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NOTICE OTHERWISE GIVEN: WILL IN ABSENTIA TRIALS AT THE SPECIAL TRIBUNAL FOR LEBANON VIOLATE HUMAN RIGHTS?

*Chris Jenks**

INTRODUCTION

On February 14, 2005, a massive car bomb exploded in downtown Beirut, killing Rafiq Hariri, the former Prime Minister of Lebanon.¹ Although Hariri resigned as Prime Minister in 2004,² he remained the “most important figure in Lebanese

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1. See U.N. Fact-Finding Mission in Leb., *Report of the Fact-Finding Mission to Lebanon Inquiring Into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri*, ¶ 1, delivered to the Security Council, U.N. Doc. S/2005/203 (Mar. 24, 2005) (prepared by Peter FitzGerald). The blast killed twenty-one people in addition to Hariri, wounded 220 more, set dozens of cars on fire, and even knocked down several buildings. See Joshua Hammer, *Getting Away With Murder?*, ATLANTIC, Dec. 2008, at 68. The bomb used is believed to have weighed over two thousand pounds and left a thirty-foot-wide crater. See *id.*

2. Hariri served as Prime Minister for Lebanon first from 1992–1998 and then again from 2000 until his resignation in 2004. See *Obituary: Rafik Hariri*, BBC NEWS, Feb. 14, 2005, http://news.bbc.co.uk/2/hi/middle_east/4264359.stm. His 2004 resignation was largely due to a split within the Lebanese government on Syria’s involvement in Lebanon. See NICHOLAS BLANFORD, *KILLING MR. LEBANON: THE ASSASSINATION OF RAFIQ HARIRI AND ITS IMPACT ON THE MIDDLE EAST* 100–15 (2006). The fault lines of the political divide pitted Hariri, the Prime Minister, on one side and the President and the Speaker of the Parliament on the other. See *id.* at 114. Hariri reportedly viewed his resignation as at most a minor setback and was planning to return to the Lebanese political stage through parliamentary elections scheduled for May 2005. See *id.* at 115.

public life”³ and was “one of the Middle-East’s best known and most influential politicians.”⁴ His assassination

had an earthquake-like impact on Lebanon. Shock, disbelief, and anxiety were the most common reactions among the people . . . —shock at the thought that what many considered to have been practices of the past seemed to be coming back; disbelief at the murder of a man whom people regarded as a “larger than life” figure; and anxiety that Lebanon might be sliding back towards chaos and civil strife as a result of that “earthquake.” These feelings quickly fused into a strong and unified outcry for “the truth.” . . . [U]ncovering the truth about the assassination of Mr. Hariri [became] their utmost priority and that peace and tranquility in Lebanon could not be restored without bringing this crime to an acceptable closure.⁵

To many, uncovering the truth meant determining whether Hariri’s support for ending Syria’s twenty-nine year occupation of Lebanon led to his death.⁶ Press reports of the assassination cited claims from unnamed opposition leaders that some combination of the Lebanese and Syrian governments was responsible for the bombing because Hariri supported the withdrawal of Syrian troops from Lebanon.⁷ Lost on no one in the region was that Hariri’s death came less than five months after the United Nations (“U.N.”) Security Council issued a resolution calling on

3. U.N. Fact-Finding Mission in Leb., *supra* note 1, ¶ 16. Hariri was widely credited with rebuilding Beirut in several senses in the wake of Lebanon’s fifteen-year civil war. *See Obituary: Rafik Hariri*, *supra* note 2; *see also* BLANFORD, *supra* note 2, at 40–49.

4. Hammer, *supra* note 1, at 68.

5. U.N. Fact-Finding Mission in Leb., *supra* note 1, ¶ 50.

6. *See generally* Hammer, *supra* note 1.

7. *See* Leena Saida & David Stout, *Huge Car Bomb Kills Lebanon’s Former Prime Minister*, N.Y. TIMES, Feb. 14, 2005, at A1. Former Prime Minister Hariri’s attitude towards Syria at the time of his death was quite different than earlier in his political career. In 1992, when Hariri was first elected Prime Minister of Lebanon, he pursued accommodation with Syria, which stationed tens of thousands of Syrian troops in Lebanon. *See* Hammer, *supra* note 1, at 71. The occupation purportedly enriched Syrian generals and enabled Syrian intelligence agents to watch for Sunni extremism thought to be fomenting in Palestinian refugee camps in Lebanon. *See id.* at 71–72. This was a concern to Syria given its border with Lebanon and because the population of Syria is mostly Sunni Muslim. More significantly, Syria’s relationship with Lebanon “allowed Syria to pursue a proxy war against Israel along Lebanon’s southern border through Hezbollah.” *Id.*

all “foreign forces” to leave Lebanon—a thinly veiled reference to Syria.⁸

Concerns about both the cause and impact of the assassination extended well beyond Lebanon or even the Middle East. The day after the assassination, the President of the Security Council issued a statement condemning “the terrorist bombing” and “express[ing] hope that the Lebanese people” would “use peaceful means in support of their longstanding national aspiration to full sovereignty, independence and territorial integrity.”⁹ That initial response led to a U.N. fact-finding inquiry,¹⁰ the report from which blamed both Lebanese security services and Syrian military intelligence for the overall lack of security, protection, and law and order in Lebanon.¹¹ Parsing out the blame, the report faulted Lebanon for a seriously flawed investigation following the bombing,¹² and Syria “for the political tension that preceded the assassination.”¹³

8. S.C. Res. 1559, ¶ 2, U.N. Doc. S/RES/1559 (Sept. 2, 2004). The United Nations (“U.N.”) Security Council website lists subject headings for the resolutions. *See* United Nations Security Council, Resolutions 2004, http://www.un.org/docs/sc/uncs_resolutions04.html (last visited Dec. 1, 2009). The headings tend to reflect the country or countries with which the resolution deals (for example, Security Council resolution 1579, “The situation in Liberia” or Security Council resolution 1560, “The situation between Eritrea and Ethiopia”). *Id.* Interestingly, the U.N. Security Council resolutions dealing with Lebanon carry the subject heading of “The situation in the Middle East,” which is either a reference to how interconnected Lebanon is to a variety of issues in the Middle East or, more likely, a way to reflect that the Lebanese “situation” involves more than just Lebanon without naming Syria. *See id.*

9. President of the Security Council, *Statement on the Situation in the Middle East*, ¶ 1, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005). While the statement does not identify from whom the Lebanese people were attempting to gain full sovereignty, independence, and territorial integrity, the obvious, if unstated, answer was Syria.

10. The U.N. Security Council statement denouncing Hariri’s death requested that the U.N. Secretary-General closely follow “the situation in Lebanon and to report urgently on the circumstances, causes and consequences” of the bombing. *Id.*

11. *See* U.N. Fact-Finding Mission in Leb., *supra* note 1, ¶ 60.

12. *See id.* ¶ 62. The report was unable to conclude whether the flawed Lebanese investigation stemmed from a “lack of capabilities or commitment.” *Id.*

13. *Id.* ¶ 61. According to the U.N.’s fact-finding team:

The Government of the Syrian Arab Republic clearly exerted influence that went beyond the reasonable exercise of cooperative or neighborly relations. It interfered with the details of governance in Lebanon in a heavy-handed and inflexible manner that was the primary reason for the political polarization that ensued. Without prejudice to the results of the investigation, it is obvious that this atmosphere provided the backdrop for the assassination of Mr. Hariri.

Id.

Portending that the initial inquiry was but the beginning of the U.N.'s involvement, the fact-finding team noted that "the credibility of the Lebanese authorities handling the investigation has been questioned by a great number of Lebanese, in the opposition as well as in government. It is therefore the Mission's view that an international independent investigation would be necessary to uncover the truth."¹⁴ With the Lebanese government's approval, in April 2005, the Security Council established a commission to "assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices."¹⁵ This set in motion a dialogue and subsequent negotiations between the U.N. and Lebanon that, in May 2007, over three years after the assassination, resulted in the establishment of the Special Tribunal for Lebanon ("STL") to "prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri."¹⁶

The STL was to be a tribunal "of an international character based on the highest standards of criminal justice."¹⁷ Although similar in some respects to the U.N. criminal tribunals that preceded it, the STL is also significantly different.¹⁸ While the previous tribunals dealt with a wide range of events over time, the

14. *Id.* ¶ 62.

15. S.C. Res. 1595, ¶ 1, U.N. Doc. S/RES/1595 (Apr. 7, 2005). The same Security Council resolution that spoke in diplomatic terms of assisting the Lebanese authorities also spoke in blunt terms, describing a "Lebanese investigation process [that] suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion." *Id.* at pmb. para. 5.

16. 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) [hereinafter STL Agreement]. In December 2005, the Prime Minister of Lebanon requested that the U.N. establish a tribunal to try those responsible for the bombing. *See* Letter from Fuad Siniora, Prime Minister of Lebanon, to the Secretary-General, Annex, U.N. Doc. S/2005/783 (Dec. 13, 2005). The better part of 2006 was spent in negotiations between Lebanon and the U.N. as to the terms and conditions of the tribunal. *See* S.C. Res. 1757, pmb. para. 3, U.N. Doc. S/RES/1757 (May 30, 2007).

17. S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

18. *See generally* William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 LEIDEN J. INT'L L. 513 (2008) (outlining character and structure of the Special Tribunal for Lebanon ("STL")). In Schabas' view, the STL is international in some respects but not necessarily an international criminal tribunal. *Id.*

STL is focused on one incident, the February 14, 2005 bombing.¹⁹ The mandate of the STL is to prosecute those responsible for a terror attack with transnational implications if not origins, but to do so applying Lebanese law.²⁰ The STL also reflects a host of procedural differences from its tribunal predecessors.²¹ One stark difference is that the STL provides for trials to occur in the absence of the accused, or “in absentia.”²² Further broadening the departure from previous tribunals, the STL allows for in absentia trials where the accused receives notice of an indictment through publication in the media or by the STL communicating the indictment to the accused’s state of residence or nationality.²³

In absentia trials are controversial and the subject of critical review by two leading human rights bodies, the U.N. Human Rights Committee (“HRC”)²⁴ and the European Court of Human Rights (“ECtHR”).²⁵ One criterion by which the HRC and ECtHR assess the permissibility of such trials is whether an individual convicted in absentia may obtain a retrial.²⁶ It is unclear whether

19. Though the STL is focused on the one bombing, the agreement between the U.N. and Lebanon provides for jurisdiction over “other attacks that occurred in Lebanon” after October 1, 2004, which are “connected in accordance with principles of criminal justice and are of a nature and gravity similar to the attack of February 14, 2005.” STL Agreement, *supra* note 16, art. 1(1).

20. See generally Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1107 (2007) (discussing the novelty of the STL mandate to prosecute offenses under the Lebanese penal code).

21. See *id.* at 1116–22.

22. See Statute of the Special Tribunal for Lebanon art. 22, S.C. Res. 1757, Attachment, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute].

23. See *id.* art. 22(2)(a).

24. Interpreting and applying article 14, paragraph 3(d), of the International Covenant on Civil and Political Rights (“ICCPR”), which provides that everyone charged with a criminal offense shall have the right to be tried in his or her presence. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

25. The court interprets and applies the European Convention on Human Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. The European Convention on Human Rights (“European Convention”) does not state a right to be tried in one’s presence as clearly as the ICCPR. Instead, the right is inferred from article 6 of the Convention, which addresses the right to a fair trial. *Id.* art. 6.

