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In Absentia at the Special Tribunal for Lebanon:

Legal Complications

By:

Sean Sheehan

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Student Name: Sean Sheehan I.D. #: _____

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The undersigned certify that they have examined the final electronic copy of this thesis and approved it in Partial Fulfillment of the requirements for the degree of:

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Thesis Advisor's Name Dr. Skulte-Ouaiss Signature _____ Date

Committee Member's Name Dr. Salamey Signature _____ Date

Committee Member's Name Dr. Ghantous Signature _____ Date

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DEDICATION PAGE

I dedicate this thesis to my supportive friends and family. For always understanding and pushing me to complete this academic achievement. Most of all, this thesis is dedicated to my wife who supported me through every challenge, stress filled night, long arduous weekend filled with writing, and was the first person I wanted to see when I turned in my completed thesis. I could not have completed this thesis if it was not for you. Lastly, I want to dedicate this thesis to my beautiful daughters whose smile and laughter always made me see why I was continuing with my education.

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In Absentia at the Special Tribunal for Lebanon: Legal Complications

Sean Michael Sheehan

ABSTRACT

The issue of the Special Tribunal for Lebanon's use of *in absentia* has become a complex political debate in Lebanon and an intricate legal discussion in the international tribunal system. The Tribunal's creation was ignited by the assassination of ex-Prime Minister Rafik Hariri and put the political situation in Lebanon into disarray. The assassination molded the modern-day political parties found in Lebanon and was a continuation of the violent assassinations in Lebanese politics. The STL's creation shortly thereafter laid a foundation for the eventual decision by the Tribunal to use *in absentia*, a trial in the absence of the defendant. The definition of *in absentia* has been debated and the Tribunal's current implementation of *in absentia* has allowed the Tribunal to host a trial by *default*, a trial without any evidence the defendants have knowledge of the charges.

The decision to implement *in absentia* has placed an extra burden upon the already weak political system in Lebanon. The implications of any decision at the STL has a multiplied effect in Lebanon's politics. This thesis looks at the legal definition of *in absentia* and trial by *default* based upon previous legal systems, decisions, and tribunals. The thesis then looks at how *in absentia* is applied at the STL and what the political ramifications are for the use of this legal concept. The thesis finds that the STL adapted its legal understanding of *in absentia* to fit the political situation in Lebanon and the surrounding region. The thesis explains how the development of the international tribunal system and the history of politics in Lebanon has allowed the STL to wrongly justify *in absentia*'s use.

An Abstract of Exactly 274 Words

Keywords: Special Tribunal for Lebanon, *In Absentia*, Trial by *Default*, Lebanon, United Nations Security Council, United Nations, Rafik Hariri, Rule of Law, Due Process, Tribunal, International Law.

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Chapter 1

Introduction

1.1. Introducing *In Absentia* and Lebanese Politics

On February 14, 2005 an explosion occurred bringing the city of Beirut and the country of Lebanon to a halt.[1] The explosion, a common occurrence in Lebanese society and politics,[2] brought the attention of the United Nations and states throughout the world to focus on the small state of Lebanon.[3] The influence of Lebanese politics through violent acts was accepted in the state as part of the day to day business involved with being a politician.[4] The acts on February 14, 2005 created an abrupt interruption to the normal operations of Lebanon's political and judicial system.[5]

The intervention of the United Nations and a multitude of other states began with an internationally operated investigation and has culminated into the formulation of an international tribunal that at the time of this writing was prosecuting four individuals for their participation in the explosion.[6] The political atmosphere simultaneously throughout the investigation and trial has been noneffective and at times not working at all.

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[1] Report of the International Investigation Commission Established Pursuant to Security Council Resolution 1595, UNSC S/2005/662, (20 Oct. 2005).
[2] William Harris, *Investigating Lebanon's Political Murders: International Idealism in the Realist Middle East?*, 67 The Middle East Journal 1, 14 (Winter 2013)(stating that in a four-year time period from 2004 to 2008 there were 58 deaths and 335 wounded in 13 assassinations of local personalities).
[3] UNSC S/2005/662.
[4] Harris, *supra* note 2.
[5] UNSC S/2005/662.
[6] *Ibid*.; Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon art. 1(1), S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).

Lebanese politics have held a multitude of contentious issues since the initial establishment of Lebanon as an internationally respected state. Issues have varied throughout the state's existence, but the creation of the international tribunal, The Special Tribunal for Lebanon (hereinafter "STL" or the "Tribunal"), has combined controversial tribulations effecting the international tribunal system and the domestic systems in Lebanon. At discussion throughout the thesis is the complication and inability of Lebanon's government to operate sufficiently and the added pressure of the STL upon the politics in Lebanon. The complications are multiplied by the decision to proceed forward with the use of the controversial legal concept *in absentia*. The decision to use *in absentia* deviates from previous tribunals to stray away from the topic.

1.2. Thesis Statement

The use of *in absentia* has been discussed in a multitude of facets ranging from its use at domestic courts to the use in international tribunals.[7] At discussion here is the current use of *in absentia* at the international tribunal, the Special Tribunal for Lebanon. This thesis will discuss, "What are the legal justifications for hosting the Special Tribunal for Lebanon *in absentia* or as a trial in *default*, and does the Tribunal's legal integrity foster Lebanon's political stability?" The thesis will go further and attempt to understand why *in absentia* is currently being implemented at the STL, and if *in absentia* will allow the eventual decisions rendered by the court to

[7] *See generally*, Anne Klerks, *Trials in Absentia in International Criminal Law*, Tilburg University, 20 (2008)(Master's Thesis); Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights*, 33 Ford. Int'l L. J. 1 (2009).

stand up to international legal scrutiny. Lastly, the thesis will consider what the impact on Lebanon is, due to the continuation of the Tribunal *in absentia*.

The hypothesis for the thesis is that the Special Tribunal for Lebanon's use of *in absentia* has violated the defendants' rights to due process by holding a trial effectively by *default*. In addition, using *in absentia* has added to the precarious political situation in Lebanon. The concept of international tribunals was to be created in a society that was judicially ineffective while ensuring the stability of a society politically.[8] The thesis will investigate whether the STL can manage both aspects of the integral foundational keys to an international tribunal: legal integrity and political stability.[9] The thesis will discuss if the decision rendered to proceed with the trial through *in absentia* has undermined the ability of the STL, as a precedential tribunal that is venturing into a new dominion of international and domestic law, as well as politics. The thesis will also discuss the tribunal's implications to its own political and legal foundation by the implementation of complete *in absentia*, also known as trial by *default*, the STL can be developed and studied for future international tribunals. In this concept, future tribunals can continue the process of creating a uniform international tribunal system that can effectively hear and judicate over violations of international law in addition to domestic law.

[8] *E.g.* David Cox & Andrew O'Neil, *The Unhappy Marriage Between International Relations Theory and International Law*, 20 Global Change, Peace & Security 2 (June 2008).
[9] Yuval Shany, "Assessing the Effectiveness of International Courts," 31 (Oxford, 2014), stating that, "measuring international court effectiveness under the goal-based approach necessitates analysis specific to each respective institution." Thus, the analysis applicable to the STL is distinct in the fact that the Tribunal is applying domestic law to a domestic terrorism crime through an international mechanism.

1.3. Methodology

The organization of the thesis first analyzes the use of *in absentia* from a liberal, jurisprudential theoretical approach breaking down the practical application of *in absentia* in addition to the language defining *in absentia*. The thesis will review previous international tribunals' rulings and the application of *in absentia* to provide an understanding of the applicability and development of *in absentia* to the STL. Through the abovementioned theoretical approach, the thesis will give a clear and concise evaluation of the STL in regard to how *in absentia* is used in the international tribunal system and specifically to the STL's application of domestic Lebanese law for crimes during times of peace. From this analysis, the thesis will also provide a foundation to gauge the ability of the STL to reach a fair and justifiable verdict through *in absentia* for future tribunals to develop from. Then, the thesis' analysis will adopt a constructivist methodology to apply to the political discussion of Lebanon's current political state with the backdrop of the STL's use of *in absentia*.

1.4. Introduction to *In Absentia*

In absentia is a Latin phrase literally translating to "in the absence of."[10] The phrase has a legal application in that *in absentia* is used when the defendant cannot be in court for any phase of the criminal trial held against them. The reasonings for the inability of the defendant to be unable to attend trial proceedings varies throughout the legal systems in diverse jurisdictions. The most significant difference between

[10] Stan Starygin & Johanna Selth, *Cambodia and the Right to be Present: Trials In Absentia in the Draft Criminal Procedure Code*, Sing. J.L.S. 170, 171 (2005).

the uses of *in absentia* applies to the use in common law systems versus civil law systems. In general terms, common law systems only apply *in absentia* in proceedings of the criminal trial viewed as non-essential hearings for the defendant's due process rights with the exception of the initial appearance of a defendant at trial and the later disappearance of said defendant.[11] Conversely, civil law systems often apply *in absentia* when the absconding or an unruly defendant interferes with the pursuit of justice or restoration of crimes against society that are sought by the legal system.[12]

In absentia has faced a balancing test throughout its debated use and legal creation. On the one hand, the argument against *in absentia* revolves around the potential abuse by a government and possible inability to protect a defendants' due process and human rights. On the other hand, *in absentia* allows for the ability to bring crimes to trial that would typically not reach trial, the ability for society to heal, the truth to be presented in a public court, victims to have closure, and a legal system to avoid being stalled by an absconding or noncompliant defendant.[13] As stated by Ohlin, the idealistic goals for the prosecution of such crimes against society lay within "punishing perpetrators of international crimes, creating a historical record of atrocities, giving voice to victims through eye-witness testimony, and prospectively

[11] *See generally*, *Diaz v. United States* 223 U.S. 442 (1912); U.S., Federal Rules of Criminal Procedure, R. 43, advisory committee notes n.1–3 (1944); Illinois v. Allen, 397 U.S. 337, 346–47 (1970); Eugene Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial In Absentia and the Relinquishment of a Criminal Defendant's Right to be Present*, 96 Marquette Law Review 2 (2012).
[12] Starygin & Selth, *supra* note 10, at 173-175; *see also* Paola Gaeta, *Trial In Absentia Before the Special Tribunal for Lebanon*, in: "The Special Tribunal for Lebanon: Law and Practice." Oxford Univ. Press, 2014.
[13] *Starygin & Selth, supra* note 10, at 171.

strengthening norms of international humanitarian law."[14] Whether these goals can be achieved by holding a trial by *in absentia* is what is debated.

The courts of international foundation and courts based solely in domestic state jurisdiction have attempted to balance, to varying degrees of success, the due process rights of a defendant against the necessity of the courts to administer justice for grave acts committed against society.[15] The balancing test is apparent in common law, civil law, as well as hybrid tribunal systems created at the international level. Each of the aforementioned legal judicial systems have all allowed trials *in absentia* in one facet or another, which will be explained in a later chapter. The complications of the use of *in absentia* are typically furthered through the exasperation of domestic legal systems resulting from political influence.[16] Often, the inability for a legal system to remain unbiased in the face of political pressure is when the necessity of an international tribunal exists.[17]

As stated above, *in absentia* is a Latin phrase referring to the absence of the defendant.[18] Under the application of the legal concept of *in absentia*, the absence of the defendant is not required for all stages involved in the legal process from pre-trial, trial, and post-trial phases. In fact, there are typically two types of *in absentia* at focus when *in absentia* is discussed involving a legal system.[19] The first distinction is

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[14] Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. Int'l L. & For. Affr. 77, 83 (Spring, 2009).
[15] Shany, *supra* note 9.
[16] *See* Human Rights Watch, *Egypt: Shocking Death Sentences Follow Sham Trial: 529 Denied Right to Meaningful Defense, Face Capital Punishment*, March 24, 2014 (New York) available at: https://www hrw.org/news/2014/03/24/egypt-shocking-death-sentences-follow-sham-trial. (last accessed June 14, 2016).
[17] Shany, *supra* note 9.
[18] Starygin & Selth, *supra* note 10, at 171.
[19] *Ibid*.

when the defendant has attended at least the pre-trial phases of the legal process, the arraignment and indictment stages, and then the defendant absconds from the trial.[20] In this application of *in absentia* the court proceeds forward with trial on the basis that the defendant has had notice that the trial is ongoing and the legal integrity of the trial will not be impeded through the actions of a fleeing defendant.[21] This form of the legal application *in absentia* is used commonly throughout legal systems across the globe and is referred to as a *prima facie* waiver to a defendant's legal right to be present at trial.[22]

The second distinction occurs only when the defendant does not attend any stage of the legal process.[23] In this instance the defendant has never attended, been present, or actively participated in any phase of the legal process or trial. Furthermore, the defendant is often informed of the indictment against them through a third party or public communication method. Frequently, the second distinction is not permitted in a majority of states unless a clear wavier can be presented on the defendant's behalf.[24]

The two distinctions are similar in appearance but differ drastically in application as well as legal implications to the legal system. This section applies a brief and simple understanding of *in absentia*'s use in international tribunals as the topic will be discussed in more depth further in the thesis as will the legal concept of *in absentia*.

[20] Starygin & Selth, *supra* note 10, at 171.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid*.

1.5. Integrity of the Rule of Law

Societies have continually found those willing to prosecute crimes and punish offenders, but often a society is lacking in sufficient defense for those charged with atrocious crimes or those neglected by society.[25] If this is the case that a legal system provides a successful and well-furnished prosecution, but fails to provide a substantial defense, then is the legal system a mechanism of the government's will rather than a representation of its people? The barometer of how we judge these legal systems should be based on the mechanisms provided, not only for the enforcement of international laws and norms, but the protection of the rights for the defendant. This point holds validity in regard to the development and constant changing of international tribunals, and more specifically, the current use of an international tribunal for the assassination of Rafik Hariri. In fact, the current tribunal established for Lebanon's recent terrorist attack is placed at a crossroads of attempting to prosecute defendants that will likely never resurface to face the charges brought, or uphold the due process, and in correlation, the human rights of the defendants.[26] Hence, if the international Tribunal system disregards a defendant's human right to due process now, the current Tribunal may shift the international legal system down a path that will discount the human rights of defendants while attempting to paradoxically uphold human rights of victims and rule of law in society.

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[25] *See generally* Sioghán O'Grady, "One Reason Egyptian Mass Trials Are a Bad Idea: Four-Year-Olds Get Life in Prison," Foreign Policy, February 22, 2016, available at: foreignpolicy.com/2016/02/22/one-reason-egyptian-mass-trials-bad-idea-four-year-old-life-prison (last accessed June 14, 2016); David D. Kirkpatrick, "Hundreds of Egyptians Sentenced to Death in Killing of a Police Officer," The New York Times, March 24, 2014; & Human Rights Watch, *Unequal and Unprotected: Women's Rights under Lebanese Personal Status Laws*, (January 19, 2015).

[26] *See* Anne Barnard & Sewell Chan, "Mustafa Badreddine, Hezbollah Military Commander, Is Killed in Syria," The New York Times, June 9, 2016 (writing that the death of defendant *in absentia* Mustafa Badreddine occurred following an explusion in the suburbs of Damascus, Syria). The death of Mustafa Badreddine can be used as a basis for the argument on behalf of hosting trials *in absentia* but ignores the repercussions to future international tribunals and legal systems.

A legal system's legitimacy is not found within society's willingness to prosecute crimes against individuals or crimes committed against society as a whole. Instead, a legal system's legitimacy is found in society's willingness to provide a fair, balanced trial and an adequate defense for persons accused of even the most heinous of crimes. As the French writer and philosopher François-Marie Arouet, better known as Voltaire, once wrote, "C'est de que les Nations tiennent ce grand principe, qu'il vaut mieux hazarder de sauver un coupable que de condamner un innocent."[27] The phrase literally translates to, "[i]t is from that the Nations hold this great principle, that it is better to risk saving a guilty man than to condemn an innocent one," and this idea was used as the developing concept for much of France's civil legal system.[28] William Blackstone analogously stated, "[b]etter that ten guilty persons escape than that one innocent suffer."[29] Similar to the development of the French civil legal system, the 'Blackstone Ratio' has become (or representative of) the foundation for common law systems throughout the world that have been created upon the developed legal system in England.[30] These philosophical concepts in which common and civil law (Roman law) systems have developed from should also hold substantial representation in the hybrid courts developed from therein.

The difficulty with international tribunals is what the tribunals are created for, how they develop, and what they represent. Better stated, "[i]nstitutions are given

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[27] Voltaire, "Zadig, ou La Destinée," Ch. 6 at 28 (Marcel Didier 1962).
[28] *Ibid*.
[29] William Blackstone, "Commentaries on the Laws of England," Book 4, Ch. 27 at 358 (Claredon Press 1765-69).
[30] *E.g.* Article 39 of *Magna Charta Libertatum* (also known as the Great Charter of Freedoms 1215), stating that "[n]o freeman shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgment of his peers or the law of the land"; *see also* Artur Malaj, *Reflection of the Due Process Standards in Judgment in Absentia*, 1 Academic Journal of Interdisciplinary Studies 4, 135 (March 2015).

meaning and relevance not only by how they are used, but also by how we conceive their role and how the environment in which they operate is perceived. Institutions can and will be changed by shifting material circumstances and a reconceptualization of their roles."[31] This point holds validity in regard to the development and constant changing of international tribunals, and more specifically, the current use of an international tribunal for the assassination of Rafik Hariri.

The next step in a tribunal's analysis after the scrutinizing of the rule of law, is the political cohesion the tribunal allows for the government to hold. International tribunals have been created in regions or states that experienced weak governance and impotent judicial systems.[32] Hence, most international tribunals, as is the case with this Tribunal here, were created with the intent of ensuring legal application of the rule of law in a country that it goes unenforced as well as political stability in a region that has been plagued with civil war and internal strife.[33]

The discussion of what laws are applied at an international tribunal are equally important to the meaning of the institution and the political stability associated with the tribunal. Previous tribunals have attempted to involve laws applied domestically in the states that are involved.[34] Typically, this brings minimal disparages to the rule of law or the application of the rule of law. Consequently, the STL has proceeded forward with the specific legal concept of *in absentia*, which has brought significant

[31] Cox, *supra* note 8, at 201; *see also* Christian Reus-Smit, 'The Politics of International Law,' in The Politics of International Law, ed. Christian Reus-Smit (Cambridge University Press, 2004).
[32] Shany, *supra* note 9, at 37.
[33] Shany, *supra* note 9, at 40-41, (stating that, "international courts grew out of the movement towards the pacific settlement of disputes, founded as permanent institutions for resolving international conflicts through legal means. Thus, a quintessential judicial function and a plausible goal of international adjudication is to resolve specific conflicts of interests whose prolongation or exacerbation may harm international relations, cooperative structures, and peaceful coexistence.").
[34] Klerks, *supra* note 7.

examination.

In chapter two, I will examine the previous literature focusing on the STL and focus specifically on literature discussing the use of *in absentia*. The third chapter will discuss the background in regard to the political and legal situation that perpetuated the creation of the STL. The fourth chapter will define *in absentia* and trial by *default*. The fourth chapter will also focus on the use of *in absentia* across several international tribunals developed since the end of World War II as well as discussing prominent common law and civil law systems practices and uses of *in absentia*. The fifth chapter will disseminate the use of *in absentia* at the STL and the complications specific to the STL affect the defendants' due process rights. The sixth chapter will analyze the implication of *in absentia* on the Lebanese political system. The sixth chapter will also discuss issues symbolizing the polarization of politics with *in absentia* as a backdrop to one of the main dividing factors in modern day Lebanese politics being the terrorism attack killing Rafik Hariri. The chapter will explain how the use of *in absentia* is a continuation for the polarization in Lebanese politics. The final chapter will concentrate on the impact made to the international tribunal system and the progress for tribunals under the use of *in absentia*. The thesis will also conclude with a review of the previous chapters and provide a summation to the answer for the question at hand.

