Trials *in absentia* in international (criminal) law

What is the exact position of the *in absentia*-principle in international (criminal) law and what is the influence of the Special Tribunal for Lebanon on this position?

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Introduction

After half a century of disuse of international criminal tribunals and courts, there appears to be 'a re-emergence of these institutions to hold accountable persons who committed massive and cruel crimes that strike at the very core of humanity'.[1] However, these tribunals and courts that are set up to investigate and prosecute the most serious crimes of international concern, face urging problems.

A major problem is to catch high level suspects who are suspected of committing grave violations of international law. In the context of modern tribunals, such as the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the

[1] Harmon & Gaynor 2004, p. 403.

International Criminal Tribunal for Rwanda (hereinafter: ICTR), it seems that no trial can proceed without the physical presence of an accused.[2] Without a trial, the tribunal or court cannot function, the goals which were set will not be achieved and justice cannot be done to the victims of these horrible crimes.[3] In the greater part of these high level cases, it depends on international cooperation whether the suspects will eventually be tried before a tribunal or court. In a perfect world, all States fulfil their duty to cooperate based on international treaties and statutes. Unfortunately, the world we live in today is not that perfect.

The international criminal tribunals and courts cannot themselves implement arrest warrants and do not have their own police force.[4] Hence, most arrests are executed by national authorities or international forces like SFOR.[5] Admittedly, in recent history we have seen many success stories in which the international criminal tribunals and courts were able to bring justice. The facts and figures on international justice acquired by the international criminal tribunals and courts speak for themselves. For example, up to this day, 44 judgments have been completed by the ICTY and before the ICTR, 28 cases have been handed down.[6] Moreover, 6 people are currently standing trial before the Special Court for Sierra Leone and the International Criminal Court issued 11 warrants of arrest, of which 3 people are transferred to the International Criminal Court.[7] Nevertheless, perhaps in quite some ('high

[2] As stated in articles 20 (2) and 21 (4) ICTY Statute and articles 19 (2) and 20 (4) ICTR Statute. See also article 63 Rome Statute of the International Criminal Court; article 17 (4) (d) of the Statute of the Special Court for Sierra Leone; article 35 (d) of the law on the establishment of the Cambodia Extraordinary Chambers; section 5 of the Transitional rules of criminal procedure (East-Timor); section 1 of Regulation no. 2001/1 On the Prohibition of Trials *in absentia* for Serious Violations of International Humanitarian Law (Kosovo); article 20 (4) of the Iraqi High Tribunal; and article 247 of the Criminal Code of Bosnia and Herzegovina.

[3] Harmon & Gaynor 2004, p. 408.

[4] Harmon & Gaynor 2004, p. 409.

[5] 'SFOR is a stabilisation force, whose mission is to provide for a safe and secure environment in Bosnia and Herzegovina'. SFOR Mission, WWW <http://www.nato.int/sfor/organisation/mission.htm>, consulted on 25 February 2008.

[6] International Criminal Tribunal for the former Yugoslavia, judgements, WWW < http://www.un.org/icty/cases-e/index-t.htm>, last updated in 12 December 2007; see also International Criminal Tribunal for Rwanda, Status of cases WWW <http://69.94.11.53/default.htm>, consulted on 19 May 2008.

[7] Special Court for Sierra Leone, cases, WWW <http://www.sc-sl.org/Taylor.html>, consulted on 19 May 2008; see also International Criminal Court, situations and cases, WWW < http://www.icc-cpi.int/cases.html>, consulted on 19 May 2008 and International Criminal Court, Democratic Republic of the Congo, WWW < http://www.icc-cpi.int/cases/RDC.html>, consulted on 19 May 2008.

level') cases, the international criminal tribunals and courts are faced with minimum cooperation or even non-compliance.

The (non-) surrender of Radovan Karadžić and Ratko Mladić is an example of the failure of international cooperation of, in this case, the Bosnia Serb Government with the ICTY. Both Karadžić[8] and Mladić[9] are indicted for genocide, crimes against humanity and violations of the laws or customs of war, but they have up to this day successfully avoided capture. The former chief prosecutor of the ICTY, Carla del Ponte, urged in her farewell news conference the international community not to let Karadžić and Mladić off the hook. She stated that "the fact that [they] are still at large is a stain on our work, a stain on all these great achievements".[10]

Another example is the case of Ali Kushayb, leader of the Janjaweed militias in Sudan. He is, together with Ahmad Harun who is nowadays minister of humanitarian affairs in Sudan, wanted by the International Criminal Court (hereinafter: ICC) for crimes against humanity and war crimes. In May 2007, the ICC issued an arrest warrant against Kushayb and Harun, yet the Sudanese Government refuses to surrender them to the authorities of the ICC. Again, because of not having a police force of its own, the ICC is dependent on the willingness of other actors to cooperate, in this case to execute the arrest warrant(s).

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[8] The indictment charges Radovan Karadžic on the basis of his individual criminal responsibility (article 7(1) of the ICTY Statute) and superior criminal responsibility (article 7(3) of the ICTY Statute) with: "two counts of genocide (article 4 of the ICTY Statute - genocide, complicity in genocide), five counts of crimes against humanity (article 5 of the ICTY Statute - extermination, murder, persecutions on political, racial and religious grounds, inhumane acts (forcible transfer)), three counts of violations of the laws or customs of war (article 3 of the ICTY Statute - murder, unlawfully inflicting terror upon civilians, taking hostages), and one count of grave breaches of the Geneva Conventions (article 2 of the ICTY Statute - wilful killing)"; Case information sheet, "Bosnia and Herzegovina" & "Srebrenica", Karadžic case (IT-95-5/18). The case information sheet can be found on: WWW <http://www.un.org/icty/glance/karadzic.htm>, last updated on 23 June 2004.

9 The amended indictment charges Ratko Mladić on the basis of his individual criminal responsibility (article 7(1) of the ICTY Statute) and his superior criminal responsibility (article 7(3) of the ICTY Statute) with: "two counts of genocide (article 4 of the ICTY Statute – genocide, complicity in genocide), seven counts of crimes against humanity (article 5 of the ICTY Statute – persecutions on political, racial and religious grounds, extermination, murder, deportation, inhumane acts (forcible transfer), inhumane acts), and six counts of violations of the laws or customs of war (article 3 of the ICTY Statute – murder, unlawfully inflicting terror upon civilians, cruel treatment, attacks on civilians, taking hostages)"; Case information sheet, "Bosnia and Herzegovina" & "Srebrenica", Mladić case (IT-95-5/18). The case information sheet can be found on: WWW <http://www.un.org/icty/glance/mladic.htm>, last updated on 23 June 2004.

[10] Soares 2007, p. 32.

For international criminal tribunals and courts to be truly effective and credible to investigate and prosecute the most serious crimes of international concern, there is an urgent need for a durable solution. It is crucial for them to deal with the problem of non-appearance of the accused. The possibility for trials *in absentia* could be the ultimate solution. When a trial in the absence of the accused is a legal possibility, there is no need to wait for the trial to proceed. The Statute of the Special Tribunal for Lebanon, that is principally set up to investigate the assassination of former Prime Minister of Lebanon Rafiq Hariri, contains this innovative solution. It would be interesting to examine whether this Lebanon-solution will be relevant for (future) international criminal tribunals or courts.

This thesis will focus on the following research question:

What is the exact position of the *in absentia*-principle in international (criminal) law and what is the influence of the Special Tribunal for Lebanon on this position?

I will examine this research question by focussing on the exact status of trials *in absentia* before international criminal tribunals and the internationalised courts. To be able to discuss this position, I will look at international (criminal) law and case law of these tribunals and courts. After this, I will examine the influence of the Special Tribunal for Lebanon on the position of the *in absentia*-principle in international (criminal) law.

In chapter one, I will discuss the general framework in which the *in absentia*-principle can be placed. The second chapter will deal with the possibility of trials *in absentia* before the Nuremberg and Tokyo International Military Tribunals. In the third chapter, I will look at the position of trials *in absentia* before the ICTY and ICTR by examining the (drafting process of the) Statutes and Rules of Procedure and Evidence of these tribunals and their case law. Whether the ICC has the same view on the possibility of holding trials *in absentia* will be discussed in chapter four. Chapter five will deal with the internationalised courts and the status of trials *in absentia* before these courts. The novelty concerning trials *in absentia* in the Statute of the Special Tribunal for Lebanon and the underlying arguments, are part of chapter six. This thesis will end with a recapitulation of the preceding chapters and an answer to the central question will be provided.

Chapter 1 - General framework of the *in absentia*-principle in (inter)national law

In order to discuss the status of trials *in absentia* in the context of the international criminal tribunals and internationalised courts, one should first look at what (inter)national law in general states about this principle. Before the international framework will be discussed, it is important to understand the national perspective on trials *in absentia*, by means of exploring the civil law as well as the common law tradition. But first of all, the basic definition of *'in absentia'* will be explained.

§ 1.1. The in absentia*-principle*

According to the Black's Law Dictionary (8th ed. 2004), *in absentia* simply means: "in the absence of (someone); in (someone's) absence".[11] Nevertheless, one can at least consider two different scenarios which can be labelled as a trial *in absentia*. Firstly, the scenario in which the accused is present at least during the arraignment and the indictment, but in which, after this stage of the proceeding, the accused himself decides voluntarily not to attend trial.[12] The second scenario is when the accused has never appeared at any stage of the trial.[13] While the first scenario can be seen as a waiver of the right to be present by the accused, the second scenario poses significant questions on whether the accused knew about the trial and was properly served with an indictment.[14]

Next to these two scenarios, another situation of a trial that is conducted in the absence of the accused may appear, when the accused is removed by the judge because of, for example, disruption of the trial (only in exceptional circumstances). Nevertheless, the absence of the accused who is removed by the judge can not be seen as a waiver of the right to be present, since the accused itself does not chooses not to appear but this decision is made by the judge at the trial. Obviously, this situation neither poses any questions on whether the accused was informed on the trial or whether he[15] has been properly served with an indictment.

Within the context of this thesis, I will discuss the *in absentia*-principle according to the all-embracing definition of the Black's Law Dictionary, thus not focusing on one particular scenario or situation.

§ 1.2. The national level: the civil law versus common law tradition

The international criminal tribunals and internationalised courts are considered to have a *sui generis*[16] character, which means that they are unique in character. Nevertheless inevitably, they are (even slightly) influenced by the domestic systems. As to be able to understand the position of the international criminal tribunals and internationalised courts on trials *in absentia*, it is important to look at the roots of this position which can be found in national

[11] Black's Law Dictionary (8th ed. 2004), *in absentia*, 2004 Thomson/West.

[12] Starygin & Selth 2005, p. 171.

[13] Starygin & Selth 2005, p. 171.

[14] Starygin & Selth 2005, p. 171.

[15] Please make sure that when referring to 'he/his/him', one should also read 'she/her/her'.

[16] According to Black's Law Dictionary (8th ed. 2004), *sui generis* can be described as: "Of its own kind or class; unique or peculiar".

law. That's why this paragraph will deal with the viewpoint of domestic legal systems on trials *in absentia*, by discussing the civil law- and the common law tradition.[17]

In the civil law tradition, trials *in absentia* are usually a normal part of the criminal system.[18] However, this does not mean that all civil law traditions allow for trials *in absentia*. Whether a State allows for trials *in absentia* depends on the national law of the State and often on the severity of the crime concerned. For instance, Germany does not allow for trials *in absentia* at all.[19] However, the French Code of Criminal Procedure permits trials *in absentia* for felony cases[20], under the condition that when the suspect is captured, he has the right to a retrial.[21] Moreover, several States of the European Union, including the Netherlands[22], allow for trials *in absentia*.

In countries that have a common law tradition, trials *in absentia* are however 'not an ordinary part of the criminal system'.[23] The requirements set by the national law differ in every country. For example, the United Kingdom requires that the accused is present throughout the trial when it concerns a serious offense. In a federal case in the United States of America, the defendant "must be present at every stage of his or her trial".[24] However, based on Rule 43 of the Federal Rules of Criminal Procedure[25], the defendant automatically waives his or her right to be present when (s)he is voluntarily absent after the trial has begun.[26]

When discussing the civil law and common law tradition, it is interesting to see that both traditions have a different perspective on the question in which kind of situations trials *in*

[17] The main difference between the civil law tradition (Roman law) and the common law tradition (born in England) is that the civil law tradition has abstract rules which are codified and then applied by judges, while in the common law system, law is derived from judicial decisions instead of codified rules.

[18] Starygin & Selth 2005, p. 174.

[19] Starygin & Selth 2005, p. 174.

[20] The term 'felony' shows that the case involves a serious/major crime instead of an offense (minor crime).

[21] Starygin & Selth 2005, p. 174.

[22] According to the Dutch Code of Criminal Procedure (1962), trials *in absentia* are allowed for when certain formalities have been observed, based on article 280. Importantly, the accused must be notified on the date and place of the trial, as made clear in the provisions of the Code of Criminal Procedure. See also: Stamhuis 2001, p. 717.

[23] Starygin & Selth 2005, p. 173.

[24] Illinois v. Allen (1970) 397 U.S. 370 at 338; Lewis v. United States (1892) 146 U.S. 370.

[25] Federal Rules of Criminal Procedure (USA), Rule 43 (c) (1), WWW <http://www.law.cornell.edu/rules/frcrmp/Rule43.htm>, consulted on 2 March 2008.

[26] Starygin & Selth 2005, p. 174.

absentia are allowed for. In France, a trial *in absentia* is only permitted in case of a serious/major crime. The perspective of the United Kingdom on trials *in absentia* is a totally different one. It requires the perpetrator of a serious crime to be present at his or her trial, *because of* the severity of the crime. This difference may be of interest when we will look at the international criminal tribunals and internationalised courts in the next chapters, because these tribunals and courts deal with the most serious crimes of international (criminal) law.

§ 1.3. The International Covenant on Civil and Political Rights

After looking at the roots of the position on holding trials *in absentia* in national law, the international framework will be discussed in the following paragraphs. This general framework is first of all formed by a provision in the International Covenant on Civil and Political Rights (hereinafter: ICCPR).[27] The ICCPR is a United Nations treaty and is considered to have significant meaning within the field of human rights. The preamble of the covenant notes that conditions must be created to enable everyone to enjoy his or her civil and political rights. The rights mentioned in the ICCPR are strict obligations and the signatory States are bound by the covenant.[28]

The provision in the covenant considering the *in absentia*-principle is article 14 (3) (d). This article is of importance to the position of the *in absentia*-principle in international law, since the ICCPR is "an authoritative legal instrument in the field of civil and political rights".[29] Article 14 (3) (d) ICCPR notes that everyone shall be entitled "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing".[30] If one looks strictly at the text of this article, it could be argued that this article does not bar trials *in absentia*. After all, it only states the right of the accused to be tried in his presence. That would mean that the accused can waive his right to be tried in his presence, implicitly leading to the fact that a trial can be held in the absence of the accused.

The meaning of article 14 (3) (d) ICCPR is further explained in General Comment No.13 of the Human Rights Committee.[31] In this Comment, the Committee makes clear that

[27] International Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976).

[28] Tomuschat 2003, p. 38.

[29] Sun 2007, p. 17.

[30] Article 14 (3) (d) of the ICCPR.

[31] The Human Rights Committee is "a body entrusted with monitoring compliance by States with their obligations under the ICCPR". See Tomuschat 2003, p. 96.

"[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary".[32] Based on this statement, trials *in absentia* are thus permitted in exceptional cases and for 'justified reasons'. Unfortunately, the Comment does not further explain the meaning of these conditions.

Although the Comment does not further explain when trials *in absentia* are actually allowed, the case of Mbenge v. Zaire may give some clarification since the Human Rights Committee held in this case that to adjudicate a person *in absentia* may be allowed in exceptional circumstances. These circumstances were that "the accused should be informed of the case and should be summoned to appear in a timely manner as to enable the accused to prepare his defence".[33]

§ 1.4. The European Convention on Human Rights and Fundamental Freedoms

Next to the ICCPR, the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR)[34], forms also a part of the international framework. The convention is an important document in international law, as it "maintains and further realises human rights and fundamental freedoms".[35]

The European Court of Human Rights (hereinafter: ECtHR) permits trials *in absentia* under certain conditions which are laid down in case law. The ECtHR based its view on the interpretation of article 6 (3) (c) of the ECHR, which makes clear that everyone charged with

[32] United Nations Human Rights Committee, Office of the High Commissioner for Human Rights, General Comment No. 13 'Equality before the courts and the right to a fair and public hearing by an independent court established by law', twenty-first session, 1984, WWW <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument>, 1996-2001, consulted on 3 March 2008.

[33] Amnesty International USA, Fair Trials Manual, Chapter 21. The right to be present at trial and appeal, WWW <http://www.amnestyusa.org/Fair_Trials_Manual/211_The_right_to_be_present_at_trial/page.do?id=1104724&n1=3&n2=35&n3=843>, consulted on 3 March 2008.

[34] European Convention on Human Rights and Fundamental Freedoms, adopted 4 November 1950.

[35] European Court of Human Rights, historical background, WWW <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>, consulted on 28 April 2008.

a criminal offence "has the right to defend himself in person or through legal assistance of his own choosing".[36] In Colozza v. Italy[37], the ECtHR added to that the right to be present at trial. According to the court, the accused should be able to take part in the hearing, based on the object and purpose of article 6 (3) (c) ECHR. It noted that the accused, to enjoy the rights granted to him by article 6, has to have the opportunity to be present at the trial.[38] Nevertheless, the court stated that trials *in absentia* are permitted, as long as "it could be understood as a waiver of the opportunity of the accused to be present at the trial".[39] Such a trial *in absentia* is only possible under the condition that the authorities must have taken all steps to inform the accused. When the accused becomes aware of the proceeding afterwards, he should be able to obtain a fresh determination of his case (a retrial).[40] The ECHR made clear in Thomann v. Switzerland[41] that the judges who tried the accused in the trial from which he was absent "are in no way bound by their first decision and (...) take a fresh consideration of the case". Hence, it can be concluded that the ICCPR and the ECHR both have the possibility of a trial *in absentia* under strict circumstances, but the possibility of a retrial is only granted by the ECHR.

Chapter 2 – The Nuremberg & Tokyo International Military Tribunals

In the previous chapter, we looked at the general framework of (inter)national law in which the *in absentia*-principle can be placed. This was done by discussing the possibility of trials *in absentia* on the national level, by reviewing the civil law and common law tradition, and after that the international perspectives of the ICCPR and ECHR were examined.