26. See *Sejdovic v. Italy*, App. No. 56581/00, 42 Eur. H.R. Rep. 17, ¶ 44 (2004); see also U.N. Human Rights Comm. [HRC], *Communication No. 699/1996: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International*

the STL's retrial provisions meet that requirement. While the STL does provide a right of retrial if an accused is convicted in absentia,²⁷ the right is to retrial before the STL, a tribunal scheduled to exist for only three years.²⁸ Years often pass before someone tried and convicted in absentia is apprehended and the retrial issue arises.²⁹ For the in absentia trial provisions of the STL to comply with human rights norms, the tribunal would seemingly need to operate, or have the ability to reconvene, for as long as someone convicted in absentia has not been retried.³⁰ Given the financial difficulties in establishing and operating the STL, the prospects of its long-term operation seem dim. For the STL to not be in operation, and thus not able to provide a retrial to those convicted in absentia and later apprehended, would be inconsistent with the fair trial provisions of both international and regional human rights agreements.

Whether or not the STL's notice, in absentia trial, and retrial provisions pass human rights muster is significant in both the short and long term. In the short term, the tribunal's legitimacy is in jeopardy. If the provisions violate human rights norms, states from which extradition of those convicted in absentia is sought will face an impossible choice: comply with an extradition request from a U.N. sanctioned tribunal or with the state's binding human rights obligations. In the long term, the significance of the STL's potentially flawed in absentia trial provisions may extend well beyond the tribunal's legacy. There are broader implications for the credibility of U.N. tribunals, including whether in absentia trial provisions, or any other aspect of supposedly settled criminal procedure, are now negotiable.

This Article will examine whether the STL's in absentia trial provisions violate human right norms and, if so, whether the

Covenant on Civil and Political Protections (Maleki v. Italy), ¶ 7(b), U.N. Doc. CCPR/C/66/D/699/1996 (Sept. 13, 1999) [hereinafter *Maleki*].

27. See STL Statute, *supra* note 22, art. 22(3).

28. See STL Agreement, *supra* note 16, art. 21. Article 21 states that the agreement between Lebanon and the U.N. to establish the STL "shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal." *Id.* annex art. 21(1). After the three-year period, the agreement provides for the possibility of extending the duration "to allow the Tribunal to complete its work." *Id.* annex art. 21(2).

29. See *Sejdovic*, 42 Eur. H.R. Rep. 17, ¶¶ 9-14; *Maleki*, *supra* note 26, ¶¶ 2.1-2.2.

30. See ICCPR, *supra* note 24, art. 14(3)(d); European Convention, *supra* note 25, art. 6.

right to tribunal-appointed counsel or to retrial remedies any such violation. Part I explains the operation of the STL, with particular attention drawn to the funding difficulties the tribunal faces, and details the STL's in absentia trial provisions and subsequent right to counsel and retrial. Part II compares the in absentia trial provisions of the STL to those of other tribunals to demonstrate that the STL's in absentia trial provisions represent a radical departure from prior law, even though there is an overlooked tolerance for some form of in absentia proceedings in the other tribunals. The ramifications of that departure are then explored in Part III through a discussion of hypothetical challenges of extradition by accused tried in absentia by the STL. The challenges utilize the most likely venues—the individual complaint mechanisms afforded by the International Covenant on Civil and Political Rights (“ICCPR”)³¹ and the European Convention for Protection of Human Rights and Fundamental Freedoms (“European Convention”).³² Part III outlines the relevant provisions of the ICCPR implicated by in absentia trials, how the HRC has interpreted the right to be present, and how a challenge to extradition following an in absentia trial at the STL might fare under the ICCPR. Part IV conducts a similar inquiry with respect to the European Convention and relevant case law from the ECtHR. The final Part discusses the implications if the STL's in absentia trial provisions are found deficient for the STL, the U.N., and for subsequent tribunals. The Article concludes that the STL's in absentia trial notice provisions would violate human rights norms and that those violations are not likely to be remedied by a right to retrial before a tribunal of finite duration. Ultimately the Article determines that the STL's in absentia trial provisions were in a sense purchased at a price that will be paid by the international community.

I. STL

Before discussing the human rights implications of the STL's in absentia trial provisions, some background information on the tribunal is in order. As will be discussed, of critical

31. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [Hereinafter ICCPR Optional Protocol].

32. European Convention, *supra* note 25, art. 34.

importance to the human rights analysis of in absentia trials is whether a retrial is available. Yet the funding of the STL to date calls into question whether the tribunal will remain operable and thus have the physical ability to conduct a retrial. Also, the STL's in absentia provisions, subsequent right to counsel and retrial require explanation before being contrasted with international criminal justice norms to date.

A. *General Operation*

The STL is located in The Hague, the Netherlands,³³ and formally began functioning on March 1, 2009.³⁴ Despite a four-year investigation leading to its establishment, the STL does not have any suspects in custody and thus no trials scheduled.³⁵

33. *See Lebanon: Ban Ki-moon Welcomes Dutch Agreement to Host Hariri Tribunal*, U.N. NEWS CENTRE, Aug. 17, 2007, <http://www.un.org/apps/news/story.asp?newsid=23535>. This decision was made after the U.N. and Lebanon reached an agreement to create the STL. The STL agreement addresses the issue of location by stating that “[t]he Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses” STL Agreement, *supra* note 16, art. 8(1).

34. *See* Press Release, The Secretary-General, Secretary-General, Announcing Start of Special Tribunal For Lebanon, Says Its Work Marks Decisive Milestone in Tireless Efforts by All Lebanese to Uncover Truth, U.N. Doc. SG/SM/12119 (Mar. 2, 2009) (announcing that the STL “commenced functioning” on March 1, 2009).

35. That there is no one in custody in The Hague is not an indication that the STL is inactive. In fact, the docket is empty because an STL pre-trial judge ordered the release of four Lebanese generals from the Beirut prison in which they had been held for nearly four years. *See Four Suspects in Hariri Killing Freed*, WASH. POST, Apr. 30, 2009, at A13. According to prosecutor Daniel A. Bellemare, who did not oppose the release,

I am mindful of the fact that the Hariri case may have seemed only about the four detained officers in some people's minds and that the case of the four officers has been portrayed in media reports as such since the investigation started probably because they have been the most visible individuals in the investigation.

Press Release, Special Tribunal for Lebanon, Prosecutor Informs Pre-Trial Judge He Does Not Oppose Release of Four Detainees in the Hariri Case (Apr. 29, 2009), <http://www.stl-tsl.org/sid/70>. The prosecutor added, however, that “[n]ot only should people understand that the investigation is bigger than the case of the four officers, they should also understand that should any of the investigative leads direct us back to them with sufficient credible evidence I will seek their detention and indictment.” *Id.* Perhaps illustrating the prosecutor's point, Zuhair Mohamad Said Saddik, a former Syrian intelligence officer suspected of involvement in the assassination, was arrested in the United Arab Emirates about a week before the STL ordered the release. *See Suspect Arrested in Hariri Assassination*, UNITED PRESS INT'L, Apr. 20, 2009, http://www.upi.com/emerging_threats/2009/04/20/suspect-arrested-in-hariri-assassination/upi-

The STL is scheduled to operate for three years from the date of commencement.³⁶ While there is a mechanism in place to extend the tribunal,³⁷ funding is likely to constrain any extension and possibly even the initial three-year term. The STL's funding is based on a cost sharing arrangement whereby states' voluntary contributions comprise fifty-one percent of the tribunal's costs while the Lebanese Government provides the other forty-nine percent.³⁸ The U.N. Secretary-General's funding goal was, by the STL's commencement, to have "sufficient contributions in hand to finance the establishment of the Tribunal and 12 months of its operations, plus pledges equal to the anticipated expenses of the following 24 months of the Tribunal's operation."³⁹ That goal was not met. As of December 2008, funding was sufficient to commence the STL and sustain operations for twelve months.⁴⁰ As of February 2009, one month before the STL commenced, fundraising for the subsequent two years was "ongoing."⁴¹ Funding may well dictate the lifespan of the STL,⁴² which would impact the viability of retrials for those tried under the STL's in absentia provisions.⁴³

96091240244831/. The status of Saddik is unclear. According to the STL, Lebanese judicial officials submitted Saddik's name to the STL pre-trial judge. See Press Release, Special Tribunal for Lebanon, *supra*. Saddik was not technically relevant to the decision to release the four generals, as that decision dealt with individuals detained in Lebanon, and while Lebanese officials had issued an arrest warrant for Saddik, that warrant had been lifted. See *id.*

36. See STL Agreement, *supra* note 16, art. 21.

37. See *id.*

38. See United Nations, Factsheet: Special Tribunal for Lebanon, <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml>.

39. *Id.*

40. See The Secretary-General, *Fourth Report of the Secretary-General Submitted Pursuant to Security Council Resolution 1757 (2007)*, ¶ 2, delivered to the Security Council, U.N. Doc. S/2009/106 (Feb. 24, 2009).

41. *Id.* ¶ 21.

42. Interestingly, while the United States is supporting the STL, it is also seeking diplomatic reengagement with Syria. See Mary Beth Sheridan, *Clinton Visits Lebanon as Key Elections Loom*, WASH. POST, Apr. 27, 2009, at A6 (describing U.S. Secretary of State Hillary Rodham Clinton as emphasizing "that the [administration of U.S. President Barack Obama] would continue to support" the STL); Scott Wilson, *Obama Will Restore U.S. Ambassador to Syria*, WASH. POST, Jun. 24, 2009, at A8 (reporting that the Obama administration will return a U.S. ambassador to Syria after a four-year hiatus). Doing both at the same time will be a delicate balancing act.

43. Whether or not retrial before the STL is operating and thus available to those convicted in absentia but later arrested will be of critical importance to a human rights body determining whether the proceedings violate fair trial rights. See, e.g., *Maleki, supra*

B. *In Absentia Provisions*

Purportedly at the insistence of the Lebanese delegation negotiating with the U.N., the STL statute provides for in absentia trials.⁴⁴ In general, the STL allows “trials to commence and to end . . . without an accused ever having showed up in court, and even where they have failed to appoint a defence lawyer, on the mere condition[]” that the indictment is duly publicized or communicated to the accused’s state of residence or nationality.⁴⁵ More specifically, under article 22 (“Trials in absentia”) of the STL statute:

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.⁴⁶

The STL enters a controversial field by authorizing in absentia trials. Adding to that controversy are the mechanisms by which the STL will conduct in absentia proceedings, mechanisms ostensibly included to protect the rights of those tried outside their presence. Article 22 continues:

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

note 26; *Sejdovic v. Italy*, App. No. 56581/00, 42 Eur. H.R. Rep. 17 (2004). For a discussion of these cases see *infra* Parts II.A.3, II.B.3.

44. See Aptel, *supra* note 20, at 1121. Lebanese criminal procedure allows in absentia trials. See *id.* From the Lebanese perspective, the STL’s in absentia provisions are generous to the accused as, at least at the STL, someone tried in absentia would have a court-appointed defense counsel, which they would not have under the Lebanese penal system. See Int’l Ctr. for Transitional Justice, *Handbook on the Special Tribunal for Lebanon*, at 28 (Apr. 10, 2008) available at <http://www.ictj.org/images/content/9/1/914.pdf>.

45. See Paola Gaeta, *To Be (Present) or Not To Be (Present): Trials In Absentia Before the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1165, 1168 (2007).

46. STL Statute, *supra* note 22, art. 22(1).

- (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.⁴⁷

Having established that the STL may hold in absentia trials, upon notice “otherwise given” of the indictment, article 22 concludes with section three, which provides that: “[i]n 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.”⁴⁸

II. *IN ABSENTIA PROCEEDINGS IN INTERNATIONAL CRIMINAL TRIBUNALS*

To place the uniqueness of the STL’s in absentia trial provisions in context, the following brief review of the evolution of how modern international criminal tribunals have viewed in absentia proceedings is helpful. In allowing a complete trial to occur, without the accused ever appearing or designating defense counsel, based on notice otherwise given, the STL’s in absentia trial provisions provide for a form of “total in absentia” trial, a departure from the in absentia trial provisions of other international tribunals.⁴⁹

47. *Id.* art. 22(2).