Chapter 2

Background on the Special Tribunal for Lebanon

2.1. February 14, 2005

On February 14, 2005 at about 12:50 p.m. Lebanon's ex-Prime Minister Rafik Hariri left Nejmeh Square in Beirut heading towards Kuraytem Palace.[35] Hariri was traveling in a motorcade of six cars that included his security detail and a member of Lebanon's Parliament.[36] As the motorcade passed by St. George Hotel at Minae al-Hosn Street on the way to drive down the Corniche a massive bomb was detonated instantly killing Hariri and Fleyhan as well as twenty-one other individuals.[37] The "Report of the Fact-Finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri," better known as the Fitzgerald Report, was conducted from February 25, 2005 to March 24, 2005.[38] The Fitzgerald Report described the final moments of Hariri's life just prior to the explosion displaying how sophisticated, well-planned, and organized of an operation the attack was.

The Fitzgerald Report quickly found that it was, "clear that the assassination took place in a political and security context marked by an acute polarization around the Syrian influence in Lebanon and a failure of the Lebanese State to provide adequate

[35] Report of the International Investigation Commission Established Pursuant to Security Council Resolution 1595, UNSC S/2005/662, (20 Oct. 2005).
[36] *Ibid*.
[37] *Ibid.* at 20.
[38] Report of the Fact-Finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri (Fitzgerald Report)(2005, Mar). Retrieved Mar, 2017.

protection for its citizens."[39] The report stated there was a political principle behind the assassination even though the report was unable to state who was behind the explosion. Even more so, the Fitzgerald Report found that the assassination left Lebanon in political chaos and an upheaval.[40] "Immediately after the assassination, the political spectrum was divided between 'opposition' and 'loyalty' camps, crystallizing around the position towards the current Lebanese government/president and the existing Syrian/Lebanese relationship."[41] Many protestors took to the streets calling for the resignation of the chiefs of the security agencies, the Syrian military to exit Lebanon, a new neutral government in lieu of the upcoming elections, and the establishment of an international investigation.[42] The 'loyalty' camp responded by holding a protest on March 8, 2005 with approximately a half million people in support of the Syrian President and regime under Bashir al-Assad as well as Hezbollah.[43] The opposition held a protest on March 14, 2005 in resistance of the 'loyalty' camp, al-Assad, and Hezbollah. The March 14th protest was estimated to have over one million people participating and again called for 'independence' of Lebanon as well as the resignation of the chiefs of the security agencies, the Syrian military to exit Lebanon, a new neutral government in lieu of the upcoming elections, and the establishment of an international investigation.[44]

The protests described above are what still constructs the political divide in Lebanon at the time of this writing, the March 8th coalition and the March 14th coalition. The

[39] Fitzgerald Report, *supra* note 38. at 5.
[40] *Ibid*, at 17 (concluding that, "[t]he assassination of Mr. Hariri had an earthquake-like impact on Lebanon. Shock, disbelief, and anxiety were the most common reactions among the people with whom [the writers of the Fitzgerald Report] spoke.").
[41] *Ibid*. at 18.
[42] *Ibid*. at 19.
[43] *Ibid.* (adding that after the March 8th protest al-Assad agreed to withdraw the Syrian forces to the Beqa'a Valley to implement the Taef Agreement in addition to withdrawals to the Syrian border).
[44] *Ibid*.

following list is the timeline starting from mid-2004 to September 2005 leading up to, affecting, and influencing the eventual creation of the STL:

- "26 August 2004, Rafik Hariri meets in Damascus with Syrian President Bashar Al-Assad to discuss the extension of the term of President Lahoud.
- 2 September 2004, the United Nations Security Council adopts resolution 1559 (2004) concerning the situation in the Middle East, calling for the withdrawal of all foreign forces from Lebanon.
- 3 September 2004, the Rafik Hariri bloc approves the extension law for President Lahoud.
- 3 September 2004, the Lebanese Parliament adopts the extension law for President Lahoud and forwards it to the Lebanese Government for execution.
- 7 September 2004, Economy Minister Marwan Hamadeh, Culture Minister Ghazi Aridi, Minister of Refugee Affairs Abdullah Farhat and Environment Minister Fares Boueiz resigned from the Cabinet in protest at the constitutional amendment.
- 9 September 2004, Prime Minister Rafik Hariri indicates to journalists that he will resign.
- 1 October 2004, assassination attempt on Marwan Hamadeh, in Beirut, Lebanon.
- 4 October 2004, Rafik Hariri resigns as prime minister.
- 11 October 2004, Syrian President Bashar Al-Assad delivers a speech condemning his critics within Lebanon and the United Nations.
- 19 October 2004, United Nations Security Council expresses concern that resolution 1559 (2004) has not been implemented.
- 20 October 2004, President Lahoud accepts Hariri's resignation and names Omar Karame to form the new government. 2005
- 14 February 2005, Rafik Hariri and 22 other individuals are killed in a massive blast in a seafront area of central Beirut.
- 25 February 2005, the United Nations Fact-finding Mission arrives in Lebanon.
- 8 March 2005, Hezbollah organizes a one million strong "pro-Syrian" march.
- 14 March 2005, a Christian/Sunni-led counter-demonstration demands the withdrawal of Syrian troops and the arrest of the chief of the security and intelligence services.
- 19 March 2005, a bomb explodes in Jdeideh, a northern suburb of Beirut, wounding 11 people.
- 23 March 2005, three people are killed and three others wounded in an explosion in the Kaslik shopping centre, north of Beirut.
- 25 March 2005, the United Nations Fact-finding Mission issues its report in New York.
- 26 March 2005, a suitcase bomb explodes in an industrial zone in north-east Beirut, injuring six.
- 1 April 2005, nine people are injured in an underground garage in an empty commercial and residential building in Broumana.
- 7 April 2005, the Security Council forms the United Nations International Independent Investigation Commission into the assassination of Rafik Hariri and 22 others on 14 February

2005.

- 19 April 2005, Lebanon's Prime Minister Najib Mikati announces that parliamentary elections will be held on 30 May 2005.
- 22 April 2005, General Jamil Al-Sayyed, head of the Internal Security Forces, and General Ali Al-Hajj, head of the Sûreté générale, decide to put their functions at the disposal of Prime Minister Najib Mikati.
- 26 April 2005, the last Syrian troops leave Lebanon ending a 29-year military presence.
- 26 April 2005, the United Nations Verification Mission starts its mission to verify the complete withdrawal of Syrian military and intelligence agents from Lebanon and its full compliance with resolution 1559 (2004).
- 6 May 2005, a bomb explodes in Jounieh north of Beirut injuring 29 people.
- 7 May 2005, Parliament convenes to adopt the proposed changes to the electoral law of 2000.
- 30 May 2005, the first round of the elections was held. The Rafik Hariri Martyr List, a coalition of Saad Hariri's Future Movement, the Progressive Socialist Party and the Qornet Shehwan Gathering, won the majority of the seats in Parliament.
- 2 June 2005, journalist Samir Kassir is killed when his car explodes in east Beirut.
- 21 June 2005, former Lebanese Communist Party leader George Hawi is killed when his car explodes close to his home in Wata Musaytbeh.
- 30 June 2005, Fouad Siniora, former finance minister under Rafik Hariri, forms the new government composed of 23 ministers.
- 12 July 2005, Defence Minister Elias Murr is wounded and two other people are killed in a car bomb attack in Beirut.
- 22 July 2005, at least three people are wounded near rue Monot when a bomb explodes in the Ashrafieh quarter.
- 22 August 2005, three persons are injured in an explosion in a garage near the Promenade Hotel in the Al-Zalqa area north of Beirut.
- 16 September 2005, one person is killed and 10 others wounded by a bomb near a bank in Ashrafieh.
- 19 September 2005, one person is killed and two wounded in a small explosion at the Kuwaiti information office in Beirut.
- 25 September 2005, a car bomb injures prominent news anchor, May Chidiac, in north Beirut."[45]

The eventual determinations made in the first release of the "Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005)," also known as the "United Nations International Independent Investigation Commission" (hereinafter "UNIIIC"), were released on 19

[45] UNSC S/2005/662, at 7-9.

October 2005 by Detlev Mehlis. The report concluded that pursuant to the timeline listed above, there was a significant amount of "evidence pointing at both Lebanese and Syrian involvement in this terrorist act… [and] the likely motive of the assassination was political."[46] The report also concluded that, "[g]iven the infiltration of Lebanese institutions and society by the Syrian and Lebanese intelligence services working in tandem, it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out without their knowledge."[47] The report concluded there was a complex situation with a neighboring country, Syria, holding a significant role in the assassination of Hariri while simultaneously having power and control within the Lebanese government and security apparatuses in addition to displaying a willful desire to not cooperate and mislead the UNIIIC.[48] The actions of Syria can be understood by the interpretation of the UNIIIC by some states to only operate under a "voluntary framework negotiated between states to regulate their cooperation in criminal matters."[49] Thus, "[t]he most serious consequence of the lack of cooperation with the investigation is that the arrest of [five] individuals indicted for the Hariri attack has so far been impossible."[50]

[46] UNSC S/2005/662, para. 216-217.
[47] UNSC S/2005/662, at para. 217 (explaining also, "a well-known fact that Syrian military intelligence had a pervasive presence in Lebanon at the least until the withdrawal of the Syrian forces…[and] [t]he former senior security officials of Lebanon were [Syria's] appointees.").
[48] *Ibid*. at para. 215-223 (stating that the Syrian authorities needed "to clarify a considerable part of the unresolved questions[,]" held "initial hesitation" to cooperating with the investigation, attempted to "mislead the investigation by giving false or inaccurate statements[,]" and "[t]he letter addressed to the Commission by the Foreign Minister of the Syrian Arab Republic proved to contain false information.").
[49] Amal Alamuddin & Anna Bonini, *The UN Investigation of the Hariri Assassination*, at 69 in: "The Special Tribunal for Lebanon: Law and Practice." Oxford Univ. Press, 2014.
[50] *Ibid.* at 68.

2.2. History of Lebanon's Violence and Assassinations

Lebanon has been plagued with turmoil, political corruption, violent wars, and a strew of assassinations dating back to well before the Lebanese Civil War.[51] In fact, Lebanon has a long history of internal conflict with the influence of neighboring states in said conflicts and associated political issues.[52] To best understand the eventual determination for the creation of the STL via the United Nations Security Council, the long history of turmoil and religious conflict in Lebanon must be understood. Furthermore, the specific rules and regulations used by the STL need to be understood through the analysis of the eventual development of the legal system established in Lebanon that was cultivated from the French civil judiciary system.

The relationship between Lebanon and France was cultivated during the colonization of Lebanon and carried on even through the eventual independence gained by Lebanon.[53] Lebanon was established under the gerrymandering of France so that on November 22, 1943 after several long struggled bouts with the French colonial power, Lebanon was an independent state with a fifty-one percent majority population being Christian.[54] The creation of Lebanon and the use of a consoctionalism governmental system that directly allotted Parliament seats and high ranking government positions based upon the religion of the elected official.[55]

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[51] Imad Salamey, "The Government and Politics of Lebanon," at 26-37 (Routledge, 2014).
[52] Salamey, *supra* note 51.
[53] *Ibid*. at 26-37.
[54] *Ibid*. at 29.
[55] *Ibid*. (explaining that the political positions are delegated as a Maronite President, Sunni Prime Minister, Shia President of National Assembly (Parliament Speaker), and Greek Orthodox Deputy Speaker of Parliament, but the religious association have never been written or specifically stated in the Constitution or any other government document.[55] In reality, the positions have long been agreed upon in a 'gentlemen's agreement' called the National Pact and the religious parties have continually abided by the agreement.)

The balancing of Lebanon's governmental powers as well as appointed and elected officials via religion, and their attendant religiously affiliated political parties, continues to cause strife throughout the small Mediterranean state.[56] The majority of the power was originally given to the President and, by extension, to the decreasing Christian population. The Taef Accord, which officially brought an end to the 15-year war, relegated power of the Maronite President, but did not discuss parliamentary seats.[57] Today, while parliamentary seats and the key political leadership posts are accorded on a 50-50 basis (Muslim-Christian), the actual population is approximately 70-30 (Muslim-Christian).[58] The compounded issues facing Lebanon and the region, as well as the assassination attempt on the life of Pierre Gemayel, caused the final spark igniting Lebanon into a civil war between Christians and Muslims.[59] As the war progressed the different factions changed sides multiple times in hopes of garnishing more power.

The Lebanese civil war was a political mess with Syria and Israel both establishing military presences in the small state trying to quell the violence while pushing their own personal agenda.[60] Specifically, Syria under Hafez al-Assad, Bashir al-Assad's father, attempted to play the role of mediator multiple times between rival groups throughout the civil war in hopes of creating a Lebanese state, following the end of the civil war, that was acquiescent to Syrian control.[61] The allegiances changed

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[56] Salamey, *supra* note 51, at 30.
[57] *Ibid*. at 30.
[58] Tala Ramadan, "New Report Reveals Substantial Demographic Changes in Lebanon," *An-Nahar*, 29 July 2019, https://en.annahar.com/article/1002964-new-report-reveals-substantial-demographic-changes-in-lebanon (last visited February 2, 2020).
[59] Salamey, *supra* note 51, at 41. Pierre Gemayel was the leader and founder of the Kataeb Party, also referred to as the Phalangist Party, and opposed the Arab Nationalist movement while supporting the implementation of foreign troops in Lebanon.
[60] *Ibid*. at 46-47.
[61] Robert M. Bosco, *The Assassination of Rafik Hariri: Foreign Policy Perspectives*, 30 Int'l Political Science Review 4, 351 (2009); Salamey, *supra* note 51, at 48-49. (At one point, the Christian

multiple times throughout the civil war, and more specifically, these allegiances are not representative of the allegiances at the time of this writing, or on February 14, 2005.[62]

The Lebanese Civil War officially ended on October 22, 1989 with the signing of the Taef Agreement, but the violence continued following the signing.[63] The car bomb killing Rene Moawad, Lebanon's first President following the signing of the Taef agreement, just one month following the agreement, looked to unsettle the loosely based peace deal.[64] In January of the following year, General Aoun attacked the Lebanese Forces militia bringing East Beirut to chaos once again and allowed the opportunity for Syria to further involve itself in Lebanese politics.[65] General Aoun left in exile and his supporters were defeated and many of his supporters were executed at their stronghold around the Presidential Palace.[66] The United States and its allies, namely Israel, did not object or put a stop to the Syrian military operation that quelled General Aoun's uprising.[67] At the time, the United States were focused on their first Iraqi war and Saddam Hussein, which allowed al-Assad and the Syrian

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Maronites were divided fighting each other, with the Lebanese forces fighting against the militia under General Michel Aoun, who was himself supported by Saddam Hussein's Iraq to counter balance Iran's influence in the region with Hezbollah. Simultaneously, the Shia in Lebanon were divided between the Amal party, supported by Syria and the President Hafiz al Assad, and Hezbollah, who was supported by Iran.)

[62] The current shift in alliances in Lebanon has since changed considering that Syria under Bashir al-Assad, Iran, and Hezbollah form the pact of Moumana'a and the Amal party, Hezbollah, and Michel Aoun's Free Patriotic Movement, or the Orange party, form the primary influences of the March 8th political party in Lebanon. *E.g.* Thomas Esposito, *Political Integration of Hezbollah into Lebanese Politics* (June 2009) (unpublished M.A. theses, Naval Postgraduate School); Camille Germanos, *Hizbullah and the Free Patriotic Movement: The Politics of Perception and the Failed Search For a Naitonal Territory*, 4 The Sing. M.E. Papers (2013).

[63] Salamey, *supra* note 51, at 56 (writing that the agreement is named for the city al-Taef, Saudi Arabia in which the negotiations occurred that the members of the 1972 Lebanese Parliament finally achieved the agreement).

[64] *Ibid*. at 58.

[65] *See generally* Bosco, *supra* note 61.

[66] Salamey, *supra* note 51, at 58.

[67] *Ibid*.

government to gain unchecked control in Lebanon.[68]

Estimations have varied, but reports have indicated the Lebanese Civil War left approximately 144,000 dead, 185,000 wounded, over 17,000 more missing, 14,000 handicapped, more than 2,000 women murdered after having been raped, and almost one million persons forcibly displaced during the war, all of which were primarily civilians.[69] While from 1990 to 2004, Lebanon acquired a relative peace from assassinations most likely due to the majority of politicians appeasing the Syrian hegemonic government.[70] Shortly trailing the ingress of Syria, in 1991 an amnesty law was passed by parliament pardoning all political crimes committed during the civil war with a few exceptions and all the militias were dissolved, with the significant exception to Hezbollah.[71] The 1991 amnesty law left a noteworthy impact on Lebanese politics as it "granted immunity for perpetrators of large-scale atrocities but not for the assassination of political leaders…[because] accountability of leaders for their mass crimes, it was argued, risked political instability."[72]

Following the end of the civil war until 2004 almost all politicians and elite persons in Lebanese society were either loyal to the Syrian government or became 'clients' of the Syrian government.[73] Thus, the need for any form of violence or assassinations was likely deemed not necessary because other options became available with Syrian

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[68] Salamey, *supra* note 51, at 58; Bosco, *supra* note 61, at 351.
[69] Michael Humphrey, *The Special Tribunal for Lebanon: Emergency Law, Trauma and Justice*, 33 Arab Studies Quarterly J. 1, 17 (2011)(stating that, "90 percent of whom were civilians."); Marieke Wierda, Habib Nassar, & Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for* Lebanon, J. of Int'l Crim. Jus. 5, 1068 (2007); *see also*, Iolanda Jaquemet, *Fighting Amnesia: Ways to Uncover the Truth about Lebanon's Missing*, 3 The Int'l J. of Transitional Justice 1, 69-90 (2009).
[70] Salamey, *supra* note 51.
[71] *Ibid*. at 58.
[72] Humphrey, *supra* note 69, at 17.
[73] Harris, *supra* note 2.

intelligence operating in Lebanon to monitor all events, especially politics, and Syria operating protection rackets and kickback schemes.[74] For example, Lebanese Army commander Emile Lahoud operated the Army, and thereafter President of Lebanon, with direct association to the Syrian military intelligence and Michel Murr, the former Pro-Syrian Interior Minister for Lebanon, used an internal security network to incarcerate and harass adversaries of the Syrian regime.[75] As noted by Bosco, this establishment of such a network to control Lebanese politics and the economy foreshadow the events of Hariri's assassination.