In this chapter, the first two international criminal tribunals that actually held responsible (major) leaders of a country who committed serious international crimes will be discussed. However, before examining the Nuremberg and Tokyo International Military Tribunals and their (non-) possibility of trials *in absentia*, some information will also be

[36] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953), article 6 (3) (c).

[37] European Court of Human Rights Series A 89/1985, Colozza v. Italy, 7 EHRR 516, paragraph 27.

[38] Stamhuis 2001, p. 722.

[39] Stamhuis 2001, p. 722.

[40] Stamhuis 2001, p. 722.

[41] European Court of Human Rights Reports 1996-III Court (Chamber), Thomann v. Switzerland, paragraph 35.

provided on the first true efforts in modern history of setting up international -criminal- institutions, namely in the aftermath of the First World War.

§2.1. The aftermath of the First World War

After the First World War, several attempts were made to establish international –criminal- institutions. On 25 January 1919, the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' was set up by the victorious Allies at the Paris Peace Conference. Two representatives from each of the five main Allied powers (the U.S., Britain, France, Italy and Japan) and one representative from Belgium, Greece, Poland, Romania and Serbia, gave shape to the Commission. The task of the Commission was to investigate the responsibility of the authors of the war and the violations of laws of war and humanity.[42] The creation of an Allied 'High Tribunal' which could try violations of the laws of war and humanity was discussed among the members of the Commission. Those responsible for committing 'crimes against the laws of humanity' were charged based on the so-called 'Martens clause' in the Preamble of the 1907 Hague Convention respecting the laws and customs of war on land.[43] However, the United States and Japan opposed to rely on the Martens Clause for charges based on "crimes against the laws of humanity".[44]

On 28 June 1919, the Treaty of Versailles was signed by Germany and the Allied and Associated powers. This treaty provided for the prosecution of Kaiser Wilhelm II by an international tribunal (article 227), and the prosecution of German military personnel for committing war crimes by Allied Military Tribunals (articles 228 & 229). The Netherlands, where Kaiser Wilhelm II had sought refuge, refused however to hand over the Kaiser and the

[42] Cherif Bassiouni 1997, p. 15.

[43] The Martens Clause stresses that "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience". Rupert Ticehurst, International Review of the Red Cross no. 317, 'The Martens Clause and The Laws of Armed Conflict', 30 April 1997, WWW <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JNHY>, consulted on 5 March 2008.

[44] Cherif Bassiouni 1997, p. 17. "The United States and Japan opposed, because they were of the opinion that the investigation of the uncodified violations of the laws of humanity (provisions on these violations were never really implemented and ratified), was not included within the Commission's mandate".

Allied Powers omitted to place a formal request for extradition.[45] Hence, the international tribunal, pursuant to article 227, was never established.[46]

§2.2. The aftermath of the Second World War

In 1943, the Moscow Declaration was signed by the Allied States, in which it was promised to punish criminals from the European Axis countries.[47] During the Second World War, the idea occurred that an international tribunal was preferable to punish these war criminals.[48]

The Nuremberg International Military Tribunal (hereinafter: Nuremberg IMT), was set up as a response to the massive crimes perpetrated during the hideous Nazi regime in Europe. The London Agreement, which was the basis for the creation of the Nuremberg IMT, was signed by the four major Allied powers (France, the United Kingdom, the United States and the Union of Soviet Socialist Republics) on 8 August 1945. The Charter of the Nuremberg IMT was annexed to the London Agreement and nineteen other States supported the Charter later on.[49] The Nuremberg IMT had the task to deal with the major leaders who committed international crimes. The same crimes committed by lower-ranking officials were tried, on the basis of Control Council Law No. 10, before courts which were set up by the four Allied powers in their zones of occupation in Germany.[50]

The Nuremberg IMT had, according to article 6 of the Charter, jurisdiction over crimes against peace, war crimes and crimes against humanity. The prosecution based on crimes against peace was without any legal precedent and whereas in 1919, the United States had still opposed to charges based on crimes against humanity, this was not a point of discussion anymore at that time.[51]

The Tokyo International Military Tribunal (hereinafter: Tokyo IMT) was a response to the horrifying crimes that were committed during the Japanese occupation of many South East Asian nations. At the Potsdam declaration[52], the four Allied powers declared that they were

[45] Cherif Bassiouni 1997, p. 18.

[46] Cherif Bassiouni 1997, p. 18.

[47] The so-called 'Axis Powers' were the countries that opposed to the Allied Powers during the Second World War.

[48] Cryer and others 2007, p. 92.

[49] Biddle 1947, p. 684.

[50] Cassese 2003, p. 331.

[51] Cherif Bassiouni 1997, p. 26.

[52] 'Proclamation Defining Terms for Japanese Surrender Issued', at Potsdam, 26 July 1945, WWW <http://www.ndl.go.jp/constitution/e/etc/c06.html>, paragraph 10, consulted on 5 March 2008.

willing to prosecute leading Japanese officials for the crimes they committed during wartime. On 19 January 1946, the Tokyo Charter was approved and just like the Nuremberg IMT, the Charter provided for jurisdiction over crimes against peace, war crimes and crimes against humanity.[53]

Although both International Military Tribunals were revolutionary at that time by "breaking the State monopoly on criminal prosecution of international (war) crimes"[54], they also contained some major drawbacks. One of these drawbacks was the fact that these tribunals were perceived as 'victor's justice', because judges and prosecutors were appointed from the Allied States themselves. At the Nuremberg IMT, no judge was appointed from a neutral country, but the Tokyo IMT bench did consist of persons from neutral countries, such as India and the Philippines.[55] Another element which could be seen as a proof that these tribunals constituted 'victor's justice' was the fact that crimes committed by military personnel from the Allied powers did not fall within the jurisdiction of the International Military Tribunals.[56] This is obviously a major drawback of the International Military Tribunals, since it shows that these Military Tribunals were willing excuse the Allied Powers for the crimes they committed in the conflicts. Moreover, the Statutes of the Nuremberg IMT and Tokyo IMT both provided for crimes against peace, in particular, the waging of a war of aggression. There was no legal basis for crimes against peace; the notion of aggression as an international crime did not exist at that time.[57] This leads to another element of victor's justice, namely the violation of the *nullum crimen sine lege* principle.[58] By prosecuting on the basis of retroactive application of rules, like rules on crimes against peace, some people supported the argument that the Nuremberg and Tokyo IMT violated the *nullum crimen sine*

[53] Cassese 2003, p. 332.

[54] Cassese 2003, p. 333.

[55] Cassese 2003, p. 332.

[56] Tomuschat 2006, p. 832.

[57] Nowadays, the crime of aggression is included in the Rome Statute of the International Criminal Court. According to article 5 sub 1 (d) and sub 2 of the Rome Statute, the jurisdiction over the crime of aggression shall only be exercised once a provision is adopted by the States Parties that sets out a definition of the crime and under which conditions the court shall exercise its jurisdiction.

[58] This is the prohibition of applying ex post facto law ("a law that impermissibly applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed"). See Black's Law Dictionary (8th ed. 2004), 2004 Thomson/West.

lege principle. Nevertheless, others argued that prosecution of these crimes was already possible on the basis of customary international law.[59]

§2.3. Trials in absentia *before the Military Tribunals*

The Nuremberg IMT Charter provided for trials *in absentia* in article 12 of the Charter. It mentioned that:

> The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.[60]

This possibility to convict a person charged with crimes set out in the Nuremberg IMT's jurisdiction was used only once before the Tribunal in the case of Martin Bormann. He had a powerful position in the Nazi Party, mainly in the final period of the war. Martin Bormann was a general in the SchutzStaffel (also known as 'SS'), he gained control over all laws and orders issued by Hitler and he became the Nazi Party secretary in 1943.[61]

The indictment against Martin Bormann was based on participation in a common plan or conspiracy, war crimes and crimes against humanity, which are all included in article 6 of the Nuremberg Charter. Martin Bormann himself was not present at the trial. His counsel said that Martin Bormann was dead and that the Tribunal should not use article 12 of the Nuremberg Charter to convict his client *in absentia*. However, the Nuremberg IMT presumed him to be alive and at large and decided to convict Martin Bormann *in absentia*.[62] There appeared to be no further conditions for a conviction *in absentia* by the Nuremberg IMT.

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[59] Customary law is one of the major sources of International (Humanitarian) Law. Customary law "results from a general and consistent practice of States that is followed by them from a sense of legal obligation". See Meron 2007, p. 141.

[60] Avalon Project: Charter of the Nuremberg International Military Tribunal, WWW < http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm#art12> article 12, consulted on 7 March 2008.

[61] Avalon Project: Judgement Bormann, WWW <http://www.yale.edu/lawweb/avalon/imt/proc/judborma.htm> paragraphs 1 and 4, consulted on 7 March 2008.

[62] Avalon Project: Judgement Bormann, WWW <http://www.yale.edu/lawweb/avalon/imt/proc/judborma.htm> paragraph 10, consulted on 7 March 2008.

Consequently, Bormann was found guilty of committing war crimes and crimes against humanity[63] and sentenced to death.[64]

Based on article 29 of the Nuremberg Charter, the conviction could be altered or reduced if Bormann appeared to be alive and was apprehended after his conviction. It would then be possible for the Control Council of Germany "to consider mitigating facts, or to alter or reduce the sentence, when considered appropriate".[65]

Nevertheless, after the judgment of the Nuremberg IMT, the whereabouts of Martin Bormann remained unclear. Some people claimed he was already dead at the time of the verdict, others said he was alive and on the run. In 1998, it became clear that a body which was found at a Berlin building site in 1972 was the body of Martin Bormann.[66]

Another *in absentia*-case before the Nuremberg IMT was the case of Gustav Krupp von Bohlen und Halbach. His counsel noted that his health did not permit him to attend the trial and that a trial in his absence would not be desirable. Finally, Gustav Krupp von Bohlen und Halbach was not convicted *in absentia*, because he was declared mentally incapable of standing trial.[67]

The Tokyo Charter did not include an article relating to trials *in absentia*. It did not mention an equivalent like article 12 of the Nuremberg IMT. Nevertheless, there appeared to be no prohibition of trials *in absentia* either. More importantly, article 9 of the Tokyo Charter, considering the notion of a fair trial for the accused, did not include the right of the accused to be present at trial.[68] This may lead to the conclusion that trials *in absentia* were allowed before the Tokyo IMT, but in any case, the Tribunal has never used this possibility.

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[63] Avalon Project: Judgement Bormann, WWW <http://www.yale.edu/lawweb/avalon/imt/proc/judborma.htm>, conclusion, consulted on 9 March 2008.

[64] Avalon Project: Judgement: Sentences, WWW <http://www.yale.edu/lawweb/avalon/imt/proc/judsent.htm>, ("The Tribunal sentences the Defendant Martin Bormann on the counts of the Indictment on which he has been convicted, to death by hanging"), consulted on 19 May 2008.

[65] Avalon Project: Judgement Bormann, WWW <http://www.yale.edu/lawweb/avalon/imt/proc/judborma.htm>, paragraph 10, consulted on 7 March 2008.

[66] BBC News, 'Bormann's body identified', 4 May 1998, WWW <http://news.bbc.co.uk/1/hi/world/europe/87452.stm>, consulted on 9 March 2008.

[67] Avalon Project: Nazi conspiracy and aggression – Chapter IV, WWW <http://www.yale.edu/lawweb/avalon/imt/document/nca_vol1/chap_04.htm>, consulted on 9 March 2008.

[68] Avalon Project: the Charter of the International Military Tribunal for the Far East, WWW <http://www.yale.edu/lawweb/avalon/imtfech.htm >, consulted on 9 March 2008.

Chapter 3 - The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

The legacy of the Nuremberg and Tokyo IMT(s) did not lead to a (frequent) use of international criminal tribunals. It would take nearly another 50 years before the idea of the use of international criminal tribunals revived. In the early 1990s, the fall of the Berlin Wall led to the end of a period of conflict and competition between the two superpowers, the United States and the Soviet Union.[69] Especially at that time, the need for international justice was felt by the international community, mainly based on the growing importance of human

[69] The period of tension between the United States and the Soviet Union became also known as 'the Cold War'.

rights. This became even clearer when the conflicts in the former Yugoslavia and Rwanda erupted. The stories about war crimes and pictures of prison camps led to a sense of outrage, the same feeling that was felt at the end of the Second World War.[70] There was an urging need for international criminal tribunals to punish the actors of grave violations of international humanitarian law. Eventually, the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) were established by resolutions of the United Nations Security Council. In contrast to the 'victor's justice' of the Nuremberg and Tokyo IMT(s), the ICTY and ICTR both have an actual international character, since their judges are not directly involved in the conflict and human rights norms are at the core of the legal framework of the ICTY and ICTR. Nevertheless, one may doubt whether the set up of a tribunal by the Security Council, in which only some countries play a major role, is really that legitimate.

In this chapter, the characteristics of the ICTY and ICTR will be briefly discussed and after that, the possibility of trials *in absentia* will be examined by looking at the (drafting process of the) Statutes and Rules of Procedure and Evidence of these tribunals. After this, we will consider the relevant case law.

§ 3.1. The International Criminal Tribunal for the former Yugoslavia

In 1991, armed conflicts arose in the Socialist Federal Republic of Yugoslavia[71], when the Republic of Slovenia, the Republic of Croatia and the Republic of Macedonia declared their independence. Next to the call for independence of these parts of the former Yugoslavia, Bosnia and Herzegovina declared its independence in 1992. The Bosnian-Serbs who lived in this part of the former Yugoslavia did not want to become independent and they reacted with harsh violence on their fellow-citizens. They were supported by the army of the Federal Republic of Yugoslavia (which was then formed by Serbia and Montenegro). Finally, Bosnia was divided in two parts; the Federation of Bosnia-Herzegovina and the 'Republica Srpska'. In 1995, the area around the city Srebrenica was attacked by the Bosnian-Serb troops and they

[70] Cryer and others 2007, p. 102.

[71] The Socialist Federal Republic of Yugoslavia consisted of six Republics: Serbia (which also consisted of two autonomous provinces: Kosovo and Vojvodina), Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro. See BBC News, 'Timeline Break-up of Yugoslavia', last updated on 22 May 2006, WWW < http://news.bbc.co.uk/1/hi/world/europe/4997380.stm>, consulted on 21 May 2008.

killed more than 8,000 Muslim men and boys.[72] After this, the Dayton Peace Agreement was agreed upon by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, to bring an end to the conflict and to promote peace and security.[73]

The conflicts in the former Yugoslavia were marked by large-scale violations of international humanitarian law, especially by sexual offences and the practice of 'ethnic cleansing'.[74] In 1992, an impartial Commission of Experts was set up to examine and investigate allegations of international crimes in the former Yugoslavia.[75] While the Commission was still at work, the Secretary-General of the United Nations consulted States "on the creation of an international criminal tribunal to try those responsible for war crimes and crimes against humanity in the former Yugoslavia".[76] In Security Council Resolution 808 (22 February 1993), the Secretary-General recommended to set up the tribunal as a subsidiary organ of the UN by way of a Security Council resolution. Finally, the ICTY was established by Security Council Resolution 827 of 25 May 1993.[77] The creation of the tribunal by a Security Council Resolution had some advantages, namely that the tribunal could be set up rather fast and that all UN States are automatically bound by the Statute of the newly established tribunal.[78]

The jurisdiction granted to the ICTY is explained in articles 1 to 9 of the Statute of the ICTY. The tribunal has jurisdiction over war crimes, crimes against humanity and genocide

[72] BBC News, 'Timeline Break-up of Yugoslavia', last updated on 22 May 2006, WWW < http://news.bbc.co.uk/1/hi/world/europe/4997380.stm>, consulted on 21 May 2008.

[73] Office for the High Representative and EU Special Representative, 'Dayton Peace Agreement - General Framework Agreement', 14 December 1995, WWW <http://www.ohr.int/dpa/default.asp?content_id=379>, consulted on 21 May 2008.

[74] Cryer and others 2007, p. 102.

[75] Security Council Resolution 780 of 6 October 1992, preamble.

[76] Cryer and others 2007, p. 103.

[77] The ICTY was established by the Security Council Resolution 827 of 25 May 1993, based on the powers granted to the Security Council by Chapter VII of the UN Charter. Chapter VII enables the Security Council to take action in case of threat to international peace and security. The establishment of the ICTY (and ICTR) has been (highly) criticized, as being an expansion of the powers granted to the Security Council on the basis of Chapter VII of the UN Charter.

[78] International Criminal Law Society, the International Criminal Law Tribunals for the former Yugoslavia and Rwanda, WWW <http://www.icls.de/index.html>, consulted on 2 May 2008.

committed after 1 January 1991 on the territory of the former Yugoslavia.[79] Moreover, it is important to note that the ICTY, based on article 9 (2) of the ICTY Statute, has primacy over national courts.

§ 3.2. The International Criminal Tribunal for Rwanda

In 1994, the conflict between Hutu and Tutsi people, which is based on historical ethnic tension between the two groups, came to a climax. Months before the conflict was sparked by the death of the president of Rwanda, Hutu people were already called upon to kill Tutsi by the Radio Télévision Libre des Mille Collines. On 6 April 1994, an airplane in which the former president of Rwanda (Juvénal Habyarimana) and the former president of Burundi (Cyprien Ntaryamira) were flying, was shot down and both presidents died. Within hours after the shooting down of the airplane, violence was spread all over the country and triggered the genocide that took place between April and June in Rwanda.[80]

The UN and its members condemned the situation in Rwanda and set up a Commission of Experts to examine violations of international humanitarian law committed in Rwanda.[81] The ICTR was set up by Security Council Resolution 955 (again based on its Chapter VII powers) and the Statute of the ICTR was drafted by the members of the UN. Rwanda, at that moment a member of the Security Council[82], voted against the creation of the tribunal because of the fact that the death penalty was not included in the Statute and that other crimes than genocide were not excluded from the jurisdiction of the ICTR.[83]

The ICTR has, like the ICTY, jurisdiction over war crimes, crimes against humanity and genocide, although there are some differences. In case of war crimes, the ICTY may prosecute on the basis of war crimes that are committed in international armed conflicts, as well as in non-international armed conflicts[84], while the jurisdiction of the ICTR is limited to

[79] Cryer and others 2007, p. 104.

[80] Braeckman 2007, p. 236.

[81] Security Council Resolution 935 of 1 July 1994, paragraph 1.

