Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?

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

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2 Hariri served as prime minister for Lebanon first from 1992-1998 and then again from 2000 until his resignation in 2004. Obituary, Rafiq Hariri: Rafiq Hariri loved to project himself as Mr Lebanon, British Broadcasting Corporation News, Feb. 14, 2005, available at 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. NICHOLAS BLANFORD, KILLING MR. LEBANON THE ASSASSINATION OF RAFIQ HARIRI AND ITS IMPACT ON THE MIDDLE EAST 100-115 (I.B. Tauris & Co Ltd 2009) (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. 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. Id at 115.

3 UNSC Fact Finding Report, supra note 1, at ¶ 16. Hariri was widely credited with rebuilding Beirut in several senses in the wake of Lebanon’s 15 year civil war. Obituary, supra note 2. See also BLANFORD, supra note 2, at 40-49.

4 Hammer, supra note 1.
had an earthquake-like impact on Lebanon. Shock, disbelief, and anxiety were the most common reactions among the people....[S]hock 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 [bec[a]me their utmost priority and that peace and tranquility in Lebanon could not be restored without bringing this crime to an acceptable closure.  

To many, uncovering the truth meant determining whether Hariri’s support for ending Syria’s 29 year old occupation of Lebanon led to his death. Press reports of the assassination cited unnamed opposition leaders’ claims that some combination of the Lebanese and Syrian governments was responsible for the bombing because Hariri supported the withdrawal of Syrian troops from Lebanon. Lost on no one in the region was that Hariri’s death came less than five months after the United Nations Security Council (UNSC) issued a resolution calling on all “foreign forces” to leave Lebanon, a thinly veiled reference to Syria.  

5 UNSC Fact Finding Report, supra note 1, at ¶ 50.  
6 Hammer, supra note 1.  
7 Leena Saida and David Stout, Huge Car Bomb Kills Lebanon's Former Prime Minister, N.Y. TIMES, Feb. 14, 2005, at 1, available at http://www.nytimes.com/2005/02/14/international/14cnd-beirut.html. Former Prime Minister Hariri’s attitude towards Syria at the time of his death was quite different then 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. 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. 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.  
8 S.C. Res. 1559, preambular ¶ 6, U.N. Doc. S/RES/1559 (Sep. 2, 2004). The UNSC website lists subject headings for the resolutions. See UNSC RESOLUTIONS, http://www.un.org/Docs/sc/unscc_resolutions04.html. The headings tend to reflect the country or countries with which the resolution deals (“The situation in Liberia” UNSC 1579 or “The situation between Eritrea and Ethiopia” UNSC 1560). Id. Interestingly, the UNSC resolutions dealing with Lebanon have a subject heading of “The situation in the Middle East” which is a either a reference to how inter
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 UNSC issued a statement condemning “the terrorist bombing” and “expressed 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, 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.10 Parsing out the blame, the report faulted Lebanon for a seriously flawed investigation following the bombing11 and Syria “for the political tension that preceded the assassination.”12

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

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9 Statement by the President of the Security Council, 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, again the obvious if unstated answer was Syria.

10 The UNSC 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 UNSC Fact Finding Report, supra note 1, at ¶ 62. The report was unable to conclude whether the flawed Lebanese investigation stemmed from a “lack of capabilities or commitment……” Id.

12 Id. at ¶ 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.
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."\textsuperscript{13} With the Lebanese government’s approval, in April 2005, the U.N. 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.”\textsuperscript{14} This set in motion a dialogue and subsequent negotiations between the U.N. and Lebanon which 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….”\textsuperscript{15}

The STL was to be a tribunal “of an international character based on the highest standards of criminal justice.”\textsuperscript{16} While similar in some respects to the U.N. criminal tribunals which preceded it, the STL is also significantly different.\textsuperscript{17} While the previous tribunals dealt with a wide range of events over time, the STL is focused on one incident, the February 14,

\textsuperscript{13} Id.

\textsuperscript{14} S.C. RES. 1595, ¶ 1, U.N. Doc. S/RES/1595 (April 7, 2005). The same UNSC which spoke in diplomatic terms of assisting the Lebanese authorities also spoke in blunt terms, describing a “Lebanese investigation process [which] suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion.” Id. at preambular ¶ 5.


\textsuperscript{17} See William A. Schabas, The Special Tribunal for Lebanon: Is a ‘Tribunal of an International Character’ Equivalent to an International Criminal Court?, LEIDEN J. INT’L L. 21 (2008). In Schabas’ view, the STL is international in some respects but not necessarily an international criminal tribunal.
2005, bombing.\textsuperscript{18} 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.\textsuperscript{19} The STL also reflects a host of procedural differences from its tribunal predecessors.\textsuperscript{20} One stark difference is that the STL provides for trials to occur in the absence of the accused, or in absentia trials.\textsuperscript{21} 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.\textsuperscript{22}

In absentia trials are controversial and the subject of critical review by two leading human rights bodies, the Human Rights Committee (HRC)\textsuperscript{23} and the European Court of Human Rights (ECtHR).\textsuperscript{24} One criteria by which the HRC and ECtHR assess the permissibility of in absentia trials is whether an individual so convicted has the ability

\begin{footnotesize}
\begin{enumerate}
\itemWhile 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 15, at art. 1.
\itemId. at 1116-1121.
\itemId. at art. 22(2)(a).
\itemInterpreting and applying the International Covenant on Civil and Political Rights, specifically, Article 14, paragraph 3(d), which provides that everyone charged with a criminal offense shall have the right to be tried in his or her presence. International Covenant on Civil and Political Rights, Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16 (A/6316), 999 U.N.T.S. 302, reprinted in 6 I.L.M. 383 (1966), art. 14(3)(d), [hereinafter ICCPR].
\itemInterpreting and applying the European Convention on Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 04, 1950, ETS No. 5, 213 UNTS 222 [hereinafter the European Convention]. The 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 European Convention, which addresses the right to a fair trial. Id. at art. 6.
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to obtain a fresh determination of the charges, or retrial.\textsuperscript{25} It is unclear whether the STL’s retrial provisions meet that requirement. While the STL does provide a right of retrial where an accused is convicted in absentia,\textsuperscript{26} the right is to be retried before the STL, a tribunal scheduled to exist for only three years.\textsuperscript{27} When someone is tried and convicted in absentia, often years pass before they are apprehended and the retrial issue arises. For the STL’s in absentia trial provisions 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. Given the financial difficulties in establishing and operating the STL, the prospects of its long term operation seem dim. But not doing so would seem to render the right of someone convicted in absentia to a retrial a possible, but not absolute, right, likely running afoul of the fair trial provisions of both international and regional human rights agreements.