Violence quickly returned to Lebanon under the watchful eye of Syria as a pro-West anti-Syrian political following began to gain traction. Many Sunni and Christian businessmen and politicians began operating in a fashion not congenial to the desires of the Syrian government now operating under Hafiz al-Assad's son, Bashir al-Assad. In the 2000's the relationship between Lebanon and Syria began to change and many other Sunni and Christian politicians and businessmen reacted against the brash, young Bashir al-Assad's hostilities in Lebanon.[76] The pro-Syrian President Lahoud attempted to extend his presidency with the support of the al-Assad regime against the wishes of Hariri and several other Lebanese members of Parliament.[77] In fact, on August 26, 2004, it was reported that Hariri had a meeting with al-Assad at the presidential palace in Damascus, Syria.[78] In the meeting it was said that al-Assad stated, "It will be Lahoud. I will break Lebanon over your head and over Walid Jamblatt's head. So you had better return to Beirut and arrange the matter on that

[74] Harris, *supra* note 2.
[75] Bosco, *supra* note 61, at 352.
[76] Harris, *supra* note 2, at 15.
[77] Samer Abboud & Benjamin Muller, *Geopolitics, Insecurity and Neocolonial Exceptionalism: A Critical Appraisal of the UN Special Tribunal for Lebanon*, Security Dialogue 44, 470 (2013).
[78] Ronen Bergman, "The Hezbollah Connection," The New York Times, February 10, 2015.

basis."[79] Assad denied vehemently that he ever made these statements.[80] By this point, however, a growing international alliance resulted in UN Security Council Resolution 1559, passed in September 2004, calling for the removal of Syrian and all other foreign forces in Lebanon and for Lebanon to host a free and fair presidential election.[81] In contrast, the following day a resolution was passed by Lebanon's Parliament allowing for an extension to Lahoud's presidential term causing a mass exodus of members of Parliament including Hariri.[82] The most prominent face of anti-Syrian movement became Hariri, which added to the distrust Bashir al-Assad held for Hariri regarding Hariri's Saudi and Western relationships.[83] Hariri, who was initially a 'client' of Syria in the 1990's under Hafiz al-Assad while Hariri was operating his construction company Solidere, began to display a divergence from the Syrian regime.[84] On October 20, 2004 Hariri resigned from office and began to put his attention to the regional elections in hopes that a new government would put him back as Prime Minister.[85]

The level of political violence shifted significantly thereafter. From October of 2004 to January of 2008, there were 58 people killed and approximately 335 wounded.[86] The ongoing dilemma of each assassination and killing of innocent persons went

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[79] Bergman, *supra* note 78. (It is important to note that al-Assad denies ever threatening Hariri or Jamblatt in any manner during the meeting. It should also be noted that Hafez al-Assad had a history of being implicated in Lebanese political assassinations and was specifically accused by opposing political factions in Lebanon for the assassination of Walid Jamblatt's father, Kamal Jumblatt, in 1977 and the Maronite Christian President-elect Bashir Gemayel in 1982.).
[80] *Ibid*.
[81] Security Council Declares Support for Free, Fair Presidential Election in Lebanon; Calls for Withdrawal of Foreign Forces There, S.C. Res. 1559, Annex, U.N. Doc. S/RES/1559 (2 September 2004); *see also* Abboud & Muller, *supra* note 77, at 470; Bergman, *supra* note 78 (stating that, "the Syrians suspected, not without justification, that Hariri was involved [getting Resolution 1559 passed].").
[82] Abboud & Muller, *supra* note 77, at 470.
[83] Harris, *supra* note 2, at 15.
[84] *Ibid*. at 15; *also* Abboud & Muller, *supra* note 77, at 470.
[85] Bergman, *supra* note 78.
[86] Harris, *supra* note 2, at 9.

unanswered by Lebanese law and was ignored by the United Nations.[87] The constant onslaught of bombings and shootings had historically occurred without any repercussions or respect to the rule of law in Lebanon.[88] It is likely that the fear that Syria had its hand in many of the attacks vicariously through Hezbollah's actions also was a worry resulting in lack of prosecutions.[89]

The United Nations and Lebanon's regional neighbors finally were forced to take notice on February 14, 2005 when Rafik Hariri's was assassinated. Hariri's death held substantial political complications and led to the intervention by the United Nations and the Security Council.

2.3. Creation of the Special Tribunal for Lebanon

The STL was created upon the basis of an agreement between the United Nations and the Lebanese Republic.[90] The debate regarding the creation and legitimacy of the Tribunal is at dispute *politically* in Lebanon, but that is not at discussion here.

As stated above, the creation of the STL was formed following a massive explosion that occurred in Beirut taking the lives of twenty-three people including, the target of the attack, Lebanon's former Prime Minister Rafik Hariri.[91] Yet, the explosion and concurrent assassination of the former Prime Minister was only one of many of politically linked assassinations that have occurred since the end of the long civil war

[87] *E.g.* Wierda et. al., *supra* note 69, at 1065-1081 (2007).
[88] Harris, *supra* note 2, at 9.
[89] *Ibid*.
[90] Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon art. 1(1), S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).
[91] Harris, *supra* note 2, at 9.

that engulfed Lebanon's daily affairs for fifteen years.[92] The assassinations have included Lebanese presidents, parliament members, journalists, high ranking political party members, investigators, military officers, and other activists involved in Lebanon's political and economic affairs.[93]

The assassination of Rafik Hariri had a different effect on Lebanon than the many assassinations that had occurred previously and subsequently, however. As mentioned above, the assassination spurred the historical protests in March 2005 that now define the political arena in Lebanon between the March 8 coalition and the March 14 coalition.[94] What is more, and the focus of this thesis, the assassination of Prime Minister Rafik Hariri laid the foundation for the precedential international tribunal to prosecute those responsible for the assassination of Rafik Hariri, the STL.[95] The STL was established outside of Lebanon in The Hague, Netherlands, in a conjoined effort between the Lebanese government and the UN.[96] On May 30, 2007 under the UN Security Council Resolution 1757, the STL was officially created and granted the responsibility to specifically investigate and prosecute the perpetrators of the Rafik Hariri assassination and any other attacks connected during or occurring between October 1, 2004 and December 12, 2005 or any later date.[97]

Before the creation of the STL, and shortly following the explosion in Beirut killing Hariri, the Security Council passed Resolution 1595 on 7 April 2005.[98] Security

[92] Harris, *supra* note 2, at 9.
[93] *Ibid*.
[94] Fitzgerald Report, *supra* note 38, at 19.
[95] UN Doc. S/RES/1757 (2007).
[96] *Ibid.*
[97] *Ibid*.
[98] UN Doc. S/RES/1595 (7 April 2005).

Council Resolution established the UNIIIC as described above in direct correlation to the assassination of Rafik Hariri.[99] Resolution 1595 was an answer to the violence that had been treated with impunity in Lebanon in the past.

Although the Security Council had been involved in the investigation and monitoring the situation from the onset of the assassination of Hariri, the Tribunal was eventually created based on the foundation found in a letter sent to the Secretary General of the United Nations from the Prime Minister of Lebanon at that time, Fouad Siniora.[100] The letter requested the Secretary General to "establish a tribunal of an international character to try all those who are found responsible for the assassination of the late Prime Minister…and to expand the mandate of the International Independent Investigation Commission or create an independent international investigation commission to investigate the assassination attempts and assassinations and explosions that took place in Lebanon starting with the attempt on the life of Minister Marwan Hamade on 1 October 2004."[101] The Prime Minister wrote the letter on 14 May 2007 without the official support of Parliament because the Speaker of Parliament refused to convene the Assembly or receive any documents.[102]

Nicohlas Michel explained that at the time the letter was written, "six ministers, out

[99] UN Doc. S/RES/1595 (7 April 2005).
[100] UN Doc. S/2005/783 (2005).
[101] *Ibid*.
[102] Nicholas Michel, *The Creation of the Tribunal in its Context*, at 23 in: "The Special Tribunal for Lebanon: Law and Practice." Oxford Univ. Press, 2014 (writing, "(a) for all practical purposes the domestic route to ratification had reached a dead end, with no prospect for a meeting of parliament to complete formal ratification; and that (b) despite their stated support for the establishment of a tribunal, the opposition has declined to discuss with Mr. Michel any reservations they may have on any of the agreed statutes." Citing, Annex to Letter Dated 15 May 2007 from the Secretary-General to the Security Council, UN Doc S/2007/281 (2007) [Letter Dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General].).

of a total of twenty-four, from Hezbollah, Amal, and the Free Patriotic Movement… suspend[ed] their participation in the Council of Ministers…[and] [o]n April 2007, seventy members of parliament, a majority, submitted to the Secretary-General a petition describing their unsuccessful attempts to have the parliament convened and requesting that all necessary measures be taken to establish the Tribunal."[103] What is more, "all the members of the majority supported the ratification of the treaty…[and] [n]one of the representatives of the opposition opposed the creation of the Tribunal."[104] Instead, the opposition parties simply desired different approaches.[105] In fact, Hezbollah stated, "its unwillingness to discuss the establishment of the Tribunal, and to share with the United Nations its proposals for amendments to the Treaty and/or the statute, until an agreement in principle had been reached for the creation of a government of national unity that would provide them with a blocking or controlling share of the seats in the cabinet."[106] Even more so, the Speaker of Parliament, Nabih Berri who is a member of the Amal Party, openly stated that the problem was not necessarily the Tribunal, but instead the configuration of the government and thus questioned the constitutional legitimacy of the government to hold a vote at all.[107]

Eventually, in response to the letter from the Prime Minister the Security Council approved Resolution 1757 (2007) on 30 May 2007.[108] The Resolution was the first instance that the Security Council was not unified in a decision in regards to the

[103] Michel, *supra* note 102, at 21-23.
[104] *Ibid*. at 23.
[105] *Ibid*.
[106] *Ibid*.
[107] *Ibid*. (The Amal Party is a Shiite-based political party that is aligned with Hezbollah and the March 8 coalition).
[108] Record of the Security Council's 5685th Meeting, UN Doc S/PV.5685 (2007)(stating that ten votes in favor, none in opposition, and five abstentions consisting of the Russian Federation, the Republic of China, Indonesia, Qatar, and South Africa); *see also*, Michel, *supra* note 102, at 24-25.

investigation and eventual creation of the STL.[109] The creation of the STL in itself was a political decision by the Security Council (and in correlation the international community) to ignore the prior bloodshed, and instead focused on one assassination and the repercussions from the violence that followed.[110] In fact, the STL was the first instance in the long history of violence that the international community decided to take notice of the political violence in Lebanon.[111] The previous statement considered, it is difficult to separate the political interests of outside States as well as political parties within Lebanon to create the STL.[112] Albeit if the STL was not created it is hard to believe the Hariri assassination would have been investigated and legal scrutiny placed upon the crime.

Since the inception of international criminal law during the IMTs at Nuremburg and Tokyo (Far East) following the atrocities of World War II, the international legal system has been developing further and further.[113] In correlation with this thesis, the IMT at Nuremburg was the last international tribunal held in which a defendant was tried in total *in absentia*.[114] Since the IMT at Nuremburg has concluded, all defendants tried in international tribunals by *in absentia* have at least been present at one portion of the trial.[115]

[109] Michel, *supra* note 102, at 25.
[110] *Generally*, Gaeta, *supra* note 12.
[111] Salamey, *supra* note 51.
[112] Michel, *supra* note 102.
[113] Kirsten Sellers, "Imperfect Justice at Nuremberg and Tokyo," 21 The European Journal of Int'l Law 4, (2011). Found in Guénaël Mettraux (ed). *Perspectives on the Nuremberg Trial*. Oxford: Oxford University Press, 2008, 832.
[114] *Ibid*.
[115] Jenks, *supra* note 7.

Chapter 3

Literature Review and History of *In Absentia* versus Trial by *Default*

The formation of the STL as well as its application of *in absentia* has become a much debated topic with considerable ramifications politically, socially and ethically. From its conception in 2007, to its present day trial, the STL has had to continually justify its existence, and more importantly, its decision to allow a trial to take place in the absence of the defendants, an event that has not taken place since the International Military Trials (hereinafter "IMT") in Nuremberg that saw the conviction of the accused *in absentia.*[116] The question of whether the circumstances leading to the formation of the STL and the indictment of the accused justifies a trial by *in absentia* has both its detractors and its advocates. This review intends to critically analyze both sides of the argument and succinctly present opposing views and stances for, and against, the incorporation of in absentia trial in the STL as well as a clarification and summarization on the different ways *in absentia* can be applied and interpreted.

The creation of the IMT could be considered an initial template for other international tribunals, and eventually the STL. It was the first instance of an *in absentia* trial and saw the conviction *in absentia* of its accused, Martin Bormann, head of the Nazi Party Chancellery at the IMT.[117] Principals taken from civil and common law systems of the founding member states, specifically, the United States,

[116] Mohammad Hadi Zakerhossein & Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals*, 26 Crim. L. Forum 181, 1 (2015)(writing "Both the International Military Tribunals (IMTs) in Nuremberg and Tokyo recognized the in absentia trial and in Nuremberg one accused was actually convicted in his absence.").
[117] *Ibid*.

United Kingdom, and France formed the building blocks of the IMT.[118] Zakerhossein proposes that the adoption of *in absentia,* in particular at the IMT, was the result of France's participation in the formation of the tribunal.[119] Klerks adds that the language of Article 9 of the Tokyo Tribunal, which did not include the right to be present at the trial, already set the precedent for *in absentia* to occur.[120] Regardless, the consent to an *in absentia* trial was an unusual move for the founding states, especially considering the use of *in absentia* is one of the key differences between civil law and common law.[121] Riachy, Zakerhossein, and Gaeta all go into depth to differentiate between these two legal systems.[122] In essence, civil law places priority on social order and society's right to see truth and justice, whereas, in common law, the priority lies with ensuring the rights of all individuals involved, including the accused. An expansion on this difference is how truth is viewed in common and civil law. In common law, truth is seen to be partly in the hands of the accused and therefore requires the presence of the accused to gain full access to the truth, however, in civil law, truth is seen to be absolute and the presence of the accused will not alter it.[123] The role of the judges in common and civil law will therefore differ. In common law, the judge needs to piece the truth together, whereas in civil law, the judge, as the trained professional, will be able to garner the truth from the evidence. [124] Furthermore, Zakerhossein draws attention to the common law system

[118] Zakerhossein & De Brouwer, *supra* note 116.
[119] *Ibid*.
[120] Klerks, *supra* note 7.
[121] Ralph Riachy, *Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenge or Evolution*, J. of Int'l Crim. Jus. 8, 1297 (2010).
[122] *Ibid*.; Zakerhossein & De Brouwer, *supra* note 116, at 205, 2.2.2.2 Common vs. Civil Law Systems.
[123] Zakerhossein & De Brouwer, *supra* note 116, at 207 (explaining that, "Although the truth is objective, it is not one-sided. On the contrary, the truth is a plural notion and finding the truth requires adopting a plural approach. The truth resembles a shattered mirror; each part of this unique mirror belongs to someone. These separate parts should be attached together to find and form the truth. Indeed, you will find parts of the truth everywhere and the whole truth nowhere").
[124] *Ibid*.

of ‘equality of arms’ where the Prosecutor and the defendant can be seen to be ‘dueling’ and the rights of the accused is preserved. [125] In Zakerhossein’s words, ‘according to the principle of equality of arms, if the Prosecutor is present and the accused is absent, there is a violation of ‘equality of arms’.[126] Jalloh disagrees, he puts forth the idea that the STL have made provisions for this possible ‘inequality’ and the creation of a defense team counteracts any ‘inequality of arms’ that would otherwise result. [127]

Similarly, the use of *in absentia* in the STL could also be seen as a part compromise between Lebanese Civil Law and the international use of common law. *In absentia* is still prevalent in Lebanon, in a judicial system based on civil law and heavily influenced by the French Judicial System.[128] Riachy points out that the roots of Trial *in absentia* stem from French law from the Criminal Ordnance of 1670 and were still in effect until 2004, when the European Court of Human Rights (ECtHR) succeeded in pressuring France to abandon this practice.[129] While the Lebanese system, which is clearly derived from the French system, also allows an *in absentia* trial*,* there are some differing conditions under which these trials occur. The French system, until 2004, penalized the accused for lack of attendance at the hearing as it is seen as a deliberate attempt to undermine the court proceedings and is therefore considered an

[125] Zakerhossein & De Brouwer, *supra* note 116, at 205 (writing, “This requirement is reflected in the concept of ‘audi alteram partem’ (literally meaning ‘hear the other side’) as a rule of natural justice.”).
[126] *Ibid*. at 203 (noting that “The fair trial principle is not a single right, but embraces a wide range of standards such as the right to a fair hearing, the right to an effective defense and the principle of equality of arms’ in criminal proceedings”).
[127] Charles Chernor Jalloh, *The Special Tribunal for Lebanon: A Defense Perspective*, 47 Vanderbilt J. Trans. L. 765, 772 (2014)(adding that, “The STL’s provision of an independent Defense Office is unique and confers on it, in the true spirit of “equality of arms,” a legal status coequal to that of the prosecution).
[128] Niccoló Pons, *Some Remarks on In Absentia Proceedings Before the Special Tribunal for Lebanon in Case of a State’s Failure or Refusal to Hand Over the Accused*, J. of Int’l Crim. Jus. 8, 1309 (2010).
[129] Riachy, *supra* note 121, at 1296.

act of contempt.[130] Additionally, prior to 2004 in France, and still today in Lebanon, the accused may not have been assigned a defense attorney *in absentia.* The system of *Proces par contumace* restricts the defendant's rights, including the right to defense counsel, and, if convicted, can lead to a loss of civil rights.[131] However, as Riachy points out, despite the 2004 reform, *in absentia* trials are still permitted. Rather, they are allowed with a greater provision for the rights of the accused, specifically, the right to defense counsel and that the defense counsel needs to be present in court.[132] The determination of how effective the assigned defense counsel can be without the participation of the accused is questioned by Abboud & Miller and Zakerhossein.[133] Irrespective of this, the allocation of a defense team to represent the accused, along with the rights of the accused to a retrial in the event of the unacceptance of the verdict appears to be the compromise. It is this particular use of *in absentia* that is the basis for the STL's adoption of trial *in absentia*.

Although it has been noted that the STL is the only international tribunal to allow a trial to occur *in absentia,* since the IMT, use of *in absentia* has been seen and practiced in international tribunals under another guise. A trial taking place without the presence of the defendants, albeit with the defendants' full knowledge, can also fall under the broad heading of trial *in absentia.* Both Jenks and Zakerhossein detail the defining difference in these circumstances being the defendants' absence deemed necessary for a multitude of reasons, including, but not limited to, the defendants' disruption of proceedings, defendants' ill health or the inability to commit the

[130] Pons, *supra* note 128, at 1309.
[131] Maggie Gardner, *Reconsidering Trials In Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence*, 43 Geo. Wash. Int'l L. Rev. 91, 6 (2011).
[132] Riachy, *supra* note 121, at 1297.
[133] Abboud & Muller, *supra* note 77, at 470 (2013); Zakerhossein & De Brouwer, *supra* note 116.

necessary time to the proceedings because of other obligations.[134] The crucial difference in these cases is the defendants' access to their defense counsel and their own participation in the defense proceedings. In the STL, it is because of the accused's absence and lack of participation in their own defense, that allows them the right to a retrial in the event of their capture[135].

Considering the very different points of view of the authors, it would be difficult to summarize a general conclusion. However, the main points can be gathered and agreed upon. The issue of basic human rights, and the right to a fair trial has been the consistent. Although Gaeta and Zakerhossein both go into detail differentiating between the types of *in absentia* trials, Gaeta puts forth an argument for the STL's *in absentia* trial, whereas Zakerhossein concludes that all *in absentia* trials are in conflict with the accused's rights to a fair trial.[136] Both in terms of preserving social order (accused cannot be free to affect witnesses) and human rights issue in which preserving social order and bringing justice is dependent of allowing equal rights to a defendant.[137]

Gaeta, Jenks, Zakerhossein and Jalloh, all detail how the STL have made provisions for a retrial in the event the accused do not appear in court or otherwise participate in their defense, directly or through a chosen defense counsel.[138] These authors either advocate for the trial *in absentia* in the STL because of this provision or remain in disagreement about the fundamental rights of the accused. Each author delves into

[134] Jenks, *supra* note 7; Abboud & Muller, *supra* note 77, at 3.
[135] Gaeta, *supra* note 12.
[136] *Ibid*.; Zakerhossein & De Brouwer, *supra* note 116.
[137] Gaeta, *supra* note 12.
[138] *Ibid*.; Jenks, *supra* note 7; Zakerhossein & De Brouwer, *supra* note 116.

the ambiguous language of what *in absentia* could mean and how it can be applied. The author's acceptance of the use of *in absentia* is determined by the exact circumstances under which it is practice.