[82] The Security Council is composed of five permanent members (China, France, the Russian Federation, the United Kingdom and the United States) and ten non-permanent members who are elected by the Secretary-General of the UN for a two-year term. These ten non-permanent members cannot be re-elected immediately after their term ends. In 1994-1995, Rwanda was one of the ten non-permanent members. See also: Membership of the Security Council, WWW <http://www.un.org/sc/members.asp>, consulted on 10 March 2008.

[83] Cryer and others 2007, p. 113.

[84] As decided in the Tadić case: Prosecutor v. Duŝko Tadić, Decision in Case No. IT-94-1-AR72, 2 October 1995, paragraphs 86-93.

non-international war crimes.[85] As to crimes against humanity, the ICTR has an additional requirement of discrimination, which the article on crimes against humanity of the ICTY does not have.[86] Moreover, the ICTY and ICTR both adopted the definition of genocide found in article II of the 1948 Genocide Convention on the Prevention and Punishment of the crime of Genocide.

The jurisdiction of the ICTR is limited to "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994".[87]

§ 3.3. Trials in absentia *before the ICTY and ICTR*

After looking at the establishment of the ICTY and ICTR, the possibility of *trials in absentia* will be discussed in this subsection. First, the (drafting process of the) Statutes and Rules of Procedure and Evidence of these tribunals will be discussed and after that we will look at case law on the position of the *in absentia*-principle before the ICTY and ICTR.

§ 3.3.1. The discussion on including the possibility of trials in absentia

The major problem of enforcement of arrest warrants and other orders was the main reason for the ICTY and ICTR to take into consideration, when discussing to allow for trials *in absenti*a during the draft of the statutes of these tribunals. As stated before, both the international ad hoc tribunals[88] are dependent on the cooperation of States or international forces to enforce arrest warrants and to catch (high level) suspects. Although States are

[85] As noted in Statute of the International Criminal Tribunal for Rwanda, article 4.

[86] The Statute of the International Criminal Tribunal for Rwanda makes clear in article 3 that the ICTR may prosecute persons responsible for crimes "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". The Statute of the International Criminal Tribunal for the former Yugoslavia only states in article 5: "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".

[87] Statute of the International Criminal Tribunal for Rwanda, article 1.

[88] The tribunals are also called 'ad hoc' tribunals because they are set up with a specific purpose, namely to try those who committed violations of international humanitarian law in the territory of the former Yugoslavia and Rwanda.

obliged to cooperate with the ICTY and ICTR[89], the ad hoc tribunals do not have the power to force this cooperation and the non-cooperation of some, or all, of the republics of the former Yugoslavia was already envisaged by the ICTY at its set up.[90]

To decide whether to allow for trials *in absentia*, internationally recognized standards and in particular article 14 (3) (d) of the ICCPR, were taken into consideration.[91] As explained in the previous chapter, article 14 (3) (d) ICCPR does not prohibit trials *in absentia*, but this article makes clear that these kinds of trials are only allowed for under exceptional circumstances. In spite of the acceptance of trial *in absentia* under exceptional circumstances, the United Nations Secretary-General gave a somewhat different interpretation at the time of the set up of the ICTY. He made clear that "a trial should not start without the (physical) presence of the accused and that trials *in absentia* should not be provided for by the Statute of the ICTY, since this would be inconsistent with article 14 (3) (d) ICCPR".[92]

Moreover, when discussing whether to include the possibility of trials *in absentia* within the ICTY Statute, there were some concerns that these kinds of trials would become the standard rather than the exception and there were concerns that the trials would end up being 'show trials' when the States Parties refuse to surrender the accused. Besides that, there was a strong feeling that the ICTY, with its limited financial resources, should focus on the accused in custody rather than giving priority to the accused prosecuted on the basis of an *in absentia* trial.[93] Since the ICTR was set up after the ICTY, one can envisage that the

[89] The obligation to cooperate with the ICTY and ICTR is created by the fact that both tribunals are established on the basis of Chapter VII-powers of the Security Council. All States have to assist in all stages of the proceeding and they shall give effect to orders issued by the Trial Chambers. This is laid down in general in article 25 of the UN Charter and more specifically in article 29 of the ICTY Statute and article 28 of the ICTR Statute. See also: 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN doc. S/25704, 3 May 1993, paragraph 125, available on: WWW <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm#VB>, consulted on 12 March 2008.

[90] McDonald 2004, p. 560.

[91] 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN doc. S/25704, 3 May 1993, paragraph 106, available on: WWW <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm#VB>, consulted on 12 March 2008.

[92] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, 3 May 1993, paragraph 101, available on: WWW <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm#VB>, consulted on 12 March 2008.

[93] Furuya 1999, p. 638 & 639.

considerations mentioned above were automatically taken into account at the set up of the ICTR.

After discussing the pro arguments for permitting trials *in absentia* (make sure orders issued by the Tribunals would not be obstructed or refused) and the contra arguments (anxiety that trials *in absentia* would become the rule instead of the exception), it was decided that trials *in absentia* had to be ruled out before the ICTY and ICTR. This was done by the inclusion of two articles in each of the Statutes of the ICTY and ICTR, namely in articles 20 & 21 (4) (d) of the ICTY Statute and articles 19 & 20 (4) (d) of the ICTR Statute. These articles ensure that the accused shall be tried in his or her presence and that the Chamber shall read the indictment to the accused, which means that the physical presence of the accused is required.

Although the possibility of trials *in absentia* was ruled out when drafting the Statutes, in the drafting process of the Rules of Procedure and Evidence of the ICTY[94], it became clear that some judges were still in favour of including some provisions on trials *in absentia*. The judges created a sort of settlement, which was laid down in Rule 61.

§ 3.3.2. Rule 61 procedure: just a compromise?

After having discussed the final ruling out of trials *in absentia* in the context of the ICTY and ICTR Statutes, the Rule 61 proceedings will be examined in this paragraph. Before exploring these special kinds of proceedings, one must take into account that they were not of great importance before the ICTR. In fact, research has shown that Rule 61 proceedings have never been used before the ICTR.[95] This is why, while discussing Rule 61, the focus will be on information based on the Rule 61 proceedings before the ICTY.

[94] These rules "govern the conduct of proceedings –from the pre-trial to the appeal phase-, the administration of evidence and the protection of witnesses". This is explained at the website of the ICTY: International Criminal Tribunal for the former Yugoslavia, Basic Legal Documents, WWW <http://www.un.org/icty/legaldoc-e/index-t.htm>, consulted on 30 April 2008.

[95] The Rules of Procedure and Evidence of the ICTR also provide for a trial in the absence of the accused when the accused refuses to appear before the Trial Chamber. According to Rule 82*bis*, "the Chamber may order, upon satisfaction of the requirements mentioned in this rule, that the trial proceed in the absence of the accused for so long as his refusal persists". This rule is used before the ICTR, for example in the case of Jean Bosco Barayagwiza (ICTR-97-19), who chose not to attend his trial. Because the accused itself chose not to attend the

The Rules of Procedure and Evidence of both the ICTY and ICTR provide for a procedure in case of failure to execute a warrant, namely in Rule 61. This rule can be invoked in a case "where the arrest warrant, which was issued after the indictment was confirmed by one Judge, has not been executed and where, because of the non-execution of the arrest warrant, the indictment has not been served to the accused".[96] There can be various reasons for the non-execution of the arrest warrant: the authorities of the territory concerned do not want to cooperate with the Tribunal or the authorities concerned were not able to find the accused.[97]

The initiative to begin a Rule 61-procedure is placed on the side of the Prosecutor. In order to invoke such a procedure, the Prosecutor shall have to ensure that the Judge (who originally confirmed the indictment) is satisfied that two requirements are met. These two requirements are laid down in Rule 61 under A (i) and (ii). The Prosecutor (and Registrar[98]) must show that he has taken all reasonable steps to 1) secure the arrest of the accused and; 2) to ascertain his/her whereabouts in case his/her whereabouts are unknown. The Judge shall then order that the indictment shall be submitted by the Prosecutor to the Trial Chamber.

The indictment shall be submitted to the Trial Chamber, together with all the evidence (or any additional evidence) that was before the Judge who initially confirmed the indictment. The Prosecutor may call and examine witnesses whose statements have been submitted to the confirming Judge or the Trial Chamber may request the Prosecutor to do so.[99] Rule 61 (C) clarifies that if the Trial Chamber is satisfied that there are reasonable grounds to believe that the accused has perpetrated the crimes charged in the indictment, it will then request the

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trial, this can be seen as a waiver of the accused of his or her right to be present. Interestingly, the Rules of Procedure and Evidence of the ICTY do not include this possibility.

[96] ICTY Press and Information Office, Information Memorandum on Rule 61, '*Rule 61: the voice of the victims*', 27 February 1996. The invocation of Rule 61 means that the steps taken in Rules 47, 52, 56 and finally 59 (have) all failed.

[97] ICTY Press and Information Office, Information Memorandum on Rule 61, '*Rule 61: the voice of the victims*', 27 February 1996.

[98] The Registry is headed by the Registrar and performs administrative as well as judicial support services for the Tribunal. The registry provides for judicial and legal services for the Trial Chambers and the Prosecution. Moreover, it performs other judicial duties assigned to it by the Tribunal's Rules of Procedure and Evidence. See: ICTY at a glance, organs of the tribunals, WWW < http://www.un.org/icty/glance-e/index-t.htm >, consulted on 12 March 2008. Also: International Criminal Tribunal for Rwanda, general information, WWW < http://69.94.11.53/default.htm >, consulted on 12 March 2008.

[99] Rules of Procedure and Evidence of the ICTY and ICTR, Rule 61 (B).

Prosecutor to read the indictment aloud in open court. Pursuant to Rule 61 (D), the Trial Chamber will issue an international arrest warrant that will be transmitted to all States and consequently brand the accused as an "international fugitive".[100] Under the same provision, the Trial Chamber may also "order a State (or States) to adopt provisional measures to freeze the assets of the accused". Under Rule 61 (E), the President of the Tribunal may notify the Security Council if the failure to effect personal service of the indictment was due to (or in part due to) a failure or refusal of a State to cooperate with the Tribunal. The Security Council may, upon notification of the Tribunal's President, decide to take measures assigned to it by the UN Charter against the State.[101] Despite of the creation of a public record by the issuance of an international arrest warrant, there are no sanctions or sentences involved in Rule 61 and there will be no determination of the accused's guilt. However, Rule 61 proceedings do have some major practical implications.

The first implication is, as stated in Rule 61 (C), the reconfirmation of the indictment in open court. By reconfirming the indictment in open court, the Tribunal may give notice to the indictments that have been issued on the alleged war criminal and allow the procedure to continue by issuing an international arrest warrant. Secondly, by invocation of Rule 61 (E), it becomes clear who is responsible for the failure to effect personal service of the indictment (by executing the arrest warrant) and based on this, the Security Council may decide to take (economic) measures.[102] Maybe even more importantly, Rule 61 affords a "formal means of redress to victims".[103] The victims of crimes allegedly perpetrated by the accused play a key role in the (success of a) Rule 61 proceeding.[104] They are given the opportunity to speak out in court and to give their testimony either directly in open court or pre-recorded and read into the record of the Prosecutor.[105] The testimony of the victim(s) will be saved as a part of the official record against the accused and will be preserved for posterity.[106] Importantly, the participation of the victims in Rule 61 cuts both ways; it enables the victims to start the

[100] ICTY Press and Information Office, Information Memorandum on Rule 61, '*Rule 61: the voice of the victims'*, 27 February 1996.

[101] Quintal 1998, p. 750.

[102] Furuya 1999, p. 644.

[103] Furuya 1999, p. 644.

[104] Rule 61 is also described as "The voice of the victims", as proudly stated in the Information Memorandum on Rule 61 of 27 February 1996.

[105] ICTY Press and Information Office, Information Memorandum on Rule 61, '*Rule 61: the voice of the victims'*, 27 February 1996.

[106] Hildreth 1998, p. 514.

healing process and it will assist, through the testimony of the victims, the Tribunal in the prosecution of the accused.[107]

Nevertheless, the Rule 61 proceedings have also generated much controversy. A significant argument that has been made is that (a part of) Rule 61 is redundant since it repeats already mentioned obligations.[108] The obligation to cooperate with the Tribunal as stated in Rule 61 (D) is already noted in article 29 of the ICTY Statute (and article 28 of the ICTR Statute). The obligation to comply in article 29 of the ICTY Statute should make issuing an international arrest warrant even unnecessary, since all States should already assist in making arrests when the initial warrant is issued.[109] Furthermore, the notification to the Security Council when the failure to effect personal service of the indictment was due to (or in part due to) a failure or refusal of a State to cooperate with the Tribunal as stated in Rule 61 (E), is already part of Rule 59 (B) of the ICTY and ICTR Statute.[110] This means that if Rule 59 (B) is properly executed, the Security Council must already have taken some sort of action against the non-cooperation of the State and this should make Rule 61 (E) redundant.[111]

Another point of major controversy is the fact that the Rule 61 proceeding does not fully fit to norms of due process.[112] More specifically, in case of Rule 61, it is argued that the witness examination is done ex parte[113] and that a record is made without granting the possibility to the defence for cross-examination. Although it is obvious that in a Rule 61 proceeding witness examination is done ex parte, since in this proceeding a warrant of arrest has not been executed and thus the accused is not present, it can be seen as a violation of

[107] Hildreth 1998, p. 514.

[108] Quintal 1998, p. 754.

[109] Quintal 1998, p. 754.

[110] Rule 59 (B) of the ICTY and ICTR Statute makes clear that: "If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly".

[111] Quintal 1998, p. 754.

[112] Quintal 1998, p. 754. Due process can be described as: "The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." Black's Law Dictionary (8th ed. 2004), due process, 2004 Thomson/West.

[113] Ex parte means: "On or from one party only, usu. without notice to or argument from the adverse party". Black's Law Dictionary (8th ed. 2004), ex parte, 2004 Thomson/West.

article 14 (3) (e) ICCPR. This article gives the defendant the minimum guarantee to confront and cross-examine the witness against him.

One may argue as well that by conducting a Rule 61 hearing, a great amount of evidence will be exposed and this may increase the possibility of witness intimidation. The Rule 61 hearing may also lead to more workload for the Prosecutor's Office.[114] Nevertheless, in spite of these controversies, those affiliated with the Tribunal consider Rule 61 to be successful.[115]

§ 3.3.3. Case law on Rule 61 proceedings before the ICTY

As stated before, the ICTR has not used the possibility of Rule 61 proceedings. Therefore, in this paragraph, only the case law of the ICTY on Rule 61 will be discussed.

To this date, there have been five Rule 61 proceedings before the ICTY.[116] Of these five cases, only in the case of Prosecutor v. Radovan Karadžić and Ratko Mladić, both the accused still remain at large. The 'Review of Indictment Pursuant to Rule 61' in this case will be discussed in the next paragraphs and after that, the case of Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić' will be looked at, because since this case, the Rule 61 proceeding has never been invoked before the ICTY. The other cases may consider other interesting elements as well, but to discuss them all is not within the scope of this thesis.

On 25 July 1995, the first indictment against Radovan Karadžić and Ratko Mladić was confirmed and this indictment "charged them with genocide and other crimes committed against the civilian population in the territory of Bosnia and Herzegovina. The second indictment, confirmed on 16 November 1995, dealt with the events that took place on the territory of Srebrenica in July 1995".[117] On the same dates that the indictments were issued,

[114] Arbour 2004, p. 399.

[115] Quintal 1998, p. 755.

[116] The cases in which the Rule 61 proceeding is used, are: (1) Prosecutor v. Dragan Nikolić a/k/a 'Jenki', Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 October 1995; (2) Prosecutor v. Milan Martić 'RSK', Case No. IT-95-11-R61, 8 March 1996; (3) Prosecutor v. Mrksić, Radić and Sljivancanin 'Vukovar Hospital', Review of Indictment Pursuant to Rule 61, Case No. IT-95-13-R61, 3 April 1996; (4) Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996; (5) Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Case No. IT-95-12-R61, 13 September 1996.

[117] Case information sheet, "Bosnia and Herzegovina" & "Srebrenica" (IT-95-5/18), Karadžić and Mladić. The case information sheet can be found on: WWW <http://www.un.org/icty/cases-e/index-t.htm>, consulted on 18 March 2008.

warrants of arrest were sent to the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Bosnia and Herzegovina and the Bosnian Serb Administration in Pale. These warrants of arrest were not executed up to 18 June 1996 and on this day, the Judges concerned decided that a reasonable time had elapsed and that the Prosecutor had taken all reasonable steps to inform the accused on the existence of the indictments.[118] The indictments were submitted to the Trial Chamber for review under Rule 61 of the Rules of Procedure and Evidence of the ICTY.[119]

To decide whether there are reasonable grounds for believing that Radovan Karadžić and Ratko Mladić committed the alleged crimes, the Trial Chamber reviewed all the submitted evidence as well as the additional material produced during the hearings. Furthermore, it heard witnesses and two amici curiae.[120] Before the hearings took place, applications were filed by two attorneys to represent Radovan Karadžić and to have access to the courtroom and all the relevant documents. The Trial Chamber refused the request, and based its argument on the fact that a Rule 61 proceeding cannot be considered to be a trial. Nevertheless, the Trial Chamber ordered the Registrar to read the indictments against Radovan Karadžić to the attorney of first choice and the attorneys were granted an observer status at the public gallery.[121]

Being satisfied that the Prosecutor had shown evidence that constituted reasonable grounds for believing that Radovan Karadžić and Ratko Mladić had committed the alleged crimes, the Trial Chamber reconfirmed the indictments on all counts on 11 July 1996. An international arrest warrant was issued and was sent to all States and the multinational military Implementation Force (which was led by NATO).[122]

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[118] Case information sheet, "Bosnia and Herzegovina" & "Srebrenica" (IT-95-5/18), Karadžić and Mladić. The case information sheet can be found on: WWW <http://www.un.org/icty/cases-e/index-t.htm>, consulted on 18 March 2008.

[119] Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paragraph 1.

[120] The Chamber may, on the basis of Rule 74 of the Rules of Procedure and Evidence of the ICTY, "grant leave to or invite a State, organization or person to appear before the Chamber and make submissions on the issue specified by the Trial Chamber". See also: Furuya 1999, p. 648.

[121] Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paragraph 4.

