judges, the parties and of the victims participating in the proceedings, without having to acquire the formal status of a witness on his own behalf. It may be assumed that the accused's answers have the same evidentiary value as the evidence of other witnesses - that is, they are not to be considered as having lesser value than if he goes into the witness box and gives sworn evidence (**Rule 144 (A)-(C)**).

Nevertheless, it has been decided that the accused, if he so desires, may also appear as a witness in his own defence (**Rule 144 (D)**).

9. Right of the Accused to Self-Representation

29. In light of recent unfortunate experiences at the ICTY, and consistent with the case law of the European Court of Human Rights (see, for example, *Croissant* v. *Germany*, §§ 27-32) and major decisions of national courts (for instance, the decision of the Italian Constitutional Court no. 421 of 18 December 1997), the drafters of the RPE thought it necessary to construe the right of the accused in Article 16 "to defend himself or herself in person" as the right of the accused to ask questions, call witnesses or examine or cross-examine witnesses either himself or – whenever required by the interests of justice – with the assistance of defence counsel (of the accused's own choosing or assigned by the Tribunal). Such assistance does not necessarily preclude an otherwise active role by the accused throughout the proceedings. Indeed, the complexity of international criminal proceedings is such that it is almost inconceivable that an accused, in order to fully ensure his defence, will not need the assistance of experienced defence counsel. As the ECHR stated in *Croissant*, "it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course (Article 142 of the Code of Criminal Procedure; see paragraph 20 above). *However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice*" (§ 29; emphasis added). In the context of the STL, the interests of justice clearly include, *inter alia*, the interest of the international community and of the Lebanese people to a fair and expeditious trial of the accused in question and of any other accused (whether they are being

tried jointly or separately), the effective presentation of evidence, the orderly administration of justice, the truth-searching mission of the Tribunal, and the protection and interests of victims and witnesses.

30. In light of the above, and in accordance with the LCCP, as well as the criminal procedures of most civil law countries, the RPE provide for the right of the accused to choose whether or not to conduct his own defence in person. However, the RPE add that the Pre-Trial Judge, the Trial Chamber or the Appeal Chamber may impose counsel, to represent or otherwise assist the accused, whenever the judges find that this is necessary in the interests of justice and to ensure a fair and expeditious trial.

The above considerations have been taken into account in **Rule 59 (F).**

10. The Use of Written Evidence

31. Trials before international criminal tribunals are normally based on the adversarial system. Consequently, they follow the oral tradition and do not allow written evidence, except under strict conditions and only if it goes to proof of a matter other than the acts and conduct of the accused (see, for example, Rule 92 *bis* of the ICTY RPE). In contrast, criminal systems such as that of Lebanon, based on the Romano-Germanic tradition, although envisaging the oral examination and cross-examination of witnesses, tend to admit, subject to certain conditions, written evidence without cross-examination of the relevant witnesses. They leave the determination of the probative value of written evidence to the evaluation of Judges, based on the notion of "*intime conviction du juge*" (intimate conviction of the judges).

It should be stressed that the Nuremberg International Military Tribunal allowed the Prosecution to admit into evidence a wide range of affidavits and written documents. Presumably this was due to the fact that most of these documents tended to prove facts that were part of a widespread pattern of criminality.

Generally speaking, professional judges should be trusted in their assessment of the evidence; they are expected to be competent, experienced and therefore capable of attaching to the evidence the value it deserves, on a case-by-case basis.

32. The RPE approach this issue by striking a balance between the rights of the accused and the objective of discovering the truth, bearing in mind that this balance becomes particularly difficult when a court of law is confronted with crimes of terrorism. In this regard, the RPE are based both on an attempt to reconcile the two aforementioned conflicting requirements and on a careful distinction between various categories of probative material:

(i) Documents (other than written statements);
(ii) Written statements of witnesses;
(iii) Written statements of witnesses who are in court and are prepared to testify;
(iv) Written statements of unavailable persons;
(v) Written statements of anonymous witnesses;
(vi) Transcripts of testimonies given in other proceedings.

33. As for category one (documents - for instance a letter, an intercept, the minutes of a meeting), **Rule 154** provides that such documents may be admitted into evidence if they have probative value.