Whether or not the STL’s in absentia notice, 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


\textsuperscript{26} STL Statute, supra note 21, at art. 22(3).

\textsuperscript{27} STL Agreement, supra note 15, at 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.” \textit{Id.} at ¶ 1. After the three year period, the agreement provides for the possibility of extending the duration “to allow the Tribunal to complete its work.” \textit{Id.} at ¶ 2.
potentially flawed in absentia provisions may extend well beyond the tribunal’s legacy. There are broader implications – of the U.N.’s credibility and whether in absentia trial provisions, or any other aspect of supposedly settled criminal procedure, are now negotiable in future tribunals.

II. OVERVIEW

This article will examine whether the STL’s in absentia trial provisions violate human right norms, and, if so, whether the right to tribunal appointed counsel or to retrial remedies any such violation. The third section explains the operation of the STL, with particular attention drawn to the funding difficulties the tribunal faces before detailing the STL’s notice provisions for in absentia trials and subsequent right to counsel and retrial. The fourth section compares the STL’s provisions to those of other tribunals to demonstrate that while there is an overlooked tolerance for some form of in absentia proceedings, the STL nonetheless represents a radical departure. The ramifications of that departure are then explored in sections five and six through 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) and the European Convention for Protection of Human Rights and Fundamental Freedoms (European Convention). Section five 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. The sixth section conducts a similar inquiry with the European Convention and relevant case law from the ECtHR. The seventh and final section discusses the implications of the STL’s in absentia provisions being found deficient, for the STL, the U.N., and for subsequent tribunals. The article concludes that the STL’s in absentia trial notice provisions violate human
rights norms and that those violations are not likely 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, purchased at a price which will be paid by the international community writ large.

III. THE SPECIAL TRIBUNAL FOR LEBANON

A. GENERAL OPERATION

The STL is located in the Netherlands and formally began functioning on March 1, 2009. Despite a four year investigation leading to its establishment, the STL does not have any suspects in custody and thus no trials scheduled.

28 U.N. News Centre, Lebanon: Ban Ki-moon welcomes Dutch agreement to host Hariri tribunal, (Aug. 17, 2007) available at http://www.wwan.cn/apps/news/story.asp?NewsID=23535&Cr=leban&Cr1=. 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 15, at art. 8(1).
The STL is scheduled to operate for three years.\textsuperscript{31} While there is a mechanism in place to extend the tribunal, funding is likely to constrain any extension and possibly even the initial three year term.\textsuperscript{32} The STL’s funding is based on a cost sharing arrangement whereby States’ voluntary contributions make up 51\% of the tribunal’s costs while Lebanon provides the other 49\%.\textsuperscript{33} The U.N. Secretary General’s funding goal was that 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.”\textsuperscript{34} That goal was not met. As of December 2008, funding was


\textsuperscript{30} That there is no one in custody in The Hague is not an indication that the STL is inactive. In fact, the dock 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. \textit{Four Suspects in Hariri Killing Freed}, WASH. POST, Apr. 30, 2009, at A13. According to the prosecutor, 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.” 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”). Special Tribunal for Lebanon, Prosecutor Informs Pre-Trial Judge He Does Not Oppose Release of Four Detainees in the Hariri Case, Apr. 29, 2009, \textit{available at} http://www.stl-tsl.org/sid/70. Perhaps illustrating the prosecutor’s point, the week before the STL ordered the release, Zuhair Mohamad Said Saddik, a former Syrian intelligence officer suspected of involvement in the assassination was arrested in the United Arab Emirates. \textit{Suspect arrested in Hariri assassination}, Unit’d Press Int’l, Apr. 20, 2009 \textit{available at} http://www.upi.com/Emerging_Threats/2009/04/20/Suspect-arrested-in-Hariri-assassination/UPI-96091240244831/. The status of Saddik is unclear. According to the STL, Lebanese judicial officials submitted Saddik’s name to the STL Pre-Trial Judge. Special Tribunal for Lebanon, Prosecutor Informs Pre-Trial Judge He Does Not Oppose Release of Four Detainees in the Hariri Case, Apr. 29, 2009, \textit{available at} http://www.stl-tsl.org/sid/70. 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. \textit{Id}.

\textsuperscript{31} STL Agreement, \textit{supra} note 15, at art. 21.

\textsuperscript{32} \textit{Id}.


\textsuperscript{34} \textit{Id}.
sufficient to establish the STL and the first 12 months of operation.\textsuperscript{35} As of February 2009, one month before the STL commenced, fundraising for the subsequent two years was “ongoing.”\textsuperscript{36} Funding may well dictate the lifespan of the STL,\textsuperscript{37} which would impact the viability of retrials for those tried under the STL’s in absentia provisions.\textsuperscript{38}

**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.\textsuperscript{39} 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 defense lawyer, on the mere condition” that the indictment be duly publicized or communicated to the accused’s state of residence or nationality.\textsuperscript{40} 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;


\textsuperscript{36} Id. at ¶ 21.

\textsuperscript{37} But see Mary Beth Sheridan, Clinton Visits Lebanon as Key Elections Loom, WASH. POST, Apr. 27, 2009, at A6 (describing Secretary of State Clinton as “emphasizing that the Obama administration would continue to support” the STL). Interestingly, while the U.S. is support the STL, it is also seeking diplomatic “renengagement” with Syria. Doing both, at the same time, will be a delicate balancing act. See Scott Wilson, Obama will Restore U.S. Ambassador to Syria, WASH. POST, Jun. 24, 2009, at A10.

\textsuperscript{38} As discussed later, whether or not retrial before the STL is available to those convicted in absentia will be of critical importance to a human rights body determining whether the proceedings violate fair trial rights.

\textsuperscript{39} Aptel, supra note 19, at 1122. Lebanese criminal procedure allows in absentia trials. 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 system alone. International Center for Transitional Justice, Handbook on The Special Tribunal For Lebanon 28, Apr. 10, 2008, available at http://www.ictj.org/images/content/9/1/914.pdf.

\textsuperscript{40} See Paola Gaeta, To Be (Present) or Not To Be (Present) Trials In Absentia before the Special Tribunal for Lebanon, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1165, 1168 (2007).
(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.\(^{41}\)

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 with:

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
   (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
   (b) The accused has designated a defence counsel of his or her own choosing, to be renumerated either by the accused or, if the accused 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.\(^{42}\)

Having established that the STL may hold in absentia trials, and on notice of the indictment “otherwise given,” 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 judgment.”\(^{43}\) To place the uniqueness of the STL’s in absentia provisions in context, a brief review of the evolution of how modern international criminal tribunals have viewed in absentia proceedings is helpful.