[122] Case information sheet, "Bosnia and Herzegovina" & "Srebrenica" (IT-95-5/18), Karadžić and Mladić. The case information sheet can be found on: WWW <http://www.un.org/icty/cases-e/index-t.htm>, consulted on 18 March 2008.

The Trial Chamber considered that the Bosnia Serb Administration was bound under rules and regulations of the ICTY and especially article 29 of the ICTY('s) Statute and the obligations laid down in the Dayton Peace Agreement[123] to cooperate with the Tribunal, but that the Administration had failed in its obligations. Both the accused were present on the territory of the Bosnia Serb Administration, but the Administration neither served the two indictments to the accused nor did it execute the warrants of their arrest.[124] The Federal Republic of Yugoslavia allowed the two accused on its territory on several occasions and the Republic failed, even upon request of the President of the ICTY, to cooperate on the execution of the arrest warrants.[125] Based on these facts, the President of the ICTY decided to report these failures to the Security Council. The Security Council issued a number of resolutions to force cooperation and on 29 April 2008, the Member States of the European Union decided to sign the Stabilisation and Association Agreement on the future membership of Serbia, but the Member States made clear that the treaty will only be ratified when Serbia will cooperate with the ICTY by handing over Radovan Karadžić and Ratko Mladić. Nevertheless, even up to this day Radovan Karadžić and Ratko Mladić still remain at large.

The case of Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić'[126] concerned a 'Review of Indictment Pursuant to Rule 61' as well. The initial indictment was confirmed on 29 August 1995, which charged Ivica Rajić on the basis of individual criminal responsibility (article 7 (1) of the ICTY Statute) and superior criminal responsibility (article 7 (3) of the ICTY Statute) with grave breaches of the Geneva Conventions of 1949 (article 2) and violations of

[123] The Dayton Peace Agreement was signed on 14 December 1995. Article IX obliges all Parties to the agreement "to cooperate fully with all entities involved in implementation of this peace settlement". Available on: Office for the High Representative and EU Special Representative, 'Dayton Peace Agreement - General Framework Agreement', 14 December 1995, WWW <http://www.ohr.int/dpa/default.asp?content_id=379>, article IX, consulted on 18 March 2008.

[124] Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paragraph 98.

[125] Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paragraphs 98, 99 & 100.

[126] Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Case No. IT-95-12-R61, 13 September 1996. Ivica Rajić was the commander of the Croatian Defence Council's (HVO). He commanded an attack on the Bosnian village of Stupni Do and he commanded forces that attacked and looted the town of Vareš. At both attacks, horrible crimes were committed.

the customs of the laws of war (article 3) and was published on 6 September 1995.[127] Ivica Rajić assigned Mr. Zvonamir Hodak to act as his legal representative, by sending a power of attorney to the ICTY on 9 February 1996.

On 6 March 1996, the Judge asked the Prosecutor to "report on his efforts to effect service of the indictment".[128] On that same day, after the Judge was satisfied that a reasonable time had elapsed and that the Prosecutor had taken all reasonable steps to inform the accused on the existence of the indictments, he ordered that the indictment against Ivica Rajić for review pursuant to Rule 61 was submitted to the ICTY. Before the Rule 61 hearing took place on 13 September 1996, evidence and material was submitted to the Trial Chamber.[129]

The first issue that the Trial Chamber had to consider was whether it had subject-matter jurisdiction over the crimes alleged against Ivica Rajić. The Trial Chamber examined articles 2 and 3 of the ICTY Statute, under which Ivica Rajić was charged and found that it had subject-matter jurisdiction on counts III and VI of the indictment.[130] Secondly, the Trial Chamber reviewed on the basis of Rule 61 (C) whether there were reasonable grounds for believing that Ivica Rajić committed the crimes charged in the indictment. Based on substantial evidence and several witness statements, the Trial Chamber was satisfied that the Prosecutor had presented reasonable evidence for believing that Ivica Rajić committed the crimes charged in the indictment. After this, international warrants of arrest were issued to the multinational military Implementation Force (led by NATO) and all States were ordered to cooperate with the Tribunal. Moreover, the Trial Chamber stated that the failure to effect personal service of the indictment and to execute the arrest warrants was seen as a refusal to cooperate with the Tribunal by the Republic of Croatia and the Federation of Bosnia and

[127] The indictment was amended on 14 January 2004, based on an order of the Trial Chamber. Case information sheet, "Stupni Do" (IT-95-14/1) Ivica Rajic. The case information sheet can be found on: WWW < http://www.un.org/icty/cases-e/cis/rajic/cis-rajic.pdf>, consulted on 22 March 2008.

[128] Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Review of Indictment Pursuant to Rule 61, Case No. IT-95-12-R61, 13 September 1996, introduction.

[129] Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Review of Indictment Pursuant to Rule 61, Case No. IT-95-12-R61, 13 September 1996, introduction.

[130] A more detailed discussion of the case is not within the scope of this thesis. See also: Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Review of Indictment Pursuant to Rule 61, Case No. IT-95-12-R61, 13 September 1996, paragraph 49.

Herzegovina.[131] On the basis of Rule 61 (E), the Security Council was notified on this failure by the President of the ICTY.

Eventually, Ivica Rajić was arrested on 5 April 2003 by Croatian authorities and then transferred to the ICTY. The indictment was amended and he pleaded guilty to grave breaches of the Geneva Conventions on 26 October 2005. On 8 May 2006, Ivica Rajić was sentenced to 12 years' imprisonment.[132]

After the case of Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić, no Rule 61 proceedings have been held before the ICTY. The Tribunal has adopted a new strategy; certain new indictments remain sealed upon request by the Prosecutor and these indictments are handed over to SFOR or other entities which have the ability to arrest and detain the indicted person.[133] Perhaps, this new strategy may be a more favourable approach, because by keeping certain indictments unsealed, at least evidence will not be exposed and witnesses might be less intimidated.

§ 3.3.4. Rule 61: a balancing act

As shown, the application of a Rule 61 proceeding leads to a balancing act between effectiveness and fairness. It is not easy to keep this balance: on the one hand, the decision under Rule 61 is merely provisional but on the other hand, the Tribunal sets a historical record and brands the indicted person as an "international fugitive".

The case law of the ICTY makes clear that a Rule 61 (provisional) decision does not necessarily lead to the arrest of the indicted person. The State which is strongly "requested" to cooperate with the Tribunal may decide not to live up to this question and wait for possible measures by the Security Council. In any case, when the indicted person is caught, the decisions taken within the context of Rule 61 must be reconsidered later on in a trial, after the accused has appeared before the Tribunal. There is no possibility to rely on the Rule 61-decision, since this proceeding holds a lower threshold considering the fairness of the procedure; testimony of witnesses and victims under Rule 61, for example, is accepted by the Trial Chamber without any cross-examination.[134] So, while the Tribunal needs to enjoy the

[131] Prosecutor v. Ivica Rajić a/k/a 'Viktor Andrić', Review of Indictment Pursuant to Rule 61, Case No. IT-95-12-R61, 13 September 1996, paragraph 70.

[132] Case information sheet, "Stupni Do" (IT-95-14/1) Ivica Rajic. The case information sheet can be found on: WWW < http://www.un.org/icty/cases-e/cis/rajic/cis-rajic.pdf>, consulted on 22 March 2008.

[133] Furuya 1999, p. 662.

[134] Quintal 1998, p. 752-754.

effectiveness of a Rule 61 proceeding as much as possible to be able to catch high-level suspects, it also needs to consider the fairness of the provisional decision taken in a Rule 61 proceeding.

Obviously, presence of the indicted person before the court is the most ideal situation for the international criminal tribunals to make sure justice is done. However, as was made clear in the previous paragraphs, the presence of the indicted person cannot always be taken for granted. The ICTY (and ICTR, although never applied) tries to deal with the non-appearance of the accused by invoking Rule 61 of the Rules of Procedure and Evidence. The tension between the need to be truly effective and having a fair procedure, is fully present in the Rule 61 proceeding. It grants a great opportunity to victims of crimes committed to testify and to be able to go on with their lives, but it does not resolve this tension. At best, the Rule 61 proceeding may be described as a compromise.

Chapter 4 – The International Criminal Court

In the previous chapter, we looked at the ICTY and ICTR and whether both tribunals allow for trials *in absentia*. As we have seen, they do not explicitly provide for trials *in absentia*, but a compromise was created in Rule 61. In this chapter, we will discuss the possibility of holding trials *in absentia* before the International Criminal Court. However, before going into this, the background of the establishment of this court and the structure and jurisdiction itself will be looked at.

§ 4.1. The establishment of the International Criminal Court

The set up of a permanent international court was already discussed in 1948, during the negotiations on the Genocide Convention. However, it was then agreed that the Genocide Convention would only look at the possibility of the establishment of such a permanent court.[135] Subsequently, the UN General Assembly asked the International Law Commission[136] to study the desirability and possibility to set up a permanent international court to prosecute the crime of genocide. The outcome of the report was positive and a special committee was set up. Nevertheless, the concept of an international court lacked universal support and the progress on the establishment stagnated.[137]

In 1989, the International Law Commission was asked by the UN General Assembly (upon a proposal by Trinidad and Tobago) to draft a Statute for a permanent international court and a final text was created in 1994. At first, some States still hesitated on the desirability of such a court, but there was enough support for a Preparatory Committee on the establishment of an International Criminal Court in 1995.[138] This Committee met six times during the years 1995-1998 and it finally completed the drafting of the text in the spring of

[135] Cryer and others 2007, p. 119.

[136] The International Law Commission (ILC) shall have for its object "the promotion of the progressive development of international law and its codification" (article 1 of its Statute). The members of the Commission "shall be persons of recognized competence in international law" (article 2 par. 1 of its Statute). In practice, the ILC works on a topic "by balancing between progressive development and codification of international law". See also: International Law Commission, Introduction, WWW < http://www.un.org/law/ilc/>, consulted on 21 April 2008.

[137] Cryer and others 2007, p. 119-121.

[138] Cryer and others 2007, p. 121.

1998. The Rome Statute[139] was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter: ICC) in Rome, on 17 July 1998. After the adoption, a Preparatory Commission for the establishment of the ICC was created by the UN and all States were invited to participate in this Commission. The Committee had a difficult task, because before a decision could take effect, all States had to agree on it. The Preparatory Commission agreed upon the Rules of Procedure and Evidence and the Elements of Crimes[140] and these were then adopted by the Assembly of States Parties.[141]

The Rome Statute is considered to be bounding on States which formally declare their consent to be committed by its provisions. It could only enter into force when 60 States had become Party to the Statute. On 1 July 2002, this requirement was fulfilled and the Statute of the ICC came into force. Up to this day, 105 States are party to the Rome Statute and the ICC sits in The Hague.[142]

§ 4.2. The structure and jurisdiction of the International Criminal Court

In this paragraph, the structure and jurisdiction of the court will be discussed. The ICC is the first permanent -treaty-based- international court.[143] It is important to note that the ICC is not an organ of the UN, nor it is created by the UN (unlike the ICTY and ICTR). The ICC is an independent international organisation and is not a part of the United Nations system, but it does cooperate with the UN.

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[139] The Statute of the International Criminal Court is also called the 'Rome Statute', since it was agreed upon during the conference in Rome in the summer of 1998.

[140] The Elements of Crimes entered into force on 9 September 2002 and "assist the Court in the interpretation and application of articles on the crimes of genocide, crimes against humanity and war crimes" (articles 6, 7 and 8 of the Rome Statute). See also: The Official Journal of the International Criminal Court, Elements of Crimes, WWW < http://www.icc-cpi.int/about/Official_Journal.html>, consulted on 21 April 2008.

[141] The Assembly of States Parties is composed of representatives of the States that have ratified and acceded to the Rome Statute. It functions as "the management oversight and legislative body of the International Criminal Court". See also: International Criminal Court, Assembly of States Parties, WWW < http://www.icc-cpi.int/asp.html>, consulted on 21 April 2008.

[142] International Criminal Court, Establishment of the Court, WWW < http://www.icc-cpi.int/about/ataglance/establishment.html>, consulted on 21 April 2008.

[143] International Criminal Court, Fact sheet; the ICC at a glance, WWW < http://www.icc-cpi.int/library/about/ataglance/ICC-Ataglance_en.pdf>, consulted on 21 April 2008.

A case may be referred to the Prosecutor of the ICC by a State Party itself[144], by the United Nations Security Council[145] or the Prosecutor may start an investigation on his own initiative.[146] However, not all cases are eligible since the ICC has, according to article 5 of the Rome Statute, jurisdiction only over "the most serious crimes of concern to the international community as a whole". These crimes are: genocide (article 6), crimes against humanity (article 7), war crimes (article 8) and the crime of aggression.[147] The court may prosecute individuals who are accused of having committed the crimes mentioned in the Rome Statute.

Another restriction is that the court has only jurisdiction with respect to crimes committed after 1 July 2002. When a State has become party to the Rome Statute after 1 July 2002, the jurisdiction of the court is limited to the date of entry into force of this Statute for that State.[148] The jurisdiction of the ICC cannot to be considered universal, since it may only exercise jurisdiction if:

> The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.[149]

However, the Court will not always act when it has jurisdiction over a case. This is laid down in the 'principle of complementarity'. This principle is included, since the intention of the ICC is not to replace the national courts but to supplement them.[150] The principle makes clear that the ICC will not exercise its jurisdiction, unless the national judicial system failed to act. The failure of the national system "may arise when a country is either unwilling or unable genuinely to carry out the investigation or prosecution".[151] The determination of

[144] Article 14 of the Rome Statute.

[145] Article 13 (b) of the Rome Statute.

[146] Article 15 of the Rome Statute.

[147] The jurisdiction over the crime of aggression shall only be exercised once a provision is adopted by the States Parties that sets out a definition of the crime and under which conditions the court shall exercise its jurisdiction (article 5 (2) of the Rome Statute). This provision is not yet adopted.

[148] Unless this State has made a declaration as provided for in article 12 (3) of the Rome Statute.

[149] This is mentioned in articles 12 and 13 of the Rome Statute.

[150] Cryer and others 2007, p. 127.

[151] Article 17 (1) (a) of the Rome Statute.

unwillingness or inability is a task of the Court, which will consider some elements as laid down in article 17 (2) and (3) of the Rome Statute.[152]

At this moment, four situations are referred to the ICC. Three of them are referred by the State Party itself (Uganda, Democratic Republic of the Congo and Central African Republic) and one has been referred to the ICC by the United Nations Security Council (the situation of Darfur, Sudan). At the end, the Prosecutor decided, taking into consideration issues of jurisdiction and admissibility, to investigate all four situations. Like the ICTY and ICTR, the ICC is dependent on the cooperation of States and international forces. Pursuant to article 86, States Parties are obliged to cooperate fully with the Court. The Court may also enter into agreements to provide cooperation and receive cooperation of non-State Parties.[153]

§ 4.3. The International Criminal Court and trials in absentia

In this subsection, we will discuss whether or not trials *in absentia* are provided for by the Rome Statute. But before we will look at the relevant articles of the Rome Statute, the discussions that took place in the International Law Commission when drafting the Statute, the Working Group and the Preparatory Committee of the UN will be reviewed.

§ 4.3.1 The discussion on permitting trials in absentia

Before the final draft of the Rome Statute was agreed upon and entered into force, a lengthy discussion on the possibility of trials *in absentia* took place in the International Law Commission, in written comments of Government representatives and in the Preparatory Committee of the UN. National sentiments and the different national systems (common law- vs. civil law tradition), played a role within these discussions.

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[152] Article 17 (2) of the Rome Statute makes clear that the Court shall consider whether "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice". Article 17 (3) of the Rome Statute notes that "in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

[153] Article 89 of the Rome Statute.

The Draft Statute of the International Law Commission provided in article 44 (1) (h) for "the presence of the accused at trial unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate".[154] The possibility of holding trials *in absentia* gave rise to discussion within the Working Group on a draft statute for an international criminal court.[155] Some members were against the inclusion of trials *in absentia*, arguing that this was unacceptable to the notion of fair trial in article 14 (3) (d) ICCPR and they argued that judgments of the Court that lacked the actual possibility of implementing them, might lead to loss of authority and effectiveness of the court in the eyes of the public.[156] Others were in favour of trials *in absentia* in cases where the accused was duly notified but cho(o)se(s) not to appear before the Court or when the accused was already arrested but escaped before the trial was completed.[157] The Working Group then encouraged the International Law Commission and General Assembly of the UN to give their comments on the issue of trials *in absentia*.[158]

Subsequently, article 44 was transformed by the Working Group (on a draft statute for an international criminal court) into article 37. This article stated that the accused shall be

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[154] UN Doc. A/48/10, 'Report of the International Law Commission on the work of its forty-fifth session', 3 May -23 July 1993, comments on article 44. Available on: WWW <http://untreaty.un.org/ilc/documentation/english/A_48_10.pdf>, consulted on 22 April 2008.

[155] The Working Group on a draft statute for an international criminal court (before 25 May 1993 known as 'the Working Group on the question of an international criminal jurisdiction'), was a subsidiary organ of the International Law Commission and especially created to deal with this topic. It "examined a series of draft provisions dealing with the more general and organizational aspects of a draft statute for an international criminal court. Moreover, the Working Group produced a preliminary consolidated draft text for a statute which was submitted for further examination by the Working Group". See UN Doc. A/48/10, 'Report of the International Law Commission on the work of its forty-fifth session', 3 May -23 July 1993, Introduction, p. 100. Available on: WWW <http://untreaty.un.org/ilc/documentation/english/A_48_10.pdf>, consulted on 20 May 2008.

[156] UN Doc. A/48/10, 'Report of the International Law Commission on the work of its forty-fifth session', 3 May-23 July 1993, comments on article 44, paragraph (2). Available on: WWW <http://untreaty.un.org/ilc/documentation/english/A_48_10.pdf>, consulted on 22 April 2008.

[157] UN Doc. A/48/10, 'Report of the International Law Commission on the work of its forty-fifth session', 3 May - 23 July 1993, comments on article 44, paragraph (3). Available on: WWW <http://untreaty.un.org/ilc/documentation/english/A_48_10.pdf>, consulted on 22 April 2008.