In sum, all the above issues and topics, the authors have addressed will be discussed in more detail in the coming chapters. Furthermore, the writings discussed above is not meant to be all-inclusive, but instead to address articles that are directly related to the topic of *in absentia* at the STL.

In absentia and trial by *default* were briefly discussed in the introduction to this thesis. The brief descriptions are developed upon in this chapter to provide a further understanding of both of the legal concepts, *in absentia* and trial by *default*. One issue to be addressed is the fact that there is no precise definition for trial by *default* and in a sense, trial by *default* is, in all actuality, a sub-category of *in absentia*. Furthermore, different international tribunals and legal systems have interpreted the use of *in absentia* contrarily for application to their courts. Additionally, a discussion of the various international tribunals is essential to the current application of *in absentia* at the STL. The rulings and interpretations have created legal precedent for the STL and future tribunals to use and a legacy to continue forward.

3.1. In Absentia and Trial by Default

As previously defined, *in absentia* is the Latin phrase referring to the absence of someone or something.[139] The application of the legal concept often varies

[139] Starygin & Selth, *supra* note 10, at 171.

depending on the legal system being analyzed as well as the complex situation the court is situated.[140] At the legal concept's most basic, *in absentia* "refer[s] to proceedings against him/her because he/she was personally served with the indictment but chooses not to appear in court for the entire duration of the trial, or at some of its hearings, or is excluded from the court due to misconduct of some type."[141] Coincidentally, Starygin and Seith divide trials held *in absentia* into two main variances found at trial. "The first is when the accused had been present at least at the arraignment and indictment stages (and often the beginning of the trial as well) and then absconds…The second situation is when the accused has never been present at any stage of the proceedings."[142] Essentially, *in absentia* only occurs when there is an absconding defendant that willingly deprives the court of their presence and has full knowledge that the proceedings involving themselves as a defendant are ongoing. The second situation described by Starygin and Seith explain the basis for trial by *default*. The additional issue to trial by *default* is the ability to prove the defendant held any knowledge the trial existed and charges were brought against the defendant.

In absentia is frequently used in both common and civil law court systems, but under strict application to ensure the judicial process and legal system is not held ransom by a voluntarily absconding defendant. In the United States for example, the right for a defendant to be at their own trial is so important that this right was written into the legal system's defining document, the Constitution, the most important document

[140] *See generally*, Starygin & Selth, *supra* note 10, at 171.
[141] Gaeta, *supra* note 12, at 230.
[142] Starygin & Selth, *supra* note 10, at 171.

undergirding the American legal system.[143] The Constitution guarantees the right to due process and the ability to confront witnesses.[144] In the United States, according to the Federal Rules of Criminal Procedure as well as the Model Penal Code, a trial may continue if the defendant chooses to abscond once the trail has begun.[145] Even more so, "the commencement of trial *in absentia* in a misdemeanor case stands on a totally different footing, and the practice of trial *in absentia* for misdemeanors, at least those punishable solely be fine, was quite common."[146]

For felony cases in the United States, the US Supreme Court ruled in *Diaz v. United States* that, "where the offense is not capital and the accused is in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."[147] This concept was reinforced through a ruling during the 1970's explaining further when *in absentia* substantiated the use in the United

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[143] U.S. Const. Amend. XIV; U.S. Const. Amend. VI; *see also* Starygin & Selth, *supra* note 10, at 174.
[144] U.S. Const. Amend. XIV; U.S. Const. Amend. VI.
[145] *See* U.S., Federal Rules of Criminal Procedure, R. 43; James G. Starkey, *Trials in Absentia*, 53 St. John's Law Review 4, (2012). American Law Institute (ALI) Model Code Crim. Proc. § 287 (1930). Section 287 provides: Presence of defendant under prosecution for felony. In a prosecution for a felony the defendant shall be present: (a) At arraignment. (b) When a plea of guilty is made. (c) At the calling, examination, challenging, impanelling and swearing of the jury. (d) At all proceedings before the court when the jury is present. (e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury. (f) At a view by the jury. (g) At the rendition of the verdict. If the defendant is voluntarily absent, the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders; *see also* Paul H. Robinson & Markus Dirk Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Criminal Law Review 3 (2007) (stating that the ALI "is a non-governmental organization of highly regarded judges, lawyers, and law professors in the United States. The Institute typically drafts a "restatement" of an area of law, which articulates and rationalizes the governing rules in American jurisdictions. When published, the ALI Restatement of the Law for a particular area often becomes persuasive authority for courts and legislatures and commonly is relied upon by courts in interpreting and applying the law.")
[146] Starkey, *supra* note 145, at 724 (see the footnotes).
[147] *Ibid*. at 725; *see also Diaz v. United States*, 223 U.S. 442 (1912).

States legal system by explaining:

> "[There are] two reasons for the general common law right of presence in federal trials: (1) assuring, a nondisruptive defendant the opportunity to observe all stages of the trial not involving purely legal matters so as to prevent the loss of confidence in courts as instruments of justice; and (2) guaranteeing the defendant the opportunity to aid in his defense so as to protect the integrity and reliability of the trial mechanism. So long as the defendant has been provided with the opportunity to be present, neither purpose is thwarted by a defendant's voluntary exercise of his option not to attend."[148]

Trials *in absentia* in common law legal systems, as is the American legal system that is explained above, ensures the defendant is present with only a few exceptions. For example, if the defendant absconds during pre-trial, then the trial is not able to proceed until the defendant returns or is forced to return.[149]

Typically, the common law legal systems do not require the defendant to be present if the stage of the legal proceedings is considered a non-critical stage, or the defendant's absence will not result in a violation of the defendant's due process rights, however.[150] Additionally, *in absentia* has been used in common law legal systems when the defendant has waived their right to be present at any stage of the legal proceedings or forfeited that right through their disruptive actions while in court.[151] In the United Kingdom and Australia the defendant has the right to be present throughout the entirety of the trial process for serious charges, but the defendant's right may be waived if that defendant during the trial phase and out of jail on bail knowingly decides to abscond.[152] In this situation, the judge has the right

[148] *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 423 U.S. 1088 (1976); *see also* Starkey, *supra* note 145, at 731.
[149] *Crosby v. United States*, 506 U.S. 255 (1993); Starygin & Selth, *supra* note 10, at 173.
[150] Gaeta, *supra* note 12, at 231.
[151] *Ibid*.
[152] Starygin & Selth, *supra* note 10, at 173.

to use their discretion to either proceed forward or wait for the capture of the absconding defendant.[153] If the judge decides to proceed forward with the trial *in absentia* then the judge must ensure to the best of their ability that the trial held continues to be fair to the defendant.[154] This concept is known as, *semel praesens semper praesens*, which translates as, to be present once is to be present forever.[155]

On the other hand, when looking at the differences between civil law and common law legal systems John RWD Jones QC and Dr. Zgonec-Rozej state that, "[t]he requirement that the defendant be present at his trial is a corollary of adversarial proceedings, where the nature of the proceedings is such that both parties need to be present. By contrast, in inquisitorial proceedings of the continental, civil law tradition, trials *in absentia* are unexceptional."[156] The statement explains the mindset behind ensuring the trial proceeds forward even if the defendant is not present, since the civil law system views trials as a communal working environment working together to understand the factual events that occurred and allowing judges to determine the answers to legal issues. Civil law applies *in absentia* to more situations in the legal system to ensure the progression of the trial and allow for society to move forward in its healing from the wounds of a crime.

Similar to common law legal systems, civil law systems view the need for a defendant to attend trial during phases that consist of purely legal matters as an

[153] Starygin & Selth, *supra* note 10, at 173.
[154] *Ibid*.
[155] Zakerhossein & De Brouwer, *supra* note 116, at 191; *see also* Paola Gaeta, *To Be (Present) or Not To Be (Present)*, 5 J. of Int'l Crim. Jus. 1165, at 1167 (2007).
[156] John RWD Jones QC and Dr. Misa Zgonec-Rozej, *Rights of Suspects and Accused*, at 178, in: "The Special Tribunal for Lebanon: Law and Practice." Oxford Univ. Press, 2014.

unnecessary insurance of justice.[157] What is more, civil law frequently rules that the finding of fact at trial is an interest of society, the victim, and the defendant, and not solely that of the State's prosecutory team arguing on a version of facts against the defendant's version of facts. Thus, civil law legal systems, as is the legal system found in France, use *in absentia* more frequently, and legal systems founded on the infrastructure of France's civil law systems, as is Lebanon's legal system, inherit the use of *in absentia* as well.[158]

In civil law, there are variances of allowing *in absentia* to be applied, but the main purveyor of *in absentia* is often the French legal system, which coincidentally is the basis for many other civil law legal systems including Lebanon. Germany, for example, cannot hold trials through *in absentia* due to the concept that civil law legal system's foundational concept requires interrogations of the defendant by the judge.[159] On the other hand, the French Code of Criminal Procedure permits trials *in absentia* even for trials involving felony charges, but if the absconding defendant is captured then they have a right to have a retrial.[160] Following in line with France, several other European states, Spain, Italy, Netherlands, and Belgium, allow *in*

[157] *E.g.* Starkey, *supra* note 145; United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 423 U.S. 1088 (1976).
[158] Gaeta, *supra* note 12, at 231.
[159] Starygin & Selth, *supra* note 10, at 174. (citing Herman Schwartz, "Point/Counterpoint: Should the Indicted War Criminals Be Tried In Absentia? Only Convictions will Produce Justice" (1996) 4(1) H.R. Brief at para. 9).
[160] Online: Legifrance, available at: http://www.legifrance.gouv.fr. (last accessed on March 26, 2017); *see also* Starygin & Selth, *supra* note 10, at 174; Riachy, *supra* note 121 (explaining that the foundation of trials *in absentia* arise from the French Criminal Ordinance of 1670, and the use of *in absentia* in the French criminal procedure system that was reworked in 2004 under the application of the French Law 204/2004 of 9 March 2004. The French law granted the defendant more protections for their fundamental rights due to "the pressure of various cumulative judgments of the European Court of Human Rights, which had found violations of Article 6 of the European Convention on Human Rights.").

absentia to be applied at trial with the similar safeguard that the defendant has a right to a retrial upon capture.[161]

As stated above, the Dutch legal system, operating under the Dutch Code of Criminal Procedure, allows for trials to occur in two forms, contradictory (in the presence of the defendant) and *in absentia*.[162] Similar to the French legal system, the Dutch legal system requires the prosecution to inform the defendant of the charges and the impending trial, but a statutorily accepted notification does not necessarily require the defendant to have physically received the notification and be aware of the charges.[163] In fact, "[a] valid notification, though without certainty about the defendant's awareness of at least the existence of the message, is constructed when the responsible officer [of the court] has tried to leave the message at the registered address or other residence known by the authorities but did not succeed."[164] In specific circumstances, delivery of the charges is not required if there is no known address or the defendant does not travel to the registered address.[165] In this circumstance, the court would not be held responsible for not notifying the defendant and thus allowing a trial by *default*, this legal term is further explained below.[166] The Dutch Code of Criminal Procedure is unique in the application of the court's use of trial by *default*, and this application is rarely acted upon.

[161] Starygin & Selth, *supra* note 10, at 174.
[162] Evert F. Stamhuis, *In Absentia Trials and the Right to Defend: Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System*, Victoria Univ. L. Rev. 32, 716 (2001).
[163] *Ibid*., at 717.
[164] *Ibid*.
[165] *Ibid*.
[166] *Ibid*.

As will be discussed later in the paper, the STL, as well as the Lebanese Code of Criminal Procedure (hereinafter "LCCP"), both allow trials to proceed via *in absentia* with specific applicable situations in which it may be granted.[167] The STL and the LCCP have been heavily influenced by the French Code that allows *in absentia* to be applied to trials.

In defense of the use of *in absentia* by civil law legal systems, it has been argued that *in absentia* is essential to ensure the effective and efficient running of a legal system.[168] The argument finds its basis in that, "trials *in absentia* may necessitate less investigatory work by police, less time for trial and less expense…[as well as] the rights of victims to have the accused brought to justice and the difficulties with obtaining/preserving evidence if the accused is not caught within a reasonable period of time."[169] To explain further, holding a trial via *in absentia* at a minimum allows "a full airing of the evidence, and if the accused has retained or appointed counsel, then all the evidence may be tested properly in any event."[170] In the court's decision to proceed forward with a trial while the defendant is absent is based upon multiple considerations that are often viewed through a case by case basis allowing the court leeway to base the decision. The court will often consider issues such as the actions of the defendant, actions taken by the government and prosecutor's office, the crime charged, and any other extenuating circumstances surrounding the trial.

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[167] *See e.g.* Statute of the Special Tribunal for Lebanon art. 22, S.C. Res. 1757, Attachment, U.N. Doc. S/RES/1757 (May 30, 2007); Lebanese Code of Criminal Procedure, Article 283 & 285.
[168] Starygin & Selth, *supra* note 10, at 173.
[169] *Ibid*.
[170] *Ibid*. (citing *R. v. Hayward (John Victor)* [2001] EWCA Crim 168 at para. 3)(reasoning by the England and Wales Court of Appeal Criminal Division found that a defendant can relinquish their right to be at trial in addition to having legal representation through a determination made by the trial court based upon fairness to the defendant, interests of the prosecutor's office, the ability of the defense counsel to operate at trial, possibility of the defendant returning to the court, and the extent to which the defendant will be disadvantaged)(internal quotations omitted).

The other side of the argument that stands against holding trials via *in absentia* are typically founded upon the rights-based approach legal systems.[171] Viewing *in absentia* through the rights-based approach, the "prosecution['s] case will always be persuasive until the accused is heard…[and] it is naïve to think that a witness's untested testimony can constitute a full airing [of facts]."[172] The rights-based approach focuses on the defendant's rights because during the trial the only person with rights and freedoms at stake is the defendant. The victims of the crime and society have already been harmed through the past act that has brought the trial to fruition. Thus, heading into trial the belief in the rights-based approach is that the trial should protect the defendant's rights to ensure an angry and violated society, as well as victims, do not persecute the wrong party.

Conversely, holding a trial by *default* refers to the continuation of criminal proceedings against a defendant when the defendant was not physically served with court documentation referring to the charges and notice of the trial concluding in the defendant not appearing at court.[173] To state differently, trial by *default* occurs when the court has no physical evidence or proof that the defendant has any knowledge of the charges against them or that the trial is or will soon be proceeding. Furthermore, the court is unable to show evidence of the defendant's knowledge of said charges and looming trial that will converge on the right to due process. This situation occurs

[171] Starygin & Selth, *supra* note 10, at 173. (explaining that the development of common law legal systems and civil law legal systems differentiates in that common law legal systems are founded on the concept of a rights-based approach ensuring the defendant's rights are protected while civil law legal systems are founded on the idea of "the inquisitive search for the substantial truth" which focuses on the rights of society)
[172] *Ibid*.
[173] Gaeta, *supra* note 12, at 230.

infrequently in common law as well as civil law, and provides a unique difficulty for an international tribunal that does not possess arresting jurisdiction in States sharing borders, as is the situation found at the STL with Syria and Iran's proximity to Lebanon.

In common law, a legal system's use of trials by *default* are not allowed in any form or aspect. This is applied in the United States', the United Kingdom's, and Australia's legal systems, and is specifically true when any form of the loss of liberty may be determined as retribution for a crime.[174] Hence, any violation of the defendant's due process rights are so substantial that a trial may not continue forward without concrete evidence of the defendant's outward decision to abscond from the trial only after the trial had begun and the defendant was in attendance.[175]

In civil law legal systems, trial by *default* is uncommon and rare instances are noted. Starygin and Seith explain that, "[s]tates that do allow trials *in absentia* without safeguards tend to be those that have less developed legal philosophy in terms of rights of the accused,…[f]or example, Tunisia, Egypt, Jordan, Lebanon, and Mauritania."[176] The States that use trial by *default* also tend to be States that do not

[174] Gaeta, *supra* note 12, at 231 (citing Magistrates' Courts Act 1980, ss 11(3) and (3A) stating: ((3)) In proceedings to which this subsection applies, the court shall not in a person's absence sentence him to imprisonment or detention in a detention centre or make a detention and training order or an order under paragraph 8(2)(a) or (b) of Schedule 12 to the Criminal Justice Act 2003 that a suspended sentence passed on him shall take effect. ((3A)) But where a sentence or order of a kind mentioned in subsection (3) is imposed or given in the absence of the offender, the offender must be brought before the court before being taken to a prison or other institution to begin serving his sentence (and the sentence or order is not to be regarded as taking effect until he is brought before the court)).
[175] *Ibid.*
[176] Starygin & Selth, *supra* note 10, at 175.

have high legal standards and use the legal system for political gains or statements.[177] Hence, trial by *default* is infrequent in common and civil law legal systems.

3.2. Use of In Absentia

The variance found in the use of *in absentia* throughout the application in common law legal systems and civil law legal systems carries forward to *in absentia*'s application in international tribunals as well. The most significant variance continues to be the STL, but other international tribunals have ruled on *in absentia* uniquely depending on the political climate and legal jurisdiction surrounding the tribunal itself.

3.2.1. The Nuremberg and Tokyo International Military Tribunals

The first significant application of international tribunals that utilized or considered the legal concept of *in absentia* was the Nuremberg Trials that followed the end of World War II. The Nuremberg Trials, one half of the IMT, was the first notable international tribunal that set the foundation for all modern tribunals that have followed, including the STL.[178] The IMT was established by the Allied countries, that is, the United States, United Kingdom, France, and the Soviet Union, following the defeat of Nazi Germany and Japan to enshrine a legal standard for crimes that took place on an international spectrum and at a time of war.[179]

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[177] World Justice Project, "Rule of Law Index 2016", available at: http://worldjusticeproject.org/rule-law-around-world. (last accessed March 27, 2017).
[178] *E.g.* Zakerhossein & De Brouwer, *supra* note 116. The International Military Tribunal consisted of the International Military Tribunal in Nuremberg (Nuremberg Trials) and the International Military Tribunal for the Far East (IMTFE).
[179] *Ibid.*; *see generally* Eric L. Chase, *Fifty Years After Nuremberg: The United States Must Take the Lead in Reviving and Fulfilling the Promise*, 6 USAFA J. Leg. Stud. 177 (1995/1996)(also stating critiques of the establishment of the Nuremberg Tribunal by the victorious Allied powers writing that

Kirsten Sellars described the initial debate over the creation of the IMT at the London Conference which occurred in the summer of 1945.[180] Sellars explained that the conference faced extreme difficulty between the four states each expressing their own agenda and desires to occur for the creation of the Tribunal.[181] Eventually, the Tribunal formed with the majority of the legal basis founded in common law legal concepts due to the influence from the two primary establishing states, the United States and the United Kingdom.[182]

The one departure from the common law legal system that was the primary basis used for the creation of the IMT was the use of *in absentia* that, as stated above, is frequently applied in civil law legal systems, as founded in France.[183] Zakerhossein argues that this is most likely due to a compromise made by the United States and the United Kingdom to accommodate for France's input to the Nuremberg Trials.[184] Zakerhossein notes the opposing argument finds that the crimes committed were so grave that these crimes allotted for a departure from this common law legal system

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the "Allies' air campaigns…[killing] thousands of civilians…and their property decimated, all without justification or excuse…[with s]imilar accusations…[to the] the fire bombings of Tokyo, [and] the atomic bomb drops on Hiroshima and Nagasaki…[Also] the Soviets insist[ance] upon pursuing a charge that the Germans were responsible for the massacre of thousands of Polish officers at Katyn Forest in September 1941…[except that] circumstantially, the guilt leaned heavily on the Soviet Union…[which] the Soviets conceded before the dissolution of the USSR.")