\(^{41}\) STL Statute, supra note 21, at art. 22(1).

\(^{42}\) Id. at art. 22(2).

\(^{43}\) Id. at art. 22(3).
IV. IN ABSENTIA PROCEEDINGS IN INTERNATIONAL CRIMINAL TRIBUNALS

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 provisions, “total in absentia” if you will, are a departure from most other international tribunals. But that’s not to say that international criminal jurisprudence forbids in absentia proceedings.

Overlooked by many is the fact that the International Military Tribunal (IMT) at Nuremburg following World War II conducted total in absentia trials. But prior to the STL, no post IMT tribunal 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 appeared but was absent at one or more subsequent proceedings. The first of the post IMT tribunals was the International Criminal Tribunal for Yugoslavia (ICTY), established in

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

45 The concept of in absentia proceedings seems to mean different things to different people. On its face, the term in absentia means “in the absence of.” Black’s Law Dictionary (8th ed. 2004). Thus technically speaking where the accused appears for part of the proceedings against him, but not all, those portions conducted outside his presence are just that, in absentia.

46 See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 391 (2d ed., Oxford Univ. Press 2008) (2003) (referring to Article 12 of the Charter of the International Military Tribunal which allowed for in absentia trials); Justice Louise Arbour, Access to Justice: The Prosecution of International Crimes: Prospects and Pitfalls, 1 WASH. U. J.L. & POL’Y 13, 22 (1999). Not only did the Nuremburg hold in absentia trials, but allowed a sentence of death as a permissible punishment following a trial held outside the presence of the accused. Id. Indeed Martin Borman, who served as the Nazi Party Secretary, was tried by the Nuremburg Tribunal, convicted, and sentenced to death, all in absentia. Id. The death sentence was not carried out as the allies could not locate Borman. Borman’s remains were eventually found and identified; he is believed to have died near Hitler’s bunker in the waning days of the war. Darius Sinai, The Sins of My Father, INDEPENDENT THE (LONDON), Feb. 1, 1999, available at http://findarticles.com/p/articles/mi_qn4158/is_19990201/ai_n14214264/pg_2/?tag=content;col1
1993. The U.N. considered and rejected the ICTY holding in absentia trials. In so doing, the U.N. Secretary General explained that:

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 International Covenant on Civil and Political Rights, which provides that the accused is entitled to be tried in his presence.

As a result, the ICTY statute provides that the accused has “the right to be tried in his presence.” The ICTY statute even lists the right to be present as a “minimum guarantee.” Yet despite that guarantee, the ICTY conducted portions of Slobodan Milosevic’s trial outside his presence when the former president of Yugoslavia was unable to attend for long periods of time due to illness. As Milosevic 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.

The 1994 International Criminal Tribunal for Rwanda (ICTR) statute mirrors that of the ICTY. While the ICTY proceeded with a trial when the accused was unable to attend, the

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48 Id.


50 Id. at art. 21(4)(d).


52 ICTY Statute, supra note 49.

ICTR completed a trial without the accused, when, having previously attended, he refused to appear in court. 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 United Nation’s Transitional Administration in East Timor (UNTAET) codified the ICTY and ICTR partial in absentia practice. The UNTAET transitional rules of procedure allowed in absentia proceedings where the accused is initially present and then flees, refuses to attend, or disrupts the proceedings. The Special Court for Sierra Leone (SCSL), a mixed national-international tribunal established in 2002, utilized similar language, incorporating the ICTY and ICTR right to be present but qualified that right in situations where the accused flees or refuses to attend. However, sandwiched in between the UNTAET and the SCSL was the United Nations Mission in Kosovo (UNMIK), which, in 2001, issued a regulation prohibiting in absentia trials without qualification. Finally, there is the Extraordinary Chambers of the Courts of Cambodia (ECCC), a mixed national-international tribunal which promulgated its


56 The Secretary-General, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Enclosure, Statute of the Special Court for Sierra Leone, art. 17(d), U.N. Doc. S/2000/915 (Oct. 4, 2000).


internal rules of procedure in 2007, less than two weeks after the UNSC announced the STL statute. The ECCC’s procedure allows for in absentia proceedings where the accused is initially present and then flees, refuses to attend, or disrupts the proceedings.

So with the exception of UNMIK, tribunal approaches towards partial in absentia proceedings evolved from the impliedly permissible of the ICTY and the ICTR to the explicitly provided for by the UNTAET, the SCSL, and the ECCC. In terms of the rationale behind this shift, one theory is that the international community wanted clearly stated authority to proceed where an accused initially appears before the court but later disrupts the proceedings or refuses to attend, as Slobodan Milosevic did at the ICTY. Additionally, or perhaps alternatively, the UNTAET, the SCSL, and the ECCC in absentia provisions are similar to those of the International Criminal Court (ICC). In 1998, the Rome Statute established the ICC, providing that “the accused shall be present during the trial.” However, the Rome Statute allows for trials

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60 Extraordinary Chambers in The Courts of Cambodia Internal Rules, Rule 80 (Rev. 2, Sep. 5., 2008) available at HTTP://WWW.CAMBODIATRIBUNAL.ORG/CTM/INTERNAL_RULES_REVISON2_05-01-08_EN.PDF?PHPMYADMIN=8319AD34CE0DB941FF04D8C788F6365E&PHPMYADMIN=OU7LPWTVY9AVP1XRZP6FZDQZG3.

61 Id. Given how close in time the ECCC and STL in absentia provisions were developed it is interesting that non governmental 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 International Center 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 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 provisions from UNATET and the SCSL, and the policy of the ICTY, while the STL’s provisions represent a more radical departure.


outside the accused’s presence where the accused is disruptive. 64 While the trial may continue, the statute requires that the trial chamber make provisions for the accused to observe the proceedings. 65

Thus while the idea that an accused’s right to be present throughout criminal proceedings is either absolute or longstanding is incorrect, the STL’s total in absentia 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 with little fanfare. That should not suggest that there is no controversy, just that the issues may lie dormant for so long as someone convicted in absentia remains a fugitive. 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. 66 There is no way of knowing when, or technically even if, this will occur. As the U.N. has noted, “[s]uspects whom the international criminal courts deal with are people

64 Id. at art. 60 (2).

65 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. Id.