[158] UN Doc. A/48/10, 'Report of the International Law Commission on the work of its forty-fifth session', 3 May - 23 July 1993, comments on article 44, paragraph (6). Available on: WWW <http://untreaty.un.org/ilc/documentation/english/A_48_10.pdf>, consulted on 20 May 2008.

present during the trial. However, it also provided in article 37 (2) of the Draft Statute of the International Law Commission for some exceptions so that the Trial Chamber could order the trial to proceed in the absence of the accused, namely in situations where "(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill health of the accused it is undesirable for the accused to be present; (b) the accused is continuing to disrupt the trial; (c) or the accused has escaped from lawful custody under this Statute or has broken bail". There were some concerns as to these exceptions, which were expressed by the members of the Preparatory Committee in its Report on the Establishment of an International Criminal Court. In general it was observed that "even the limited exceptions provided for in that paragraph were not in conformity with the rights of the accused as contained in various international human rights instruments and national constitutions, and should therefore be deleted".[159]

In reaction to this report of the Preparatory Committee, some members of the International Law Commission and Government representatives argued that permitting trials *in absentia* would be contrary to important judicial guarantees (particularly article 14 (3) (d) ICCPR). Others still favoured the inclusion of trials *in absentia*, by stating that it will be very difficult to apprehend fugitives in the international context.[160]

Finally, it was agreed by all parties, taking into account all pro and contra arguments and especially the goals set by the ICC (deterrence, redress to victims, post-conflict reconciliation and perception of fairness of the court[161]), that the ICC would not allow trials *in absentia* to take place, or to put it in another way; that the accused shall be present during the trial.

§ 4.3.2. The legal framework of the ICC and trials in absentia

The final draft of the Rome Statute, adopted at the Rome Conference on 17 July 1998, makes clear in article 63 (1) that the accused shall be present during the trial. This article let go of the exceptions provided for in the draft statute in article 37 (2), and it makes clear that the only exception which is provided for (under strict conditions) by the Rome Statute is "when the

[159] UN Doc. General Assembly Official Record, 51st session, Supplement No. 22 (A/51/22), Report of the Preparatory Committee on the Establishment on an International Criminal Court, March-April and August 1996, page 55, paragraph 256.

[160] Brown 1998-1999, p. 782.

[161] Figá-Talamanca 1998, p. 215-216.

accused who is being present for the Court continues to disrupt the trial".[162] The Court may then remove the accused for the duration that is strictly required, but (s)he shall have the ability to observe the trial and instruct his or her counsel from outside the courtroom, through the use of communications technology if necessary. However, the possibility to remove the accused when disrupting the trial "shall only be used in exceptional circumstances after other reasonable alternatives have proved inadequate".[163] This means that in order to start a trial, the Court shall under all circumstances first have to gain physical control over the accused. After all, the accused can only be removed by the Court for disruption of the trial, when he or she physically attends the trial. For the Court to gain physical arrest over the accused, it is dependent on the cooperation of States with the ICC.[164] As already stated, the ICC also suffers from lack of cooperation of States as proved in the case of the Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb").

Notwithstanding this, the Rome Statute contains a remarkable feature that does provide for some sort of pre-trial *in absentia*. As stated in article 61 (2) of the Rome Statute, "the Pre-Trial Chamber may hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial".[165] The involvement of judges in an early stage (pre-trial) is consistent with the trend in international criminal law to "speedily prepare the trial".[166] The initiative to hold such a hearing may be put on the Prosecutor or be requested by a motion of the Pre-Trial Chamber itself. Nevertheless, this mini pre-trial in absence of the accused can only be invoked when the person has waived his or her right to be present or fled or cannot be found.[167]

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[162] Article 63 of the Rome Statute.

[163] Article 63 (2) of the Rome Statute.

[164] Tiribelli 2006, p. 383.

[165] Article 61 (2) of the Rome Statute.

[166] Aptel 2007, p. 1117.

[167] This is stated in article 61 (2) of the Rome Statute:

"The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
(a) Waived his or her right to be present; or
(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.
In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice".

The requirements for a decision to hold a confirmation hearing in the absence of the person accused and the hearing itself can be found in Rule 125 and 126 of the Rules of Procedure and Evidence of the ICC. When the Pre-Trial Chamber decides to hold a confirmation hearing in absence of the person accused, it shall set a date and make this date public.[168] The Prosecutor and (when possible) the person concerned or his or her counsel, shall also be informed on the date of the hearing.[169] When the actual confirmation hearing takes place, Rules 121 and 122 shall be applied in the same way by the Pre-Trial Chamber, as when the person accused is present at the confirmation hearing.[170] If the Chamber has decided that the person shall be represented by counsel, then counsel shall be able to exercise the rights of the person concerned (Rule 126 (2). Importantly, when the person concerned has fled and is subsequently arrested and the Court has confirmed the charges (in a confirmation of charges hearing in absence of the person concerned) on which the Prosecutor seeks trial, the accused shall be committed to the Trial-Chamber. He or she may then ask that preliminary issues are referred to the Pre-Trial Chamber, in order for the Trial Chamber to function "in an effective and fair way".[171] This may mean that the person concerned may ask for the Pre-Trial Chamber to (re)consider the charges that were confirmed when the person was not present before the Court.

In the case of Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), this possibility of confirmation of charges in absence of the accused has not been used (yet). The warrants of arrest have been issued, but the accused remain at large due to the fact that the Government of Sudan refuses to hand them over to the ICC. Perhaps article 61(2) of the Rome Statute can be useful in this case, to at least have the charges confirmed on which the Prosecutor seeks trial and possibly speeding up the cooperation of States with the ICC on this case. However, the chance that the Government of Sudan will suddenly start to cooperate with the ICC because of the confirmation of charges, is rather insignificant.

§ 4.3.3. Article 61 (2) of the Rome Statute vs. Rule 61

In this paragraph, article 61 (2) of the Rome Statute will be compared with the proceedings of Rule 61 of the ICTY and ICTR. The ICC is set up after the ICTY and ICTR, so it will be

[168] Rule 125 (1) of the Rules of Procedure and Evidence.

[169] Rule 125 (2) of the Rules of Procedure and Evidence.

[170] Rule 126 (1) of the Rules of Procedure and Evidence.

[171] Rule 126 (3) of the Rules of Procedure and Evidence.

interesting to see whether the Rome Statute contains similar provisions on trials *in absentia* as the ICTY and ICTR in Rule 61. Maybe both have common features, or perhaps the ICC has a totally different way of dealing with such trials?

The provision of article 61 (2) of the Rome Statute does bear some minor resemblance to Rule 61 of the ICTY and ICTR. In both Rule 61 and article 61 (2) of the Rome Statute, the initiative to start such a procedure is (also) put on the Prosecutor's side. Moreover, in both cases, all reasonable steps must have been taken to secure the appearance/arrest of the person charged or when the whereabouts of the person are unknown, to at least inform this person on the hearing.

Nevertheless, (the proceeding of) Rule 61 concerns the reconfirmation of the indictment in open court at trial level, while the provision in article 61 (2) of the Rome Statute only provides for a confirmation of charges at the pre-trial stage. One could wonder whether the pre-trial *in absentia* made possible by article 61 (2), is also available at the trial level before the ICC?[172] When one looks at this article in combination with article 63, it is most probable that the mini trial *in absentia* is only available at the pre-trial stage, since article 63 makes clear that the presence of the accused is the rule and this rule shall only be deviated from when the person accused continues to disrupt the trial.

Moreover, if one compares the provisions of the ICTY and ICTR with the provisions of the Rome Statute, one cannot say that there appears to be a strong development towards (dis)allowing the possibility of holding trials *in absentia*. The articles 20 & 21 (4) (d) of the ICTY Statute and articles 19 & 20 (4) (d) of the ICTR Statute exclude the option of holding trials *in absentia*, but both do provide for a compromise in Rule 61. This compromise makes it possible to reconfirm the indictment in open court, to provide redress to the victims of horrible crimes and it makes clear who is responsible for the failure to execute the arrest warrants. In contrast to this, the ICC provisions do not totally rule out the option of a trial *in absentia*, by including the exception of removal of the accused when he or she continues to disrupt the trial. Besides this, a sort of pre-trial *in absentia* in a confirmation of charges hearing is provided for by the Rome Statute, which does not exists before the ICTY or ICTR.

Possibly, what both the Rule 61 proceedings and article 61 (2) mostly have in common is that their value is questionable. As made clear in the previous chapter, a Rule 61 proceeding leads to a provisional decision that may not necessarily lead to the arrest of the

[172] Brown 1998-1999, p. 794.

indicted person. In some way, the same can be said about article 61 (2), since the confirmation of charges does not substitute a trial, is only preliminary and cannot result in any verdict. When the person charged is apprehended, different conclusions (than at the confirmation of charges in absence of the person concerned) may be drawn before the Pre-Trial Chamber.

The only firm conclusion is that both do not allow a trial *in absentia* at full, but they created a totally different way to deal with the absence of the accused, which nevertheless leads in both instances to a questionable output. Hence, the ICC did not build on the experience of the ICTY and ICTR: it provides for a new perspective of trials *in absentia*.

Chapter 5 – Other courts with international elements and the *in absentia*-principle

§ 5.1.The establishment of other courts with international elements

Since the establishment of the ICTY and ICTR, the model of setting up ad hoc international criminal tribunals has not been used. Instead of these tribunals, States respond to large-scale atrocities by the creation of courts with international elements. These courts, also called internationalised or hybrid courts, are mixed in their composition, combine international law and municipal law to deal with international crimes (which are in this context: genocide, war crimes and crimes against humanity), all have (unlike the ICTY, ICTR or ICC) a seat in the country concerned and are far less expensive than ordinary international criminal tribunals.[173]

One can divide the internationalised courts in different models, based on the way they are established. The Internationalised Panels in Kosovo and the Special Panels for Serious Crimes in Dili (East Timor) are both created as a "direct result of international intervention and installation of an international transitional administration".[174] The Bosnia and Herzegovina War Crimes Chamber also falls within this category, but is established by the United Nations (as an initiative of the ICTY and the Office of the High Representative).[175] The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia are established by an agreement between the UN and the post-conflict government. This is also true for the Special Tribunal for Lebanon, but this tribunal will be discussed at length in chapter 6. Another model has been constructed for the establishment of the Iraqi High Tribunal, which was created by the occupying powers.

§ 5.2.1. Internationalised Panels in Kosovo

Since ages, Kosovo has been an area of political and territorial conflict between the Serbian (before: Yugoslav) government and Kosovo's ethnic-Albanian population. The conflict intensified in 1998, when the Kosovo Liberation Army (KLA) entered the conflict and the Serbian government reacted with harsh violence. At that time, thousands of Albanians were driven out of their homes and massacres were discovered.

On 23 September 1998, the UN Security Council adopted Resolution 1199. The objectives of this Resolution were an immediate cease-fire, the presence of the international

[173] Cassese 2003, p. 343. Note however that the 'mixed composition' element is not entirely true for the Iraqi High Tribunal. This will be further discussed in paragraph 5.6.1.

[174] Cryer and others 2007, p. 149.

[175] Cryer and others 2007, p. 159.

community in Kosovo to monitor the cease-fire and a discussion on the future of Kosovo. These objectives were not fulfilled and NATO started a bombing campaign against the Federal Republic of Yugoslavia, which lasted from 24 March 1999 until 9 June 1999. Unfortunately, no solution was found to end the conflict.[176]

Finally, a peace plan was embodied in UN Security Council Resolution 1244.[177] This Resolution stated that Kosovo had to be deployed under UN auspices, by means of an international civil and security presence. Kosovo was placed under transitional UN administration (UNMIK[178]) and the UN authorized the NATO participation in the security presence in Kosovo. At this moment, the head of this UN mission is the Special Representative of the Secretary General for Kosovo: Joachim Rücker.

The prosecution of international crimes was envisaged under the 'justice task' of UNMIK ('to perform basic civilian administrative functions'), since Resolution 1244 did not explicitly mention the role of the UN mission in international criminal trials. Initially, it was planned to establish a transitional court, but this plan was politically sensitive and expensive. Therefore it was decided, by means of a Regulation, to embed international judges and prosecutors in the ordinary courts of Kosovo.[179] The international judges and prosecutors are all placed in municipal courts and the Supreme Court of Kosovo and they work together with their Kosovar colleagues. This means that the international judges and prosecutors do not work in a centralized court, but in different courts all over the country. This is an exceptional feature of the Internationalised Panels in Kosovo.

The focus of these panels is not especially on the conflict of 1998-1999, but they mainly concentrate on the current criminal activity in Kosovo, such as human trafficking. In cases of crimes concerning the 1998-1999 conflict, the ICTY has primary jurisdiction, yet the

[176] Cryer and others 2007, p. 155.

[177] Security Council Resolution 1244 of 10 June 1999.

[178] The abbreviation 'UNMIK' stands for: United Nations Interim Administration Mission in Kosovo. The tasks of UNMIK are stated in Resolution 1244: "perform basic civilian administrative functions; promote the establishment of substantial autonomy and self-government in Kosovo; facilitate a political process to determine Kosovo's future status; coordinate humanitarian and disaster relief of all international agencies; support the reconstruction of key infrastructure; maintain civil law and order; promote human rights; and assure the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo".

[179] UNMIK Regulations 2000, Reg. No. 2000/6 of 15 February 2000 and Reg. 2000/34 of 29 May 2000, available on: WWW <http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/E2000regs.htm>, consulted on 30 March 2008.

prosecutor of the ICTY has stated that the ICTY will only try the principal perpetrators of international crimes. This means that the Internationalised Panels have jurisdiction over cases concerning lower-level perpetrators as well.

On 17 February 2008, the Parliament of Kosovo declared independence from Serbia. The prime minister recognized that Kosovo's independence will contain some limitations because of the international military and civilian presence in the country and he made clear that Kosovo would be built according to the UNMIK plan.[180] The declaration was followed by violence in the ethnic Serbian area, Russian protest and recognition of Kosovo's independence by several (EU) States. After the declaration of independence, Kosovo will have to wait some time before the independence will come to effect. During that time, the EU will deploy officials for a mission and eventually, the UN will leave Kosovo. The government of Kosovo will then run its own country, with help of the EU mission.[181] The question then is what will happen to the Internationalised Panels of Kosovo. Will they remain, or will the international judges and prosecutors hand over their cases to their national colleagues as to enable Kosovo to enjoy full independence?

§ 5.2.2. Trials in absentia *before the Internationalised Panels in Kosovo*

The UNMIK decided to apply pre-existing domestic law before the Internationalised Panels, such as the Yugoslav Federal Criminal Code, and to add international human rights law which was incorporated in domestic law. But after a while, UNMIK increasingly introduced new legislation which consisted of new regulations. One of these regulations contained a statement on the prohibition of trials *in absentia.*

Regulation No. 2001/1 on the prohibition of trials *in absentia* for serious violations of international humanitarian law was issued on 12 January 2001. In this regulation, the Special Representative of the Secretary-General announced in section 1 that: "No person may be tried in absentia for serious violations of international humanitarian law, as defined in Chapter XVI

[180] BBC News, 'Kosovo MPs proclaim independence', 17 January 2008, WWW <http://news.bbc.co.uk/1/hi/world/europe/7249034.stm >, consulted on 30 March 2008.

[181] BBC News, 'Q&A: Kosovo's future', 10 March 2008, WWW <http://news.bbc.co.uk/2/hi/europe/6386467.stm>, consulted on 30 March 2008.

of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court (17 July 1998)".[182]

The question that comes to one's mind is whether this implicitly means that trials *in absentia* are allowed for crimes, not defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court? The case law of the Internationalised Panels may provide an answer to this question, but this answer will remain unclear since the case law is not accessible for the public.

§ 5.3.1. The Special Panels for Serious Crimes in Dili (East Timor)

The island of East Timor, as a former Portuguese colony, was invaded by Indonesia in 1975 and it remained to be an Indonesian province for almost 24 years. In 1999, the majority of the population of East Timor voted for independence and this call for independence was followed by violence of pro-Indonesian militias, which was ended by intervention of UN forces.[183] The UN Transitional Administration in East Timor (UNTAET) was then set up, by means of Security Council Resolution 1272.[184]

At that time, the court structure of East Timor was totally destructed by the withdrawal of Indonesia. There were almost no qualified lawyers in East Timor, since under the Indonesian occupation the courts were exclusively guided by Indonesian personnel.[185] The UNTAET managed however to establish a new court system, by creating six district courts and a Court of Appeal. This was followed by the set up of the Special Panels for Serious Crimes in East Timor's capital city Dili, which have jurisdiction over genocide, crimes against humanity and war crimes (which are defined in UNTAET Regulation 2000/15) as well as over murder, sexual offences and torture (based on national law). The crimes must be "committed in East Timor, or when committed elsewhere, by or against an East Timor citizen,

[182] UNMIK, Bernard Kouchner, 'Regulation No. 2001/1 on the prohibition of trials *in absentia* for serious violations of international humanitarian law', 12 January 2001, available on: WWW < http://www.unmikonline.org/regulations/2001/reg01-01.html>, consulted on 30 March 2008.

[183] Cryer and others 2007, p. 155.

[184] Security Council Resolution 1272 of 25 October 1999. This Resolution stated that the mandate of the UNTAET would consist of the following tasks: "to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; to support capacity-building for self-government; to assist in the establishment of conditions for sustainable development".

[185] De Bertodano 2003, p. 229.

during 1 January 1999 until 25 October 1999".[186] The Special Panels have a mixed composition of international judges and national judges.

On 20 May 2002, UNTAET was replaced by another UN mission and authority was handed over to the new institutions. The Special Panels for Serious Crimes were still at work, but now under the authority of the new Constitution of East Timor. The UNTAET regulations were replaced step-by-step and in the end, the Special Panels for Serious Crimes handed all their cases over to the ordinary courts of East Timor.

§ 5.3.2. Trials in absentia *before the Special Panels for Serious Crimes in Dili (East Timor)*

The procedural law of the Special Panels for Serious Crimes was governed by a regulation of UNTAET.[187] Whether trials *in absentia* were allowed for, was stated in Section 5 of Regulation 2000/30. This section made clear that trials *in absentia* were not allowed for, by stating that "no trial of a person shall be held *in absentia*". However, as Section 5 made clear, there were some exceptions to this rule. The proceeding may continue "when the accused at any stage following the preliminary hearing is absent, because he flees or is voluntarily absent".[188] Moreover, when the accused is removed from the court, the proceeding may continue in absence of the accused. In that case, the process may continue, until the court finds that the decision based on the disruptive conduct does not longer apply. From that moment on, the accused shall be present again during the trial.[189]

Thus, it can be concluded that within the context of the Special Panels for Serious Crimes, a trial of a person could be held *in absentia* under the strict conditions as stated in regulation 2000/30.