As for categories two and six (written statements and transcripts), **Rule 155** renders them admissible in lieu of oral testimony only to the extent that they do not relate to individual acts or conduct of the accused as charged in the indictment.

As for category three (written statements of witnesses who are in court and are prepared to testify and to be subjected to cross-examination), **Rule 156** makes the written statement admissible even if it goes to prove the individual acts or conduct of the accused, unless the other party objects to it.

With regard to category four (statements or transcripts of unavailable persons), **Rule 158** leaves the matter to the discretion of the Chamber, adding, however, that if the evidence goes to proof of acts or conduct of the accused, this may be a factor against the admission of such evidence in whole or in part.

Finally, concerning anonymous witnesses (category five), who may be crucial in trials of terrorism (either because they are persons who fear for their lives or are intelligence officials not prepared, or allowed, to disclose their identities), **Rule 93** provides for a procedure whereby the anonymous witness testifies *in camera* before the Pre-Trial Judge alone, so that only that judge is in a position to know his identity. In addition, the Rules provide that the parties, as well as the representative of a victim participating in the proceedings, may put questions in writing to the witness through the Pre-Trial Judge. **Rule 159** adds the fundamental safeguard that a conviction may not be based solely or to a decisive extent on a statement of an anonymous witness.

11. Protection of Sensitive Information

34. International criminal proceedings relating to terrorism may require that some information provided to the parties on a confidential basis be protected. However, it is imperative that the measures taken to protect this information are fully compatible with the rights of the accused. In this regard, the European Court of Human rights in *Chahal* v. *United Kingdom* (judgement of 15 November 1996) held that:

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved […]. The Court attaches significance to the fact that […] in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."(§ 131)

In **Rules 117-118,** a balance is struck between the requirement not to disclose the source or the exact content of confidential information in the possession of the

Prosecution or the Defence and the need to ensure a fair trial fully respectful of the rights of the other party. The task of ensuring that the use of that information is not such as to affect the rights of the other party is entrusted to the Pre-Trial Judge, who thus plays the crucial role of a neutral and objective "organ of justice" acting in the interest of the overarching need to ensure that the principles of fair trial are respected. These are provisions that go beyond those necessary to delay or prevent disclosure of information that may prejudice investigations, may cause grave risk to the security of a witness or his family, or are otherwise contrary to the public interest (**Rule 116**).

Rule 117 deals with information in the possession of the Prosecutor, the disclosure of which may affect the security interests of a State or international entity. If this is the case, the Prosecutor may apply *ex parte* to the Pre-Trial Judge who, sitting *in camera*, will hold *ex parte* proceedings to determine whether the Prosecutor: (a) may be relieved of his obligation to disclose in whole or in part; or (b) may only be relieved of his obligation to disclose subject to counterbalancing measures, such as (i) provision of the information in summarized or redacted form, (ii) identification of new, similar information, or (iii) stipulation of the relevant facts. It is important to understand the concept of counterbalancing measures - that is, measures which remedy the fact that material which should have been disclosed cannot actually be disclosed and, therefore, ensure that the rights of the other party are respected.

The same provisions apply when it is the Defence (or a victim participating in the proceedings) that is in possession of information affecting the security interests of a State or international entity, and is under the obligation to disclose under the RPE (for example, under Rule 112).

Rules 118 and 119 deal with disclosure of information that: (i) is provided on a confidential basis; and (ii) affects the security interests of a State or international entity. Such disclosure may only be made with the consent of the provider. The RPE envisage a possible bifurcation:

(i) If such consent is given, the Prosecutor can present the information as evidence, and the Pre-Trial Judge or the Trial Chamber can admit it, subject to the following restrictions: (i) the Prosecutor may not be obliged to produce additional evidence received from the provider; (ii) nor may a person or representative of the provider be summoned as witness; however, (iii) if the Prosecutor calls a witness to introduce that evidence, such witness may not be compelled to answer questions relating to the information or to its origin.