[180] Sellers, *supra* note 113 (explaining that there was debate over the creation of the IMT because of a viewpoint that the IMT applied selective justice using a quote of an alternative judge at the IMT, Norman Birkett, "If it continues to apply only to the enemy, then I think the verdict of history may be against Nuremberg. While the Germans were being tried, the Charter formalized the Allies' refusal to relinquish immunity for themselves for similar crimes.").

[181] Sellers, *supra* note 113 (writing that, "[t]he American delegate threatened to walk out over the question of the court's location, the French delegate objected to plans to bring charges of crimes against peace, the British fretted over the risk of German countercharges, and the Soviets refused to countenance a definition of aggression…There were frequent misunderstandings between common and civil law delegates, and all were compelled to advance their respective nation's interests.").

[182] Zakerhossein & De Brouwer, *supra* note 116, at 185.

[183] *Ibid*.

[184] *Ibid*. (stating that Richard Overy explained, "French lawyers were unhappy with a tribunal whose main basis was to be Anglo-Saxon common law instead of Roman law, and whose procedures were foreign to French legal practice.").

norm to ensure a legal conclusion could be achieved no matter the logistical situation.[185] Either argument aside, the IMT, and more specifically the Nuremberg Tribunals, applied *in absentia* to only one trial, that of Martin Bormann.[186]

The trial of Martin Bormann in 1946 was the first case held at an international tribunal to try a defendant through *in absentia*.[187] The trial of Bormann was unique in that at the time Bormann was believed to have been killed, but the Tribunal found the evidence to be inconclusive that Bormann was dead.[188] The court ruled on 1 October 1946, that "the evidence of death is not conclusive and the tribunal, as previously stated, is 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."[189] Bormann was convicted for war crimes and crimes against humanity and was eventually sentenced to death by hanging on 15 October 1946.[190] Bormann was never located, which forced the sentence to be outstanding, but in the late twentieth century evidence found showed that Bormann had been killed prior to the Tribunal coming into existence.[191]

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[185] Zakerhossein & De Brouwer, *supra* note 116, at 185. (citing Antonio Cassese, International Criminal Law (Oxford: Oxford University Press, 2008), at 367).
[186] *See* Avalon Project: Nazi Conspiracy and Aggression, Chapter IV, Vol 1, available at: http://avalon.law.yale.edu/imt/chap_04.asp. (last accessed April 2, 2017)(explaining that the trial of Gustav Krupp von Bohlen und Halbach was considered by the Tribunal to be held through *in absentia*, but it was eventually determined that Krupp was mentally unfit to stand trial).
[187] Elizabeth Herath, *Trials in Absentia: Jurisprudence and Commentary on the Judgement in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal*, Harvard Int'l L. J. 55 (2014).
[188] Chase, *supra* note 179, at 186.
[189] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946; quote found in Chase, *supra* note 179, at 186.
[190] Chase, *supra* note 179, at 186.
[191] The Associated Press, "New Genetic Tests Said to Confirm: It's Martin Bormann," *The New York Times*, May 4, 1998, available online at: http://www.nytimes.com/1998/05/04/world/new-genetic-tests-said-to-confirm-it-s-martin-bormann html. (last accessed on 1 April 2017); *see also* Chase, *supra* note 179, at 186.

The trial of Bormann was based on Article 12 of the Nuremberg Tribunal, which allowed the Tribunal to try any defendants through *in absentia* if the Tribunal found it necessary for any reason to ensure justice was achieved.[192] The Nuremberg Tribunal's Rules of Procedure Rule 2(b) ensured that the Tribunal was to give notice to the defendant.[193] To be in compliance of Rule 2(b), the Tribunal released a public notice regarding the upcoming Tribunal through newspapers and radio airtime in the months of October and November 1945 attempting to notify Bormann of the charges he faced.[194] The Tribunal found this sufficient notice for Bormann to know there were charges against him and that if he did not appear before the Tribunal the trial would take place without him present.

Following the completion of the IMTs in Nuremburg and Tokyo, the world did not see another international tribunal established for an extensive time period. The next tribunal was not established until mass scale acts of violence returned to Europe in the states of the former Yugoslavia. From the end of World War II to the timeframe surrounding the conflict in the former Yugoslavia, other treaties and international courts were created to employ a constant set of rules and laws across international

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[192] Nuremberg Trial Proceedings, *Charter of the International Military Tribunal* (August 8, 1945) Vol. 1, rule 12 (stating that, "[t]he Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.") The IMTFE, the Tribunal developed almost entirely by the United States due to the United States dominant presence in the Pacific theater of war, did not provide any legal framework to establish a trial through *in absentia*, but negated to ensure a trial through *in absentia* could not occur. Nevertheless, no instances of *in absentia* were considered at the IMTFE for debate.

[193] International Military Tribunal at Nuremberg, Rules of Procedure (adopted 29 October 1945), Rule 2(b); *e.g.* Zakerhossein & De Brouwer, *supra* note 116, at 186. Rule 2(b) states, "[a]ny individual defendant not in custody shall be informed of the indictment against him and of his right to receive the documents specified in sub-paragraph (a) above, by notice in such form and manner as the Tribunal may prescribe."

[194] Zakerhossein & De Brouwer, *supra* note 116, at 186. (citing James McGovern, *Martin Bormann* (New York: Littlehampton Book Services Ltd, 1968), 167–168.)

borders.

3.2.2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (hereinafter "ICCPR") is a United Nations treaty created to form a uniform set of rules and laws that would apply a standard set of human rights across borders and legal systems.[195] At the time of this writing there are one hundred and sixty-nine countries that have become parties to the treaty, six signatories, and twenty-two that have taken no action.[196] Although there are one hundred and sixty-nine countries that are party to the Treaty, the ICCPR does not have the power to dictate law or standards in the those countries until the Treaty has been signed by the country and passed through the country's respective political system.[197] Similarly, the ICCPR is unable to dictate the articles and rules by which the Tribunals established conduct its proceedings.[198] Nevertheless, the ICCPR does represent a norm within the United Nations and international tribunal system, and is often used for precedence during the creation of articles and rules, as well as standards, for international legal systems to uphold.

ICCPR does directly address the issue of *in absentia* in Article 14(3).[199] Article 14(3)

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[195] Int'l Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976).
[196] United Nations, Human Rights: Office of the High Commissioner, Status of Ratification: Interactive Dashboard, available at: http://indicators.ohchr.org/. (last accessed April 4, 2017).
[197] *Ibid*; *see* Gary J. Shaw, *Convicting Inhumanity In Absentia: Holding Trials In Absentia at the International Criminal Court*, 44 Geo. Wash. Int'l L. Rev. 107, 123-124 (2012)(citing the Vienna Convention on the Law of Treaties Art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.")).
[198] Klerks, *supra* note 7, at 11 (citing Shiyan Sun, *The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification*, 6 Chinese J. of Int'l L., 17-42 (2007)(quoting, "the ICCPR is an authoritative legal instrument in the field of civil and political rights.")(internal quotations removed)).
[199] ICCPR, Art. 14(3) (1976).

states that all defendants are entitled to be informed of the charges promptly, tried in their presence and defend themselves, in addition to the ability to examine witnesses or have a party examine witnesses on their behalf.[200] The application of Article 14(3)(d) specifically limits a courts' ability to try any defendant through a trial by *default*, and is often argued to even limit the ability of other forms of *in absentia*.[201] In fact, Article 14(3) limits the express ability of holding a trial by *default* through the statement that the defendant must "be tried in his presence."[202]

In addition, Article 14(3)(a) also sets forth another significant issue of holding a trial by *default*, in that a tribunal must prove the defendant has been informed of the charge and understands the nature and cause of the charge against them.[203] The assumption that the defendant has actual knowledge of the charge would not be sufficient to substantiate this subsection without the defendant present in the court, or evidence showing actual knowledge held by the defendant. Prior to the creation of the ICCPR, the European Convention on Human Rights addressed the issue of *in absentia* as well.

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[200] ICCPR, Art. 14(3) (1976): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt."
[201] *Ibid*.; *see* Gaeta, *supra* note 12, at 233-235 (describing a converse argument based upon a memorandum submitted by Antonio Cassese stating trial by *default* does not violate human right when used in exceptional circumstances).
[202] ICCPR, Art. 14(3)(d).
[203] ICCPR, Art. 14(3)(a).

3.2.3. The European Convention on Human Rights

The European Convention on Human Rights (hereinafter "ECHR") was created shortly following the end of World War II and opened for signature in Rome on 4 November 1950.[204] The ECHR eventually came into force in 1953 and has forty-seven parties to the convention, all consisting of states from Europe.[205] Similar to the ICCPR, the ECHR is a treaty that is only enforceable upon States that are signatories to the convention, and more importantly is not dictating to any international tribunals.[206] That said, the ECHR sets a precedence and standard for international standards in regards to human rights.

The ECHR addresses the legal application of *in absentia* as the ICCPR does using similar language, but conversely does not specifically state the defendant is to be present at the trial. Instead, the convention allowed rulings through court cases to clarify the meaning of Article 6 and the Article's effect on the use of *in absentia*, as well as trial by *default*, within the European signatory states' legal systems. The European Court of Human Rights (hereinafter "ECtHR")[207] explained in the decision of *Sejdovic v. Italy* that, "[n]either the letter nor the spirit of article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial."[208] The ECtHR clarified this statement by explaining that the trial court must ensure the right to wave a person's

[204] The European Convention on Human Rights, available at: http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer. (last accessed April 4, 2017).
[205] *Ibid*.
[206] Shaw, *supra* note 197, at 126.
[207] The ECtHR is the standing court that makes determinations under the convention, the ECHR.
[208] Gaeta, *supra* note 12, at 241; *e.g. Sejdovic v. Italy* (2006) ECHR 2006-II, para 86.

own attendance at trial that is shown in an "unequivocal manner."[209] The ECtHR expressed extreme caution in proceeding forward with a trial in which a defendant was not present, or been presented at any phase of the trial.

The ECtHR ruled in *Colozza v. Italy* that it is not expressly stated in the ECHR, but everyone holds the right, "to defend himself in person to examine or have examined witnesses and to have the free assistance of an interpreter if he cannot understand or speak the language used in court and it is difficult to see how he could exercise these rights without being present."[210] The ECtHR again clarified this belief in 1993 in the decision of *Poitrimol v. France* writing "a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance." [211]

In a recent divergence from the previous rulings of the ECtHR, the court found in *Stoyanov v. Bulgaria* that an official notification may not always be necessary and "established facts might provide an unequivocal indication that the accused is aware" of the proceedings.[212] Through the ECtHR, this ruling affirms the right to hold a trial through *in absentia*, and may allow trial by *default*. The court has yet to make a ruling in a case presented regarding trial by *default*. Several years prior to the

[209] Gaeta, *supra* note 12, at 241; *e.g. Sejdovic v. Italy* (2006) ECHR 2006-II, para 86.
[210] Herath, *supra* note 187, at 5, citing *Colozza v. Italy*, 89 Eur. Ct. H.R. (ser. A) (1985)(internal quotations removed).
[211] *Ibid*., citing *Poitrimol v. France*, 277 Eur. Ct. H.R. (ser. A), para. 31 (1993).
[212] *Stoyanov v Bulgaria*, App no 39206/07 Eur. Ct. H.R., 31, para 31 (2012); Gaeta, *supra* note 12, at 241 (citing from the court's decision, "in the absence of official notification, certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution… [t]his may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest..., or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.").

Stoyanov v. Bulgaria ruling, in *Battisti v. France*, the ECtHR found that due to the defendant's self-appointment of legal representation to the court, the defendant was aware of the charges and the pending trial, thus the court could proceed forward with the proceedings.[213] Hence, under the guidelines of the ECtHR's interpretations of the ECHR, the court may only allow *in absentia* to occur when there is unequivocal evidence presented that the defendant knows of the charges and the proceedings related to the charges. The standards recognized by the ICCPR, ECHR, and the ECtHR, generally and specficially focusing on the application of *in absentia*, assisted in the foundation for the creation of the first permanently estsblished international court.

3.2.4. The International Criminal Court

The International Criminal Court (hereinafter "ICC") was established through the Rome Statute on 17 July 1998 through a vote of one hundred and twenty in favor, seven against, and twenty-one abstaining.[214] The ICC debated several issues due to opposing views for legal systems through the world, and *in absentia* was one specific issue that became apparent throughout the discussions. The arguments for the use of *in absentia* ranged from constituting the defendant with a "moral sanction" for the crimes committed as well as bringing world acknowledgment to the crime that would, ideally, lead to the defendant's capture.[215] Equally, the argument against *in absentia's* use focused on the issue that it denied the right of the defendant a fair trial, and in the event of a conviction the court would hold no effectiveness since the

[213] *Battisti v France* (dec) App. No. 28796/05, Eur. Ct. H.R. (2006); *see also* Gaeta, *supra* note 12, at 242.
[214] Shaw, *supra* note 197, at 112.
[215] *Ibid*.

defendant could not be punished.[216]

Eventually, the ICC concluded that the defendant should be present at the trial, and only in specific instances should the ICC allow trials to proceed *in absentia*. Article 60(1) of the Rome Statute states, "[u]pon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial."[217]

The ICC does allow for *in absentia* in specific circumstances and is laid out in Article 63(2) writing, "[i]f the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom… measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required."[218] Article 63 first clarified under subsection (1), that, "[t]he accused shall be present during the trial."[219]

The ICC Rules of Procedure and Evidence 124(1) also state, "[i]f the person concerned is available to the Court but wishes to waive the right to be present at the hearing on confirmation of charges, he or she shall submit a written request to the

[216] Shaw, *supra* note 197, at 113.
[217] Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90, Art. 60(1); *see also* Gaeta, *supra* note 12, at 231-232 (footnote 11).
[218] Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90, Art. 63(2).
[219] Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90, Art. 63(1); *see e.g.* Gaeta, *supra* note 12, at 232; Klerks, *supra* note 7, at 40-41.

Pre-Trial Chamber, which may then hold consultations with the Prosecutor and the person concerned, assisted or represented by his or her counsel."[220] In application, the ICC ruled in *Prosecutor v. Katanga and Chui* that the defendant may waive their right to be present with a formal request and the Pre-Trial Chamber may proceed with the understanding that the defendant recognizes the possible consequences.[221] Furthermore, the court ruled in *Prosecutor v. Ruto and Sang* that the Pre-Trial Chamber may hold the confirmation hearing *in absentia* under the justification that the defendant "has waived his right to be present, has fled or cannot be found."[222]

Thus, the ICC allows for *in absentia*'s use at trial only in "exceptional circumstances" and clarifies the importance the Court, international committees established for creation of the ICC, and the United Nations General Assembly saw in having the defendant stand in Court for their crimes.[223] The ICC ensures the defendant has at least been presented to the Court in person and voids any opportunity for the Court to try a defendant that has not been present at court in any form, or as explained above, holding a trial by *default*. The other international criminal system setup around this time, focusing specifically on the conflict in the states of the former Yugoslavia, also discussed the use of *in absentia*.

3.2.5. The International Criminal Tribunal for the Former Yugoslavia

The IMT was the last international tribunal to preside for almost fifty years until the

[220] Zakerhossein & De Brouwer, *supra* note 116, at 193 (citing International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, 124(1) (2000)).
[221] *Ibid*. at 192-193 (citing from *Prosecutor v. Katanga and Chui*, ICC-01-04-01/07 (9 July 2008)).
[222] *Ibid*.
[223] *Generally* Shaw, *supra* note 197 (explaining the process that took place of forming committees and drafting of statutes prior to the eventual establishment of the ICC).

eventual creation of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY") on 25 May 1993 through Security Council Resolution 827.[224] During this timeframe the Cold War between the United States and the Soviet Union was ongoing voiding the opportunities for the continuation of the legal precedent established by the IMT. Following the fall of the Berlin Wall and the collapse of the Soviet Union, the ICTY was created and again addressed similar issues as the IMT including the precarious issue of trial through *in absentia*.

The ICTY was created in response to the violations of international human rights law during the years following the break-up of the former Yugoslavia into several states.[225] The conflict in the former Republics of Yugoslavia, consisting of Serbia (made up of Kosovo and Vojvodina), Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro, lasted approximately four years.[226] The majority of fighting occurred in Bosnia and Herzegonia with over 100,000 people losing their lives, and Sarajevo experiencing some of the biggest violations of human rights with 10,541 people being killed just in Sarajevo.[227] The Dayton-Paris Peace Agreement finally put an end to the fighting with representatives from the Republic of Bosnia and Herzegonia, the Republic of Croatia, and the Federal Republic of Yugoslavia all signing the agreement.[228] In direct correlation to the fighting that had occurred, the Security Council set out an inquiry to gather evidence of the war crimes that had been committed during the four year time period.[229] The Security Council then

[224] UN Doc. S/RES/827 (1993).
[225] Klerks, *supra* note 7.
[226] *Ibid*. at 20-21; *see also* Open Democracy, "The Crime, the Time, and the Politics of ICTY Justice," London, 23 April 2016.
[227] Open Democracy, *supra* note 226.
[228] Dayton-Paris Peace Agreement, 24 November 1995 (Bosnia and Herzegovina).
[229] S/RES/780 (1992).

passed another Resolution, Security Council Resolution 808, requesting that a tribunal be established, and eventually Security Council Resolution 827 was passed establishing the ICTY.[230]

The legal issue at hand, *in absentia*, was determined by the ICTY Statute under Article 21(d) stating that the defendant is required to attend the Tribunal and to defend himself.[231] It is important to note that the ICTY Rules of Procedure and Evidence did allow the removal of an accused under Rule 80(B) if the accused acted unruly or disrupted the trial process, thus allowing in one form the use of *in absentia* at trial.[232] In the creation of the ICTY there was debate between differentiating opinions of the use of *in absentia* at the Tribunal, finding that the majority opinion was that trials *in absentia* do not uphold the standards of human rights.[233] Gaeta pointed out that the former President of the ICTY, Antonio Cassese, stated that, in his opinion, there were instances applicable for trials by *default* at the ICTY, but nevertheless the ICTY continued forward prohibiting trials by *default*.[234]

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[230] S/RES/808 (1993); S/RES/827 (1993).
[231] ICTY Statute, Article 21(d) (stating, "the accused shall be entitled to the following minimum guarantees, in full equality: to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it").
[232] ICTY Rules of Procedure and Evidence, Rule 80(B) (stating, "[t]he Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom"); *see also* Herath, *supra* note 187, at 2.
[233] Gaeta, *supra* note 12, at 233-234. (citing the Report of the Secretary-General Pursuant to para. 2 of S/RES/808 (1993); UN Doc S/25704 (1993) para. 101 (writing, "a trial should not commence until the accused is physically present before the International Tribunal… [t]here is a 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.")).
[234] Gaeta, *supra* note 12, at 234 (citing Antonio Cassese, Personal Notes on Debates at the Second Session of the ICTY Plenary, The Hague, The Netherlands, 17 January–11 February 1994, IT/25, 21 January 1994).