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[186] UNTAET 'Reg. 2000/15', 5 July 2000, section 2, available on: WWW < http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>, consulted on 30 March 2008.

[187] UNTAET 'Reg. 2000/30 on the Transitional Rules of Criminal Procedure', 25 September 2000, available on: WWW < http://www.un.org/peace/etimor/untaetR/reg200030.pdf>, consulted on 1 April 2008.

[188] UNTAET 'Regulation 2000/30 on Transitional Rules of Criminal Procedure', 25 September 2000, section 5.2, available on: WWW < http://www.un.org/peace/etimor/untaetR/reg200030.pdf>, consulted on 1 April 2008.

[189] UNTAET 'Regulation 2000/30 on Transitional Rules of Criminal Procedure', 25 September 2000, section 5.3., 5.4 & 48.2., available on: WWW < http://www.un.org/peace/etimor/untaetR/reg200030.pdf>, consulted on 1 April 2008.

§ 5.4.1. The Extraordinary Chambers in the Courts of Cambodia

In 1975, the Communist Party of Kampuchea (better known as "Khmer Rouge") seized the capital city of Cambodia Phnom Penh. During four years, atrocities were committed by the Party under leadership of Pol Pot and millions of people died by execution, disease, forced labour or starvation. After the Khmer Rouge period, a civil war started which only ended in 1998. After 20 years of civil war, Cambodia sought the assistance of the UN to bring to justice those who committed the horrendous crimes in the period of 17 April 1975 until 6 September 1979. Unfortunately, the one person most responsible for the atrocities committed in Cambodia will never stand trial, because Pol Pot died on 16 April 1998.[190]

After the request of assistance by the Cambodian government, negotiations were held to discuss the introduction of Extraordinary Chambers and the establishment of an ad hoc Tribunal.[191] However, the fear of corruption within the Cambodian judicial system led to the withdrawal of the UN Secretary-General from the process.[192]

At the end of 2002, the UN General Assembly adopted a resolution to welcome the publication of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and asked the Security Council to resume negotiations.[193] In May 2003, an agreement between the UN and Cambodia, "concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", was adopted and the Cambodian National Assembly ratified the agreement in October 2004.[194]

The Extraordinary Chambers are part of the Cambodian court system and composed of national prosecutors and judges and international personnel. Their main task is, according to article 1: "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that

[190] De Bertodano 2003, p. 227.

[191] The creation of the Extraordinary Chambers is a domestic solution, since Cambodia did not agree on the establishment of an ad hoc tribunal. The ad hoc tribunals differ from the Extraordinary Chambers since the ad hoc tribunals do not form a part of the domestic court system and apply international humanitarian law only (hence, they do not apply national law).

[192] Cryer and others 2007, p. 153.

[193] General Assembly, Resolution 57/228A of 18 December 2002.

[194] General Assembly, Resolution 57/228B of 13 May 2003 (the agreement is attached to the resolution).

were committed during the period from 17 April 1975 to 6 January 1979".[195] The trials are held in Cambodia and suspects may be charged with crimes under Cambodian law (murder, torture and religious persecution) and crimes under international law (genocide, war crimes, crimes against humanity and crimes against internationally protected persons).

§ 5.4.2. Trials in absentia *before the Extraordinary Chambers in the Courts of Cambodia*

As stated in article 33 of the Law on the Establishment of the Extraordinary Chambers, the jurisdiction of the Extraordinary Chambers shall be practised in accordance with the international standards of justice, fairness and due process of law.[196] More specifically, this article makes clear that the chambers' exercise of jurisdiction shall be in accordance with articles 14 and 15 of the ICCPR.[197] The right of the accused to be tried in his or her presence, based on article 14 (3) (d) of the ICCPR, is more explicitly stated in article 35 (d) of the Law on the Establishment of the Extraordinary Chambers.

Moreover, Rule 81 of the Internal Rules of Procedure of the Cambodian Extraordinary Chambers states "the right of the accused to be tried in his or her own presence".[198] Nevertheless, in this rule, some exceptions to this right are laid down. When, after his or her initial appearance and after having been duly summoned, the accused refuses or fails to attend the proceedings, the proceedings may continue in his or her absence. He or she may then be defended by his or her own lawyer or, when (s)he refuses to choose a lawyer, (s)he will be assigned a lawyer by the Chamber. In cases where the accused has been expelled from the

[195] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 1. Available on: WWW <http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf >, consulted on 1 April 2008.

[196] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 33. Available on: WWW < http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf >, consulted on 1 April 2008.

[197] Cambodia signed and ratified the ICCPR on 26 May 1992, which is directly enforceable in the domestic legal order (based on Article 31 of the 1993 Constitution of Cambodia).

[198] Extraordinary Chambers in the Courts of Cambodia, Internal Rules (rev.1) as revised on 1 February 2008, Rule 81. Available on: WWW <http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf>, consulted on 1 April 2008.

proceedings, the accused may remain in telephone contact with his or her lawyer.[199] Based on Rule 81 (5) of the Internal Rules, the Chamber may, upon consent of the accused, resume the proceedings in the absence of the accused when the accused cannot attend the proceedings because of health reasons or other serious concerns. The accused may then be defended by his or her own lawyer or, when (s)he refuses to choose a lawyer, (s)he will be assigned a lawyer by the Chamber. The use of audiovisual means may be used upon request of the accused.

It can be concluded that based on the Internal Rules and the Law on the Establishment of the Extraordinary Chambers, the accused has the right to be tried in his or her presence. The only possible exceptions to this Rule, thus a proceeding in the absence of the accused, are the ones stated in Rule 81. Up to this moment, there has been no case law on this subject because of the fact that the Extraordinary Chambers have just started prosecution in 2007. Interestingly enough, two of the most powerful leaders of the Khmer Rouge, Ieng Sary and Pol Pot, were tried and found both guilty of the crime of genocide by the People's Revolutionary Tribunal in 1979.[200] Neither of them appeared in court (and hence were tried *in absentia*), nor served any sentence.[201]

§ 5.5.1. The Special Court for Sierra Leone

In 1992, a Liberian rebel group (the Revolutionary United Front) entered Sierra Leone to overthrow the military rulers and to gain control of the diamond mines. The conflict resulted in a civil war, in which child soldiers were recruited to commit gross human rights violations

[199] Rule 37 Disruption of Proceedings, Internal Rules (Rev. 1), as revised on 1 February 2008. Available on: WWW <http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf>, consulted on 30 March 2008.

[200] The People's Revolutionary Tribunal was a court in Cambodia, which was especially set up to try Ieng Sary and Pol Pot. See Cambodia – International Center for Transitional Justice-, 'Background', updated March 2008, WWW <http://www.ictj.org/en/where/region3/642.html>, consulted on 20 May 2008.

[201] FAQ: Extraordinary Chambers in the Courts of Cambodia, 'Have any of the Khmer Rouge senior leaders been tried before?', 21 July 2006, WWW <http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=44>, consulted on 30 March 2008. Nevertheless, since November 2007 Ieng Sary is being prosecuted for Crimes against Humanity and Grave Breaches of the Geneva Conventions of 1948 by the Extraordinary Chambers in the Courts of Cambodia (thus not for the charge of genocide, for which he was already convicted by the People's Revolutionary Tribunal in 1979). On 30 April 2008, the Pre-Trial Chamber decided to deny the request of Ieng Sary for leave to suspend the consideration of his appeal on Provisional Detention. See also: Extraordinary Chambers in the Courts of Cambodia, cases, WWW <http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs>, consulted on 26 May 2008.

such as physical mutilation by amputation of various limbs. The conflict was ended by an intervention of a UN peace-keeping force.[202]

Following the request of the president of Sierra Leone to the Security Council for the establishment of a special court to adjudicate the ones who committed the horrible crimes during the civil war, a Security Council Resolution[203] was adopted to request the Secretary-General of the UN to enter into negotiations with Sierra Leone.[204] On 16 January 2002, an agreement between the Government of Sierra Leone and the UN Secretary-General was signed and the final draft of the Statute for the Special Court for Sierra Leone was agreed upon.

The Special Court for Sierra Leone sits in Freetown[205] and has, based on articles 2-4 of its Statute, jurisdiction over international crimes, namely crimes against humanity; violations of Article 3 common to the Geneva Conventions and of Additional Protocol II; and other serious violations of international humanitarian law. Moreover, on the basis of article 5 of its Statute, the Special Court has jurisdiction over (certain) offences relating to the abuse of girls and offences relating to the wanton destruction of property (which are both crimes under Sierra Leonean law).

The Special Court for Sierra Leone has some unique features. First of all, the Special Court is a separate international organ, which means that it is not part of the domestic legal system of Sierra Leone and the Special Court has, based on article 8 of its Statute, primacy over the national courts of Sierra Leone. Secondly, the judges of the Special Court are mainly international judges appointed by the UN Secretary-General. The UN also appoints the prosecutor and registrar, while the Government of Sierra Leone appoints the minority of the judges and the Deputy Prosecutor.[206] Another unique element is the extension of jurisdiction over persons of 15 years of age.[207] The jurisdiction of the Special Court was extended because of the major role of child soldiers in committing horrendous crimes during the civil war in

[202] Cryer and others 2007, p. 150.

[203] Security Council Resolution 1315 of 14 August 2000.

[204] Cryer and others 2007, p. 150.

[205] Note however (and see also below) that for security reasons, the case of Charles Taylor takes place at the International Criminal Court in The Hague.

[206] Cryer and others 2007, p. 151.

[207] Special Court for Sierra Leone, article 7 of the Statute, WWW < http://www.sc-sl.org/Documents/scsl-statute.html>, consulted on 1 April 2008.

Sierra Leone.[208] Although the jurisdiction of the Special Court for Sierra Leone was extended over persons of 15 years of older, the Prosecutor of the Court has made clear that he will not use this provision to prosecute children. He said that: "the children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes".[209]

Currently, six accused are on trial at the Special Court. Another person indicted is Johnny Paul Koroma. Despite the fact that his whereabouts are unknown, his indictment remains in force.[210] The case of Prosecutor vs. former Liberian president Charles Taylor is at this moment held in The Hague, due to safety concerns.

§ 5.5.2. Trials in absentia *before the Special Court for Sierra Leone*

The Statute of the Special Court states in article 17 (4) (d) that the accused has the right to be tried in his or her presence. However, Rule 60 of the Rules of Procedure and Evidence mentions two exceptions to this general rule. It makes clear in subsection (A) that an accused who has made his initial appearance, may be tried in his absence when i) "he has been afforded the right to appear at his own trial but he refuses to do so or ii) is at large and refuses to appear in court".[211] Based on Rule 60 (B), the accused may be represented by his or her own counsel or a counsel appointed by the court. Moreover, as stated in Rule 60 (B), the case may only proceed when the judge or Trial Chamber is satisfied "that the accused has, expressly or impliedly, waived his or her right to be present".

An example of the use of Rule 60 is the case of Prosecutor of the Special Court vs. Issa Sesay, Morris Kallon and Augustine Gbao. Augustine Gbao made his initial appearance before the court on 16 April 2003. After that, he appeared for his trial on 5 and 6 July 2004. However, on 7 July 2004, he refused to go to court. The court was satisfied, in light of the foregoing findings, that Augustine Gbao had waived his right to be present at trial and the trial

[208] De Bertodano 2003, p. 243.

[209] Special Court for Sierra Leone, Press Release, 'Special Court Prosecutor Says He Will Not Prosecute Children', 2 November 2002, WWW < http://www.sc-sl.org/Press/prosecutor-110202.pdf>, consulted on 5 May 2008.

[210] Special Court for Sierra Leone; other cases, WWW <http://www.sc-sl.org/cases-other.html>, consulted on 1 April 2008.

[211] Special Court for Sierra Leone, Rules of Procedure and Evidence (amended on 19 November 2007), WWW <http://www.sc-sl.org/Documents/rulesofprocedureandevidence.pdf>, consulted on 4 April 2008.

proceeded in his absence. The defence team of Augustine Gbao continued to represent him, as allowed for under Rule 60 (B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.[212]

§ 5.6.1. The Iraqi High Tribunal

During the terrifying authoritarian regime of Saddam Hussein, wars were fought against Iran, Kuwait and national groups. Especially the Kurds were violently suppressed. In March 2003, the United States, the United Kingdom and several Allies started an attack against Iraq and the regime was defeated in April of that year. Soon afterwards, it was decided to establish a specialised court in order to deal with the crimes of the old regime. On 10 December 2003, the Iraqi Special Tribunal was established by the Interim Governing Council, under authorisation of the Coalition Provisional Authority. Only three days later, Saddam Hussein was found and arrested in the village of Adwar.

While there were some concerns about the legal basis of the Iraqi Special Tribunal, the Transitional National Assembly annulled the Statute of the Special Tribunal and replaced it by the Statute of the renamed Iraqi High Tribunal on 9 October 2005.[213] The Iraqi High Tribunal is integrated in domestic law and has, according to article 1 of the Statute, jurisdiction over

> any Iraqi national or resident of Iraq accused of genocide, crimes against humanity, war crimes or violations of stipulated Iraqi Laws, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict.[214]

[212] Prosecutor vs. Sesay, Kallon and Gbao (SCSL-04-15-T), 'Ruling on the issue of Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days', 7 July 2004, available on: WWW < http://www.sc-sl.org/Transcripts/RUF-070704.pdf>, consulted on 4 April 2008.

[213] Mettraux 2007, p. 287.

[214] Article 1 of the Statute of the Iraqi High Tribunal, as available on: WWW <http://www.iraq-iht.org/en/selection1.html>, consulted on 4 April 2008.

Interestingly, unlike the international criminal tribunals or internationalised courts, the Iraqi High Tribunal has a national Prosecutor, its bench is composed exclusively of national judges and it uses the Iraqi Criminal Code to supplement the provisions of its statute and rules.[215] However, in cases concerning a State as one of the plaintiffs, the appointment of non-Iraqi judges is allowed by the Statute. As Michael P. Scharf states it: "the Iraqi High Tribunal is not international enough to call it a hybrid court, but it is an Internationalised domestic tribunal".[216]

§ 5.6.2. Trials in absentia *before the Iraqi High Tribunal*

The Statute of the Iraqi High Tribunal states in article 20 (d) (4) that "the accused has the right to be tried in his presence".[217] The Rules of Procedure and Evidence are silent on this subject. By only stating the right of the accused to be tried in his presence and not explicitly prohibiting trials *in absentia*, one could say that this implicitly means that the accused can waive his right to be tried in his presence, leading to the fact that a trial can be held in the absence of the accused. The Statute does not provide for a rule on the waiver to be present and there appears to be no case law on this subject (yet). Hence, this means that by only stating the right of the accused to be present, the Iraqi High Tribunal has not made a very strong statement on whether to allow for trials *in absentia*.

§ 5.7.1. The Bosnia and Herzegovina War Crimes Chamber

In the Republic of Bosnia and Herzegovina, the Serbs, Croats and Bosnian Muslims lived together until the conflict erupted. In 1992, the Government of Bosnia wanted to declare its independence and held a referendum whether the three ethnic groups supported this call for independence. The Croats and Bosnian Muslims supported the idea of the Government, but the Serbs did not want take part in the referendum. Upon the positive decisions on independence of the Croats and Bosnian Muslims, the Serbs declared their own Republic, the 'Republica Srpska'. After that, the ethnic groups were involved in several conflicts and this ended in a terrible war.[218]

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[215] Scharf 2007, p. 259. Nevertheless, non-Iraqi advisors and experts may work for the Iraqi High Tribunal, as stated in Rule 21 of the Rules of Procedure and Evidence of the Iraqi High Tribunal.

[216] Scharf 2007, p. 259.

[217] Iraqi High Tribunal, Statute, WWW <http://www.iraq-iht.org/en/selection7.html>, consulted on 4 April 2008.

[218] Center for Balkan Development, 'History of war in Bosnia - historical background', May 1996, WWW <http://www.friendsofbosnia.org/edu_bos.html>, consulted on 4 April 2008.

The 1995 Dayton Peace Agreement led to a complex political structure and the State of Bosnia was divided in two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska. The justice system did not work properly at that time, because of loss of skilled judiciary and the lack of proper equipments and facilities. Within this context, the Bosnia and Herzegovina War Crimes was established in the Federation of Bosnia and Herzegovina in 2005.[219]

The jurisdiction of the War Crimes Chamber "has been established as a domestic institution with international components"[220] and is seen as an important part of the ICTY completion strategy.[221] Its jurisdiction concerns cases that are referred to the War Crimes Chamber by the ICTY, based on Rule 11*bis* of the ICTY Rules of Procedure and Evidence.[222] Additionally, the War Crimes Chamber handles cases where investigations have not been completed and which have been submitted by the Office of the Prosecutor of the ICTY.[223]

The War Crimes Chamber deals with the most serious war-related crimes in Bosnia and has international judges and prosecutors.[224] The law on which the War Crimes Chamber operates is national law, including criminal and criminal procedure codes introduced by the Office of the High Representative.[225]

[219] Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina, 'Background to the establishment and mandate of the War Crimes Chamber', February 2006, WWW <http://www.hrw.org/reports/2006/ij0206/2.htm >, consulted 4 April 2008.

[220] Cryer and others 2007, p. 159.

[221] Security Council Resolution 1503 of 28 August 2003. The 'completion strategy' makes clear that the tribunal will concentrate solely on high-level cases and leaves the rest of the cases to (national) courts.

[222] Rule 11*bis* enables the ICTY (regardless of whether the accused is in ICTY's custody or not), after an indictment has been confirmed, to refer the case to the authorities of another State in whose territory the crime is committed; or in which the accused was arrested; or who has jurisdiction and is willing and adequately prepared to accept such a case.

[223] Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina, 'Background to the establishment and mandate of the War Crimes Chamber', February 2006, WWW < http://www.hrw.org/reports/2006/ij0206/2.htm >, consulted 4 April 2008.

[224] Cryer and others 2007, p. 159 & 160. "Crimes that are not considered to be 'the most serious war-related crimes', are dealt with before the courts of the different cantons or districts of the Federation of Bosnia and Herzegovina".

[225] Cryer and others 2007, p. 159.