66 Presumably, the STL would submit the names of those convicted in absentia to the International Criminal Police Organization or INTERPOL, the world’s largest police organization. See INTERPOL fact sheet, available at http://www.interpol.int/Public/ICPO/FactSheets/GI01.pdf. In turn, INTERPOL would use its system of international notices to share that information among its 187 member countries. See List of INTERPOL Member States, available at http://www.interpol.int/Public/ICPO/Members/default.asp. Specifically, INTERPOL would like 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.” See INTERPOL Notices, http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf. Both the ICTY and the ICTR utilized INTERPOL when seeking to locate persons suspected of violating international human rights law. Id.
who can easily abscond for long periods, thanks to power, money, help from large and organized groups, and possibly even from States.”

But when eventually found and the STL seeks the extradition of someone tried and convicted in absentia, criticism of the tribunal’s in absentia provisions may quickly follow. The spark for that criticism may be a fugitive from the STL challenging 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. 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.

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67 Conference on International Criminal Justice, May 14-18, 2007, Report to the International Criminal Court, ¶ 54, ICC-ASP/6/INF.2 (Oct. 19, 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 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.

V. ICCPR

A. Fair Trial Provisions

The ICCPR is a United Nations treaty which arose from the Universal Declaration of Human Rights. The ICCPR reflects basic civil and political rights and has been ratified by over 150 States, including Lebanon and Syria. Article 14 of the ICCPR provides for a variety of trial related rights. The rights include that “everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.” More specifically, “in determination of any criminal charge against him, everyone shall be entitled to… be tried in his presence and to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right…”

B. Enforcement and Extraterritorial Application

Enforcement of the ICCPR is through the HRC, which is a “body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.” Under Article 41 of the ICCPR, the HRC may consider inter-state complaints.
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 Party to the protocol. 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.”

States Party 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. Thus a State’s obligations are “clearly grounded in measures it has taken within its own territory.” 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. According to the HRC:

If a State party extradites a person within its jurisdiction in circumstances such 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.

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75 ICCPR, supra note 23, at art. 41.


78 ICCPR, supra note 23, at art. 2.


The decisions of the HRC under OP1 reflect the U.N.’s human rights system. Before applying the ICCPR provisions to the STL, the HRC’s Maleki decision explains the circumstances under which in absentia trials may permissibly occur and the role of retrials.  

C. HRC INTERPRETATION OF IN ABSENTIA PROCEEDINGS BALANCED AGAINST ICCPR FAIR TRIAL RIGHTS

In 1997, the HRC released its Maleki decision, which stemmed from the complaint of Ali Maleki, an Iranian citizen tried and convicted in absentia in Italy in 1988. In 1988 an Italian court sentenced Maleki to 10 years imprisonment for drug trafficking. Although Maleki was not present at his trial, he was represented by court-appointed counsel. Following Maleki’s in absentia trial and conviction, the Court of Appeal confirmed the sentence in 1989. Five years later, Italian authorities apprehended Maleki at the Rome airport as he attempted to return to Iran.

The Italian authorities imprisoned Maleki to serve his 10 year sentence. Maleki’s son, Kambiz Maleki, then submitted a communication to the HRC arguing that Italy violated the

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81 Maleki, supra note 25.
82 Id. at ¶s 1, 2.1.
83 Id. at ¶ 2.1.
84 Id. at ¶ 6.4.
85 Id. at ¶ 2.2.
86 Id. 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 United States 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 Iraq in also unclear. That Maleki’s return trip to Iran routed him though Italy, a country in which he had been convicted and sentenced to imprisonment in absentia, seems an ill advised travel route.
87 Id at ¶s 1.2.2 and 2.2.
ICCPR by trying his father in absentia. Italy in turn argued that its in absentia trial provisions did not violate the ICCPR, and that while Maleki was indeed absent from his trial, he was represented by court-appointed counsel and “therefore had a fair trial.” Italy also argued that even if the trial did not meet ICCPR requirements, any violation was cured by Maleki’s ability under Italian law to apply for a retrial. The HRC did not find either Italian argument persuasive.

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.” 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. 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. The HRC described Italy’s position as

[C]learly 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.

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88 Id. at ¶s 1, 5. Kambiz Maleki did not identify which specific provisions of the ICCPR Italy was alleged to have violated.

89 Id. at ¶ 6.4.

90 Id. at ¶ 7(b).

91 Id. at ¶ 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.

92 Id.

93 Id. at ¶ 9.4.
Italy’s argument that any deficiency in its in absentia trial provisions was cured by the ability of someone so convicted to apply for retrial 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.” 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. However, providing for the possibility of retrial did not equate to the absolute right of retrial envisioned by the HRC. Italy’s 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” and that retrials were possible “in certain circumstances.” At no point did Italy represent that Maleki was entitled to such a retrial. 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.”

D. WOULD EXTRADITION OF SOMEONE CONVICTED IN ABSENTIA BY THE STL VIOLATE A STATES’ PARTY OBLIGATIONS UNDER THE ICCPR?

94 Id.
95 Id. at ¶ 9.5.
96 Id. at ¶ 9.4.
97 Id. at ¶ 7(b).
98 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. Id. at ¶ 3.2. Italy did not address Kambiz’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. Id. at ¶ 9.5.
99 Id. at ¶ 9.5.
The *Maleki* decision is instructive on the application of the ICCPR’s fair trial rights to the STL’s in absentia provisions, and not favorably so. While the HRC interpretation of the ICCPR is that in absentia trials are not per se impermissible, a State which holds such proceedings does so while assuming a burden to justify the trials. In several areas, including notice of proceedings, appointment of defense counsel, and right of retrial, 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.

i. **Mechanics of a 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. The HRC was able to consider the communication in *Maleki* because it was submitted on behalf of Mr. Maleki, who was subject to Italian jurisdiction, claimed that Italy violated his rights under the ICCPR, and because Italy is a State Party both to the ICCPR and the OP1 individual complaint mechanism.

Given those limitations, is a scenario by which the HRC considers the STL’s in absentia 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

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100 Id. at ¶ 9.3.
101 EMEH, *supra* note 77.
years later. 103 The STL seeks to assert control of the individual and transfer to a jail to begin to serve their sentence.104 The admissibility analysis of a communication to the HRC challenging extradition following an in absentia trial at the STL begins with loci of the communication’s author.105 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, so the HRC could not consider a communication against either Lebanon or the STL.106 While that would seem to end any potential HRC inquiry before it begins, that is not necessarily the case. Considering the person tried, convicted, and sentenced in absentia by the STL, and whose location comes to the attention of STL officials. Where the person is located in the territory of a State Party to the ICCPR and OP1, and the STL seeks extradition, the prospect of a permissible communication to the HRC exists. While Syria is not a party to OP1, Libya and Algeria, as well as over 100 other countries, are.107 Assuming the fugitive was located in Algeria,

103 Under the STL statute, such an individual would have court appointed counsel. Laudable that court appointed counsel may be, as is discussed later, the presence of such counsel does not remedy notice defects. STL Statute, supra note 21, at art. 22(2)(c).