48. *Id.* art. 22(3).

49. The term “international tribunal” is used here to refer to not only tribunals but also courts and chambers. While there are distinctions between the terms, those distinctions are not relevant to the STL in absentia discussion.

In absentia trial provisions are not an unusual feature of war crimes tribunals.⁵⁰ Overlooked by many is the fact that the International Military Tribunal (“IMT”) at Nuremburg following World War II conducted total in absentia trials.⁵¹ But prior to the STL, no tribunal since the IMT has allowed total in absentia trials. Instead, modern tribunals, first by practice and later by rule, generally allow “partial in absentia” proceedings, meaning that the accused initially appears but is absent at subsequent proceedings.⁵²

The first of the tribunals after the IMT was the International Criminal Tribunal for Yugoslavia (“ICTY”), established in 1993.⁵³ The U.N. considered and rejected allowing the ICTY to hold in absentia trials.⁵⁴ In so doing, the U.N. Secretary-General explained:

A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the [ICTY] statute as this would not be consistent with article 14 of the [ICCPR], which provides

50. The concept of in absentia proceedings seems to mean different things to different people. On its face, the term “in absentia” translates as “in the absence of.” BLACK’S LAW DICTIONARY 774 (8th ed. 2004). Thus, technically speaking, if the accused appears for part of the proceedings against him, but not all, those portions conducted outside his presence are just that, in absentia.

51. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 391 (2d ed. 2008) (referring to article 12 of the Charter of the International Military Tribunal (“IMT”), which allows for in absentia trials); Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL’Y 13, 22 (1999). Not only did the IMT hold in absentia trials, but it allowed a sentence of death as a permissible punishment following a trial held outside the presence of the accused. *Id.* Indeed, Martin Bormann, who served as the Nazi Party secretary, INT’L MILITARY TRIBUNAL, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 338 (1947), was tried by the IMT, convicted, and sentenced to death, all in absentia. 1 *id.* at 341, 366; see Arbour, *supra*, at 22 (citing 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, *supra*, at 172). The death sentence was not carried out as the allies could not locate Bormann. See Darius Sanai, *The Sins of My Father*, INDEP. (London), Feb. 1, 1999, at 8. Bormann’s remains were eventually found and identified; he is believed to have died near Hitler’s bunker in the waning days of the war. *Id.*

52. See Herman Schwartz, *Trials in Absentia*, 4 HUM. RTS. BR. 1, 12 (1996).

53. See S.C. Res. 827, ¶ 9, U.N. Doc. S/RES/827 (May 25, 1993).

54. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 101, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993).

that the accused shall be entitled to be tried in his presence.⁵⁵

As a result, the ICTY statute provides that the accused has the right “to be tried in his presence.”⁵⁶ The ICTY statute even qualifies the right to be present as one of several “minimum guarantees.”⁵⁷ Yet despite that guarantee, the ICTY conducted portions of Slobodan Milošević’s trial outside his presence when the former president of Yugoslavia was unable to attend for long periods of time due to illness.⁵⁸ As Milošević attended the start of his trial, the ICTY did not contradict the Secretary-General by subsequently holding proceedings outside his presence. But such proceedings were still in absentia, albeit of the partial variant, the authority for which is not clear under the ICTY statute.⁵⁹

The 1994 International Criminal Tribunal for Rwanda (“ICTR”) statute mirrors that of the ICTY.⁶⁰ While the ICTY proceeded with a trial when the accused was unable to attend, the ICTR completed a trial without the accused, when, having previously attended, he refused to appear in court.⁶¹ Thus both tribunals allowed, at least through practice, partial in absentia trials when the accused was unable or unwilling to continue to attend proceedings.

By 2000 the U.N. Transitional Administration in East Timor (“UNTAET”) codified the ICTY and ICTR partial in absentia

55. *Id.* (endnote omitted).

56. Int’l Criminal Tribunal for the Former Yugo. , *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 21(4)(d) (Sept. 2009), available at http://www.icty.org/x/file/legal%20library/statute_sept09_en.pdf [hereinafter ICTY Statute].

57. *Id.*, art. 21(4).

58. See Marlise Simons, *Citing New Medical Report, Milosevic’s Lawyers Urge Postponement in War Crimes Trial*, N.Y. TIMES, Nov. 13, 2005, at A22.

59. See ICTY Statute, *supra* note 56, art. 21(4)(d).

60. Compare Int’l Criminal Tribunal for Rwanda [ICTR], *Statute of the International Tribunal for Rwanda*, art. 20(4)(d) (2007), available at <http://www.ict.org/english/basicdocs/statute/2007.pdf> [hereinafter ICTR Statute], with ICTY Statute, *supra* note 56, art. 21(4)(d).

61. See Prosecutor v. Barayagwiza, Case No. ICTR 99-52-T, Judgment, ¶ 7 (Dec. 3, 2003); see also Press Release, ICTR, Three Media Leaders Convicted for Genocide, ICTR/INFO-9-2-372.EN (Dec. 3, 2003), available at <http://www.ict.org/ENGLISH/PRESSREL/2003/372.htm> (explaining that Barayagwiza was tried in absentia after he refused to attend his trial after the appeals chamber reversed a decision that was favorable to him).

practice.⁶² The UNTAET transitional rules of procedure allowed in absentia proceedings if the accused is initially present and then flees, refuses to attend, or disrupts the proceedings.⁶³ The Special Court for Sierra Leone (“SCSL”), a mixed national-international tribunal established in 2002,⁶⁴ utilized similar language, incorporating the ICTY and ICTR right to be present,⁶⁵ but qualified that right in situations in which the accused flees or refuses to attend.⁶⁶ However, between the UNTAET and the SCSL was the U.N. Mission in Kosovo (“UNMIK”), which, in 2001, issued a regulation prohibiting in absentia trials without qualification.⁶⁷ Finally, there is the Extraordinary Chambers of the Courts of Cambodia (“ECCC”), a mixed national-international tribunal,⁶⁸ which promulgated its internal rules of procedure in 2007,⁶⁹ less than two weeks after the U.N. Security Council announced the STL statute.⁷⁰ The ECCC’s procedure allows for in absentia proceedings if the accused is initially present and then flees, refuses to attend, or disrupts the proceedings.⁷¹

62. Compare U.N. Transitional Admin. in E. Timor, *Regulation No. 2000/30 on Transitional Rules of Criminal Procedure*, § 5.1, U.N. Doc. UNTAET/REG/2000/30 (Sept. 25, 2000) [hereinafter UNTAET Rules], with ICTY Statute, *supra* note 56, art. 21(4)(d), and ICTR Statute, *supra* note 60, art. 20(4)(d).

63. See UNTAET Rules, *supra* note 62 §§ 5.2–3, 48.2.

64. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138; see The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 9, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000).

65. Compare Statute of the Special Court for Sierra Leone, art. 17(4)(d), Jan. 16, 2002, 2178 U.N.T.S. 145, with ICTY Statute, *supra* note 56, art. 21(4)(d), and ICTR Statute, *supra* note 60, art. 20(4)(d).

66. See Special Court for Sierra Leone, *Rules of Procedure and Evidence*, R. 60(A) (May 27, 2008), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3d&tabid=176> [hereinafter SCSL Rules].

67. See U.N. Interim Admin. Mission in Kosovo, *Regulation No. 2001/1 on the Prohibition of Trials In Absentia for Serious Violations of International Humanitarian Law*, U.N. Doc. UNMIK/REG/2001/1 (Jan. 12, 2001) [hereinafter UNMIK Rules].

68. See G.A. Res. 57/228, ¶¶ 2, 4(a), U.N. Doc. A/Res/57/228 (May 22, 2003) (concerning the prosecution under Cambodian law of crimes committed during the period of the Khmer Rouge).

69. Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Rev.4)* (Sept. 11, 2009), available at <http://www.eccc.gov.kh/english/cabinet/fileupload/121/irv4-en.pdf> [hereinafter ECCC Rules].

70. See S.C. Res. 1757, *supra* note 16.

71. See ECCC Rules, *supra* note 69, Rule 81(4) (Sept. 11, 2009). Given how close in time the Extraordinary Chambers of the Courts of Cambodia (“ECCC”) and STL in

Thus, with the exception of UNMIK, tribunal approaches towards partial in absentia proceedings evolved from being implicitly permissible in the ICTY and the ICTR to being expressly so in the UNTAET, SCSL, and ECCC.⁷² One possible reason for the shift is that the international community wanted clearly stated authority to proceed if an accused initially appears before the court but later disrupts the proceedings or refuses to attend, as Slobodan Milošević did at the ICTY.⁷³ Additionally, or perhaps alternatively, the UNTAET, the SCSL, and the ECCC in absentia provisions are similar to those of the International Criminal Court (“ICC”). The Rome Statute established the ICC in 1998⁷⁴ and, under article 63, provided that “[t]he accused shall be present during the trial.”⁷⁵ However, the Rome Statute allows for trials outside the presence of the accused if the accused is disruptive.⁷⁶ While the trial may continue, the statute requires that the trial chamber make provisions for the accused to observe the proceedings.⁷⁷

absentia provisions were developed it is interesting that nongovernmental organizations (“NGO”) raised concerns about the ECCC’s in absentia provisions which do not seem to have been raised during the drafting of the STL statute. See Int’l Ctr. for Transitional Justice, *Comments on Draft Internal Rules for the Extraordinary Chambers in the Court of Cambodia* (Nov. 17, 2006) available at <http://www.ictj.org/images/content/6/0/601.pdf>; Letter from Human Rights Watch to the Secretariat of the Rules and Procedure Committee for the Extraordinary Chambers of the Courts of Cambodia (Nov. 17, 2006), available at <http://www.hrw.org/en/news/2006/11/17/extraordinary-chambers-courts-cambodia>. The contrast between the NGO response to the ECCC and STL is all the more striking given that the ECCC’s provisions are in line with the UNATET and the SCSL statutes, and the policy of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), while the STL’s provisions represent a more radical departure.

72. Compare ICTY Statute, *supra* note 56, art. 21(4)(d), and ICTR Statute, *supra* note 60, art. 20(4)(d), with UNMIK Rules, *supra* note 67, and UNTAET Rules, *supra* note 62, and ECCC Rules, *supra* note 69, and SCSL Rules, *supra* note 66, R. 60(A).

73. See Roger Cohen & Marlise Simons, *At Arraignment, Milosevic Mocks His U.N. Accusers*, N.Y. TIMES, July 4, 2001, at A11.

74. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

75. *Id.* art. 63(1).

76. *Id.* art. 63(2).

77. *Id.* Specifically, the Rome Statute provides that:

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Thus, while the idea that an accused's right to be present throughout criminal proceedings is neither absolute nor longstanding under international law, the STL's total in absentia trial provisions still mark a departure from other modern international tribunals. Over the next three years, the STL may try and convict individuals in absentia, in accordance with its statute, and perhaps with little fanfare. That should not suggest that in absentia trials by the STL are uncontroversial, but a viable challenge to such trials may lie dormant while those convicted in absentia remain at large.⁷⁸ A host of issues, and likely post hoc criticism of the STL's in absentia provisions, will arise when someone convicted in absentia is subsequently located.⁷⁹ There is no way of knowing when, or technically even if, this will occur. As noted by the U.N., "[s]uspects whom the international criminal courts deal with are people who can easily abscond for long periods, thanks to power, money, help from large and organized groups, and possibly even from States."⁸⁰

Id.