§ 5.7.2. Trials in absentia *before the Bosnia and Herzegovina War Crimes Chamber*

In order to determine whether trials *in absentia* are allowed for before the Bosnia and Herzegovina War Crimes Chamber, one has to look at the Criminal Procedure Code of Bosnia and Herzegovina.[226] In article 6 of the Code, one can read that the accused has a right to be informed on the charges against him and on the grounds of suspicion, that he must be given the opportunity to give a statement, that all facts and evidence in his favour must be presented and "that the accused shall not be bound to present his defense or to answer questions posed to him". To ensure the presence of the accused and a successful conduct of the criminal proceedings, several measures may be taken, as stated in article 123: summons, apprehension, house arrest, bail and custody.[227] These articles state rights of the accused and try to ensure that the accused is present, but the main article on trials *in absentia* is article 247 of the Criminal Code of Bosnia and Herzegovina. This article firmly states that "an accused may never be tried *in absentia*". Consequently, trials *in absentia* are banned by the Bosnia and Herzegovina War Crimes Chamber.

§ 5.8. Interim conclusions

Based on the findings from the previous paragraphs, one may make some interim conclusions. First of all, it becomes clear that some of the courts are inspired by article 14 (3) (d) ICCPR. The Iraqi High Tribunal, as a State party to the ICCPR, confirms the right of the accused to be present before the Tribunal, but makes no further statement on allowing for trials *in absentia*. Thus, the accused can still be tried in his absence, by waiving his right to be present. Furthermore, both the law of the Extraordinary Chambers in the Courts of Cambodia and the law of the Special Court for Sierra Leone state the right of the accused to be present, but they also mention exceptions to this right. This means that the right of the accused to be present

[226] The Criminal Procedure Code of Bosnia and Herzegovina has been adopted by the Bosnia and Herzegovina Parliamentary Assembly and is published in the Official Gazette of Bosnia and Herzegovina 36/03. The Code can be found on: WWW < http://www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc>, consulted on 5 April 2008.

[227] A 'summon' can be described as "a court order to appear served to the accused". 'Apprehension' can be defined as "an arrest/seizure in the name of the law". "The confinement of a person who is accused or convicted of a crime to his or her home", is called 'house arrest'. Sometimes an electronically monitored bracelet is used. 'Bail' can be introduced as "a security required by a court for the release of a prisoner who must appear at a future time. This security can, for example, consist of a sum of money". "The custody of a person whose freedom is directly controlled and limited", is called '(physical) custody'. All definitions are obtained from Black's Law Dictionary (8th ed. 2004), Thomson/West.

can be waived under these exceptional circumstances and that trials *in absentia* are allowed for before the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone.

The Special Panels for Serious Crimes in Dili (East Timor) make clear in section 5 of Regulation 2000/30 that trials *in absentia* are not allowed for. However, again, there are some exceptions to this rule, which are stated in section 5.2 and section 5.3. This means that trials *in absentia* are allowed for when these exceptions can be applied to a certain situation. A more firmly statement on trials *in absentia* is made by the Internationalised Panels of Kosovo, by stating that trials *in absentia* are prohibited for serious violations of international humanitarian law (as defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court). Whether this implicitly means that trials *in absentia* are allowed for in cases of crimes that are not defined in Chapter XVI of the applicable Yugoslav Criminal Code or in the Rome Statute of the International Criminal Court remains uncertain. The only tribunal which has made a strong and unambiguous statement on trials *in absentia* is the Bosnia and Herzegovina War Crimes Chambers. The accused may *never* be tried *in absentia*, according to article 247 of the Criminal Procedure Code of Bosnia and Herzegovina.

It can be concluded that, based on the findings of this chapter, it depends on each of the courts whether they have made a (strong) statement on trials *in absentia*. The majority of the courts at least states the right of the accused to be tried in his or her presence, as is also envisaged under article 14 (3) (d) ICCPR. A division based on the way the courts are set up is hard to make, since there seems to be no convincing similarities between the courts that are established in the same way. For example, the Special Panel for Serious Crimes in Dili (East Timor) and the Internationalised Panels of Kosovo are both created as a direct result of international intervention and installation of an international transitional administration, but they do not share the same perception of the *in absentia*-principle. Moreover, a certain development of the *in absentia*-principle cannot be deducted from the law and case law of the different courts either. This is shown by the fact that the Bosnia and Herzegovina War Crimes Chamber and the Iraqi High Tribunal are both established in 2005, but that the former bans trials *in absentia* whereas the latter only states the right of the accused to be tried in his presence. Thus, one cannot argue that a general rule concerning or a certain development of the *in absentia*-principle within the context of these internationalised (domestic) courts can be identified.

Chapter 6 – The Special Tribunal for Lebanon

After having dealt with the international criminal tribunals and internationalised court, in this chapter we will look at the most recent tribunal: the Special Tribunal for Lebanon. Before we will look at the actual tribunal, the violent history of Lebanon's last decades will be discussed. After this, the creation and legal framework of the Special Tribunal for Lebanon will be looked at and it will become clear that this tribunal really is far from ordinary. The possibility of trials *in absentia*, which is at the core of this thesis, will be reviewed. The Special Tribunal for Lebanon has included a novelty on this issue. The chapter will end with a few concluding remarks.

§ 6.1. A short overview of the history of conflicts in Lebanon within the last decades

The Republic of Lebanon has been an area of conflict for many decades. These political and religious conflicts were characterised by large-scale atrocities committed by local and foreign actors, which could easily be defined as war crimes or crimes against humanity.[228] Thousands were killed, wounded, missing and forcibly displaced. These crimes were committed in a context of almost total impunity during the period of war in Lebanon from 1975 until 2005.[229] Officially, the conflict already ended in 1990 with the signing of the peace agreement of Taif, but the Israeli forces continued to attack civilian targets till 2000, when they pulled back from the area of South Lebanon. The Syrian forces however remained in Lebanon and it took until 2005 for them to withdraw under international pressure. Although the Syrian forces had withdrawn from Lebanon, the influence of Syria on the Lebanese Government remained and the control of the Syrian security forces even grew gradually.[230]

On 14 February 2005, the former Lebanese Prime Minister Rafiq Hariri was assassinated by a bomb(ing) attack in Beirut. The explosion did not only take the life of Rafiq Hariri, but also killed more than twenty other people and some hundred more were wounded.[231] Rafiq Hariri was a very powerful politician in Lebanon and served as a Prime Minister from 1992-1998 and in the period of 2000-2004. He was praised for being able to

[228] Wierda and others 2007, p. 1067.

[229] Wierda and others 2007, p. 1067-1069.

[230] Wierda and others 2007, p. 1067-1069.

[231] 'The Oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 2. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 27 April 2008.

restore the Republic of Lebanon after the war, by means of his great leadership. He resigned as Prime Minister in 2004, because of the reassignment of Emile Lahoud as President of the Republic of Lebanon, who is thought to be an accomplice of Syria.[232]

In 2006 the violence was sparked again, when Hezbollah[233] captured two Israeli soldiers to trade them in for Hezbollah militias who were captured by Israel. In reaction to this, Israel immediately started a military offensive, by which many Lebanese civilians were killed.[234] Even up to this day, the conflict between Hezbollah and Lebanese pro-government groups continue. Within the last weeks, clashes were reported in Beirut and Tripoli between groups that support the pro-Western and anti-Syrian Lebanese government and Hezbollah. Notwithstanding this, the Lebanese Government and Hezbollah have concluded a pact in Doha on 21 May 2008, to end the ongoing (political) crisis. Whether this pact is a suitable solution to the crisis will become clear in the near future.

§ 6.2. The creation of the Special Tribunal for Lebanon

The attack of 14 February 2005 was followed by the killings of other prominent public figures, and all were highly condemned by the international community, especially by the Secretary-General of the UN and the Security Council.[235] On 7 April 2005, the Security Council Resolution 1595 established an UN International Independent Investigation Commission (hereinafter: UNIIIC) to assist the Lebanese authorities in their investigation of the attack.[236] The first report of the UNIIIC already made clear the probable involvement of Syrian security officials in the attack on Hariri and the succeeding attacks. On 13 December 2005, after the second report of the UNIIIC, the Lebanese Government asked the UN in a letter "to establish a tribunal of an international character to try all those alleged responsible for the attack of 14 February 2005 in Beirut that killed the former Lebanese Prime Minister

[232] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 2. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 27 April 2008.

[233] Hezbollah is a Shi'a anti-Western political and paramilitary organisation, which is supported by Iran and Syria. Nowadays, Hezbollah is Party to the Lebanese Parliament.

[234] BBC News, 'Country profile: Lebanon', last updated 9 May 2008, WWW <http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/791071.stm>, consulted on 21 May 2008.

[235] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 2. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 27 April 2008.

[236] Security Council Resolution 1595 of 7 April 2005.

Rafiq Hariri and 22 others".[237] In response to the letter, the Security Council requested the Secretary-General to provide the needed assistance by consulting the Lebanese Government on the nature and scope of such a tribunal.[238]

In the months after the letter of the Lebanese Government, an agreement between the UN and the Lebanese Republic on "setting up a tribunal of an international character based on the highest international standards of criminal justice" was discussed.[239] The UN wanted to set up a treaty-based international institution that would be established by an agreement, just like the Special Court for Sierra Leone.[240] A draft agreement was created in November 2006 and the agreement was duly signed by the Government of Lebanon and the UN. Nevertheless, despite the support of the Lebanese Parliament, the ratification of the agreement never occurred and the Prime Minister of Lebanon decided after several months to ask the Security Council "to deliver a binding decision on the establishment of a Tribunal".[241]

The Security Council, acting under its Chapter VII powers of the UN Charter by stating that the assassination of Hariri and its consequences constitute(s) a threat to international peace and justice, adopted Resolution 1757 of 30 May 2007[242] to authorise the establishment of the tribunal. The Resolution, to which the agreement and the statute of the tribunal were attached, asked the Government of Lebanon to comply with the legal requirements for the entry into force of the Agreement within 10 days.[243] However, the Lebanese Government did not live up to the deadline. Notwithstanding this, the provisions of the document annexed to the Resolution and the Statute of the Special court for Lebanon (hereinafter: STL) entered into force on 10 June 2007.[244] The basis for the STL remained to be the agreement between the UN and the Lebanese Republic, although the agreement did not

[237] UN Doc. S/2005/783, Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General.

[238] Security Council Resolution 1644 of 15 December 2005.

[239] Security Council Resolution 1664 of 29 March 2006.

[240] Fassbender 2007, 1094.

[241] Swaak-Goldman 2007, p. 989.

[242] Security Council Resolution 1757 of 30 May 2007, which can be found on: UN Security Council: Resolutions, S/RES/1757 (2007), WWW < http://www.un.org/Docs/sc/unsc_resolutions07.htm>, consulted on 22 May 2008.

[243] Swaak-Goldman 2007, p. 989.

[244] Swart 2007, p. 1154.

entered into force upon ratification of the Lebanese Government, but the Resolution 1757 of the Security Council put the agreement into effect.[245]

This is the way the newest tribunal came into being; it all started with an agreement between the Lebanese Government and the UN, and it ended up being the first tribunal, after the ICTY and ICTR, that was established by the Security Council, pursuant to Chapter VII of the UN Charter (but still on the basis of the agreement). Nevertheless, unlike the ICTY and ICTR, the STL is not a subsidiary organ of the Security Council.

§ 6.3. The legal framework of the Special Tribunal for Lebanon

As stated in article 1 of its Statute[246], the STL has a narrow mandate, relating to a single murder and situations that can be connected to this murder:

> The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks.[247]

The narrow mandate of the STL is somewhat peculiar for a tribunal, since the (other) international criminal tribunals or internationalised courts are created to prosecute people responsible for committing gross human rights violations and mass atrocities.[248] Nevertheless, when one looks at the symbolic importance of the Hariri assassination, as it resulted in chaos and polarisation of Lebanese politicians, perhaps it is not that strange that in this situation a tribunal is set up.

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[245] Fassbender 2007, p. 1093.

[246] The articles of the Statute to which these (next) paragraphs refer to, can all be found in Security Council Resolution 1757 of 30 May 2007. This resolution is available on: UN Security Council: Resolutions, S/RES/1757 (2007), WWW < http://www.un.org/Docs/sc/unsc_resolutions07.htm>, consulted on 9 May 2008.

[247] Article 1 of the Statute of the STL.

[248] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 6 & 7. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 27 April 2008.

Another oddity is the subject-matter jurisdiction of the STL. Article 2 of the Statute of the STL makes clear that the STL is the first court that will try persons who are accused of solely violating domestic (Lebanese) criminal law.[249] The source of substantive law applied by the STL are "provisions of the Lebanese Penal Code relating to acts of terrorism, offences against life and personal integrity, illicit associations and failure to report crimes, offences, and articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[250] While the assassination of Hariri and situations related to it could not be defined as war crimes or other violations of international humanitarian law[251], there was a discussion during the negotiations of the Statute whether the STL should also have jurisdiction over crimes against humanity. However, this initiative was insufficiently supported by some of the members of the Security Council.[252]

Some other important features of the legal framework of the court are the fact that it has concurrent jurisdiction with the national courts of Lebanon, but that, within its jurisdiction, the STL shall have primacy over the national courts of Lebanon.[253] Moreover, the organs of the STL are the Chamber(s), the Prosecutor; the Registrar and the Defence Office. The Chambers are composed of national judges and international judges, of which the latter are in the majority.[254]

§ 6.4. The STL: a national court, an internationalised court or something else?

The subject-matter jurisdiction concerns only provisions of the Lebanese Penal Code, which is a remarkable innovation and it poses the question as to how to define the STL? Evidently,

[249] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 2. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 27 April 2008.

[250] Article 2 of the Statute of the STL.

[251] The war crimes that are of common knowledge are those that fall in the category of grave breaches of the Geneva Conventions and Additional Protocol I. These grave breaches provisions can only be applied in international armed conflicts. Nevertheless, war crimes may also be committed in non-international armed conflicts/internal armed conflicts, as made clear by article 3 common to the Geneva Conventions and Additional Protocol II. See also: Ratner 2007, p. 420 & 421 and Prosecutor v. Duŝko Tadić, Decision in Case No. IT-94-1-AR72, 2 October 1995.

[252] Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, at par. 23-25.

[253] See Article 4 of its Statute.

[254] Swaak-Goldman 2007, p. 990.

the STL is not an international criminal tribunal like the ICTY and ICTR, since the STL applies only national law. But could one argue that, based on its limited (national) jurisdiction, the STL is not an international criminal tribunal at all, but just an ordinary national court? To answer this question one has to take into consideration that the STL will sit outside Lebanon (in Leidschendam, in the Netherlands), that it will have a majority of international judges, that the United Nations was involved in the construction and the entering into force of the Statute of the STL and that, according to article 4 (1) of the STL Statute, the Tribunal will have primacy over national courts in Lebanon.[255] Hence, the argument of the STL being a purely national court is not convincing either.

Can the STL perhaps be seen as an internationalised court? The characteristics of an internationalised court, as made clear in chapter 5, can be described as courts that are mixed in their composition, combine international law and municipal law to deal with crimes and all have a seat in the country concerned. As already stated, the STL does not sit in Lebanon but in Leidschendam, in the Netherlands. Besides this, the STL does not combine international and municipal law, since the STL will try persons who are accused of solely violating domestic (Lebanese) criminal law. This feature of the STL is somewhat odd if one compares the STL with the (other) internationalised courts, of which all have jurisdiction over at least one core international crime. Perhaps the oddity may lead to the conclusion that the STL cannot be considered as a true internationalised court either? Should one consider it then as an internationalised domestic tribunal, similar to the Iraqi High Tribunal?[256]

As can be concluded from the arguments mentioned above, the Special Tribunal for Lebanon does not fit within the already existing categories of international criminal tribunals or internationalised courts. Moreover, the STL cannot be seen as a national tribunal. One may only come to one conclusion; that the STL as such constitutes a whole new category of tribunals.

§ 6.5. The position of the STL on trials in absentia

In this subsection, the possibility of holding trials *in absentia* before the STL will be discussed. Firstly, the influence of the civil law tradition, the problematic relation with third States in the context of cooperation with the STL and especially the cooperation with Syria

[255] Cryer and others 2007, p. 155.

[256] Scharf 2007, p. 259. This is unlikely, since the Iraqi High Tribunal has jurisdiction over the crimes of genocide, crimes against humanity, war crimes or violations, while the STL only has a national subject-matter jurisdiction.

will be looked at. Secondly, the framework which allows for holding trials *in absentia* before the STL will be discussed. Thirdly, the right to a retrial will be explored.

§ 6.5.1 The influence of the civil law tradition on the STL: permitting trials in absentia

One of the most eye-catching innovations of the STL is the possibility of holding trials *in absentia*. As stated by the Secretary-General, the inclusion of a provision on trials *in absentia* would be crucial "to ensure that the legal process would not be unduly delayed because of the absence of the accused".[257] The Secretary-General took into consideration the civil law tradition of Lebanon, for the greater part created at a time when Lebanon was under French mandate in 1918-1943.[258]

This possibility of holding trials *in absentia* may become problematic for countries that do not accept for trials *in absentia* to take place (for example common law countries that adhere to the principle that the accused must be present at trial). The Security Council Resolution 1757, to which the Agreement and the Statute of the STL is attached, neither calls upon third States to cooperate nor does it mention any obligation of third States[259] to cooperate with the STL. This is rather unusual, since the STL is, like the ICTY and ICTR, a tribunal established on the basis of Chapter VII-powers of the Security Council. As a consequence, it is very likely that third States (that do not accept for trials *in absentia* to take place) will refuse to cooperate with the STL (by for example providing for a testimony) because they cannot accept the consequences that flow from a trial *in absentia* before the STL.[260]

This means that, while the STL has personal jurisdiction not being limited to nationality (as made clear in article 1 of its Statute), it might become a problem for the tribunal to try persons of other nationality than the Lebanese nationality, when the Statute lacks a provision on cooperation of third States. Principally, this may be of great concern as to the relationship between Syria and the STL. As already became clear in the first report of the UNIIIC, it is very probable that Syrian citizens or officials were involved in the attack on

[257] Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, at paragraph 32.

[258] Aptel 2007, p. 1108.

[259] This is (of course) different for Lebanon. The cooperation of the Government of Lebanon is laid down in article 15 of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, which is attached to the Security Council Resolution 1757.

[260] Swart 2007, p. 1156.