104 It is unclear in which country someone convicted by the STL would serve their sentence. The website for the STL states that “[s]entences 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.” The Special Tribunal for Lebanon, About the STL, available at http://www.stl-tsl.org/section/AbouttheSTL. The use of “would have expressed their willingness” reads quite differently than saying States which 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.

105 The location of the jail in which the fugitive would be incarcerated following extradition would also be relevant.

106 The related question of whether the HRC could ever consider U.N. actions, and thus whether the U.N. may violate human rights is beyond the scope of this article.

the subsequent communication to the HRC would not complain that the STL violated the author’s rights under the ICCPR, at least directly. Instead, the communication would assert that Algeria was violating the author’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.

That the underlying issue is of ICCPR fair trial rights, for which the STL would be directly responsible for violating while not being a party to OP1, is not technically relevant. The HRC has previously stated that:

> 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.\(^{108}\)

So if the STL’s in absentia provisions violate Article 14 of the ICCPR, the “necessary and foreseeable consequence” of Algeria extraditing a fugitive convicted in absentia by the STL is that the fugitive’s ICCPR right to a fair trial would be violated. Thus, Algeria may violate its ICCPR obligations not having had anything to do with the flawed trial which triggered the

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\(^{108}\) Kindler, *supra* note 80, at ¶ 6.2 (emphasis added).
violation. In considering whether the in absentia provisions do violate Article 14, the STL’s notice provisions are particularly vulnerable to criticism.\textsuperscript{109}

\begin{itemize}
\item[ii. \textsc{Notice Provisions}]
\end{itemize}

In \textit{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 an accused in absentia.\textsuperscript{110} A court trying someone in absentia must verify that the accused has been informed of the proceedings-- assuming knowledge will not suffice. The STL’s notice provisions, which speak to notifying the accused or serving him or her with an indictment, are not at issue. But the STL’s notice otherwise given provisions rely on much greater assumptions than the “clearly insufficient” Italian assumptions which violated the ICCPR. Under the STL’s notice otherwise given provisions, the notice requirement is met where the accused’s indictment has been published in the media or communicated to the accused’s State of residence or to the accused’s state of nationality.\textsuperscript{111}

(a) \textbf{Publication}

While the STL statute requires the use of only one of the three mechanisms by which it may otherwise provide notice, these mechanisms, individually or even were they all to be employed in one case, fail to meet the ICCPR’s notice requirement.\textsuperscript{112} Publishing an indictment

\textsuperscript{109} ICCPR, \textit{supra} note 23, at art. 14(3)(d).

\textsuperscript{110} Maleki, \textit{supra} note 25, at ¶ 9.4.

\textsuperscript{111} STL Statute, \textit{supra} note 21, at art. 22(2)(a) (emphasis added).

\textsuperscript{112} 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. Mbenge v. Zaire, HRC, Communication No. 16/1977, Mar. 25, 1983. On its face, Mbenge hardly seems to lend support for the STL’s notice
in the media as the sole means of providing notice of proceedings is the functional equivalent of Italy impermissibly assuming notice in *Maleki*. There is no other way to characterize the STL publishing notice of an indictment-- the tribunal assumes that the accused will view the notice or learn of it from someone who does. The HRC will consider that assumption as it did Italy’s assumption in *Maleki*, clearly insufficient, and the resulting trial a violation of the accused’s ICCPR fair trial rights.

**(b) 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 by which the STL indicts an individual believed to reside in Algeria, Libya, or any of the other States Party to OP1. It would seem appropriate for the STL to communicate the indictment to that State and request the individual’s transfer. But if the State declines to do so, for the STL to proceed to try the individual in absentia amounts to perhaps an understandable violation of the ICCPR’s notice requirements, but a violation nonetheless. The standard the HRC articulated in *Maleki* was not that a State make reasonable efforts, but that it is incumbent on a State to verify that the accused was informed of the case beforehand.  

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113 There is at least one instance where the UNSC has intervened when a State refused to turn over fugitives wanted for prosecution. See S.C. Res. 748, 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).

114 *Maleki*, *supra* note 25.
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 by which the STL otherwise provides notice also violates the ICCPR.

(c) 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.\textsuperscript{115} 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 where in the world that Yemini national is, 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 may have no idea where in the world its national is and thus have no ability to communicate the indictment are irrelevant under the STL’s notice requirements. They are however relevant to, and bode poorly for, any HRC review. The STL’s efforts at notifying the accused are more attenuated under this mechanism 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, can, and will communicate the indictment, is that much more likely to violate the ICCPR. This mechanism, like that of

\textsuperscript{115} STL Statute, \textit{supra} note 21, at art. 22.
communicating the indictment to the State of residence, is an impermissible attempt by the STL at shifting the burden under the ICCPR to ensure the accused has notice of proceedings. While the STL may not be under that burden, any State Party to OP1 is.

Any effort by the STL to proceed with an in absentia trial based on notice otherwise given will violate the ICCPR, albeit through a State Party to OP1 in which the accused is found and from which extradition is sought. Even if subsequent measures by the STL to provide defense counsel and right of retrial cure the violation, and as the discussion which follows indicates it’s by no means clear that they do, that the STL’s notice otherwise given provisions violate the ICCPR’s fair trial rights is a staggering outcome for a U.N. sanctioned tribunal.

ii. **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\(^{116}\) and for a right of in person retrial.\(^{117}\) 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.\(^{118}\) As to the issue of a retrial, assuming arguendo that the STL’s notice otherwise given mechanisms do violate the ICCPR, a right of retrial would

\(^{116}\) *Id.* at art. 22(2)(c). This analysis is predicated on a scenario where the accused did not designate his or her defense counsel. Obviously where an accused does so designate, it is in response to knowing of the proceedings for which one needs a defense counsel, so there are unlikely to be significant notice concerns.

\(^{117}\) *Id.* at art. 22(3). The assumption from footnote 116 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.

\(^{118}\) *Maleki*, *supra* note 25, at ¶ 6.4.
remedy any such violation.\textsuperscript{119} On its face the STL provides such a right. But on its face Italian law provided a right to retrial, just not as applied to Maleki.\textsuperscript{120} 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 which 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 similar to that in Maleki – a theoretical right and not a practical reality and thus a violation of the ICCPR.\textsuperscript{121}

The STL’s in absentia 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 the extraditing State in a precarious position 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.\textsuperscript{122}

VI. European Convention

A. Fair Trial Provisions

\textsuperscript{119} Id. at ¶ 11.