78. See, e.g., ICCPR, *supra* note 24, art. 2(3); European Convention, *supra* note 25, art. 13.

79. See, e.g., THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 260 (Roy S. Lee ed., 1999) (identifying "outstanding questions concern[ing] the rights of the accused when . . . tried in absentia."). Presumably, the STL would submit the names of those convicted in absentia to the International Criminal Police Organization ("INTERPOL"). In turn, INTERPOL would use its system of international notices to share that information among its 188 member countries. See International Criminal Police Organization [INTERPOL], *INTERPOL: An Overview*, Doc. COM/FS/2009-10/GI-01 (2009), available at <http://www.interpol.int/public/icpo/factsheets/gi01.pdf>; INTERPOL, INTERPOL Member Countries (Oct. 14, 2009), <http://www.interpol.int/public/icpo/members/>. Specifically, INTERPOL would use a "Red Notice" to "seek the arrest of a wanted person with a view to extradition based on an arrest warrant or court decision." INTERPOL, INTERPOL Notices, Doc. COM/FS/2009-02/GI-02 (2009), available at <http://www.interpol.int/public/icpo/factsheets/gi02.pdf>. Both the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") utilized INTERPOL in seeking to locate persons suspected of violating international human rights law. *Id.* This presumption would seem to be reinforced by the fact that, in 2009, the STL and INTERPOL concluded an interim agreement regarding the STL's investigations and other proceedings that pertain to the crimes that fall under its jurisdiction. See Interim Agreement Between the Special Tribunal for Lebanon and the International Criminal Police Organization—INTERPOL, Aug. 19, 2009, available at http://www.stl-tsl.org/x/file/theregistry/library/cooperation/interpol_agreement.pdf.

80. Conference on International Criminal Justice, May 14–18, 2007, *Report of the Conference on International Criminal Justice*, at 54, ¶ 6, U.N. Doc. ICC-ASP/6/INF.2 (Aug. 21, 2007). The conference report noted that Mafia fugitives absconded "for long periods of time." *Id.* Contrary to the perception that a fugitive would flee great distances, the

But when a person convicted in absentia is eventually found and the STL seeks his extradition, challenges to the tribunal's in absentia trial provisions may quickly follow.⁸¹ For example, a fugitive may challenge his extradition through a communication to a human rights body. The communication would argue that because the STL's in absentia trial provisions violate human rights norms, the state from which the fugitive's surrender is sought would violate its own human rights obligations by complying with the extradition request.⁸² The most likely avenues to challenge extradition and to claim fair trial violations are the individual complaint mechanisms afforded by the ICCPR and the European Convention.⁸³

report also noted that fugitives often do not even leave the country in which law enforcement are looking for them. *Id.* The reported cited one instance where a Mafia boss remained in Italy while a fugitive from Italian authorities for over 40 years. *Id.*

81. See, e.g., *Maleki*, *supra* note 26.

82. See, e.g., HRC, *Communication No. 470/1991: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Protections* (Kindler v. Canada), ¶ 13.2(b), U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993) [hereinafter *Kindler*].

83. See ICCPR, *supra* note 24, art. 2(3); European Convention, *supra* note 25, art. 13. The individual complaint mechanisms of the ICCPR and European Convention appear to be more viable options for a fugitive challenging an in absentia conviction at the STL than other regional human rights bodies. Admittedly, the Inter-American system recognizes a right to be present at trial. See American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123 (providing a right to a hearing, notification of charges, and to defend one's self personally or with defense counsel of one's choosing). But there is little case law from the Inter-American Court of Human Rights on in absentia trials. The focus of court's jurisprudence has been on forced disappearances and torture by the state. See Santiago Canton, *The Inter-American Commission on Human Rights: 50 Years of Advances and the New Challenges*, AM. Q., Summer 2009, <http://www.americasquarterly.org/Inter-American-Commission-Human-Rights>. Similarly, the African Charter on Human and People's Rights recognizes rights which, similar to the European Convention, while not expressly stating a right to be present at trial could not exist without the accused being present or at least on notice of the proceedings. See African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 1520 U.N.T.S. 245 (providing a right to have one's case heard and the right to defense counsel of one's choice). However, the enforcement mechanism for those rights is uncertain. The African Court of Human and People's Rights never heard a case and is in the process of being merged with the African Court of Justice, becoming the African Court of Justice and Human Rights. See African International Courts and Tribunals, The African Court on Human and People's Rights, http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last visited Dec. 1, 2009); see also Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, July 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III).

III. AVENUES OF RELIEF

Each of the human rights bodies contains fair trial provisions which in the ICCPR explicitly and in the European Convention implicitly address the accused's right to be present at trial. While the right is similar, the two bodies vary on the extraterritorial application and enforcement of their respective human rights instruments. Analysis of an *in absentia* case demonstrates how each body interprets the accused's right to be present and how *in absentia* trials may permissibly be held. All of which leads to addressing the question this Article posits—whether extradition of someone convicted *in absentia* by the STL violates human rights obligations under either the ICCPR or the European Convention.

A. ICCPR

1. Fair Trial Provisions

The ICCPR is a U.N. treaty that arose from the 1948 Universal Declaration of Human Rights.⁸⁴ The ICCPR reflects basic civil and political rights and has been ratified by 165 states, including Lebanon and Syria.⁸⁵ Article 14 of the ICCPR provides for a variety of trial-related rights, including that “everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”⁸⁶ More specifically, “[i]n the determination of any criminal charge against him, everyone shall be entitled . . . [t]o be tried in his presence, and to defend himself in person or through legal assistance of his choosing; [and] to be informed, if he does not have legal assistance, of this right.”⁸⁷

84. See ICCPR, *supra* note 24, pmb. (“Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . .”).

85. See Treaty Section, Secretariat, Multilateral Treaties Deposited with the Secretary-General—International Covenant on Civil and Political Rights, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&cmdtsg_no=iv-4&chapter=4&lang=en (last visited Dec. 1, 2009).

86. *Id.* art. 14(1).

87. *Id.* art. 14(3).

2. Enforcement and Extraterritorial Application

The ICCPR is enforced through the HRC, which is a “body of independent experts that monitors implementation of the [ICCPR] by its State parties.”⁸⁸ Under article 41 of the ICCPR, the HRC may consider interstate complaints.⁸⁹ More relevant to potential issues arising from the STL’s in absentia provisions, the first Optional Protocol (“OP1”) to the ICCPR allows the HRC to examine individual complaints of alleged violations of the ICCPR by states parties to the protocol.⁹⁰ The HRC has reaffirmed the OP1 limitation that it “may only receive and consider communications from individuals subject to the jurisdiction of a State party to the Covenant and Optional Protocol ‘who claim to be victims of a violation by that State party of any of their rights set forth in the Covenant.’”⁹¹

States parties to the ICCPR “undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” by the covenant.⁹² Thus, a state’s obligations are “clearly grounded in measures it has taken within its own territory.”⁹³ But when a state takes action within its territory, such as extraditing someone, the state cannot ignore what later happens to that person simply because the effects occurred outside the extraditing state’s territory and at the hands of a different state.⁹⁴ According to the HRC, “[i]f a State party extradites a person within its jurisdiction in circumstances such

88. Office of the U.N. High Comm’r for Human Rights, Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Dec. 1, 2009).

89. See ICCPR, *supra* note 24, art. 41(1).

90. See ICCPR Optional Protocol, *supra* note 31, art. 1. While neither Lebanon nor Syria is a party to the optional protocol, 113 countries are. See Treaty Section, Secretariat, Multilateral Treaties Deposited with the Secretary-General—Optional Protocol to the International Covenant on Civil and Political Rights, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-5&chapter=4&lang=en (last visited Dec. 1, 2009).

91. HRC, *Communication No. 409/1990: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Protections* (EHEH v. Italy), ¶ 3.2, U.N. Doc. CCPR/C/40/D/409/1990 (Nov. 5, 1990) [hereinafter *EHEH*] (emphasis omitted).

92. ICCPR, *supra* note 24, art. 2(1).

93. Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 41, 52 (Fons Coomans & Meeno T. Kamminga eds., 2004).

94. See *Kindler*, *supra* note 82, ¶ 13.2.

that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”⁹⁵

3. HRC Interpretation of In Absentia Proceedings Balanced Against ICCPR Fair Trial Rights

The HRC’s 1997 *Maleki* decision explains the circumstances under which in absentia trials may permissibly occur and the role of retrials.⁹⁶ *Maleki* stemmed from the complaint of Ali Maleki, an Iranian citizen tried and convicted in absentia in Italy for drug trafficking.⁹⁷ In 1988, an Italian court sentenced Maleki to ten years imprisonment.⁹⁸ Although Maleki was not present at his trial, he was represented by court-appointed counsel.⁹⁹ Following Maleki’s in absentia trial and conviction, the court of appeal confirmed the sentence in 1989.¹⁰⁰ Five years later, Italian authorities apprehended Maleki at the Rome airport as he attempted to return to Iran.¹⁰¹

The Italian authorities imprisoned Maleki to serve his ten-year sentence.¹⁰² Maleki’s son, Kambiz Maleki, then submitted a communication to the HRC arguing that Italy violated the ICCPR by trying his father in absentia.¹⁰³ Italy in turn argued that its in absentia trial provisions did not violate the ICCPR, and that Maleki, while indeed absent from his trial, was represented by court-appointed counsel and “that therefore he had a fair trial.”¹⁰⁴ Italy also argued that, even if the trial did not meet

95. *Id.*

96. *See Maleki, supra* note 26, ¶¶ 9.2–.3, .5.

97. *See id.* ¶¶ 1, 2.1.

98. *See id.* ¶ 2.1.

99. *See id.* ¶ 6.4.

100. *See id.* ¶ 2.1.

101. *See id.* ¶ 2.2. In 1991, Maleki was arrested in the United States while visiting family. *Id.* The Italian government requested that the United States extradite Maleki, which the U.S. District Court for the Central District of California denied in 1992. *Id.* It is not clear whether Maleki remained in the United States following the denial of Italy’s extradition request, so the point of origin for his 1995 attempt to return to Iran is also unclear. That Maleki’s return trip to Iran routed him through Italy, a country in which he had been convicted and sentenced to imprisonment in absentia, *id.*, seems an ill-advised travel route.

102. *See id.* ¶¶ 1, 2.2.

103. *See id.* ¶¶ 1, 5. Kambiz Maleki did not identify which specific provisions of the ICCPR were allegedly violated by Italy. *Id.* ¶ 1.

104. *Id.* ¶ 6.4.

ICCPR requirements, any violation was cured by Maleki's ability under Italian law to apply for a retrial.¹⁰⁵ The HRC did not find either Italian argument persuasive.¹⁰⁶

On the issue of whether Italy's in absentia trial provisions were a per se violation of the ICCPR, the HRC noted that such a trial is compatible with the ICCPR "only when the accused was summoned in a timely manner and informed of the proceedings against him."¹⁰⁷ The HRC added that, in order for Italy to comply with the ICCPR's fair trial provisions, Italy must show how the notice requirements were met in Maleki's case.¹⁰⁸ This, Italy was unable to do. Italy stated that it "assumed" that Maleki was informed by his court-appointed attorney of the proceedings against him in Italy.¹⁰⁹ The HRC described Italy's position as

clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused in absentia. It was incumbent on the court that tried the case to verify that [Maleki] had been informed of the pending case before proceeding to hold the trial in absentia. Failing evidence that the court did so, the [HRC] is of the opinion that [Maleki's] right to be tried in his presence was violated.¹¹⁰

Italy's argument that any deficiency in its in absentia trial provisions was cured by the ability of someone so convicted to apply for retrial¹¹¹ fared no better. The HRC acknowledged that the violations of Maleki's right to be tried in his presence "could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy."¹¹² On its face, there did not seem to be an issue—the HRC said Italy must provide a retrial, a right to which is provided for under Italian law.¹¹³ However, providing for the possibility of retrial did not equate to the absolute right of retrial envisioned by the HRC. Italy's

105. *See id.* ¶ 7(b).