(ii) If the provider does not give his consent to the disclosure of the information, but the Prosecutor is under an obligation to disclose the material, the Prosecutor will have to apply to the Pre-Trial Judge. The Prosecutor will *not* provide him with the original information or any detail about its origin; he will only submit to the Pre-Trial Judge: (i) an overview of the steps taken to obtain the provider's consent; (ii) if the information is exculpatory, the reason why it is so; and (iii) a list of proposed counterbalancing measures. It is for the Pre-Trial Judge to rule on the matter and order the necessary counterbalancing measures, if need be, including the amendment of the indictment or the withdrawal of charges. An alternative procedure to direct resort to the Pre-Trial Judge

may hinge on a Special Counsel, to be appointed by the President (from a confidential list of persons approved by the provider of the confidential information); this Counsel is entitled to review the information and to then advise the Pre-Trial Judge on the most appropriate counterbalancing measures. Under both scenarios, the Pre-Trial Judge will notify the Trial Chamber of the situation and of the orders he took in this respect.

Under **Rule 119 (H),** these provisions also apply – *mutatis mutandis* – to the **Defence**, whenever it is the Defence which is in possession of information that has been obtained on a confidential basis and is likely to affect the security interests of a State or international entity.

It is important to emphasize that the Prosecutor has a vested interest in ensuring that the material is either disclosed, or that the counterbalancing measures are sufficient to protect the rights of the accused. Since the Trial Chamber will receive a report from the Pre-Trial Judge detailing the procedure (though not describing the confidential material as such), it will have to be satisfied that the situation as a whole (including the counterbalancing measures taken by the Pre-Trial Judge, if any) is not prejudicial to the accused and does not allow a reasonable doubt as to his guilt. In such circumstances, the Trial Chamber would be compelled to acquit the accused, since guilt would not be the only reasonable conclusion. Thus, the Prosecutor is encouraged to continue negotiations with the provider with a view to allowing disclosure, or at least to be as open as possible as to the impact of the confidential information on its case.

12. Trials *in Absentia*

35. In a number of civil law countries, including Lebanon, Belgium and Italy, trials *in absentia* are admissible. The case law of the European Court of Human Rights and the UN Human Rights Committee has repeatedly emphasized that trials *in absentia* are consistent with the principles of fair justice provided that a set of safeguards for the accused are employed (they are the same safeguards as those enshrined in Article 22(2) of the Statute of the STL). In contrast, these trials are criticised and strongly opposed in common law systems, both because in some of these States (e.g. the US) the right of indictees to attend trial is enshrined in the Constitution, and on other grounds. In particular, the adversarial model, based on a "duel" between the parties, requires the presence of the accused so that he may instruct his counsel. Furthermore, trials *in absentia* are often used by dictatorial systems to try and condemn, hence ostracize, political opponents abroad. However, in the United Kingdom, for example, trials can be conducted in the absence of an accused if he has pleaded not guilty in pre-trial proceedings and has been warned (assuming he is on bail) that, if he does not attend trial, his trial may proceed in his absence. His absence from that moment onwards does not turn judicial proceedings into proceedings *in absentia*.

36. These grounds militating against trials *in absentia* do not apply to international criminal trials, particularly when they are not based on full acceptance of the adversarial model. In such trials, proceedings do not boil down to a contest between two parties. Rather, the main goal is the pursuit of truth and justice. Moreover,

international trials are conducted under a spotlight - the close scrutiny of the whole international community - which would not tolerate any abuse, bias or unfair treatment.

Further, the fact that trials *in absentia* were contemplated in the Charter of the Nuremberg International Military Tribunal (Article 12), and that such a trial was conducted against the absent Martin Bormann, indicate that, at the international level, trials *in absentia* were, at least in the post World War II period, held to be acceptable. However, this precedent gives rise to mixed feelings. True, two of the States behind that Charter, namely the US and the UK, are common law countries; however, only grudgingly did they accept trials *in absentia* (see B.F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books Inc., 1977), pp. 229-232). Furthermore, one cannot ignore the fact that the proceedings against Bormann proved difficult for defence counsel, who was unable to find witnesses for the defence (see *Trial of the Major War Criminals,* vol. 3, pp. 547-9; vol. 14, p. 418; vol. 17, pp. 244-9). Only the existence of numerous documents that were deemed authentic and incontrovertibly bore the signature of the accused made it possible for the Tribunal to convict and sentence him to death. In its judgement, the IMT noted that Bormann's counsel had "laboured under difficulties", adding that he "was unable to refute this evidence [presented by the Prosecution]. 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" (vol. 1, at p. 340).