\textsuperscript{120} Id. at ¶ 9.5.

\textsuperscript{121} Id.

\textsuperscript{122} 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. Id. at 117.
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.”\textsuperscript{123} All 47 member states of the Council have acceded to the European Convention.\textsuperscript{124}

Unlike the ICCPR, the European Convention does not unambiguously state the right of an accused 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,”\textsuperscript{125} the rights to “defend himself in person,”\textsuperscript{126} to “examine or have examined witnesses,”\textsuperscript{127} and “to have free assistance of an interpreter if he cannot understand or speak the language used in court.”\textsuperscript{128} The ECtHR has held that “it is difficult to see how [an accused] could exercise these rights without being present”\textsuperscript{129} 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.”\textsuperscript{130}


\textsuperscript{124} Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005, available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG.

\textsuperscript{125} European Convention, supra note 24, at art. 6 \S 1.

\textsuperscript{126} Id. at \S 3(c).

\textsuperscript{127} Id. at \S 3(d).

\textsuperscript{128} Id. at \S 3(e).

B. ENFORCEMENT AND EXTRATERRITORIAL APPLICATION

The ECtHR was established in 1959 as part of, and to monitor States Party compliance with, the European Convention. The court has “jurisdiction to rule, through binding judgments, on individual and inter-State applications alleging violations of the Convention.”132 Under Article 1, “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I” of the Convention.133 Section I’s rights and freedoms include the Article 6 fair trial rights.134 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. On the one hand, the ECtHR has recognized 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.”135 But on the confusing other hand, the European Court has also expressly not excluded the possibility that “an issue might exceptionally be 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.”136

130 Id. at ¶ 29.

131 ECtHR facts and figures, supra note 123.

132 Id.

133 European Convention, supra note 24, at art. 1.

134 Id. at art. 6.

135 Mamatkulov v. Turkey, ECtHR, (Appl. No. 46827/99), [hereinafter Mamatkulov] Feb. 4, 2005. Again, the State or States in which those convicted by the STL would serve their jail sentences have not been identified. See footnotes 104 supra.

So the analysis of the permissibility under the European Convention of a proposed extradition between member States differs from that of a member State extraditing a person to a non member State. How the analysis differs seems to depend on the difference between a “regular” violation of the European Convention in the case of intra Europe extradition and “flagrant” violations when considering a member State extraditing a fugitive to a non member State. 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, like the STL, may be considered. That baseline provides a norm from which whether the STL’s in absentia provisions constitute a flagrant violation of the European Convention may be accessed.

C. ECtHR INTERPRETATION OF IN ABSENTIA PROCEEDINGS BALANCED AGAINST THE EUROPEAN CONVENTION’S FAIR TRIAL RIGHTS

Similar in many ways to the HRC Maleki case, the ECtHR in Sejdovic addressed the level and type of notice required before permissibly trying someone in absentia, which side bears the burden of proving or disproving notice, and when a State must afford a right to retrial. 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. At that trial, an Italian court found Sejdovic guilty of the fatal shooting of a man in a gypsy encampment in Rome in 1992. Witnesses identified Sejdovic as the individual responsible, and a month after the shooting an

137 The higher standard for intra Europe 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.

138 Sejdovic, supra note 25.

139 Id. at ¶ 1.

140 Id. at ¶ 8.
Italian investigating judge ordered Sejdovic’s detention pending trial.\textsuperscript{141} Italian authorities could not locate Sejdovic to enforce the order and, believing that he was deliberately evading justice, declared him a fugitive.\textsuperscript{142} The Italians assigned Sejdovic a lawyer and tried him in absentia, along with four others suspected of involvement in the shooting.\textsuperscript{143} While Sejdovic was not present, his court appointed attorney attended and actively participated in the trial.\textsuperscript{144} Nonetheless, Sejdovic was convicted of manslaughter and illegally carrying a weapon and sentenced to 21 years and 8 months imprisonment.\textsuperscript{145} Sejdovic’s defense attorney declined to appeal the conviction, which became final in 1997.\textsuperscript{146} In 1999, German police arrested Sejdovic in Hamburg pursuant to an Italian arrest warrant.\textsuperscript{147} Shortly thereafter, the Italian Minister of Justice requested that Germany extradite Sejdovic to Italy to serve his prison sentence.\textsuperscript{148} German authorities then sought additional information from Italy on Sejdovic’s case.\textsuperscript{149} Italy acknowledged that Sejdovic had never been officially notified of the charges against him and that Italy had no idea whether Sejdovic had been in contact with his court appointed attorney.\textsuperscript{150} The conversation between Germany and Italy then turned to whether Sejdovic was entitled to a new trial in Italy should Germany extradite him. When Italy informed Germany that Sejdovic

\textsuperscript{141} Id. at ¶s 8-9.

\textsuperscript{142} Id. at ¶ 9.

\textsuperscript{143} Id. at ¶ 10.

\textsuperscript{144} Id. at ¶ 15. Sejdovic’s attorney called “a large number of witnesses” to testify. Id.

\textsuperscript{145} Id. at ¶ 12.

\textsuperscript{146} Id. at ¶ 13.

\textsuperscript{147} Id. at ¶ 14.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at ¶ 15.

\textsuperscript{150} Id.
may request a new trial but that such requests are not automatically granted, Germany refused Italy’s extradition request and released Sejdovic.\textsuperscript{151} 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 his defense to the court.\textsuperscript{152}

Italy argued to the ECtHR that Sejdovic’s rights under the European Convention had been respected.\textsuperscript{153} Italy claimed that not only had they appointed Sejdovic an attorney, but one who mounted an effective defense.\textsuperscript{154} Italy pointed to the fact that the same attorney had been appointed for all the defendants and that three had been acquitted.\textsuperscript{155} 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 a fugitive.”\textsuperscript{156} That Sejdovic became untraceable immediately after the shooting amounted to a waiver of his right to appear at trial, at least according to Italy.\textsuperscript{157} Under this view, Italy claimed

\begin{enumerate}
\item \textsuperscript{151} Id. at ¶s 15-16.
\item \textsuperscript{152} Id. at ¶s 3, 20.
\item \textsuperscript{153} Id. at ¶ 21.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. That point seemed to cut both ways though as Sejdovic noted that the defendants who been acquitted were present at trial, while the two who were convicted were tried in absentia. Id. The other defendant convicted in absentia was convicted of the same offenses as Sejdovic and sentenced to 15 years and 8 months imprisonment. Id. at ¶ 12.
\item \textsuperscript{156} Id. at ¶ 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. Id.
\item \textsuperscript{157} Id. at ¶ 32.
\end{enumerate}
that the ECtHR could and indeed should infer from Sejdovic’s actions that he intended to escape trial.\footnote{Id.}