106. *See id.* ¶ 9.4.

107. *Id.* ¶ 9.3. Moreover, the burden is not on Maleki to establish that he was not summoned in a timely manner and informed of the proceedings against him. Rather, the burden is on the state party, which, in order to show compliance with the fair trial requirements, "must show that these principles were respected." *Id.*

108. *See id.*

109. *See id.* ¶ 9.4.

110. *Id.*

111. *See id.* ¶ 7(b).

112. *Id.* ¶ 9.5.

113. *See id.* ¶ 7(b).

representations on the right to retrial under Italian law were both generalized and qualified, neither of which aided its arguments. Italy “described its law regarding the right of an accused who has been tried in absentia to apply for a retrial”¹¹⁴ and that retrials were possible “in certain circumstances.”¹¹⁵ Never did Italy represent that Maleki was entitled to such a retrial.¹¹⁶ Distinguishing the possibility of retrial from an absolute right, the HRC stated that “[t]he existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided [Maleki] with a potential remedy in the face of unrefuted evidence that these provisions do not apply to [Maleki’s] case.”¹¹⁷

4. Would Extradition of Someone Convicted In Absentia by the STL Violate Obligations Under the ICCPR?

The *Maleki* decision is instructive on the application of the ICCPR’s fair trial rights to the STL’s in absentia trial provisions. While the HRC interpretation of the ICCPR is that in absentia trials are not per se impermissible, a state that holds such proceedings assumes a heavy burden to justify the trials.¹¹⁸ In several areas, including notice of proceedings,¹¹⁹ appointment of defense counsel,¹²⁰ and right of retrial,¹²¹ the STL’s in absentia trial provisions appear to violate the ICCPR’s fair trial rights. Before reviewing how those areas would likely fare if held up to HRC scrutiny, how, and in some cases if, the HRC may consider an extradition challenge and the extraterritorial application of the ICCPR merits brief discussion.

114. *Id.* at ¶ 9.4.

115. *Id.* ¶ 7(b).

116. *See id.* ¶ 3.2. More problematic for Italy, Kambiz Maleki claimed that a retrial was not available under Italian law as the Italian prosecutor had appealed Maleki’s sentence twice and that, as a result, Maleki was barred from further appealing, even to request retrial. Italy did not address Kambiz Maleki’s claim, which he supported with a letter from an Italian lawyer who cited specific provisions of the Italian Criminal Code of Procedure in support of the argument that Maleki’s case could not be reopened. *See id.* ¶ 9.5.

117. *Id.* ¶ 9.5.

118. *See id.* at ¶ 9.3.

119. STL Statute, *supra* note 22, art. 22(2)(a).

120. *Id.* art. 22(2)(b)

121. *Id.* art. 22(3)

a. Mechanics of an Extradition Challenge

As previously discussed, the HRC may only consider communications from (1) individuals subject to the jurisdiction of a state party to the ICCPR and OP1 who (2) claim to be victims of a violation by that state party of any of their rights set forth in the ICCPR.¹²² The HRC was able to consider the communication in *Maleki* because it was submitted on behalf of Maleki, who was subject to Italian jurisdiction.¹²³ Maleki claimed that Italy violated his rights under the ICCPR¹²⁴ because Italy is a state party both to the ICCPR and the OP1 individual complaint mechanism.¹²⁵

Given those limitations, is a scenario in which the HRC considers the STL's in absentia trial provisions even possible? The answer is a qualified yes. Assume an individual tried, convicted, and sentenced to a prison sentence by the STL, all in absentia, is located years later,¹²⁶ and the STL seeks to assert control of the individual and transfer him to a jail to begin to serve his sentence.¹²⁷ The analysis of a communication to the HRC challenging extradition following an in absentia trial at the STL turns initially on where the communication's author is located and the state against which the complaint is lodged.¹²⁸ Underscoring the inquiry are the ICCPR's extraterritorial dimensions.

Lebanon is a state party to the ICCPR but not OP1, and the STL is not a state, let alone a state party to the covenant or OP1,

122. See *EHEH*, *supra* note 91, ¶ 3.2.77.

123. See *Maleki*, *supra* note 26, ¶ 12.

124. See *Maleki*, *supra* note 26, ¶ 1.

125. See Treaty Section, *supra* note 85; Treaty Section, *supra* note 90.

126. Under the STL statute, such an individual would have court appointed counsel. See STL Statute, *supra* note 22, art. 22(2)(c). While providing counsel for the accused is laudable, it does not remedy notice defects. See *infra* Part III.B.4.c.

127. It is unclear in which country someone convicted by the STL would serve their sentence. The website for the STL states, "Sentences will be served in a State designated by the President of the Special Tribunal from a list of States that would have expressed their willingness to accept persons convicted by the Special Tribunal." Special Tribunal for Lebanon, About the STL, <http://www.stl-tsl.org/section/aboutthestl> (last visited Dec. 1, 2009). "[W]ould have expressed their willingness" reads quite differently than saying states that have expressed their willingness. The implication is that no states have yet expressed their "willingness," although, given that there are no trials even pending, this seems, if anything, a prospective issue.

128. The location of the jail in which the fugitive would be incarcerated following extradition would also be relevant. See ICCPR, *supra* note 24, art. 2; ICCPR Optional Protocol, *supra* note 31, art. 1.

so the HRC could not consider a communication against either Lebanon or the STL.¹²⁹ While that would seem to end any potential HRC inquiry before it begins, that is not necessarily so. If the person tried, convicted, and sentenced in absentia by the STL is located in the territory of a state party to the ICCPR and OPI, and the STL seeks extradition, a communication to the HRC is permissible.¹³⁰ While Syria is not a party to OPI, Libya and Algeria, and 111 other countries, are.¹³¹ If a fugitive were located in Algeria, a communication to the HRC need not (indeed could not) complain that the STL violated the fugitive's rights under the ICCPR, but rather, could assert that Algeria was violating the fugitive's rights under the ICCPR by extraditing the person following an in absentia trial at the STL for which the fugitive did not receive proper notice and may not be entitled to a retrial.

It is irrelevant that the underlying issue is a violation of fair trial rights by a nonparty to OPI (i.e. the STL). The HRC has previously stated:

Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. *However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. . . . The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.*¹³²

So if the STL's in absentia trial provisions violate article 14 of the ICCPR, the "necessary and foreseeable consequence" of Algeria extraditing a fugitive convicted in absentia by the STL is

129. See ICCPR Optional Protocol, *supra* note 31, art. 1. The related question of whether the U.N. Human Rights Committee ("HRC") could ever consider U.N. actions, and thus whether the U.N. may violate human rights, is beyond the scope of this Article.

130. See *id.*

131. Treaty Section, *supra* note 90.

132. *Kindler*, *supra* note 82, ¶ 6.2 (emphasis added).

that the fugitive's ICCPR right to a fair trial would be violated. Thus, Algeria may violate its ICCPR obligations even though it had nothing to do with the flawed trial that triggered the violation.

b. Notice Provisions

In considering whether the in absentia provisions violate article 14,¹³³ the STL's notice provisions are particularly vulnerable to criticism. In *Maleki*, the HRC held that assuming that the accused learned of the proceedings against him from court-appointed counsel was "clearly insufficient" to meet the notice requirements to try the accused in absentia.¹³⁴ A court trying someone in absentia must verify that the accused has been informed of the proceedings. It is insufficient to assume knowledge,¹³⁵ as clearly do the STL's notice "otherwise given" provisions.¹³⁶ Indeed, the STL's notice provisions, which speak to notifying the accused or serving him or her with an indictment,¹³⁷ are not at issue. But the STL's notice-otherwise-given provisions rely on much greater assumptions than the "clearly insufficient" Italian assumptions that were found to violate the ICCPR in *Maleki*. Under the STL's notice-otherwise-given provisions, the notice requirement is met if the indictment against the accused is published in the media, *or* communicated to the accused's state of residence *or* state of nationality.¹³⁸ These mechanisms, whether used individually or together to provide notice, fail to meet the ICCPR's notice requirement.¹³⁹

133. See ICCPR, *supra* note 24, art. 14(3)(d).

134. *Maleki*, *supra* note 26, ¶ 9.4.

135. See *id.*

136. See STL Statute, *supra* note 22, art. 22(2)(a).

137. See *id.*

138. See *id.* (emphasis added).

139. One could perhaps cobble a counter argument from the HRC's ruling in *Mbenge v. Zaire*, a 1983 case in which the HRC held that even where an accused acknowledges learning of proceedings against him through the media, the state trying the accused has not met its ICCPR article 14 notice obligations. See HRC, *Communication No. 16/1977: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (*Mbenge v. Zaire*), U.N. Doc. CCPR/C/18/D/16/1977 (Mar. 25, 1983). On its face, *Mbenge* hardly seems to lend support for the STL's notice provisions. But *Zaire* had not published the indictment through the media. The accused simply learned of his trial through media coverage of the proceedings. *Id.* ¶ 2.2. Although *Zaire* possessed the accused's correct address in Belgium, there was "no indication . . . of any steps actually taken by [*Zaire*] in

i. Publication

Publishing an indictment in the media as the sole means of providing notice of proceedings is the functional equivalent of Italy impermissibly assuming notice in *Maleki*. In giving notice by publication, the tribunal assumes that the accused will view the notice or learn of it from someone who does. The HRC will consider that assumption clearly insufficient, as it did Italy's assumption in *Maleki*, and the resulting trial will be held to be a violation of the accused's ICCPR fair trial rights.

ii. State of Residence

For the STL to communicate the indictment to the accused's state of residence is understandable on a practical level but likely no less an ICCPR violation. One can envision a circumstance in which the STL indicts an individual believed to reside in Algeria, Libya, or any of the other states party to OPI. It would seem appropriate for the STL to communicate the indictment to that state and request the individual's transfer. If the state declines to do so,¹⁴⁰ the STL understandably might proceed to try the individual in absentia, but, under *Maleki*, the trial would nonetheless be a violation of the ICCPR. The standard the HRC articulated in *Maleki* was not that a state make reasonable efforts to give notice, but rather that a state must verify that the accused was informed of the case beforehand.¹⁴¹ Communicating the indictment to Algeria may be reasonable under the circumstances, but by itself does not constitute verification that the accused was informed of the proceedings against him. Accordingly, this mechanism in the STL's notice-otherwise-given provisions also violates the ICCPR.

order to transmit the summonses to the [accused]." *Id.* ¶ 14.2. Viewed literally, the HRC's holding in *Mbenge* is unsurprising—a state's failure to make any effort to notify the accused of proceedings against him violates the ICCPR. As applied to the STL, the interesting question *Mbenge* presents is what if Zaire had published the notice and the accused acknowledged reading it?

140. There is at least one instance in which the U.N. Security Council has intervened when a state refused to turn over fugitives wanted for prosecution. See S.C. Res. 748, ¶¶1–3, U.N. Doc. S/RES/748 (Mar. 31, 1992) (placing economic and diplomatic sanctions on Libya for failing to cooperate with the Pan Am flight 103 crash investigation, including not surrendering individuals suspected of involvement).