The ICTY attempted to find the middle ground between the differing opinions by implementing Rule 61 of the ICTY Rules of Procedure and Evidence.[235] Rule 61 stated that the court is permitted to hear evidence, as well as hear witness testimony, of the crime in extraordinary circumstances that the defendant has not surrendered.[236] Rule 61 also allows the court to determine that there is enough evidence that the accused may have committed the crime and issue an international arrest warrant to bring the accused to the Tribunal forthwith.[237] Rule 61 was debated and viewed as oppositional to the goals of the Tribunal by some in the ICTY's Prosecutor's office, but it allowed the Tribunal to move forward while ensuring the integrity of the defendants' rights.[238] Zakerhossein and De Brouwer best explained Rule 61 as "a procedure *in absentia* but not a trial *in absentia*."[239]

The ICTY confirmed the Tribunal's use of Rule 61 through the ruling of *Prosecutor v Karadžić and Mladić*.[240] In that case the Tribunal found that there was sufficient attempts to inform the accused, and, in regard to the Tribunal, heard testimony and viewed evidence under Rule 61.[241] The Tribunal eventually issued an international warrant for arrest of Ivica Rajić on 6 September 1995 for several crimes. The use of

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[235] ICTY Rules of Procedure and Evidence, Rule 61.
[236] *Ibid*. *see also* Gaeta, *supra* note 12, at 234.
[237] ICTY Rules of Procedure and Evidence, Rule 61(C) and (D); *see* Gaeta, *supra* note 12, at 234.
[238] Gaeta, *supra* note 12, at 234 (citing Louise Arbour, 'The Crucial Years', 2 J. Int'l Crim. J. 396, 399 (2004)(writing that "evidence always looks better when it is unopposed and unchallenged."))
[239] Zakerhossein & De Brouwer, *supra* note 116, at 188 (also quoting the Former ICTY Judge Rustam Sidhwa in the *Prosecutor v. Rajic*, Review of Indictment Pursuant to Rule 61, Case No. IT-95- 12-R61, 13 September 1996, opinion stating that, "Rule 61 is basically an apology for this Tribunal's helplessness in not being able to carry out its duties, because of the attitude of certain states that do not want to arrest or surrender accused persons, or even to recognize or co- operate with the Tribunal. In such circumstances, it is the International Tribunal's painful and regrettable duty to adopt the next effective procedure to inform the world, through open public hearings, of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.").
[240] *E.g.* ICTY, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v Karadžić and Mladić,* Case No IT-95-5-R61, Trial Chamber, 11 July 1996. ICTY.
[241] *Prosecutor v Karadžić and Mladić*.

Rule 61 was a way for the Tribunal to preserve evidence and testimony while ensuring the rights of the defendant were still applied at trial. The decision of the ICTY provided precedent to be used for the eventual international tribunal established for the violence that occurred in Rwanda during the 1990's.

3.2.6. The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (hereinafter "ICTR") was formed as a result of the grevious crimes committed during the 1994 internal conflict that occurred in Rwanda between two ethnic groups, the Hutus and Tutsis.[242] The genocide began on April 6, 1994 after months of radio stations stating that Hutus should kill Tutsis, but the match that sparked the flame was the shooting down of the airplane of former Rwandan President Juvénal Habyarimana and former Burundi President Cyprien Ntaryamira.[243] The country descended into chaos and thousands of Rwandans were killed in a brutal genocide that swept through the cities and countryside. The Security Council passed Resolution 935 on July 1, 1994 to send experts and investigators into Rwanda to examine the violations of international and human rights law.[244] The investigation concluded in a similar matter as the investigation in the former Yugoslavian Republics with the Security Council passing Resolution 955 on 8 November 1994 establishing the ICTR.[245]

Similar to the ICTY, the ICTR addressed *in absentia* in the Statute of the ICTR

[242] Klerks, *supra* note 7, at 22 (citing from Colette Braeckman, *'Incitement to Genocide'*, in: Roy Gutan and others (ed.), Crimes of War; What the public should know, New York/London: W.W. Norton & Company 2007).
[243] Klerks, *supra* note 7, at 22.
[244] *Ibid*.; *e.g.* UN Doc. S/RES/935 (1994).
[245] UN Doc. S/RES/955 (1994).

under Article 20(4)(d) stating that a defendant is to be tried in their own presence.[246] The two Tribunals differ whereas, under the Rules of Procedure and Evidence for the ICTR Rule 82 bis allows for trials *in absentia* as long as the accused has made an initial appearance, the accused has been notified of his required presence, and the interests of the defendant are represented by counsel.[247] Thus, the ICTR has carved out an exception to Article 20(4)(d) to be applied in the situation that a defendant chooses to abscond. The exception is to only be applied after the defendant has made an appearance at the Tribunal and the defendant has been informed of their requirement to be present at the Tribunal for a trial. Hence, under the ICTR the application of trial by *default* is not possible.

In conjunction with the ICTY, Rule 61 of the Rules of Procedure and Evidence for the ICTR allows the Tribunal to hear all evidence and testimony regarding any crimes charged against the accused in a case that the accused is believed to have absconded the law.[248] The burden of Rule 61 is with the Prosecutor to prove that all the reasonable steps to locate and inform the defendant have been done.[249] As stated above in application of Rule 61 of the Rules of Procedure and Evidence for the ICTY, Rule 61 allows a court to ensure some preservation of evidence and testimony

[246] Statute of the ICTR (8 November 1994, 33 ILM 1598 (1994)) art 20(4)(d)).
[247] ICTR Rules of Procedure and Evidence, Rule 62 bis (stating that, "Trial in the Absence of the Accused. If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that: (i) the accused has made his initial appearance under Rule 62; (ii) the Registrar has duly notified the accused that he is required to be present for trial; (iii) the interests of the accused are represented by counsel")
[248] ICTR Rules of Procedure and Evidence, Rule 62; *see also* Gaeta, *supra* note 12, at
[249] *See* ICTR Rules of Procedure and Evidence, Rule 61(a)(i) "The Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the accused to be served resides or was last known to be; and (ii) If the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisement pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber."

in the situation of an absconding defendant. In a divergence from the ICTY, the ICTR never applied the use of Rule 61 to an absconding defendant.[250] These tribunals again provided precedent for the next international tribunals creation in Cambodia.

3.2.7. The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (hereinafter "ECCC") were established due to the acts that occurred when the Khmer Rouge and Pol Pot Regime took over the small country in Southeast Asia bringing four long years of atrocities and destruction.[251] The Khmer Rouge sought to bring an era of Communism to the country, but were eventually ousted by the Vietnamese government bringing an end to a twenty-year era of civil war.[252] Finally in 2001, the government in Cambodia passed "the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea" which decided several issues, legal and political, that were at discussion between the United Nations Secretary General and the then government of Cambodia.[253] Eventually through a multitude of discussions and negotiations, the United Nations and the Cambodian government came to an agreement incorporating

[250] Klerks, *supra* note 7, at 34.
[251] *Ibid*, at 50.
[252] *Ibid*.
[253] Ernestine E. Meijer, "The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal," 207-243, at 208, in: "Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia." Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner, Univ. Press Scholarship, 2004 (citing Law NS/RKM/0801/12, adopted in its final version by the National Assembly on 11 July 2001, approved by the Senate on 23 July 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBTh Ch (7 August 2001) and signed by the Cambodian king on 10 August 2001 (translation in English: http://csf.colorado.edu/bcas/main-cas/camb-law htm/ and www.derechos.org/human- rights/seasia/doc/krlaw html).

General Assembly Resolution 57, 228 into the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea holding a jurisdiction for crimes committed from 17 April 1975 to 6 January 1979.[254] During this time period, estimates have shown that approximately 2 to 2.2 million people were killed through a multitude of means and acts of violence and even though the jurisdiction of the Tribunal ends in January 1979 the violence did not stop until the 1990's, including events occurring in the region such as Laos, Vietnam, and Thailand.[255]

The ECCC specifically addresses the issue of *in absentia* in two ways. First, the ECCC's Internal Rules, Rule 81 states that the defendant, "shall be tried in his or her presence" and going further if the defendant, "refuses to attend the proceedings, he or she shall be brought before the Chamber, by public force if necessary, where he or she shall be notified of the inalienable right to be assisted by a lawyer of choice, to have one assigned as provided in these [internal rules] or to represent him or herself."[256] Rule 81 does also allow for trials to take through *in absentia*, but only as expressly stated. If after the initial appearance the defendant absconds, is expelled due to disruptive behavior, refuses to attend proceedings, or if the defendant's health does not allow for attendance, the trial may continue through *in absentia*.[257]

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[254] *See generally* Law NS/RKM/0801/12; UNGA Res 57/228 (27 February 2003)(explaining that the law passed by the government was in favor of the political party in power at the time ensuring that the Tribunal would not charge or prosecute those within the Cambodian People's Party (hereinafter "CPP"), particularly the Prime Minister and leader of the CPP, Hun Sen).
[255] Meijer, *supra* note 253, at 211-212; Craig Etcheson, "The Politics of Genocide Justice in Cambodia," 181-212, at 181-182, in: "Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia." Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner, Univ. Press Scholarship, 2004.
[256] Extraordinary Chambers in the Courts of Cambodia, Internal Rules (rev.1) as revised on 1 February 2008, Rule 81, available at: https://www.eccc.gov.kh/sites/default/files/legal-documents/IRv1-Eng.pdf. (last accessed April 4, 2017).
[257] *Ibid*. (noting that if the defendant's health prevents attendance then the Tribunal will only proceed if the defendant consents to continuing the proceedings).

The second attempt to address the issue of *in absentia* at the ECCC is the application of Article 33 of the Law on the Establishment of the Extraordinary Chambers, which states, "the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 [ICCPR]."[258] Thus, Article 33 applies the rights to defendants that was setout by the ICCPR to be fully applicable during proceedings at the ECCC. The ECCC further explains the application of the ICCPR and *in absentia* through the detailed process written out in Article 35.[259] Article 35 states, "[t]he accused shall be presumed innocent as long as the court has not given its definitive judgment…[and] [i]n determining charges against the accused, the accused shall be equally entitled to the…minimum guarantees, in accordance with Article 14 of the [ICCPR]."[260] Article 35 goes on to state that the defendant must be informed promptly, and "in detail of the charge against them and to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, [and] to be informed of this right…"[261] The ECCC ensures that a defendant cannot have a trial held by *default* against them, and *in absentia* only applies in exigent circumstances in which the Tribunal can show that the defendant flagrantly held disregard to the Tribunal and the matters the Tribunal is focused.

In addition to the tribunals and courts discussed above, there have been several other international tribunals addressing violations of international law and, in some facet,

[258] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 33.
[259] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 35.
[260] *Ibid*.
[261] *Ibid*.

covering the issue of *in absentia*. The course of this thesis is not to discuss every tribunal that has addressed *in absentia* or trial by *default*, but instead to show a precedent established through several international tribunals and courts. As demonstrated above, the use of *in absentia* is greatly limited with the sole example of *in absentia* being applied to the Nuremberg Trials for only one defendant. Even in the precarious situation found at the Nuremberg Trials facing a defendant charged with the most heinous crimes committed in human history, the defense argued against holding the trial without his defendant present, and the Tribunal system, through the eventual creation of international tribunals in the late twenty-first century, choose to move away from this form of *in absentia* known as trial by *default*. The decisions developed over the decades regarding the use of *in absentia* and the form *in absentia* is used has created a customary international law. The creation of customary international law forms when the *opinio juris* and majority of practice coincide across states and other international tribunals and treaties.[262] As explained above, the use of *in absentia* has been greatly limited and only applicable in extreme situations prior to the STL.

[262] Starygin & Selth, *supra* note 10, at 179 (explaining that *opinio juris* is Latin for 'state opinion' and through the actions, treaties and application of law at previous tribunals the *opinio juris* is that *in absentia* should not be used at international tribunals except in extreme circumstances).

Chapter 4

In Absentia at the Special Tribunal for Lebanon (STL)

The STL has developed organically as issues have been presented. First, establishment of an investigation into the assassination followed by the consideration and eventual creation of the STL. The investigation and Tribunal have laid new groundwork for a precedent to future egregious violations of domestic and international law. As stated above, the STL was the first tribunal created without the official statement of support from the government, in this case the Lebanese government, for the creation of a tribunal. Among the multitude of other decisions and policies the STL has been forced to address, the use of *in absentia* in the form of complete *in absentia*, or trial by *default*, has brought significant attention. As the Tribunal proceeds and lays the groundwork for future tribunals to develop from, the STL's decisions have faced noteworthy scrutiny.

The STL was created with the concept of combining the LCCP and international criminal procedure standards to apply to an assassination that was feared would not be prosecuted. Lebanon's weak political stability, rule of law, and control of corruption has created a void that allowed for the Security Council to implement an international tribunal.[263] This chapter discusses the use of *in absentia* at the STL and

[263] In 2015, the World Bank ranked Lebanon's "Political Stability and Absence of Violence/Terrorism" at a rating of 7 out of 100, "Government Effectiveness" at a rating of 38 out of 100, "Rule of Law" at a rating of 25 out of 100, and "Control of Corruption" at a rating of 18 out of 100 (with 100 being the most effective of upholding standards in that respective category). To add, in 2016 the World Justice Project ranked Lebanon 89th out of 113 countries (with 1 upholding the

the decisions rendered concerning the application of *in absentia*. The basis for much of the Articles and Rules and Procedure found at the STL is originated from Lebanese domestic law, which, as noted above, has its influences from the French civil judiciary system.[264]

4.1. The STL's definition and use of *In Absentia*

The STL, through multiple influences, opted to proceed forward with the trial through *in absentia*. The choice to proceed through *in absentia* was an issue presented to the Tribunal shortly after the Tribunal's inception because the defendants were unable to be located. In fact, the Tribunal has not known the location or status of any of the defendants apart from the defendant Mustafa Amine Badreddine following his death.[265] As a means of foreshadowing the future to become of the Tribunal, the UNIIIC explained the major complications the investigation faced from the gathering of evidence and possible detainment of subjects due to Syria's unwillingness to comply. The STL set a precedent by establishing the use of *in absentia* in the defining articles as set out by the Security Council Resolution.

Resolution 1757 explained the articles and defining parameters in which the Tribunal would be conducted. The Resolution, under Article 16(4)(d), grants the right to be

highest standards of the rule of law). *See* World Bank: Worldwide Governance Indicators, available at: http://info.worldbank.org/governance/wgi/index.aspx#reports. (last accessed April 8, 2017); World Justice Project: WJP Rule of Law Index 2016 Report, available at: https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index%C2%AE-2016-report. (last accessed April 8, 2017).

[264] Gaeta, *supra* note 12, at 231.

[265] Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filings of an Amended Consolidated Indictment, STL-11-01/T/TC/F2633/20160711/R286437-R286439/EN/dm.

tried "in his or her presence," but the resolution also created a caveat through Article 22.[266] The focus of this thesis, Article 22, allows trials *in absentia*, stating:

> "1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
> (a) Has expressly and in writing waived his or her right to be present;
> (b) Has not been handed over to the Tribunal by the State authorities concerned;
> (c) 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.
>
> 2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
> (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
> (b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
> (c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.
>
> 3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement."[267]

The writing of Article 22 diverges from the majority of previous international tribunals and courts established by expressly allowing *in absentia*. Riachy notes, "[a]rticle 22 of the Statute allows [*in absentia*] trials, subject to restrictions and

[266] S.C. Res. 1757, para. 1–4, U.N. Doc. S/RES/1757 (May 30, 2007), Art. 16(d) (stating, "[s]ubject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it").
[267] S.C. Res. 1757, para. 1–4, U.N. Doc. S/RES/1757 (May 30, 2007), Art. 22.

safeguards designed to ensure conformity with the requirements of a fair trial." One restriction is the application of Article 28(2), which explains that the STL must apply the "highest standards of international criminal procedure."[268] This statement, in itself, does not necessarily apply a heightened version of international criminal procedure standards or the requirement of a fair trial, but it does allow previous court precedence to be argued at the Tribunal's use of *in absentia*.

The STL's application of *in absentia* is founded upon the basis that the LCCP allows *in absentia* trials. Lebanese law applies *in absentia* to criminal cases in only one instance that the defendant does not turn themselves in to court or law enforcement officials after a summons to appear at court has been issued.[269] Another fundamental aspect of *in absentia* under the LCCP is that "a judgment rendered *in absentia* becomes null and void when the accused turns himself in or is arrested…[and] the proceedings in the context of the trial in absentia, from the date the case was first brought before the court, also become null and void."[270]

Similarly, the STL follows suit under Rule 108(a) stating, "the Trial Chamber shall terminate proceedings and, unless the accused explicitly declares that he does not seek a new trial, initiate proceedings *ex novo*."[271] The STL's RPE Rule 108 allows

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[268] U.N. Doc. S/RES/1757 (May 30, 2007), Art. 28 (stating, (1)"The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate" and (2) "In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials **reflecting the highest standards of international criminal procedure**, with a view to ensuring a fair and expeditious trial.")(emphasis added); *see e.g.* Gaeta, *supra* note 12, at 245.
[269] Riachy, *supra* note 121, at 1300.
[270] *Ibid*, at 1304.
[271] STL RPE r108(a)(stating the full text, "[w]here the accused has failed to take part in proceedings before the Tribunal, has not appointed counsel of his choosing nor has accepted in writing appointment of counsel by the Tribunal and then appears before the Trial Chamber prior to conclusion of the in absentia proceedings, including any sentencing, the Trial Chamber shall terminate

the Tribunal to hold another trial if the defendant avails or is arrested and forcefully avails themselves to the Tribunal, but under RPE rule 108(b) the Tribunal, with consent of the defense, use part of the previous *in absentia* proceedings.[272] Furthermore, the right to retrial may only be used once at the Tribunal by the defendant.[273]

The STL does also follow the LCCP in application of serving the defendant under Articles 282, 283, and 284.[274] The STL's RPE Rule 106(A)(iii) states, "[w]here the accused: has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges by the Pre-Trial Judge; the Trial Chamber shall conduct proceedings in

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proceedings and, unless the accused explicitly declares that he does not seek a new trial, initiate proceedings ex novo"). *Ex novo* is a Latin phrase meaning from the beginning or from scratch.

[272] STL RPE r108(b): "After hearing the Parties and the victims participating in the proceedings, and acting in the interests of a fair and expeditious trial and of the good administration of justice, the Trial Chamber may, subject to the consent of the Defence, decide that part of the in absentia proceedings may be utilised in the new proceedings, and, if so, to what extent."

[273] STL RPE r108(d); *e.g.* Riachy, *supra* note 121, at 1302-1305. Interestingly, under Article 316 paragraph 3 of the LCCP, the right to appeal a decision to the Court of Cassation, Lebanon's appeals court, is not viable unless the defendant avails themselves to the court.

[274] LCCP, Art. 282, 283, and 284: Art. 282 "If the Indictment Chamber decides to indict a person, it shall issue an arrest warrant against him. The Public Prosecution Office shall serve the accused with a copy of the indictment, the list of prosecution witnesses and the arrest warrant, in accordance with the rules laid down in Articles 147, 148 and 149 of this Code, and shall refer the case file to the Criminal Court together with its statement of charges based on the indictment. No actions may be taken that are contrary to the provisions of the indictment."

Art. 283 "As soon as the file is referred to the Court, the Presiding Judge shall convene a sitting to examine it. He shall issue an order requiring the accused to surrender to the Court twenty-four hours before the beginning of the proceedings. If the accused is informed of the order and fails to surrender to the Court, the Court shall try him in absentia and regard him as a fugitive from justice. It shall order the enforcement of an arrest warrant against him and deprive him of his civil rights, prevent him from disposing of his property and from bringing any case unrelated to his personal status during the period of his flight, and it shall appoint a trustee to administer his property during that period. The trustee may not dispose of a convicted person's property without special permission from the Criminal Court. The Public Prosecution Office shall inform the Land Registry of the Court's decision in this regard so that it may be noted automatically on the record pertaining to the property of the accused."