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.”\footnote{Id. at ¶ 33.} The court found “no evidence that [Sejdovic] knew of the proceedings against him or of the date of his trial.”\footnote{Id. at ¶ 34.} Nor was the court willing to assume any inferences from the accused’s travel to Germany.\footnote{Id. at ¶ 35.} In the ECtHR’s view:

\begin{quote}
[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 of the accused’s rights…\textit{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 trial.\footnote{Id. at ¶s 35-26. Emphasis added.}
\end{quote}

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. 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.\footnote{Id. at ¶ 24.}

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However, under Italian law he needed to have done so within 10 days of when he learned of his conviction, “failing which [the appeal] shall be inadmissible.”\textsuperscript{164} So by the time that Sejdovic and Italy were submitting matters 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.\textsuperscript{165} A chance of a new trial, and especially a chance which no longer existed, was not enough for the court. Absent an unequivocal waiver of the right to appear, a person convicted in absentia “\textit{must in all cases be able to obtain a fresh determination by a court of the merits of the charge}.\textsuperscript{166}

D. \textsc{Would Extradition of Someone Convicted In Absentia By the STL Violate a States Party Obligations Under the European Convention?}

The \textit{Sejdovic} decision provides a baseline of how the ECtHR views and applies the European Convention to in absentia trial proceedings within 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 trying someone in absentia, the relevance of court appointed counsel, and the significance of the right of retrial. But within the STL context, 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 STL’s in absentia provisions flagrantly violate the European Convention, how a fugitive would be able to file a relevant

\textsuperscript{164} Id. at ¶ 18.

\textsuperscript{165} Id. at ¶ 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. Id.

\textsuperscript{166} Id. at ¶ 39. Emphasis added.
communication to the ECtHR challenging extradition, as well as how the European Convention applies extraterritorially, bears mention.

i. **Mechanics of an Extradition Challenge**

Assume a similar hypothetical as that used when discussing the ICCPR, an individual tried, convicted, and sentenced to a prison sentence by the STL, all in absentia, is located years later, but this time in France.\(^\text{167}\) The STL requests that France extradite the individual so that he or she may begin to serve their sentence.\(^\text{168}\)

In terms of how someone would be able to file a relevant communication, the answer is more straightforward than with the ICCPR and the OP1 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….\(^\text{169}\) And, as already discussed, the protections the European Convention affords are expressly not just to the citizens of States Party, but to “everyone within the their jurisdiction, irrespective of …nationality or ethnic origin.” So a Syrian national fugitive from the STL living in France may submit a communication to the ECtHR challenging his extradition.

\(^{167}\) 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*, BRITISH BROADCASTING CORPORATION, (Sep. 7, 2004) available at 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. *Suspect arrested in Hariri assassination*, Unit’d Press Int’l, Apr. 20, 2009 available at http://www.upi.com/Emerging_Threats/2009/04/20/Suspect-arrested-in-Hariri-assassination/UPI-96091240244831/.

\(^{168}\) France has already refused one Lebanese extradition request related to the Hariri assassination, a 2005 request for a Syrian intelligence agent. *Suspect arrested in Hariri assassination, supra* note 167. France apprehended the individual but refused to extradite him based on concerns that he would be executed. *Id.*

\(^{169}\) European Convention, *supra* note 24, at art. 34.
Turning to the issue of whether and how the ECtHR could even consider the STL’s in absentia 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.\footnote{Id. at art. 35.} 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 Party, 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 intra member state extradition issue in \textit{Sejdovic}.\footnote{Sejdovic was located in Germany, from where Italy sought his extradition. \textit{Sejdovic}, supra note 25, at ¶ 14.} Between contracting States to the European Convention, “mere irregularities” or a “lack of safeguards” may constitute a breach of Article 6.\footnote{Mamatkulov, supra note 135.} But in accessing whether an extradition by France to a country outside Europe violates France’s obligations under the European Convention, a more significant or fundamental violation of Article 6 is required.\footnote{Id. \textit{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.}} The permissibility of such an extradition from France would depend on whether the person “has suffered or risks suffering a flagrant denial of a fair trial” by the STL.\footnote{Soering, supra note 136.} Regardless, if and when an individual convicted in absentia by the STL is found in France, or any one of the 47 European
Council member States, and the STL requests their extradition, the individual may seek relief from the ECtHR.\footnote{Assuming the other admissibility criteria of Article 35 of the European Convention are satisfied. European Convention, supra note 24, at 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.}

\section*{ii. Notice Provisions}

The start point is the ECtHR’s acknowledgement in \emph{Sejdovic} that the European Convention does not per se prohibit in absentia trials.\footnote{Sejdovic, supra note 25, at ¶ 33.} However, that openness to in absentia trials in theory likely does not extend to the reality of the STL’s notice otherwise given provisions.\footnote{STL Statute, supra note 21, at art. 22(2)(a).}

The ECtHR held in \emph{Sejdovic} that while a person may tacitly waive their right to be present at trial, “any such waiver must be made in an unequivocal manner.”\footnote{Sejdovic, supra note 25, at ¶ 22.} 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.\footnote{Id. at ¶s 35- 36.} The STL’s notice otherwise given provisions in no way 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.”\footnote{Id. at ¶ 35.} At a minimum, the STL’s notice otherwise given provisions violate the European Convention.

As a result, were France were to extradite a fugitive convicted in absentia by the STL to a jail

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175 Assuming the other admissibility criteria of Article 35 of the European Convention are satisfied. European Convention, supra note 24, at 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.
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176 Sejdovic, supra note 25, at ¶ 33.
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177 STL Statute, supra note 21, at art. 22(2)(a).
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178 Sejdovic, supra note 25, at ¶ 22.
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179 Id. at ¶s 35- 36.
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180 Id. at ¶ 35.
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located in a European State, France would violate its obligations under the European Convention. The inquiry then turns to whether court appointed counsel or a right of retrial cure that violation.

iii. COURT APPOINTED DEFENSE COUNSEL

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. 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.

iv. RIGHT OF RETRIAL

Next is the curative possibility of the right of retrial. The court in Sejdovic could not have been more clear 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.” 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 States Party to the European Convention from which

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181 STL Statute, supra note 21, at art. 22(3).
182 Sejdovic, supra note 25, at ¶ 39.
extradition of someone tried in absentia by the STL was sought. If the individual was located in France during the pendency of the STL, the individual would seek relief from the ECtHR arguing that for France to comply with an extradition request would violate France’s obligations under the European Convention. 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 a retrial was available would be little more than speculation. France may argue that the UNSC could “restart” the STL in order to retry the individual, but could not guarantee the ECtHR that the UNSC would do so.\textsuperscript{183} Accordingly, France would not be able to claim that the individual would in fact receive a fresh determination by the STL. If France or any other European extraditing State is not able to guarantee a retrial for a fugitive convicted in absentia by the STL, the specter of what the ECtHR considers a “flagrant denial of justice” looms large.

iii. “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”…”\textsuperscript{184} 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

\textsuperscript{183} The mechanism by which the UNSC 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, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 2 (1998).