141. See *Maleki*, *supra* note 26, ¶ 9.4.

iii. Nationality

Finally, and possibly least defensible of the notice-otherwise-given mechanisms, the STL may communicate an indictment to the accused's state of nationality.¹⁴² Presumably, the STL would utilize this mechanism when it does not know where the accused is in the world, thus limiting the tribunal's ability to publish notice through the media and denying the STL the option of communicating the indictment to the accused's State of residence. Under this mechanism, if the STL indicts a Yemini national for his involvement in the Hariri assassination but has no idea of his whereabouts, the STL satisfies its notice requirement and may permissibly try the accused in absentia by merely communicating the indictment to Yemini officials. That the accused may not have resided in Yemen for years and that Yemen also may not know where its national is and thus have no ability to communicate the indictment are irrelevant under the STL's notice-otherwise-given requirements. However, these facts are relevant to, and bode poorly for the STL in any HRC review.¹⁴³ The STL's efforts under this mechanism at notifying the accused are less defensible than when the STL has at least been able to identify in which state the accused resides. As a result, communicating the indictment to the accused's state of nationality on the assumption that the state knows where the accused is and can and will communicate the indictment, is even more likely to violate the ICCPR than the other two mechanisms in the STL's notice-otherwise-given provisions. This mechanism, like that of communicating the indictment to the state of residence, is an attempt by the STL at shifting away from the burden to ensure the accused has notice of the proceedings. While such a shift may not be impermissible for Lebanon, which is not a party to OPI, it is a violation of OPI for countries that are parties to cooperate with the STL in handing over fugitives tried in absentia by the STL on the basis of the notice-otherwise-given provisions.¹⁴⁴ Even if the STL remedies the violation by providing defense counsel and a right of retrial (which, as the discussion that follows indicates, are by no means clear remedies), any

142. See STL Statute, *supra* note 22, art. 22(2)(a).

143. See *Maleki*, *supra* note 26, ¶ 9.4.

144. See ICCPR Optional Protocol, *supra* note 31, art. 1.

finding by a human rights body such as the HRC that the STL's notice-others-given provisions violate the ICCPR's fair trial rights would be a staggeringly negative outcome for a U.N. sanctioned tribunal.

c. Does the Right to Counsel or Retrial Cure the Violation?

The two potentially curative provisions under the STL statute are that the tribunal's defense office will assign an absent accused a defense counsel,¹⁴⁵ and that the accused has a right of in person retrial.¹⁴⁶ On the issue of defense counsel, as the HRC stated in *Maleki*, that the STL appoints defense counsel for an individual tried in absentia does not alter the conclusion—the subsequent proceedings will not be considered a fair trial.¹⁴⁷ As to the issue of a retrial, assuming, *arguendo*, that the STL's notice-others-given mechanisms do violate the ICCPR, a right of retrial would remedy any such violation.¹⁴⁸ On its face the STL provides such a right.¹⁴⁹ But on its face Italian law provided a right to retrial, just not as applied to *Maleki*.¹⁵⁰ So the issue is not just whether the STL generally provides a right of retrial, it is whether a specific accused, convicted in absentia, has an actual right of retrial. If someone is convicted in absentia by the STL and located within the next three years, they may indeed have an actual right of retrial that could cure any ICCPR violation created by the deficient notice provisions. If however as is more likely, the individual is not located for some years in the future and the STL is no longer operating, the analysis is more complicated. In the HRC context, such a “right” to retrial seems dangerously

145. See STL Statute, *supra* note 22, art. 22(2)(c). This analysis is predicated on a scenario in which the accused did not designate his or her defense counsel. Obviously if an accused does so designate, it is in response to knowing of the proceedings for which one needs a defense counsel, so significant notice concerns are unlikely.

146. See *id.* art. 22(3). The assumption from note 145 that the accused did not designate his or her own defense counsel continues to the retrial analysis. While the STL excepts out the right of retrial where the accused designated counsel, that exception is not problematic as the accused obviously had notice of the proceedings. Also, the STL allows for a rather obvious exception to the right of retrial—where the accused tried in absentia accepts the judgment. Built into this exception is an accused not complaining of the in absentia process, thus this exception is also unremarkable.

147. See *Maleki*, *supra* note 26, ¶ 6.4.

148. See *id.* ¶ 11.

149. See STL Statute, *supra* note 22, art. 22(3).

150. See *Maleki*, *supra* note 26, ¶ 9.5.

similar to that in *Maleki*—a theoretical right and not a practical reality and thus a violation of the ICCPR.¹⁵¹

The STL's in absentia trial provisions do not meet the fair trial requirements of the ICCPR. Attempting to comply with an STL extradition request following an in absentia trial may place an extraditing State that is a party to OPI in a precarious position vis-à-vis its own ICCPR obligations. That position may be even more untenable if instead of utilizing the ICCPR's complaint mechanism, someone convicted in absentia by the STL relies on the European Convention to challenge their extradition.¹⁵²

B. *European Convention*

1. Fair Trial Provisions

The European Convention “is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens (currently numbering 800 million people) but also to *everyone* within their jurisdiction, irrespective of, for example, sex, race, nationality or ethnic origin.”¹⁵³ All forty-seven member states of the council have acceded to the European Convention.¹⁵⁴

Unlike the ICCPR, the European Convention does not unambiguously grant an accused the right to be present at trial. Under the European Convention, the right to be present is implicit within other stated rights. For example, within article 6 (right to a fair trial), the European Convention provides that “everyone is entitled to a fair and public hearing,”¹⁵⁵ and that everyone has the rights to “defend himself in person,”¹⁵⁶ to

151. *See id.*

152. That is because unlike HRC decisions, “final decisions by the ECtHR are largely considered to be binding.” DAN STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 16 (2009). Moreover, most members of the Council of Europe have made the European Convention directly enforceable through their domestic legal system. *See id.* at 117.

153. European Court of Human Rights, *Some Facts and Figures 1998-2008*, at 1 (2008), <http://www.echr.coe.int/nr/rdonlyres/acf07093-1937-49af-8be6-36fe0fee1759/0/factsandfigureseng10ansnov.pdf> (emphasis added).

154. *See* European Convention, *supra* note 25, pmbl. para. 1.

155. *Id.* art. 6(1).

156. *Id.* art. 6(3)(c).

“examine or have examined witnesses,”¹⁵⁷ and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹⁵⁸ The ECtHR has held that “it is difficult to see how [an accused] could exercise these rights without being present”¹⁵⁹ and that “the object and purpose of [article 6] taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing.”¹⁶⁰

2. Enforcement and Extraterritorial Application

The ECtHR was established in 1959 as part of, and to monitor member states’ compliance with, the European Convention.¹⁶¹ The court has “jurisdiction to rule, through binding judgments, on individual and interstate applications alleging violations of the convention.”¹⁶² Under article 1, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”¹⁶³ Section I’s rights and freedoms include the article 6 fair trial rights.¹⁶⁴ How and to what extent member states risk violating the European Convention by extraditing someone from Europe at the request of the STL is unclear. One view is that article 1 “cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.”¹⁶⁵ But the court has also expressly not excluded the possibility that “an issue might exceptionally be

157. *Id.* art. 6(3)(d).

158. *Id.* art. 6(3)(e).

159. *Sejdovic v. Italy*, App. No. 56581/00, 42 Eur. H.R. Rep. 17, ¶ 44 (2004) (citing *Belziuk v. Poland*, 1998-II Eur. Ct. H.R. 558, 570, ¶ 37; *T. v. Italy*, 245-C Eur. Ct. H.R. (ser. A) at 41, ¶ 26 (1993); *F.C.B. v Italy*, 208-B Eur. Ct. H.R. (ser. A) at 21, ¶ 33 (1991); *Colozza v. Italy*, 89 Eur. Ct. H.R. (ser. A) at 14, ¶ 27 (1985)).

160. *Id.*

161. *See* European Court of Human Rights, *supra* note 153.

162. *Id.*

163. European Convention, *supra* note 25, art. 1.

164. *See id.* art. 6.

165. *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. 293, 346 (Bratza, J., partly dissenting) (citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 32–36, ¶¶ 83, 88–91 (1989)). Again, the state or states in which those convicted by the STL would serve their jail sentences have not been identified. *See supra* note 127 and accompanying text.

raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.”¹⁶⁶

Therefore, analyzing the permissibility of a proposed extradition between member states under the European Convention differs from that of a member state extraditing a person to a nonmember state. How the analysis differs seems to depend on the difference between a “regular” violation of the European Convention, such as for an intra-European extradition, and “flagrant” violations, such as for a member state extraditing a fugitive to a non-member state.¹⁶⁷ Understanding how the ECtHR applied article 6 in a case involving an extradition request among member states establishes a baseline from which extradition to a non-member state, like the STL, may be considered. That baseline provides a norm to assess whether the STL’s in absentia trial provisions constitute a flagrant violation of the European Convention.

3. ECtHR Interpretation of In Absentia Proceedings Balanced Against the European Convention’s Fair Trial Rights

Similar in many ways to the HRC’s *Maleki* decision, the ECtHR in *Sejdovic v. Italy* addressed the level and type of notice required before permissibly trying someone in absentia,¹⁶⁸ which side bears the burden of proving or disproving notice,¹⁶⁹ and if a state must afford a right to retrial.¹⁷⁰ The case arose from a complaint to the ECtHR by Ismet Sejdovic, a Yugoslavian national, against Italy stemming from his 1996 in absentia trial and conviction.¹⁷¹ At that trial, an Italian court found Sejdovic guilty of the fatal shooting of a man in an encampment in Rome in 1992.¹⁷² Witnesses identified Sejdovic as the individual responsible, and, a month after the shooting, an Italian

166. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 45, ¶ 113.

167. The higher standard for intra-European extraditions may play an interesting role if the STL, the state from which extradition is sought, and the state in which those sentenced to confinement by the STL are all located in Europe.

168. *See Sejdovic v. Italy*, App. No. 56581/00, 42 Eur. H.R. Rep. 17, ¶ 31 (2004).

169. *See id.* ¶ 15.

170. *See id.* ¶ 30.

171. *See id.* ¶¶ 1, 3.

172. *See id.* ¶¶ 8, 12.

investigating judge ordered Sejdovic's detention pending trial.¹⁷³ Italian authorities could not locate Sejdovic to enforce the order and, believing that he was deliberately evading justice, declared him a fugitive.¹⁷⁴ Italian authorities assigned Sejdovic a lawyer and tried him in absentia.¹⁷⁵ Although Sejdovic was not present, his court-appointed attorney attended and actively participated in the trial.¹⁷⁶ Sejdovic was convicted of manslaughter and illegally carrying a weapon, and sentenced to twenty-one years, eight months imprisonment.¹⁷⁷ Sejdovic's defense attorney declined to appeal the conviction, which became final in 1997.¹⁷⁸ In 1999 German police arrested Sejdovic in Hamburg pursuant to an Italian arrest warrant.¹⁷⁹ Shortly thereafter the Italian Minister of Justice requested that Germany extradite Sejdovic to Italy to serve his prison sentence.¹⁸⁰ German authorities then sought additional information from Italy on Sejdovic's case.¹⁸¹ Italy acknowledged that Sejdovic had never been officially notified of the charges against him and that Italy did not know whether Sejdovic had been in contact with his court appointed attorney.¹⁸² The conversation between Germany and Italy then turned to whether Sejdovic was entitled to a new trial in Italy should Germany extradite him.¹⁸³ When Italy informed Germany that Sejdovic may request a new trial, but that such requests are not automatically granted, Germany refused Italy's extradition request and released Sejdovic.¹⁸⁴ Sejdovic then petitioned the ECtHR, claiming that Italy violated his right to fair trial under article 6 of the European Convention by not informing him of the accusations against him and by convicting him in absentia without providing him the opportunity to present a defense.¹⁸⁵

173. *See id.* ¶¶ 8–9.

174. *See id.* ¶ 9.

175. *See id.* ¶¶ 10–11. Four others suspected of involvement in the shooting were also tried. *See id.* ¶ 10.

176. *See id.* ¶¶ 11, 15. Sejdovic's attorney called "a large number of witnesses" to testify. *Id.* ¶ 15.

177. *See id.* ¶ 12.