Rafiq Hariri and the subsequent attacks. When the STL wants to prosecute Syrian citizens or officials, it will depend on the cooperation of Syria with the tribunal. However, Syria is not obliged to cooperate with the STL. Despite the statement of Syria that it will comply with a request of cooperation, it remains the question whether Syria will actually cooperate with the STL and hence, whether the STL will be able to live up to its goal.[261]

§ 6.5.2. Trials in absentia *before the STL*

The possibility of holding trials *in absentia* does not mean that these kinds of trials are allowed for under all circumstances. Article 16 (4) (d) of the Statute of the STL makes clear that subject to the provisions of article 22, the accused has the minimum guarantee to be tried is his or her presence. Following this, article 22 of the Statute of the STL makes clear that a trial proceeding in the absence of the accused shall only be conducted under strict conditions. The article distinguishes three kinds of situations, namely when the accused:

> (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.[262]

The holding of a trial in absence of the accused, is thus limited to these three situations.

When the hearings are conducted in the absence of the accused, the STL shall ensure that "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".[263] Moreover, the STL must ensure that the accused has appointed a defence counsel of his or her own choosing which will be remunerated by the accused, or when it is proved that the accused cannot pay for the defence counsel, the defence counsel

[261] It could be possible that the Rules of Procedure and Evidence (that still need to be adopted by the judges of the STL) may clarify this issue or perhaps the Security Council will force Syria to cooperate by means of a Resolution. Another (small) possibility is that the international community may be able to put enough pressure on Syria to cooperate.

[262] Article 22 (1), sub a, b, and c of the Statute of the STL.

[263] Article 22 (2) (a) of the Statute of the STL.

will be paid by the Tribunal[264]. Whenever the accused fails or refuses to designate a defence counsel, counsel shall be assigned to him or her by the Defence Office of the STL.[265]

The inclusion of the possibility of trials *in absentia* may be seen as a solution to the potential problem of cooperation of Syria.[266] If Syria decides not to cooperate with the STL and refuses to hand over Syrian citizens or officials, the STL may still conduct a trial *in absentia* and render a judgment on the accused. Nevertheless, one may also pose a different view on the issue of the cooperation of Syria: one could also argue that a trial *in absentia* will only lead to less authority of the STL, since the tribunal may sentence a Syrian official *in absentia*, but it cannot force Syria to comply with this judgment. A sentence without the ability to enforce it may be seen by the public as a weak feature of the STL and this will not be beneficial to the legacy of the STL.

§ 6.5.3. Right to retrial

The drafters of the Statute endeavoured to create some sort of right for the accused who is convicted *in absentia*. In article 22 (3) of the Statute of the STL, the right to a retrial is laid down, by stating that "In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement".[267]

The rationale behind the exception to the right to retrial seems to be clear: when the accused does appoint a defence counsel of his or her own choosing, it is only logical to conclude that the accused then implicitly waived his or her right to be present and hence has no right to a retrial.[268] Nevertheless, it seems very unlikely that the accused, who refuses to surrender to the STL, will waive his or her right to have a retrial by appointing a defence

[264] Article 22 (2) (b) of the Statute of the STL.

[265] Article 22 (2) (c) of the Statute of the STL.

[266] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 27. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 10 May 2008.

[267] Article 22 (3) of the Statute of the STL.

[268] Gaeta 2007, p. 1169-1170. This was also recently decided by the ECtHR, in its case Battisti v. France, in which it made clear that "the Italian and French authorities were free to infer that by appointing two defence counsel, the accused had waived his right to be present at trial". Battisti v. France, Decision of 12 December 2006 on the admissibility of application no. 28796/05 (available on: http://www.echr.oe.int).

counsel and what is even more improbable is that the accused will accept the decision of the trial in his or her absence.[269]

The question that might come to one's mind is whether the right to retrial as stated in article 22 (3) of the Statute of the STL is also applicable in the situation when the accused has expressly and in writing waived his or her right to be present but did not appoint a defence counsel of his or her own choosing. At first, it seems to be rather clear that in this situation, the accused cannot obtain the right to have a retrial on the conviction in a proceeding (s)he wishes not to attend. But this would implicitly mean that the drafters of the Statute assumed that the accused who expressly waives his or her right to be present at trial, "at the same time waives his right to be represented by defence counsel of his own choosing".[270] This is a rather premature presumption, since the two situations can be separated; the one situation (expressly waiving right to be present), may not necessarily lead to the other situation (appointing a defence counsel of own choosing).

Next to this question, one may also wonder what will happen in the case where the State of residence of the accused forcefully prevents the accused from voluntarily turning him- or herself in.[271] When the accused wants to turn him- or herself in and this is forcefully prevented by the State of residence, it should only be fair to grant the accused the right to retrial since it was not due to his or her act that a trial had to be conducted without him or her being present. This option is however not provided for by article 22 (3) of the Statute of the STL, whilst the situation of a State of residence that forcefully prevents the accused to turn himself or herself in is imaginable. It would be wise to have this situation included in article 22 (3) of the Statute of the STL.

The right of the accused to be retried in his or her presence before the STL is more in general open to question, since it does not make clear which court shall handle the proceeding in retrial.[272] If one looks at article 5 of the Statute of the STL, one may come to the conclusion that the national Lebanese courts are not able to deal with a proceeding in retrial, since the article makes clear that a person who is already tried before the STL may not be tried before the national court of Lebanon. However, article 22 (3) does not state that the STL has the

[269] 'The oddity that is the Hariri Tribunal', M. Milanovíc 19 September 2007, p. 27. Available on the Social Science Research Network: WWW <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014906>, consulted on 9 May 2008.

[270] Gaeta 2007, p. 1170-1171.

[271] Gaeta 2007, p. 1171.

[272] Gaeta 2007, p. 1172.

exclusive right to conduct the retrial and the Statute of the STL does not explicitly indicate that the ban of article 5 also applies in proceedings in retrial. It seems to be more efficient for the national court of Lebanon to also deal with retrials when the accused has been convicted and can apply for such a trial. One may hereby take into account that the STL is not a permanent institution and that the accused may be captured or otherwise come at the disposal of the national Lebanese courts at a time when the mandate of the STL has already ended.[273] Therefore, it can be concluded that the right to retrial seems to be a generous initiative, but also leads to significant questions which demand swift answers.

§ 6.6. Concluding remarks

As discussed in this chapter, the STL, which is set up to deal with the perpetrators of the assassination of Hariri and the following attacks, has some exceptional characteristics. Next to the narrow mandate, the limited (national) subject-matter jurisdiction and the lack of the possibility to define the STL according to the existing categories of international criminal tribunals and internationalised courts, the most eye-catching feature of the STL is expressed in article 22 of its Statute. This feature, which breathes an air of civil law tradition and necessity to ensure justice, creates a novelty in the international perspective on the possibility of holding trials *in absentia*.

As became clear in the previous chapters, some of the international criminal tribunals and internationalised courts prohibit the use of trials *in absentia* while others may provide for certain exceptions to the right of the accused to be present, but only after the accused has made his initial appearance. Consequently, this means that a trial before an international criminal tribunal or internationalised court may never commence and also end without the accused ever being present before the tribunal or court.[274] The STL (which as such constitutes

[273] Article 21 of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (which is the basis for the establishment of the STL) makes clear that the STL is not a permanent institution by stating in sub 1 that "this Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal". As made clear in article 21 (2) of the Agreement, extension of the period of the Agreement may be consulted with the Security Council by the Parties, only when the activities STL have not been completed. It seems conceivable that the period of the Agreement may be ended, when one or two (or even more) accused that can apply for such a retrial, are still not captured or at disposal of the national courts.

[274] The only exception to this rule can be found at the Nuremberg IMT, in article 6: "the accused may be tried in his absence if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of

a fresh category of tribunals) adds a total new concept by stating that the trial may under stringent circumstances commence and also end without the accused ever attending the trial.[275] One could question whether it is not a bit strange that a tribunal with such peculiarities focusing on the national level provides for a novelty in the international perception of holding trials *in absentia.* However, maybe the question is the answer to this novelty; it is perhaps *because* the STL is the only tribunal that prosecutes persons who are accused of solely violating domestic (Lebanese) criminal law that it was able to add a new perspective on holding trials *in absentia*.

Besides making clear the situations in which trials *in absentia* are allowed for and which fundamental guarantees the accused can rely on, article 22 of the Statute of the STL states the right to retrial. At first, the right to retrial seems to be a generous initiative. Nevertheless, when one will look at this right in detail, some problematic features come to mind. Does the express waiver of the right to be present also comes down to the appointment of a defence counsel of own choosing? Is it desirable for the right to retrial to apply in situations where the State of residence forcefully prevents the accused to surrender to the requesting authorities? And above all, which court will deal with the proceeding in retrial?

It can be concluded that the trials *in absentia* have entered a new era in which a proceeding may begin *and* end without the accused ever being present before the tribunal. Whether this provision will actually be applied by the STL will only become clear in the near future when the STL will begin its work (it is estimated that the STL will begin its work on 15 June 2008). Yet, even if the provision will actually be used, this will not instantly mean that the STL will become successful. Moreover, for the STL to become truly effective, some other problems that have been disclosed need to be dealt with. Nevertheless, when these problems are resolved, the tribunal with all its peculiarities might end up becoming very successful.

What remains to conclude is that this tribunal as such constitutes a total new category of tribunals, it has many distinctive features and it is not afraid to enter the world of trials *in absentia* with a fresh perspective.

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justice, to conduct the hearing in his absence". Nevertheless, to construct a recent development in the holding of trials *in absentia*, one shall all the more look at the possibility of trials *in absentia* since the creation of the ICTY.

[275] Gaeta 2007, p. 1168.

Chapter 7 - Conclusion

In this thesis, I examined the position of the *in absentia*-principle in international (criminal) law and the influence of the Special Tribunal for Lebanon on this position. The main question was:

> ***What is the exact position of the* in absentia-*principle in international (criminal) law and what is the influence of the Special Tribunal for Lebanon on this position?***

To be able to find an answer to this question, I explored the international criminal tribunals and internationalised courts which are set up since the Nuremberg International Military Tribunal. I looked at the way they deal(t) with the possibility of holding trials *in absentia* by examining the law and case law of these tribunals and courts.

There is a general framework in which the trials *in absentia* play a role, which is formed by the national traditions of the common law and the civil law systems, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms. Despite the *sui generis* character of the international criminal tribunals and internationalised courts, they seem to be in some way or another influenced by the civil law or common law tradition. In the case of the Nuremberg International Military Tribunal, the influence of the civil law tradition is greatly visible in its position on allowing for trials *in absentia*. Next to this, the other international criminal tribunals (the ICTY, ICTR and ICC) take into account the international human rights documents, by stating the right of the accused to be present at his or her trial, but at the same time they make some exception to this principle (in the Rule 61 proceeding and the exception of article 61 (2) of the Rome Statute). By providing for such exceptions, the other international criminal tribunals on the one hand show their *sui generis* character, since these kinds of exceptions are unique. But on the other hand, at least in relation to the exception that is created by the ICC, one can notice that this international criminal tribunal is slightly influenced by the civil law system concerning its view on trials *in absentia*, since it provides for a confirmation hearing in the absence of the accused by a pre-trial chamber who may itself request such a hearing. This indicates an (even though small) inquisitorial character of the ICC.

As to the internationalised courts, the majority stresses the right of the accused to be present, as also envisaged under article 14 (3) (d) of the ICCPR and they are obviously more

influenced by their own domestic systems, since they combine international law and municipal law to deal with crimes. The influence of their own domestic system makes that these internationalised courts all hold their own unique view on the possibility of trials *in absentia*. The total new category of tribunals, as provided for by the recently set up Special Tribunal for Lebanon, is highly influenced by a domestic system (in the case of the STL, the civil law system). It keeps into account the international right of the accused to be present, but it grants significant exceptions to this right based on its own civil law system.

In order to make concluding observations, the exact position of the *in absentia*-principle in international (criminal) law needs to be further examined As became clear from the previous chapters, the position of the *in absentia*-principle differs in each international criminal tribunal and internationalised court. In the aftermath of the Second World War, when the Nuremberg International Military Tribunal and the Tokyo Military Tribunal were set up, there appeared to be no prohibition on the use of trials *in absentia*. Yet, at the time the ICTY was established in 1993 and the ICTR in 1994 was set up, the international criminal tribunals did not follow the practice of the Nuremberg and Tokyo IMTs. It was decided to rule out the possibility of holding trials *in absentia* in the Statutes of the ICTY and ICTR. However, a compromise was created in Rule 61, in order to provide for a procedure in case of failure to execute an arrest warrant. The case law showed that a Rule 61 decision does not necessarily leads to the arrest of the indicted person and the tribunal may not rely on the decision taken in a Rule 61 proceeding. Hence, the ICTY and ICTR do not provide for trials *in absentia*, only for a (not really effective) compromise in Rule 61. After that, the ICC was discussed with yet another unique position on the possibility of holding trials *in absentia* that was (again) not based on the experiences of the previously established international criminal tribunals. The Rome Statute provides for a preliminary confirmation of charges in absence of the accused on the pre-trial level, but prohibits the use of trials *in absentia* at the actual trial stage, unless the accused is removed (under strict conditions) because of disruptive behaviour.

Next to the ICTY and ICTR and the permanent court of the ICC, the internationalised courts were created. They are mixed in their composition and combine international law and municipal law to deal with crimes. The internationalised courts do not provide for procedures similar as those of the ICTY and ICTR, nor do they follow the reasoning of the ICC in its possibility of confirming charges in a hearing in the absence of the accused at the pre-trial stage. They all have created their own unique view on the possibility of holding trials *in absentia*. As became clear, it depends on each of the courts whether they have made a (strong)

statement on trials *in absentia*. The majority of the courts at least states the right of the accused to be tried in his or her presence, as is also envisaged under article 14 (3) (d) ICCPR, article 21 (4) (d) of the ICTY Statute, article 20 (4) (d) of the ICTR Statute and article 63 (1) of the Rome Statute. A division based on the way the courts are set up is impossible, since there seems to be no convincing similarities between the courts that are established in rather the same way. Moreover, a certain development of the *in absentia*-principle cannot be deducted from the law and case law of the different courts.

The exact position of trials *in absentia* in international (criminal) law has been described in these last paragraphs and it can be concluded from the abovementioned findings, that it is hard to construct a general rule on the exact position of trials *in absentia* in international (criminal) law. One cannot say that there is a development in the prohibition of trials *in absentia* as is sometimes suggested in literature[276], since it really depends on each international criminal tribunal or internationalised court itself whether they allow for trials *in absentia* to take place (under certain conditions) and it does not depend on whether the court is very recently established or not. Nevertheless, one may note that the recently established international criminal tribunals and internationalised courts only provide for a trial *in absentia* when the accused has been present at least during a (preliminary) phase of the trial.

To be able to provide a full overview of the position of the *in absentia*-principle in international (criminal) law, we looked at the most recently established tribunal, namely the Special Tribunal for Lebanon. This tribunal has some exceptional characteristics, namely a narrow mandate, limited (national) subject-matter jurisdiction and the tribunal as such creates a total new category of tribunals (next to the categories of international criminal tribunals or internationalised courts). The most eye-catching feature of the STL is the possibility of holding trials *in absentia*, as mentioned in article 22 of the Statute of this tribunal. As appears from the examination of the STL and the comparison with the previous established international criminal tribunals and internationalised courts, one can conclude that the STL at least adds a total new concept to the context of the international criminal tribunals and internationalised courts on trials *in absentia* in recent years, by stating that the trial may under

[276] As was for example stated in the Report of Human Rights Watch to the Secretariat of the Rules and Procedure Committee of the Extraordinary Chambers of the Courts of Cambodia, 17 November 2006. This report stresses that there is an increasing international acceptance of a standard prohibiting these sort of proceedings [proceedings of trials *in absentia*]. This report is available on: 'Report of Human Rights Watch to the Secretariat of the Rules and Procedure Committee of the Extraordinary Chambers of the Courts of Cambodia', 17 November 2006, WWW <http://www.hrw.org/backgrounder/ij/cambodia1106/>, consulted on 10 May 2008.

stringent circumstances commence *and* also end without the accused ever attending the trial. This possibility creates a new position of the *in absentia*-principle in international (criminal) law.

The conditions of the STL for a trial to be held in the absence of the accused, as stressed in article 22 (2), are exclusive, because the criteria set by this provision cannot really be compared to the conditions as laid down by the earlier established international criminal tribunals and internationalised courts, since these tribunals and courts all start from the assumption that the accused at least has been present at a (preliminary) stage of the trial.

Perhaps one could say that, because the STL is the only tribunal that prosecutes persons who are accused of solely violating domestic (Lebanese) criminal law, it was able to add a new perspective on holding trials *in absentia*. That would mean that it depends on the kind of tribunal which position it holds in international (criminal) law towards the *in absentia*-principle. Nevertheless, it is most probable that even if the STL was able to prosecute war crimes and crimes against humanity, it would then still provide for trials *in absentia* in the same way as it does now. Moreover, as shown in the previous chapters of this thesis, the already existing categories of international criminal tribunals and internationalised courts do not have a single view on the possibility of trials *in absentia*. Each tribunal or court has set its own perspective on the possibility of holding trials *in absentia* and there seems to be no convincing similarities between, for example, the internationalised courts that are established in the same way.

Based on the aforesaid findings, one may stress that as a general rule, the recently established international criminal tribunals and internationalised courts that do provide for the possibility of holding trials *in absentia* only may do so when the accused has appeared in the preliminary stage of the trial. The innovation that is added to this position is stated by the STL, which provides for a trial (under stringent conditions) to commence *and* also end without the accused ever attending the trial. This makes clear that there in fact is a development within the context of trials *in absentia*, not in the prohibition thereof, but one that actually weakens the development of prohibiting trials *in absentia*.

As to the future of the position of trials *in absentia*, it is difficult to make a prediction but I will try to make some remarks. It is possible that one will look more and more to the national tradition of the country (as was done at the set up of the STL) and maybe more tribunals will be created, like the STL, that are highly influenced by their own domestic system. But there appears to be no guideline to predict this kind of development, so it could

also be possible that the STL remains a unique kind of tribunal. Anyhow, the STL itself will first have to deal with some problematic features in order to successfully prosecute and try persons *in absentia*. This means that one will have to wait and see whether the STL will actually use the possibility of sentencing the accused *in absentia* and even if the provision will actually be used, this will not instantly mean that the STL will become successful.

What remains to conclude is that the STL, by providing for a trial (under stringent conditions) to commence *and* also end without the accused ever attending the trial, really added a new element to the *in absentia*-principle and it has certainly made clear that there in fact is a development within the context of trials *in absentia*, not in the prohibition thereof, but one that actually weakens the development of prohibiting trials *in absentia*.

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