\textsuperscript{184} Stoichkov v. Bulgaria, ECtHR, (Appl. No. 9808/02) March 24, 2005. Stoichkov dealt with issues of Bulgarian law and not extradition let alone extradition outside Europe. 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.
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.”  

The ECtHR’s conclusion flows from a State’s Party obligation, indeed duty, “to guarantee the right of criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges.”  

Per the ECtHR, the right to be present is an “essential element of Article 6” and to try someone in absentia and not provide a retrial absent unequivocal waiver is “manifestly contrary” to that Article.

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, France would violate its own obligations under the European

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185 Id. at ¶ 55. (quoting Einhorn v. France, ECtHR, (Appl. No. 71555/01) October 16, 2001. While 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 an American national who, in 1979, was arrested in the U.S. for the murder of his girlfriend. Einhorn at ¶s 1, 2. After being released on bail, he fled to France. Id. at ¶ 3. In 1993, a Pennsylvania court tried Einhorn in absentia, he was found guilty of first-degree murder and sentenced to life imprisonment. Id. at ¶ 2. In 1997, Einhorn was located in France and the United States requested his extradition. Id. at ¶ 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 U.S. would be in violation of France’s obligations under the European Convention. Id. at ¶ 4. Accordingly, France denied the extradition request. Id. Only after the Pennsylvania legislature modified a state statute so that Einhorn would be entitled to a retrial did the extradition occur. Id. at ¶ 5.

186 Stoichkov, supra note 184, at ¶ 56.

187 Id.

188 Id.
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.

VII. 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. That the STL affords 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 in absentia trial provisions, the damage to the STL, to future tribunals, and to the U.N. has largely already 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, 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.$^{189}$

The result of that dilemma will in turn lead 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 the STL and an unfortunate third party State as the human rights violators. Nor are the Lebanese likely to take pride in the effect of the STL’s in absentia provisions on future tribunals.

B. FUTURE TRIBUNALS

While some may argue that given the STL’s purview, to hold those accountable for a discreet terrorist event, even if the in absentia provisions are flawed the tribunal is unique and thus won’t be repeated. The premise of the argument is correct but it supports the opposite conclusion. Because the STL is unique its statute stands a much greater chance of being revisited and possibly repeated. For mass atrocities over time and across multiple borders, the STL offers little and there are a host of other, more applicable, tribunals from which to draw.

$^{189}$ And as mentioned in footnote 113 supra, potentially being on the receiving end of a UNSC resolution to surrender the individual(s) wanted or face sanctions. 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 UNSC.
But for those discrete terror events with a transnational component, like the Mumbai bombings, the STL is far more applicable and likely to be drawn from.

But for the STL, the international community could point to the uninterrupted post IMT custom and practice to rebut attempts at allowing total in absentia proceedings at an international tribunal. But no longer. The responsibility for this unfortunate development lies with the U.N.

C. UNITED NATIONS

By providing its imprimatur on the STL, the U.N. has undermined its own legitimacy, unintentionally to be sure. The U.N. crossed a veritable Rubicon-explicit support of total in absentia trials, which augers poorly for future tribunals. On what grounds could the U.N. oppose such provisions in later tribunals? Perhaps even more troubling is that the STL’s in absentia provisions 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 the STL creates. The STL’s in absentia provisions are likely to cause difficulties for third Party States, which will negatively influence their political, policy, and financial support of the next U.N. tribunal. The world community’s monetary support of international criminal tribunals is already limited. This recognition of the obvious is only

190 Randeep Ramesh, Indian PM accuses Pakistan agencies of supporting Mumbai terror attacks Manmohan Singh says aim of terrorist assault was to damage India’s reputation as rising world power, Guardian.co.uk, Jan. 6. 2009, available at http://www.guardian.co.uk/world/2009/jan/06/mumbai-attacks-india. (referring to the 3 day terror attacks in Mumbai, India in November 2008 for which some allege Pakistan’s involvement).

191 “Crossing the Rubicon” refers to Julius Caesar’s 49 B.C. crossing of the Rubicon River with the Roman Army, in violation of a Roman law which forbade a standing army from entering Italy proper. The expression has come to mean a point of no return. In the STL context, once the U.N. agreed to the STL’s in absentia provisions the U.N. lessened if not lost the ability to object to such provisions in future tribunals.
made more so by the global economic crisis. Added to that are the delays in ending both ICTY and ICTR, which at some point, possibly already past, will frustrate the international community.192 The U.N. expended valued monetary capital and hard earned credibility in establishing and now operating the STL. Both will be difficult to recover any time soon.

VIII. CONCLUSION

Lebanon and the U.N. would do well to reconsider the words of the Secretary-General. 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 that

…we 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 secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.193

It borders on cruelly ironic that what triggered the U.N.’s involvement in the first place was the perception that Lebanon was incapable of conducting fair and impartial trials. Yet the

192 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) available at http://69.94.11.53/ENGLISH/Resolutions/s-res-1503e.pdf. But see S.C. Res. 322, U.N. Doc. S/2008/322 (13, 2008) (forecasting a timeline by which “at best” some ICTR trial decisions would not likely announced until the later half of 2009); S.C. Res. 326, U.N. Doc. S/2008/326 (May 14, 2008) (forecasting a timeline by which ICTY trials would be ongoing into 2010). The ICTY completion timeline may be completely disrupted if, as recently reported, the capture of former Bosnian Serb commander General Radtko Mladic, occurs by the end of 2009. Craig Whitlock, Serbian Officials Say Mladic Is ‘Within Reach,’ WASH. POST, Jul. 30, 2009, at A10 (describing Mladic as Europe’s “most wanted war criminal” for his role in, among other activities, the execution of 8,000 Muslims in Sebrenica in 1995, the “worse massacre in Europe since Would War II” and a three year siege of Sarajevo which leveled the city and killed up to 10,000 people. Sources for the article were “vague” at why, in 2009, Mladic’s capture was likely).

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.