178. *See id.* ¶ 13.

179. *See id.* ¶ 14.

180. *See id.*

181. *See id.* ¶ 15.

182. *See id.*

183. *See id.* ¶ 16.

184. *See id.* ¶¶ 15–16.

185. *See id.* ¶¶ 3, 19–20.

Italy argued to the ECtHR that it had respected Sejdovic's rights under the European Convention. Italy claimed that it not only had appointed Sejdovic an attorney, but one who mounted an effective defense.¹⁸⁶ Italy pointed to the fact that the same attorney had been appointed for all the defendants and that three had been acquitted.¹⁸⁷ Italy stressed that throughout the process it provided notice of upcoming proceedings to Sejdovic's lawyer and not Sejdovic because he "had deliberately sought to evade justice and had been deemed to be a fugitive."¹⁸⁸ That Sejdovic became untraceable immediately after the shooting amounted to a waiver of his right to appear at trial, at least according to Italy.¹⁸⁹ Under this view, Italy claimed that the ECtHR could and indeed should infer from Sejdovic's actions that he intended to escape trial.¹⁹⁰

The ECtHR agreed that neither the letter nor even the spirit of the European Convention's fair trial provisions precluded "a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial; however, any such waiver must be made in an unequivocal manner."¹⁹¹ The court found "no evidence that [Sejdovic] knew of the proceedings against him or of the date of his trial."¹⁹² Nor was the court willing to assume any inferences from the accused's travel to Germany.¹⁹³ In the ECtHR's view:

[T]o inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise

186. *See id.* ¶ 21.

187. *See id.* ¶ 21. That point seemed to cut both ways though as Sejdovic noted that the defendants who had been acquitted were present at trial, while the two who were convicted were tried in absentia. *See id.* ¶ 20. The other defendant convicted in absentia was convicted of the same offenses as Sejdovic and sentenced to fifteen years and eight months imprisonment. *See id.* ¶ 12.

188. *Id.* ¶ 22. Italy also noted that it only declared Sejdovic a fugitive after searching for him at the nomad camp in Rome where he was supposedly living. *See id.*

189. *See id.* ¶ 32.

190. *See id.*

191. *Id.* ¶ 33.

192. *Id.* ¶ 34. According to the court, that the accused was not at his usual place of residence when the Italian police attempted to arrest him created nothing more than an "impression that he was aware or feared that the police were searching for him." *Id.*

193. *See id.* ¶ 35.

of the accused's rights *Vague and informal knowledge cannot suffice*

Consequently, even supposing that [Sejdovic] was indirectly aware that criminal proceedings had been opened against him, it cannot be inferred that he unequivocally waived his right to appear at his trial.¹⁹⁴

Italy's failure to ensure that Sejdovic had notice of the proceedings constituted a violation of article 6 of the European Convention and turned the court's inquiry to whether a retrial might remedy the violation.¹⁹⁵ Italy claimed that in order for Sejdovic to receive a retrial, he could have appealed his conviction by "simply" showing that he had been unaware of the proceedings.¹⁹⁶ But under Italian law, he needed to do so within ten days after he learned of his conviction, "failing which [the appeal] shall be inadmissible."¹⁹⁷ So by the time that Sejdovic and Italy were submitting the matter to the ECtHR, Sejdovic had not, and thus no longer could, request a new trial. Italy argued that the fact its law provided Sejdovic "a genuine chance" of a new trial met the European Convention's fair trial principles.¹⁹⁸ A possibility of a new trial, and especially a possibility that no longer existed, was not enough for the court. Absent an unequivocal waiver of the right to appear, a person convicted in absentia "*must in all cases be able to obtain a fresh determination by a court of the merits of the charge.*"¹⁹⁹

4. Would Extradition of Someone Convicted In Absentia by the STL Violate Obligations Under the European Convention?

Sejdovic provides a baseline for how the ECtHR views and applies the European Convention to in absentia trial proceedings administered by a member state. That baseline informs as to when a state commits a "regular" violation of the European Convention in the type and manner of notice provided before

194. *Id.* ¶¶ 35–36 (emphasis added).

195. *See id.* ¶¶ 36, 41–42.

196. *Id.* ¶ 24.

197. *Id.* ¶ 18.

198. *Id.* ¶ 25. Italy's argument was that, assuming someone tried in absentia timely filed an appeal once they learned of the conviction, the only reason they would not receive a new trial was if their absence had been intentional, which would constitute a deliberate waiver such that a new trial was not required. *See id.*

199. *Id.* ¶ 39 (emphasis added).

trying someone in absentia, the relevance of court appointed counsel, and the significance of the right of retrial. But in the context of the STL, the issue is whether the tribunal's in absentia provisions violate the European Convention. If so, a member state may violate its own obligations under the European Convention by complying with the extradition request. Before parsing out whether the in absentia trial provisions of the STL flagrantly violate the European Convention, the procedure for filing a relevant communication to the ECtHR challenging extradition, and how the European Convention applies extraterritorially, bears mention.

a. Mechanics of an Extradition Challenge

Assume a similar hypothetical to that used discussing the ICCPR, in which a person tried, convicted, and sentenced to a prison sentence by the STL, in absentia, is located years later, but this time in France.²⁰⁰ The STL requests that France extradite the fugitive to serve his or her sentence.²⁰¹

How someone would be able to file a relevant communication is more straightforward than with the ICCPR and OPI complaint mechanism. Under the European Convention, the ECtHR may "receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention."²⁰² And, as already discussed, the European Convention affords protections expressly not just to the citizens of member states, but to "everyone within their jurisdiction, irrespective of . . . nationality

200. As a BBC news story described, France and Syria have a "tangled history," so in the case of a Syrian national seeking to evade the STL, France would seem a plausible destination. Alan Little, *France and Syria: A Tangled History*, BBC NEWS, Sept. 7, 2004, http://news.bbc.co.uk/2/hi/middle_east/3635650.stm. Moreover, the one potential suspect in custody for the Hariri assassination is Syrian, and while he was most recently detained in the United Arab Emirates, he had previously been detained in France. *See Suspect Arrested in Hariri Assassination*, UNITED PRESS INT'L, Apr. 20, 2009, http://www.upi.com/top_news/special/2009/04/20/suspect-arrested-in-hariri-assassination/UPI-96091240244831/.

201. France has already refused one Lebanese extradition request related to the Hariri assassination in 2005 for a Syrian intelligence agent. *See Suspect Arrested in Hariri Assassination*, *supra* note 200. France apprehended the individual but refused to extradite him based on concerns that he would be executed. *See id.*

202. European Convention, *supra* note 25, art. 34.

or ethnic origin.”²⁰³ So a Syrian-national fugitive from the STL living in France may submit a communication to the ECtHR challenging his extradition.

Turning to the issue of whether and how the ECtHR could even consider a challenge to the STL’s in absentia trial provisions, a communication to the court alleging that the STL violated the European Convention would be inadmissible as the STL is not a high contracting party to the convention.²⁰⁴ To be admissible, the communication would have to allege that, in complying with the STL’s extradition request, France would violate its obligations under the European Convention. That there is an extraterritorial application of the European Convention for its states parties, like France, is clear enough, but the scope of that obligation is anything but. Assuming the jail is not located in Europe, whether extradition from France of someone convicted in absentia by the STL constitutes a violation of the European Convention by France raises a slightly different question than that of the intramember state extradition issue in *Sejdovic*.²⁰⁵ Between member states of the European Convention, one view is that “mere irregularities” or a “lack of safeguards” may constitute a breach of article 6.²⁰⁶ But in assessing whether an extradition by France to a country outside of Europe would violate France’s obligations under the European Convention, a more significant or fundamental violation of article 6 is required.²⁰⁷ The permissibility of such an extradition from France would depend on whether the subject “has suffered or risks suffering a flagrant denial of a fair trial” by the STL.²⁰⁸ Regardless, the subject may seek relief from the ECtHR, if and when an individual convicted in absentia by the STL is found in

203. European Court of Human Rights, *supra* note 153.

204. *See* European Convention, *supra* note 25, art. 35(3).

205. *Sejdovic* was located in Germany, from where Italy sought his extradition. *See Sejdovic v. Italy*, App. No. 56581/00, 42 Eur. H.R. Rep. 17, ¶ 14 (2004).

206. *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. 293, ¶ 14 (Grand Chamber) (Bratza, J., partly dissenting).

207. In one Chamber’s view, “what the word ‘flagrant’ is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.” *Id.*

208. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 45, ¶ 113 (1989).

France, or any one of the forty-seven European Council member States, and the STL requests his or her extradition.²⁰⁹

b. Notice Provisions

The ECtHR acknowledged in *Sejdovic* that the European Convention does not per se prohibit in absentia trials.²¹⁰ However, that openness to in absentia trials in theory likely does not extend to the reality of the STL's notice-otherwise-given provisions.²¹¹

The ECtHR held in *Sejdovic* that while a person may tacitly waive his or her right to be present at trial, "any such waiver must be made in an unequivocal manner."²¹² The court was willing to suppose that Sejdovic was indirectly aware of the proceedings against him but held that, despite such awareness, the state cannot infer unequivocal waiver.²¹³ Thus, the STL's notice-otherwise-given provisions do not meet the ECtHR's requirements. Publishing the indictment in the media or communicating it to the state of residence or nationality is, at best, the "vague and informal knowledge" of criminal proceedings the court held "cannot suffice."²¹⁴ At a minimum, the STL's notice-otherwise-given provisions violate the European Convention. As a result, were France to extradite a fugitive convicted in absentia by the STL to a jail located in a European state, France would violate its obligations under the European Convention.²¹⁵ The inquiry then turns to whether court-appointed counsel or a right of retrial cures that violation.

209. Assuming the other admissibility criteria of article 35 of the European Convention are satisfied. See European Convention, *supra* note 25, art. 35. This includes a requirement that the individual exhaust domestic remedies so the individual would first need to petition the courts of the European state from which their extradition was sought. See *id.*

210. See *Sejdovic*, 42 Eur. H.R. Rep. 17, ¶ 33.

211. See STL Statute, *supra* note 22, art. 22(2)(a).

212. *Sejdovic*, 42 Eur. H.R. Rep. 17, ¶ 33.

213. See *id.* ¶¶ 35–36.

214. *Id.* ¶ 35.

215. This is assuming that the jail used by the STL is located in a European state. The STL has not yet determined the location where those sentenced to confinement will be incarcerated. See *supra* note 127 and accompanying text.

c. Does the Right to Counsel or Retrial Cure the Violation?

Simply put, the STL's provisions for court appointed defense counsel for those tried in absentia do not cure the deficiencies of notice otherwise given. Indeed, that the STL's in absentia provisions require that a defense counsel will be assigned to ensure "full representation of the interests and rights" of an accused tried in absentia borders on irrelevance in terms of the European Convention and the ECtHR's waiver inquiry.²¹⁶ The issue is not representation, effective or otherwise. The issue is whether the accused has notice of the proceedings against him. An attorney appointed by the STL does not establish notice to the accused, let alone proof of unequivocal waiver.

Next is the curative possibility of the right of retrial. The court in *Sejdovic* could not have been clearer on the importance of a right of retrial when an individual is convicted in absentia absent the required unequivocal waiver. The individual "must in all cases be able to obtain a fresh determination by a court of the merits of the charge."²¹⁷ As Italy's argument that its criminal procedure code provided for retrials and that Sejdovic had a chance of retrial failed, so would an analogous argument by a state party to the European Convention from which extradition of a person tried in absentia by the STL was sought. If such a person were located in France during the pendency of the STL, that person would seek relief from the ECtHR arguing that France would violate its obligations under the European Convention by complying with an extradition request. Here, France could argue both that the STL provided a statutory right to retrial and that, with the STL still operating, the right was available to the individual subject to the extradition request. But once the STL ceases operation and a fugitive is then found in France, any claim that retrial is available would be little more than speculative. In this scenario, France may argue that the U.N. Security Council could "restart" the STL in order to retry the individual, but could not guarantee so to the ECtHR.²¹⁸

216. STL Statute, *supra* note 22, art. 22(3).

217. *Sejdovic*, 42 Eur. H.R. Rep. 17, ¶ 39.