Art. 284 "The order shall be served on the accused by way of publication and by posting it for a period of ten days at the entrance to his last place of residence, displaying it in the public square of his town or village, and posting it at the entrance to the courtroom. If the accused has no domicile or no known place of residence in Lebanon, he shall be notified exceptionally through publication of the decision, at the State's expense, in two local newspapers designated by the Court and in the Official Gazette. It shall also be published by posting it at the entrance to the registry of the Criminal Court."

absentia."[275] The Tribunal provides a method to try a defendant through *in absentia* according to an understanding that the reasonable and necessary steps have been taken to inform the defendant. The Tribunal applies the methods to inform the defendant through the LCCP's Articles 282, 283, 284. What is more, the STL allows representation of the defendants at trial, whereas conversely the LCCP under Article 285 does not allow representation "by counsel at proceedings conducted *in absentia*."[276]

It should also be noted, a significant issue presented by the STL's Article 22 is that the burden of proof shifts from the Tribunal, or the prosecution, to substantiate the claim that the defendant has actual knowledge of the charges and proceedings held against them, and places the burden on the defendant.[277] The only burden of proof the Tribunal holds is that it applied the STL's Rule 106 and took the steps that are considered reasonable under the LCCP's Articles 282, 283, and 284 to inform the defendant.[278] The actual knowledge the defendant has of the indictment or pending trial is irrelevant under this article. This complication results in a defendant that is not present at the Tribunal, is being tried *in absentia*, and now must establish evidence that the steps taken to inform them of the indictment and trial were not reasonable, all occurring without the defendant being present or choosing their legal representation.

[275] STL RPE r106(A)(iii). Rule 106(B) also prepares for the possibility of a State refusing to hand the defendant over to the Tribunal and the Tribunal proceeding forward through *in absentia*. The rule appears to be written preemptively due to fears the neighboring State of Syria would be implicit in the attacks and refuse to cooperate with the Tribunal. This rule displays a propensity to create rules for issues that only directly affect the Tribunal and are not held at the international standard of criminal procedure.
[276] LCCP, Art. 285.
[277] U.N. Doc. S/RES/1757 (May 30, 2007), Art. 22(2)(a).
[278] *E.g.* STL RPE r106(A)(iii); LCCP, Art. 282, 283, & 285.

Article 22(2)(a) specifically states "the Special Tribunal shall ensure that: (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality." This article only requires the attempt to inform the defendant and in the case where the defendant is unable to be reached through in-person attempts, such as the case here, then the publication via television or radio is sufficient. Then, the issue that arises is the inability to substantiate notice was actually given without some form of testimony. It is noted in other research papers that the phrase in Article 22 "notice has otherwise been given" does not provide an absolution for the Tribunal to not inform the defendants, but also does not require a burden of proof that is beyond a reasonable doubt.[279]

4.2. Decisions on *In Absentia* at the STL

The STL's Trial Chamber and the STL's Appeals Chamber have both made several determinations effecting the course of action the Tribunal has taken with respect to the use of *in absentia*. The first decision rendered by the Appeals Chamber discussing *in absentia* was the "Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision," covered the issues of the absence of a defendant that was not notified in person and the right of a retrial with a non-permanent Tribunal, which is guaranteed in the STL's Articles.[280] Stated differently, the application of trial by *default* at the STL brought two issues forward for the Tribunal to rule on: (1) the progression of proceedings

[279] Gaeta, *supra* note 12, at 245.
[280] *Prosecutor v. Ayyash et. al.*, Case No. STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012; Gaeta, *supra* note 12, at 242-243.

when the Tribunal has no evidence that the defendants have actual knowledge of the charges or the nature and cause of the charges against them, as well as (2) the retrial of a defendant, if captured or availing themselves to the Tribunal, following a guilty verdict from a non-permanent Tribunal.[281]

The first issue focuses on the actual notification of the defendants. The decision by the STL to continue with the trial *in absentia* is based upon the belief that the defendants knew, or should have known, of the charges brought against them at the STL through the multiple facets the STL used to reach the defendants.[282] In conjunction with this concept was information acquired by the Tribunal in 2009 that found Hezbollah informed the defendants to lower their profiles and vanish once it appeared the Tribunal was acquiring significant evidence that could implicate them in the assassination of Hariri.[283] The issue with the information found by the Tribunal and used in helping to make the decision to host the trial *in absentia* is that the information was never presented in the Tribunal. In fact, the information has apparently been used as an unofficial basis for a determination in a court of law that should only use objective facts presented openly at proceedings as a foundation to make any determination.

The Appeals Chamber ruled directly on the issue of notification involving Article 22(2)(a) explaining:

> "[t]here is no requirement under the Tribunal's Statute or Rules, or under international human rights law that the Trial Chamber must

[281] Gaeta, *supra* note 12, at 242.
[282] *Ibid*.
[283] Bergman, *supra* note 78.

> receive positive knowledge of the accused's knowledge, or that *notification* must be carried out officially and in person. Rather, the Trial Chamber must be satisfied that the three elements set out above are met on the basis of the available evidence before it... Given this requirement and the consequences that flow from a decision to proceed in absentia, this is necessarily a high evidentiary standard."[284]

The ruling negates all precedence established prior and ignores any rights the defendants may have to the due process of being informed of the indictment and trial. In fact, "[t]he Trial Chamber concluded that: [i]n the totality of these circumstances it is inconceivable that [the four Accused] could be unaware that they have been indicted. Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra have also each been notified according to Lebanese criminal procedural law of the indictment and of various Tribunal documents informing them of their rights to participate in the trial without being physically present in the court room."[285] This statement made by the Trial Chamber, and applied again by the Appeals Chamber, is contradictory stating that the defendants knew of the indictment without any factual basis to apply to the situation. The Trial Chambers and Appeals Chamber both failed to present any evidence in their decision that the defendants knew or explained how they should have known the trial except the statement that the "near saturation media coverage in Lebanon" was sufficient.[286] The decision failed to consider that the defendant may

[284] *Prosecutor v. Ayyash et. al.*, Case No. STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012; *see* Gaeta, *supra* note 12, at 245.
[285] *Prosecutor v. Ayyash et. al.*, Case No. STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012, at para. 45; *e.g.* Gaeta, *supra* note 12, at 246.
[286] *Prosecutor v. Ayyash et. al.*, Case No. STL-11-01/PT/AC/AR126.1, Appeals Chamber, 1 November 2012, at para. 42.

not be residing in Lebanon or that media is an effective method of reaching people in the state.

Under Article 28 of Security Council Resolution 1757, decisions rendered by the Tribunal are to be guided by the LCCP as well as other appropriate reference materials to ensure the highest standards of international criminal procedure are upheld.[287] This considered, Lebanon and the LCCP, as stated above, does not have the highest standard of criminal procedure, or rule of law, and is in conflict with upholding the highest standards of international criminal procedure.[288] Lebanon has consistently been ranked as one of the worst states in regards to corruption and rule of law.[289] Thus, to apply Lebanon's laws and standards at the STL is contradictory to the point of hosting an international tribunal that will uphold itself to the strict level of standards and scrutiny that tribunals have faced in the past.

The second issue presented to the Tribunal is the defendant's right to retrial from a non-permanent Tribunal upon the capture or availing themselves to the Tribunal. The defense counsel argued that the inability of the STL to guarantee the right to a retrial established a trial by *default* and violated the due process rights of the defendants.[290] The Tribunal did not apply substantial legal application to this matter. Instead, the Tribunal simply stated that there is, "no reason to believe that [the right to retrial] guaranteed by the Statute will not be respected."[291] Essentially, the Tribunal negated to answer the future issue revolving around the eventual capture or availing of the

[287] U.N. Doc. S/RES/1757 (May 30, 2007); *see generally* Riachy, *supra* note 121.
[288] *See* World Bank & World Justice Project, *supra* note 263.
[289] *Ibid*.
[290] Gaeta, *supra* note 12, at 248.
[291] *Ibid*. at 246 (citing Trial Chamber Decision on Trial *In Absentia* (n53) para 27); 2012 Appeals Chamber Reconsideration Decision (n51) n36.

four remaining defendants. The Appeals Chamber felt that there was no need to discuss the future complications that may ensue if a defendant is captured or avails themselves following the closure of the STL.[292] The failure to analyze or even entertain the discussion revolving around the right to retrial displays again that the STL circumvents discussions regarding issues that are held to a high standard at other tribunals, but undermine the capabilities and progress of the STL.

4.3. Due Process Rights' of the Defendants

The right of the defendants to be present at trial is held in common and civil law systems, albeit at different variances as discussed above. Hence, except in extreme circumstances, the *opinio juris* and *jus cogens* applicable to the STL is that the defendant holds a right to provide their own defense and appoint their own defense counsel.

One of the apparent issues with holding the STL *in absentia* is the inability for the defendants to speak with or direct their defense attorneys in presenting an effective defense. A member of the defense team at the STL was quoted as saying, "[t]his is a moot court, like a fictional case…[w]e don't have access to our clients and can't raise an alibi. All we can do is deconstruct the prosecutor's theory…a theory…that is based on unproved investigative techniques, including co-location and link analysis."[293]

[292] 2012 Appeals Chamber Reconsideration Decision (n51) n36; Gaeta, *supra* note 12, at 246.
[293] Bergman, *supra* note 78 [internal citations removed].

Moreover, the defense is incapable of efficiently contesting any evidence presented at the Tribunal without the defendant present.[294] Starygin notes that, "the accused's version and testing of the prosecution's evidence is crucial…[especially because] the prosecution's case will always be persuasive until the accused is heard."[295] Starygin goes further and explains that, "[i]f an accused is not present at trial, he or she is unable to give evidence, or challenge the evidence put forth by the prosecution, whether by examining witnesses, presenting alternative versions of the truth or pleading mitigating circumstances."[296] Conviction of a defendant that is not present then becomes almost certainly inevitable, since no adequate responses can be provided.[297] The defendant's due process rights to be present at the Tribunal to ensure a high standard of international criminal procedure is upheld is essential to the integrity of the Tribunal as well as the decision rendered based upon the evidence presented.

Given that one of the main issues of the Tribunal's decision to proceed forward with trail through the use of *in absentia* is the appointment of counsel in lieu of the defendant's attendance, rule 2 of the STL's RPE must be analyzed.[298] First, the 'defence' is defined as "the accused /suspected and/or Defence counsel."[299] 'Defence counsel' is then defined as a "person representing or eligible to represent a suspect or accused pursuant to Rules 58 and 59 of the Rules.'[300] The defense counsel may be

[294] Starygin & Selth, *supra* note 10, at 173.
[295] *Ibid*.
[296] *Ibid.* at 172.
[297] *Ibid*.; *see e.g.* Zakerhossein & De Brouwer, *supra* note 116, at 204 (writing, "[t]he right to a fair trial aims at enabling the accused to defend himself effectively. The right to an effective defense is the cornerstone of a fair trial. The presence of the accused at trial is desirable because it is of great benefit for the accused to defend himself effectively.")
[298] STL RPE r2.
[299] *Ibid*.; *see also* Jones QC, *supra* note 156, at 180-181.
[300] STL RPE r2; *see also* Jones QC, *supra* note 156, at 180-181.

defined as the defense under the STL's RPE, but the defense counsel is incapable of speaking for the defendant, nor does the defense counsel have any possibly of losing their personal liberty at stake in the decision of the trial.[301] "Thus where the Rules explicitly refer to 'an accused', for example in rule 91(I)(i), (ii), and (iii), those are matters on which defense counsel evidently cannot speak on the accused's behalf."[302] Thus, the appointment of the defense counsel by the Tribunal, not the defendant themselves, is not sufficient to circumvent the defendant's attendance at the Tribunal's proceedings.

The balance a court faces when proceeding forward with a trial through *in absentia* is the due process rights of the defendant to stand for their defense and the need for society and the victims to acquire justice and retribution for the violations that have occurred. When *in absentia* is applied, the Tribunal must proceed with dire caution as the defendant is no longer present to advocate for their rights. Thus, the Tribunal and the Tribunal's appointed defense counsel must protect and apply the rights for the defendant. The balance then should be viewed as a defendant losing their personal liberty and society and the victims gaining retribution for a violation committed against them. In this consideration, society and the victims have already had the violation committed against them and they have nothing to lose at the Tribunal, and only retribution and justice to gain. Conversely, the defendant becomes the only entity at the Tribunal with the threat of losing a right or privilege. The Tribunal must ensure care when considering this possibility of ruling in favor of the parties that can only gain from the Tribunal's affirmative decision and nothing to lose from a Tribunal's adverse decision.

[301] *E.g.* Jones QC, *supra* note 156, at 180-181.
[302] *Ibid*. at 181.

Furthermore, practically analyzing the use of *in absentia* by a tribunal is fruitless.[303] The underlying goal of a tribunal and conviction is to remove a person violating law from society as well as to punish or rehabilitate them.[304] In the use of *in absentia*, the practical aspect of enforcing any decision on a defendant is peril less. Stated differently, the decision by the tribunal will stand empty with no defendant to impose the sentencing on. Another point to the impractical aspects of the holding of a tribunal through *in absentia* applies to the right to retrial guaranteed through the articles.[305] This forces any procedures and possible decisions held beforehand to be tasked again. More so, the previous decision now taints the decision that may come through a retrial if, and when, the defendant is captured or avails themselves to the Tribunal.[306] Lastly, the exuberant costs of holding an international tribunal that will only be forced to reconvene upon the capture or availing of the defendant is not economically responsible or sustainable.[307] The STL costs approximately sixty million Euros a year and approximately five hundred million US dollars as of 2014.[308] This is a massive burden for any state to afford, but particularly for a small state like Lebanon that is paying approximately half of the costs associated with the STL.

On the other hand, holding a trial *in absentia* in the view of the victims is a principle

[303] Zakerhossein & De Brouwer, *supra* note 116, at 198-199.
[304] Frank W. Schneider, Jamie A. Gruman, & Larry M. Coutts (2012). *Applied Social Psychology* (2nd ed., pp. 248-251). Thousand Oaks, CA: SAGE Publications.
[305] Zakerhossein & De Brouwer, *supra* note 116, at 200.
[306] Starygin & Selth, *supra* note 10, at 172 (citing Amnesty International, *Fair Trials Manual* (London: Amnesty International Publications, 1998)).
[307] Zakerhossein & De Brouwer, *supra* note 116, at 200.
[308] Special Tribunal for Lebanon, Sixth Annual Report (2014–2015), p. 27; *see* Zakerhossein & De Brouwer, *supra* note 116, at 200 (citing Adam Taylor, "The U.N.'s tribunal in Lebanon has cost millions and made no arrests. Now the journalists are on trial," *The Washington Post*, 7 April 2015.)

and applicable point of the international tribunals, but also specifically the STL.[309] Two stated goals of victim participation are a "restorative justice paradigm, [resting] on the assumption that involvement in criminal proceedings has important reparative value for the victims…[and] a contribution to truth."[310] This stated, the participation of victims is difficult because victims hold a personal interest in the outcome of the trial and may not consider the integrity of the court in order to achieve justice or retribution for the crimes committed.[311] More so, the attendance of the victims at the Tribunal while the defendants are absent contends how fair the proceedings can be and does the defendant hold any due process rights at the Tribunal.

The use of *in absentia* at an international tribunal essentially creates a show trial for the prosecution and victims. The defendants have no say in what occurs at the tribunal and the complications of such a trial are often seen in the political realm. This leads to the point of what political complications occur directly due to an international tribunal's implementation and do these political costs outweigh the progress of the tribunal.

4.4. Rights of the Victim & Society

[309] Zakerhossein & De Brouwer, *supra* note 116, at 199; *see also* Howard Morrison & Emma Pountey, *Victim Participation at the Special Tribunal for Lebanon*, in: "The Special Tribunal for Lebanon: Law and Practice." Oxford Univ. Press, 2014.
[310] Morrison & Pountey, *supra* note 309, at 156-157 (internal quotations omitted).
[311] *Ibid*. (adding in the footnote that, "allowing individuals to be designated from the outset of the proceedings as 'victims of a crime', this jeopardizes fair trial rights by making it more difficult for the defence to argue at a later stage that the crime in question did not occur.")(citing Erin O'Hara, *Victim Participation in the Criminal Process*, 13 J. L. & Poly 229, 233, (2005) stating, "the motivation for victims lies not in criminal justice, with participation being a step down a slippery slope...to a time...when personal vengeance ruled the outcome of cases"(internal citations omitted)); *see also* Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol. 2, New York: Oxford University Press)(2002).

It has been argued that the rights of the victims should be balanced against the defendant through "some procedural principles of an imperative nature, which represent the backbone of international criminal procedure: the presumption of innocence, the right to a fair hearing in full equality, the right to an expeditious trial, the right to confront and present evidence, and so on."[312] Zappalá described the rights of the defendant as the primary issue that has been enshrined in "all human rights instruments and…customary international law; [which] must be implemented at three levels."[313] The three levels were described as "relevant normative instruments regulating the activities of each given court…ensured by the judges in the proceedings on a case by case basis…[and] a mechanism of redress in case violations."[314] Once these have been achieved and provided for the defendant then where does the victim's rights stand at the Tribunal and how should the Tribunal balance the victim's rights? The creation of the international tribunals is to make society whole and to provide justice for victims of the crime that has occurred.[315] To ignore the victims of this crime is to ignore the crime itself but mentioned in a manner to ensure fairness to all present.[316]

The definition of victim is set out in the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the declaration focused on the states' "obligation provide remedies and reparation to victims of violations of human rights and humanitarian law, rather than establishing a specific regime or approach to

[312] Salvatore Zappalá, *The Rights of the Victims v. the Rights of the Accused*, J. of Int'l Crim. Jus. 8, 137 (2010)
[313] *Ibid*.
[314] *Ibid*.
[315] *Generally*, Shany, *supra* note 9.
[316] *Ibid.* (Justice Robert Jackson forewarned at the Nuremburg Trials, "to pass a poisonous chalice to the lips of the defendants is to pass it to our own.")

the right of victim participation in judicial proceedings."[317] What is more, the UN Declaration put into language the concept that "[v]ictims should be treated with compassion and respect for their dignity."[318]

The presentation of a fair trial is also considered to include fairness for the victims in that the victim is provided "fair access to justice."[319] Victim participation provides balance to legal system by allowing victims to "monitor the states actions and to advance interests in truth and justice."[320] The first purpose of victim participation is rooted in the restorative justice paradigm that the criminal process provides "reparative value for the victims."[321] The restorative justice paradigm includes emotional reparations, but provides a tangible opportunity for victims to receive a financial compensation for damages, losses, and injuries suffered.[322] The second aspect of victim participation is contribution to the truth, as stated above.[323] The ICC wrote that, "(i)bring[ing] clarity about what indeed happened; and (ii) clos[ing] possible gaps between the factual findings resulting from the criminal proceedings and the actual truth."[324] The principle of court and international tribunals is to provide justice and healing to society after a crime has occurred.[325]

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[317] Morrison & Pountey, *supra* note 309, at 153 citing Annex to GA Res 40/34, UN Doc A/RES/40/34/Annex (1985) [UN Declaration].
[318] *Ibid*.
[319] Anni Pues, *A Victim's Right to a Fair Trial at the International Criminal Court*, J. of Int'l Crim. Jus. 13, 951 (2015).
[320] Raquel Aldana-Pindell, "In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes," 35 Vand. J. Transnat'l L. 1399, 1414 (2002).
[321] Morrison *supra* note 309, at 156.
[322] *Ibid*.
[323] *Eg*. *Ibid*.
[324] *Ibid*.
[325] *See,* Shany, *supra* note 9.