37. The disadvantage of trials *in absentia* is that, generally speaking, they are not popular in public opinion (as proven by the fact that they are banned in such important civil law countries as Germany and Spain; in France they were abolished in 2004 and replaced by the *jugement par défaut*, Articles 410 and ff. *Code de procédure pénale*).

38. According to Article 22 of the Statute, the STL may conduct trials *in absentia* when an accused has expressly waived his right to be present, has not been handed over by a State, or has absconded or otherwise cannot be located. If an accused who has been tried *in absentia* has not designated counsel, he has the choice either to accept the judgement issued or to ask for a retrial.

39. The Rules, while implementing the principles enshrined in Article 22 of the Statute, aim at (i) making resort to *in absentia* trials exceptional only, and (ii) limiting the scope of such trials, based on the assumption that the physical attendance of the accused at trial is not necessarily required, in that his "legal presence" may suffice under certain conditions. According to the RPE, therefore, the following trials are not considered *in absentia*:

(i) where the accused attends the initial appearance hearing (after obtaining a safe-conduct, if need be) and then leaves, so long as a defence counsel continues to act on his behalf and attends the hearings in person (**Rules 104 and 105**);
(ii) where the accused appears before the Tribunal – even just for the initial appearance hearing – by video-conference or by counsel appointed or accepted by him, and in addition refrains from waiving expressly and in writing his right to be present (**Rule 104**).

Therefore, in such instances, the accused is not considered "absent" from the proceedings in a legal sense, but only physically not present before the Tribunal. As such he cannot subsequently enjoy a right to a retrial that *in absentia* proceedings would allow (Article 22 of the Statute).

40. Even when all the conditions for a trial *in absentia* proper are fulfilled, **Rule 106 (B)** provides that the Trial Chamber may request the President to take steps with a view to ensuring that the accused may participate in the proceedings. In addition, the RPE regulate both the situation where the accused appears in court during proceedings *in absentia* (see **Rule 108**) and the situation where the accused appears before the Trial Chamber or the Appeals Chamber following the conclusion of the trial *in absentia* (see **Rule 109**).

13. Sentencing Proceedings

41. In common law traditions, sentencing is distinct from, and follows, trial proceedings. This is for a simple reason – a trial is generally by jury, and the jury is only entitled to decide whether the defendant is guilty or innocent; if the jury convicts the accused, it then falls to a judge to pronounce on the sentence in a different set of proceedings. At the international level, this model was initially upheld (see the first draft of the ICTY RPE (1994), Rules 99-100). Later on, at the behest of some Judges coming from the Romano-Germanic tradition, the two sets of proceedings were merged. This, it is submitted, proved to be a mistake, because, as a result: (i) there may arise some confusion when Judges have to hear at the same trial stage both fact witnesses and character witnesses; and (ii) during trial, the Trial Chamber may have to hear many "character witnesses" concerning an accused even when it may ultimately decide to acquit that accused. In short, hearing character witnesses at a stage where the Court has not yet formally decided whether to acquit or convict the defendant may prove to be a waste of time. Moreover, the accused and his counsel are often put in a difficult position in that they have to argue as to the accused's lack of responsibility for the crime, while at the same time putting forward evidence and arguments relevant to any sentence which may be imposed.

Separate sentencing proceedings also have the advantage that if, having been convicted, the accused upon reflection admits that he did indeed commit the offences of which he has been found guilty, his subsequent admission or contrition can be taken into account when assessing the quantum of the sentence. It also gives counsel time to absorb and reflect upon the verdict, which may be a mixture of convictions or acquittals on a multi-count indictment, and then more appropriately make submissions on sentence to the court.

42. The RPE, in **Rule 171**, therefore revert to the common law system and split the proceedings into two different sets: one designed to establish the guilt or innocence of the accused, the other aimed at sentencing (assuming the Prosecutor is able to show guilt beyond a reasonable doubt).