218. The mechanism by which the Security Council could preserve the ability to restart the STL might be to remain "seized of the matter." See Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 73 (1998).

Accordingly, France would not be able to claim that the individual would in fact receive a new adjudication by the STL. If France or any other European extraditing state is not able to guarantee retrial for a fugitive convicted in absentia by the STL, the specter of what the ECtHR considers a “flagrant denial of justice” looms large.²¹⁹

d. “Flagrant Denial of Justice”

In straightforward fashion, the ECtHR has considered “whether the requirement of article 6 to ensure the right of the accused to be present during the proceedings against him or her is so basic as to render proceedings conducted in absentia and whose reopening has been refused a “flagrant denial of justice.”²²⁰ The court’s equally clear answer was that

“a denial of justice undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself.” This conclusion is in line with the established case-law confirming that the right of an accused to participate in the proceedings is a fundamental element of a fair trial.²²¹

219. *Stoichkov v. Bulgaria*, App. No. 9808/02, 44 Eur. H.R. Rep. 14, ¶ 51 (2005).

220. *Id.* ¶ 54 (quoting *Drozdz v. France*, 240 Eur. Ct. H.R. (ser. A) at 34–35 (1992)). *Stoichkov* dealt with issues of Bulgarian law and not extradition, let alone extradition outside Europe. *See id.* *Stoichkov* does however provide the ECtHR’s view on where on the spectrum of importance the right to be present at trial lies, and thus the magnitude of a violation of that right.

221. *Id.* ¶ 55 (citations omitted) (quoting *Einhorn v. France*, 2001-XI Eur. Ct. H.R. 275, ¶ 55 (2001)). Although *Einhorn* was a decision on the admissibility of an application to the ECtHR, the underlying issues are extremely relevant to a discussion on extraditing a fugitive outside Europe based on an in absentia proceeding. *Einhorn* was a U.S. national who was arrested in the United States for the murder of his girlfriend. *See Einhorn*, 2001-XI Eur. Ct. H.R. 275, ¶¶ 1, 2. After being released on bail, he fled to France. *See id.* ¶ 3. In 1993, a Pennsylvania court tried *Einhorn* in absentia. He was found guilty of first-degree murder and sentenced to life imprisonment. *See id.* ¶ 2. In 1997, *Einhorn* was located in France and the United States requested his extradition. *See id.* ¶ 3. A French court determined that, as *Einhorn* had not unequivocally waived the right to defend himself in person, had not chosen his defense counsel, and was not entitled to a retrial, for France to extradite *Einhorn* to the United States would be in violation of France’s obligations under the European Convention. *See id.* ¶ 4. Accordingly, France denied the extradition request. *See id.* Only after the Pennsylvania

The ECtHR's conclusion flows from a state party's obligation, indeed duty, "to guarantee the right of a criminal defendant to be present in the courtroom—either during the original proceedings or in a retrial after he or she emerges."²²² Per the ECtHR, the right to be present is one of the "essential requirements of Article 6"²²³ and to try someone in absentia and not provide a retrial absent unequivocal waiver is "'manifestly contrary'" to that article.²²⁴

It is thus equally straightforward that the STL's notice-otherwise-given provisions violate the European Convention. The violations are of substantive rights, and if the STL is no longer functioning at the time a fugitive is apprehended and challenges extradition, any "right" to retrial would be speculative and thus the violation will be considered flagrant. If the STL has ceased operations, the result for a third-party state like France is that, by extraditing a fugitive convicted in absentia by the STL, that state would violate its own obligations under the European Convention. If the STL is still operating, the right to retrial may correct the deficiencies of the notice otherwise given. But the ripple effect of the STL's flawed in absentia provisions will reach the legacy of the STL, the development of future tribunals, and even the role of the U.N.

IV. *THE PRICE TO BE PAID*

The STL's notice-otherwise-given provisions violate both the ICCPR and the European Convention. That the STL will appoint defense counsel for those tried in absentia does not alter that outcome. Similarly, for the STL to afford a right to retrial may cure the violation, but does not alter the staggering conclusion that provisions of a U.N.-sanctioned tribunal violate human rights norms. In the quite-possible event that a fugitive tried in absentia by the STL is not found until after the STL ceases operation, then what is essentially a U.N.-brokered human rights violation will stand unchecked. Even if the STL never utilizes its

legislature modified a state statute so that Einhorn would be entitled to a retrial did the extradition occur. *See id.* ¶ 5.

222. *Stoichkov*, 44 Eur. H.R. Rep. 14, ¶ 51 (2005), ¶ 56.

223. *Id.*

224. *Id.* (quoting *Drozdz*, 240 Eur. Ct. H.R. (ser. A) at 34–35).

in absentia trial provisions, the damage to the STL, to future tribunals, and to the U.N. has already largely been done.

A. STL

The STL's in absentia provisions will eventually erode its own legitimacy, first abroad and then within Lebanon. As this Article described, the STL's in absentia provisions will be found lacking if either the HRC or ECtHR are involved in the assessment. The indirect manner in which this will occur increases the negativity with which some third party states may come to view the STL. This Article utilized hypothetical examples of how the STL's in absentia provisions may be found deficient under human rights law. Implicit in those examples are states, like Algeria and France, where those convicted by the STL may be found years later. In arguing that the state is not violating its human rights obligations by extraditing someone convicted in absentia by the STL, states, like Algeria or France, would be in the awkward position of defending the STL's in absentia provisions despite having had nothing to do with them. The equally unpalatable alternative would be to refuse an extradition request from a U.N.-sanctioned tribunal, thereby being perceived as thwarting international justice.²²⁵

The result of that dilemma will lead in turn to the STL losing legitimacy within Lebanon. Whatever sense of closure or justice in absentia trials at the STL afford the families of the bombing victims and the people of Lebanon in the short term will be undone when a fugitive involved in the assassination is able to cloak himself as the victim of human rights violations and to characterize the STL and an unfortunate third party state as the human rights violators. Neither are the Lebanese likely to take pride in the effect of the STL's in absentia provisions on future tribunals.

225. And also, potentially being on the receiving end of a U.N. Security Council resolution to surrender the individual(s) wanted or face sanctions. *See supra* note 140. Given the ability to veto, that would be an unlikely result for a state like France, or any of the other permanent members of the U.N. Security Council.

B. *Future Tribunals*

Some may argue that, because of the unique purview of the STL—holding those responsible for a discrete terrorist event—the tribunal’s in absentia provisions, even if flawed, will not be replicated in future tribunals. It is true that for tribunals dealing with mass atrocities and war crimes, there are a host of other, more applicable, tribunals from which to draw. But for those discrete terror events with a transnational component, like the Mumbai bombings,²²⁶ the STL is much more relatable, and its uniqueness renders its provisions quite likely to be drawn from.

After the IMT and until the STL, the international community could point to the uninterrupted custom and practice of not allowing total in absentia proceedings in an international tribunal. But not any longer. The responsibility for this unfortunate development lies with the U.N.

C. *United Nations*

In adopting the STL and its explicit support of total in absentia trials the U.N. crossed a veritable Rubicon, which augurs poorly for future tribunals. On what grounds could the U.N. oppose such provisions in later tribunals? Perhaps even more troubling is that the adoption of the STL’s in absentia trial provisions by the U.N. may be construed to mean that even seemingly settled areas of criminal procedure are now negotiable in future tribunals.

Marshalling support for international criminal tribunals is a challenging enough undertaking without the added burdens that arise from the in absentia trial provisions of the STL. Future challenges to the STL’s in absentia trial provisions are likely to

226. See Randeep Ramesh, *Indian PM Accuses ‘Official Agencies’ in Pakistan of Being Behind Mumbai Attacks*, *GUARDIAN* (London), Jan. 7, 2009, at 23 (referring to the three-day terror attacks of November 2008 in Mumbai, India, for which some allege Pakistan’s involvement). Another example, and which bears some similarities to the events which led to the STL, is found in Iraq. Prime Minister Nouri al-Maliki called for the establishment of an international tribunal to investigate the August 2009 suicide truck bombings in Baghdad against the Iraqi foreign and finance ministries, killing an estimated one hundred people. Members of the Iraqi government claim that two Syrian nationals planned and financed the bombings and that Syria refused to surrender the suspects. Sameer Yacoub, *Iraq Presses UN Envoy on Bombings Tribunal, Syria*, *GUARDIAN*, Sept. 6, 2009, available at <http://www.guardian.co.uk/world/feedarticle/8694130>.

cause difficulties for third-party states potentially exposed to such challenges, which will negatively influence these states' political, policy, and financial support for future U.N. tribunals. The world community's monetary support of international criminal tribunals is already limited and delays in ending both the ICTY and ICTR are likely to strain international financial support for future tribunals.²²⁷ The U.N. expended financial support and hard-earned credibility within the international community in establishing and now operating the STL. Both will be difficult to recover any time soon.

V. CONCLUSION

Lebanon and the U.N. would do well to reconsider the words of former Secretary-General Kofi Annan. While discussing post conflict reconstruction, the Secretary-General's comments on balancing peace and justice are almost prescient of the STL. The Secretary-General cautioned:

[W]e should remember that the process of achieving justice for victims may take many years, and it must not come at the expense of the more immediate need to establish the rule of law on the ground. . . . At times, the goals of justice and reconciliation compete with each other. Each society needs to form a view about how to strike the right balance between them [I]f we ignore the demands of justice simply to

227. See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (describing the completion strategies for ICTY and ICTR to complete trials by the end of 2008 and all work in 2010). *But see* Fausto Pocar, President, ICTY, *Assessment and Report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, ¶ 18, delivered to the Security Council, U.N. Doc. S/2008/326 (May 14, 2008) (forecasting a timeline by which ICTY trials would be ongoing into 2010); Dennis Byron, President, ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 67, delivered to the Security Council, U.N. Doc. S/2008/322 (May 13, 2008) (forecasting a timeline by which "at best" some ICTR trial decisions would not likely be announced until the later half of 2009). The ICTY completion timeline may be completely disrupted if, as recently reported, the capture of former Bosnian Serb commander General Radtko Mladić, occurs by the end of 2009. See Craig Whitlock, *Serbian Officials Say Mladic Is 'Within Reach'*, WASH. POST, Jul. 30, 2009, at A10 (describing Mladić as Europe's "most wanted war criminal" for his role in, among other activities, the execution of eight thousand Muslims in Srebrenica in 1995, the "worst massacre in Europe since World War II," and a three-year siege of Sarajevo that leveled the city and killed up to ten thousand people).

secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.²²⁸

It borders on cruel irony that what triggered the involvement of the U.N. in the first place was the perception that Lebanon was incapable of conducting fair and impartial trials.²²⁹ Yet the result of the U.N.'s involvement is a tribunal with flawed in absentia trial provisions, the consequences of which will negatively impact the international community more than if the U.N. had never been involved in the first place. While Lebanon may have extracted, and the U.N. conceded, the ability to hold total in absentia trials at the STL through notice otherwise given, the true price for those concessions will be paid by the international community.

228. Press Release, The Secretary-General, Secretary-General Expresses Hope for New Security Council Commitment to Place Justice, Rule of Law at Heart of Efforts to Rebuild War-Torn Countries, U.N. Doc. SG/SM/8892 (Sept. 24, 2003).

229. See STL Agreement, *supra* note 16.