Justification and responsibility of having victims present, particularly at an international tribunal, pertains to allowing for the victims' a right to justice and, more importantly, ensuring the truth of what occurred is established in a recorded and formal setting.[326] Furthermore, having victims present at the Tribunal provide an avenue to the victims' receiving reparations for the crime committed against them via the criminal process.[327]

Victims are provided a unique opportunity to ensure the truth is provided at the Tribunal and there is no "distortion of facts or easy procedural short-cuts, which transform the charges in a way which does not reflect the scope of what they suffered (wrong selection of charges, doubtful guilty pleas and/or dropping charges) to the detriment of the reasons why the proceedings were commenced in the first place."[328]

The first issue with balancing the defendants' rights against the victims' rights through normative instruments that regulate the activities which is ensured by the judges on a case by case basis is that when rights are left to a discretionary power there is a possibility of providing a different result each time.[329] Thus, this may display an appearance of biasness towards either the defendant or the victim.[330] The Tribunal would be required to have a consistent roll for the victims across the

[326] Shany, *supra* note 9, at 152-153.
[327] Zappalá, *supra* note 312, at 153.
[328] *Ibid*. at 161.
[329] Pues, *supra* note 319.
[330] Zappalá, *supra* note 312.

longevity of the investigation and trial to ensure a fair trial for both the defendants and victims.[331]

The careful balancing of the defendants' rights against the rights of the victims by the STL can provide the ability for the STL to reach the truth with all parties committed to the legal process. On the other hand, the STL is required to proceed forward with caution with victim participation. At the time of this writing the STL has victims in attendance at the STL advocating for their rights, but the defendants are to present to advocate for their rights. The justices must ensure that the rights for all parties involved at the STL.

[331] UN Declaration, *supra* note 313 at s A, para 4.

Chapter 5

Implications in Lebanon's Politics with the Use of *In Absentia*

The use of international tribunals is to apply a heightened legal standard, rule of law, and legal scrutiny to a state, or domestic legal system, that normally fails to achieve such a standard.[332] Even more so, the tribunal is intended to provide political cohesion and stability to the state in question that normally would not be able to achieve said stability without foreign intervention.[333] The legal scrutiny of the STL was discussed previously, but the second responsibility of the tribunal, political stability, requires discussion below. In view of these requirements to the effectiveness of an international tribunal, the STL must allow for political cohesion and stability in Lebanon, particularly with the STL's decision to proceed forward using *in absentia*.

As stated above, the history of Lebanon has continually seen a cause and effect between the political situation and the rule of law. The long history of assassinations throughout Lebanon's history came to a head in the assassination of Hariri. [334]

Unfortunately, though perhaps inevitably, the STL has only added to the complications facing the Lebanese political environment and further dividing the two coalitions, March 8th and March 14th, formed following the assassination of Hariri.

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[332] *E.g.* Shany, *supra* note 9.
[333] *Ibid*. (stating that, "power is afforded to courts for a specific reason, to advance certain policy goals endorsed by the mandate providers, and application of judicial power for other reasons instead may be viewed, at some level, as a breach of trust and/or a power grab.").
[334] Salamey, *supra* note 51.

Since the inception of the STL, the release of the indictment on 17 January 2011, and the eventual release of the names of the, now, defendants, the STL has created more political turmoil.[335] Saad Hariri, Rafik Hariri's son, stated that he, "welcomed the indictments and described them as a historic moment for Lebanon…[while simultaneously] Hezbollah leader Sayyed Hassan Nasrallah said the authorities would never arrest his members."[336] Nasrallah went further and stated, "[t]hey cannot find them or arrest them in 30 days or 60 days, or in a year, two years, 30 years or 300 years."[337] At the time of the indictment and eventual release of the names of the indicted, the Lebanese Parliament was controlled by March 8th and the controlled Parliament supported Hezbollah with issues presented by the STL.[338]

In 2008 Lebanon was pushed to the brink of civil war once again by a military campaign led by Hezbollah.[339] The conflict began from the Prime Minister Fouad Siniora and the March 14th controlled government attempting to cut the private telecommunications of Hezbollah, but were also due to "disputes over a parliamentary election law and a new cabinet had been settled."[340] The dispute was between Shiites of the March 8th coalition and Druze and Sunni of the March 14th coalition with several issues at focus including the, at that time, vacant Maronite Presidential seat.[341] The attack by Hezbollah was an attempt for them to display their

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[335] *Lebanon: UN Names Hezbollah Men in Rafic Hariri Case*, BBC News, July 29, 2011, available at: http://www.bbc.com/news/world-middle-east-14345997. (last accessed April 9, 2017); Mark Leon Goldberg, *Special Tribunal for Lebanon Files Indictment. Hezbollah on Notice*, UN Dispatch, January 17, 2011, available at: https://www.undispatch.com/special-tribunal-for-lebanon-files-indictment-hezbollah/. (last accessed April 9, 2017).
[336] BBC News, *supra* note 335.
[337] *Ibid*. (explaining that Nasrallah believed that the accusations were unfounded and were an attempt to restrain the Hezbollah backed Lebanese government).
[338] *Ibid*.
[339] Reuters, *Lebanon Rivals Reach a Deal, Ending Months of Political Conflict*, The New York Times, May 21, 2008, available at: http://www nytimes.com/2008/05/21/world/middleeast/21lebanon html. (last accessed April 9, 2017).
[340] *Ibid*.
[341] The New York Times, *supra* note 339.

military capabilities against the March 14th coalition and Saad Hariri specifically.[342] The cabinet of Prime Minister Siniora was viewed to be illegitimate by Hezbollah and the March 8th coalition because several Shiite ministers resigned in 2006.[343] The disputes between Hezbollah and Saad Hariri's pro-West and pro-STL Sunni based political party, the Future Movement, were the built up from a multitude of previous disputes.

The brokered deal following the violence gave Hezbollah and the March 8th Coalition veto power over government decisions, official recognition of Hezbollah as a social, political, and an armed force, and granted the March 8th Coalition eleven seats in the Cabinet.[344] The deal would prevent any situation similar to the creation of the STL from occurring again.

The political pressures of supporting the STL forces complicated maneuvers, even for Hariri's son, Saad Hariri. On 6 September 2010, Saad Hariri gave an interview with *As-Sharq Al-Awsat* stating:

> "I have opened a new page in relations with Syria since the formation of the government.... One must be realistic in this relationship and build it on solid foundations. One should also assess the past years, so as not to repeat previous mistakes. Hence, we conducted an assessment of errors committed on our behalf

[342] Robert F. Worth & Nada Bakri, *Hezbollah Seizes Swath of Beirut From U.S.-Backed Lebanon Government*," The New York Times, May 10, 2008, available at: http://www nytimes.com/2008/05/10/world/middleeast/10lebanon html. (last accessed April 9, 2017)(explaining that the attack by Hezbollah was initiated when the government attempted to severe the private telecommunications of Hezbollah stating that the telecommunications were a violation of Lebanese sovereignty. Hezbollah's Nasrallah replied by stating, "[w]e have said before that we will cut the hand that targets the weapons of the resistance, [t]oday is the day to fulfill this promise.").
[343] Tom Perry, *Lebanon Political Conflict Turns Violent*, Reuters World News, May 7, 2008, available at: http://www.reuters.com/article/us-lebanon-strike-idUSL0761005520080507. (last accessed April 9, 2017).
[344] Terry Atlas, *Lebanese Political Deal is a Win for Hezbollah*, US News and World Report, May 21, 2008, available at: https://www.usnews.com/news/world/articles/2008/05/21/lebanese-political-deal-is-a-win-for-hezbollah. (last accessed April 9, 2017)(explaining that Hezbollah and their allies initially only held six seats in the cabinet).

> with Syria, and I felt for the Syrian people, and the relationship between the two countries. We must always look at the interest of both peoples, both countries and their relationship. At a certain stage we made mistakes. We accused Syria of assassinating the martyred premier, and this was a political accusation.... I do not want to talk much about the tribunal, but I will say that the tribunal is not linked to the political accusations, which were hasty."[345]

In this interview Saad Hariri attempted to come to a rapprochement in his relationship with the Syrian President Bashir al-Assad by apologizing for his "thoughtless" implication claiming that Syria was responsible for the assassination of his father, Rafik Hariri.[346] The statement by Saad Hariri was a significant change from his previously unwavering support for the STL. The pressure and complications of supporting a tribunal that does not have the defendants standing trial weighed against the political blowback is seen to wear even on those close to the victims.

Similar issues have been presented by others that initially supported the STL and have since backtracked on their remarks. Walid Jumblatt, the leader of a Druze based political party mentioned in the 'Background' Chapter, once argued that the assassination of Hariri should be defined as an act of terror holding international repercussions so that Lebanon may once again hold its own sovereignty from Syria.[347] Jumblatt went further and stated the STL was the only way Syria could be punished as well as deterred from similar future actions.[348] Analogously to Saad Hariri, Jumblatt eventually reversed his attitude towards the STL and the

[345] Casey L. Addis & Christopher M. Blanchard, *Hezbollah: Background and Issues for Congress*, Congressional Research Service Report for Congress: Prepared for Members and Committee of Congress, October 8, 2010.
[346] Humphrey, *supra* note 69, at 15.
[347] Bosco, *supra* note 61, at 359.
[348] *Ibid*.

continuation of a tribunal with no defendants present while he faced the repercussions politically in Lebanon with his relations to Hezbollah and the March 8th Coalition. Jumblatt stated, "[a]t a meeting with the outgoing Russian ambassador to Lebanon in 2010, Jumblatt said he wished the tribunal had never been established. 'We got the tribunal, but I wish we did not,' Jumblatt said… 'The aim of [U.N. Security Council] Resolution 1559 and the 2006 War [with Israel] was to disarm the Resistance [Hezbollah]. When this failed, they resorted to [attempting to use] the STL's indictment [to carry out this goal]."[349] The pressures of a tribunal that is not able to prosecute any defendants, and yet has detrimental effects on daily political decisions has appeared to reverse support from even those that initially fully supported the Tribunal.

In January of 2011, Hezbollah and supporters within the March 8th Coalition withdrew from Lebanon's cabinet in response to the indictment that would be released shortly thereafter implicating the defendants, all Hezbollah members.[350] Hezbollah continually denied any part in the assassination and further, "urged [then] Prime Minister Saad Hariri… to end all cooperation with the tribunal and to reject its findings. Otherwise, it has promised to act, with… resignations serving as its first salvo." In fact, "Hezbollah has staked its reputation on having the tribunal discredited. To comply completely with Hezbollah's demands, Mr. Hariri would

[349] Belén Fernández, *The Strange World of The Special Tribunal for Lebanon*, Current Affairs: A Magazine of Politics and Culture (September 20, 2016), available at: https://www.currentaffairs.org/2016/09/the-strange-world-of-the-special-tribunal-for-lebanon. (last accessed April 9, 2017).
[350] Nada Bakri, *Resignations Deepen Crisis for Lebanon*, The New York Times, January 12, 2011, available at: http://www nytimes.com/2011/01/13/world/middleeast/13lebanon html?_r=1&pagewanted=all&amp. (last accessed April 9, 2017).

probably sacrifice his political career."[351] In fact, the resigning ministers stated, "they resigned to protest Saad Hariri's stand not to find a settlement on how to deal with the ramifications of the Tribunal."[352]

In response to the resignation of the ministers by Hezbollah and their allies, Saad Hariri and his bloc released a statement "expressing a willingness to compromise. But… added, 'There's no way to compromise on the issue of the court and justice.'"[353] Although Saad Hariri refused, Hezbollah and their allies that resigned "wanted Mr. Hariri to withdraw Lebanon's funding for the tribunal, stop all co-operation, and denounce the court's findings even before they were released."[354] The STL has continued to be a political dilemma in Lebanon and frequently those holding political and personal interests are forced to either curtail their opinion at times or take risks to push their interests.

The political repercussions in Lebanon complicate any decision made regarding the STL and can lead to repercussions outside of the political realm. In December of 2013 Mohamad Chatah, a key advisor to Saad Hariri, was assassinated while he was heading to a meeting with Saad Hariri and the March 14th coalition.[355] The former minister was also the former Ambassador to the United States as well as an advisor

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[351] Bakri, *supra* note 350. (noting, "[a]s is often the case with Lebanon, internal crises take on disproportionate importance, given the role that foreign powers habitually play in the country's domestic affairs. Hezbollah is supported by Iran and Syria, while the United States, France and Saudi Arabia have backed Mr. Hariri's government.")
[352] Al Jazeera and Agencies, *Lebanese Government Collapses: Government Falls After Hezbollah and Allies Withdraw from Coalition in Row Over UN Probe into Murder of Rafik al-Hariri*, Al Jazeera, January 13, 2011, available at: http://www.aljazeera.com/news/middleeast/2011/01/201111215135643082 9.html. (last accessed April 9, 2017).
[353] Bakri, *supra* note 350.
[354] *Q&A: Hariri Tribunal*, BBC News, January 16, 2014, available at: http://www.bbc.com/news/world-middle-east-12182326. (last accessed April 9, 2017).
[355] *Beirut Blast Kills Sunni ex-Minister Mohamad Chatah*, BBC News, December 27, 2013, available at: http://www.bbc.com/news/world-middle-east-25524729. (last accessed April 9, 2017).

to Rafik Hariri during Rafik Hariri's tenure as Prime Minister.[356] Chatah typically held a low-profile and had been known as a critic of Assad and Hezbollah, but was a moderate within the March 14th coalition.[357] In this consideration though, Chatah had texted just prior to his assassination that, "Hezbollah is pressing hard to be granted similar powers in security and foreign policy matters that Syria exercised in Lebanon for 15 years."[358] To add, Chatah had also proposed "to hold a separate meeting on Lebanon that would include an agreement for Hezbollah's withdrawal from the fighting in Syria… [and had written] a letter to Iran's President Hassan Rouhani… appealing for the withdrawal of all Lebanese parties including Hezbollah from the fighting in Syria."[359]

Immediately following the assassination of Chatah, Saad Hariri may have indirectly accused Syria and Hezbollah of being responsible for the assassination.[360] Saad Hariri stated, "[t]hose who assassinated Mohamad Chatah are the ones who assassinated Rafik Hariri; they are the ones who want to assassinate Lebanon."[361] The violence and political turmoil found in Lebanon continue to permeate the issues at the STL.

Saad Hariri, the former Prime Minister of Lebanon from 2009 to 2011, was again elected to the position of Prime Minister after being nominated by the President-

[356] Samia Nakhoul & Stephen Kalin, *Beirut Bomb Kills Lebanese ex-Minister Who Opposed Assad*, Reuters: World News, December 27, 2013, available at: http://www.reuters.com/article/us-syria-crisis-beirut-bomb-idUSBRE9BQ01H20131227. (last accessed April 9, 2017).
[357] Kim Ghattas, *Mohamad Chatah Killing Targets Potential Lebanon PM*, BBC News, December 29, 2013, available at: http://www.bbc.com/news/world-middle-east-25536149. (last accessed April 9, 2017).
[358] *Ibid*.
[359] *Ibid*.
[360] *Ibid*.
[361] *Ibid*.

elect, at the time of the nomination, Michel Aoun.[362] Saad Hariri had objected to the candidacy for President by Michel Aoun because Aoun is part of the March 8th Coalition and aligned with Hezbollah.[363] To add, the Speaker of Parliament, Nabih Berri, a member of the Shiite Amal Movement, part of the March 8th Coalition, and aligned with Hezbollah, initially opposed the appointment of Saad Hariri as well.[364]

The assassinations, violent conflicts, and political confrontations have only been perpetuated by the STL's progression as an international tribunal operating through trial by *default*. The political complications and violence in Lebanon has not quelled since the ruling to proceed with the trial through trial by *default*.

[362] *Saad Hariri Named Lebanon's New Prime Minister*, BBC News, November 3, 2016, available at: http://www.bbc.com/news/world-middle-east-37860414. (last accessed April 9, 2017).
[363] BBC News, *supra* note 362.
[364] *Ibid*.

Chapter 6

Conclusion

This thesis has sought to investigate the history of use of *in absentia* in international tribunals with the goal of better understanding how and why the concept has been used in the Special Tribunal for Lebanon. This laid a solid foundation for the examination of whether or not the use of *in absentia* has allowed the STL to advance its goals of justice and stability in Lebanon.

In sum, legal systems and courts will continually find governments and officials to charge and prosecute defendants for crimes committed against society, victims, and the world's most vulnerable populations. The legitimacy of a legal system and that system's judiciary is not the foundation and veracity of the prosecution. Conversely, the legitimacy of a legal system and the system's judiciary is based upon the quality and fairness the defendant and their counsel have to promote the defendant's due process rights.

The other founding issue of an international tribunal is to provide political cohesion and stability to a society vulnerable with corruption and lack of rule of law. International tribunals are created to provide an avenue for society to progress forward following an abhorrent violation against that society.

The STL has failed to provide a high standard of international criminal procedure by writing the Articles, as well as the Rules and Procedure of Evidence, to directly accommodate foreseeable complications. The standard of international criminal

procedure is meant to transcend any violation as a steady ship in a rocky sea, and is not meant to maneuver its values to accommodate difficult situations that arise. In fact, the standards of criminal procedure are most importantly held when these difficult situations arise.

The STL manipulated precedent created through the multiple international tribunals previously held and treaties established due to the involvement of Hezbollah and the Syrian government. The foreseeable issues revolving around Hezbollah and the Syrian government's possible involvement in the assassination of Hariri was a test to the international tribunals system that the STL has now failed though the tribunal is on-going.

In addition, the second obligation of the international tribunal system of ensuring political cohesion and stability has failed as well. The STL's choice to proceed with a trial through trial by *default* presents difficulties for operators of Lebanon's already complex political environment. The violent and turbulent political arena in Lebanon has been forced to address another issue that was meant to bring justice for the assassination of a prominent politician and his family. Instead the STL has been used by politicians on both sides of the gambit in Lebanon, March 8th coalition and March 14th coalition, as a soapbox for their own agenda.

The creation of the STL has been surrounded around decades of unanswered assassinations throughout the Lebanese civil war and the years following while Syria influenced its control in Lebanon.[365] The STL was faced with making a country, that

[365] Salamey, *supra* note 51.

has been divided by religion that had used bloodshed as a political tool, whole through the application of international legal scrutiny to an assassination that currently defines the political landscape of Lebanon.[366] To understand the creation of the STL, the decision to apply French based civil law, and the inability to make the defendants attend the STL, the historical analysis of Lebanon's politics and violence should be comprehended. Politics and the law applied is usually directly correlated to each other.

Finally, the balance between politics, the defendants' rights, and the victims' rights have the last protection of the judiciary. The judiciary at the STL, as well as other international tribunals, are essential to the fairness of a trial and ensuring the rights of all persons involved are not violated, starting with the defendants.[367] The judiciary is the last line of protection that hopefully does not have any outside political influence while balancing the rights of all parties involved.[368]

The young and continually developing international tribunal system has hit a stumbling block with the STL's ruling to proceed forward with the use of a complete *in absentia* or trial by *default*. The international tribunal system can use this decision and this tribunal as a learning opportunity of how to proceed in the future to garnish its high standard of international criminal procedure once again.

[366] Salamey, *supra* note 51.
[367] Zappalá, *supra* note 312.
[368] *Ibid*.; Michel, *supra* note 102.

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