Absent Justice: An Argument for Trial *In Absentia* after the Death of the Defendant in Cases of Gross Human Rights Violations

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EXECUTIVE SUMMARY

This thesis proposes continuing trials *in absentia* as an alternative to closing proceedings after the death of the defendant in cases of gross human rights violations. The proposal is viewed as part of an expanding array of mechanisms aimed at guaranteeing victims rights. I ground the proposal in an understanding of the goals of transitional justice, and the alternative measures available to meet these goals. Coming to a final verdict in an international criminal trial is an important step toward meeting transitional justice goals including the utilitarian and retributive goals achieved through ruling on liability, and symbolic justice for victims.

In general, trial *in absentia* is viewed as acceptable by international and regional human rights courts if safeguards are met. Different international tribunals have approached trial *in absentia* with varying degrees of tolerance. This thesis examines international and regional standards surrounding trial *in absentia*, including case-law from the Human Rights Committee (HRC), International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and European Court of Human Rights (ECtHR), and concludes that partial *in absentia* trials will likely continue to be permitted in international law. This thesis devotes a separate chapter to analysis of trial *in absentia* at the International Military Tribunal (IMT) and the Special Tribunal for Lebanon (STL), the Statutes of which explicitly allow for proceedings in the absence of the defendant.

Despite the strong tradition dictating that a trial should end upon the death of defendant, legal theory and precedent shows that international criminal law allows for some procedural flexibility in favor victim's rights, due to the gravity of international core crimes and the *sui generis* nature of international tribunals. In order to establish guidelines surrounding when flexibility can occur, this thesis examines international law in the frame of

Packer's two models, as well as the work of Damaska and Megrét, and case-law from the European Court of Human Rights.

The thesis concludes by examining how trial *in absentia*—usually resulting from the flight of the defendant, the defendant's refusal to appear at his or her trial, the defendant's disruption of the courtroom, or serious medical needs of the defendant—can apply to cases where the defendant has died, without violating human rights norms. This thesis ultimately advocates for the adoption of a waiver system in which the defendant may agree to the continuation of his or her trial after death.

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INTRODUCTION

This thesis originates from an advocate's experience in the field. In 2014, I worked as a research assistant at The National Security Archive, a non-profit organization centered around using the U.S. Freedom of Information Act to obtain documents furthering human rights research and international criminal trials. I had the task of beginning to request and compile information regarding the former Haitian dictator Jean-Claude "Baby Doc" Duvalier, in order to provide a report on available documentary evidence to the investigating judge in Haiti who would decide, responding to an appeal of the charges, whether to try Duvalier for crimes against humanity. Jean-Claude Duvalier had returned to Haiti in 2011, after twenty-five years of exile following his rule as "president for life" from 1971 to 1986. In the tradition of his father, Francois "Papa Doc" Duvalier, Jean-Claude Duvalier oversaw torture, enforced disappearance, extra-judicial killing, and repression of civil society by Haitian military and paramilitary forces, with an estimated 30,000 victims during the consecutive regimes.[1] Upon his return, Duvalier was charged with corruption, embezzlement, criminal conspiracy, and crimes against humanity. In 2012, all charges except embezzlement were dropped by order of the presiding judge. However, in February 2014, the Port-Au-Prince Court of Appeal ruled in keeping with international law that there is no statute of limitations on crimes against humanity, and charges were reinstated.

On October 4, 2014, at the age of 63, Jean-Claude Duvalier died of a heart attack. The case against him was still under investigation. While international organizations encouraged the investigating judge to continue the case against Duvalier's subordinates,[2] the political reality in Haiti meant proceedings would likely be prolonged or postponed indefinitely.

[1] The human rights abuses of Jean Claude Duvalier's regime are documented by numerous reports, but the exact number of victims is unknown. For further information, see Human Rights Watch report "Haiti's Rendezvous with History: The Case of Jean-Claude Duvalier," Amnesty International report "Haiti: You Cannot Kill the Truth: The Case Against Jean-Claude Duvalier," or, for a short overview, the TeleSUR broadcast "Terror under Jean Claude Duvalier's dictatorship in Haiti" (https://www.youtube.com/watch?v=6x0bROpy-SM).
[2] "Haiti: Move Ahead with Ex-Dictator Case," *Human Rights Watch*, February 19, 2016, https://www.hrw.org/news/2016/02/19/haiti-move-ahead-ex-dictator-case.

Personally, I was frustrated; but I could not begin to imagine the feelings of the victims who survived Duvalier's regime. Among the traditional accounts of the former dictator's death, one could find headlines in diaspora communities such as "After death of Jean-Claude 'Baby Doc' Duvalier, calls for justice remain in Haiti,"[3] and "It's a shame Jean-Claude Duvalier died a free man."[4] In the following weeks, analysis by the international community continued, with articles titled "Duvalier's death derails Haiti's hope to find closure,"[5] and "How will Haiti reckon with the Duvalier years?"[6] As recently as 2016, a joint press release by major international human rights organizations encouraged Haiti not to let the case "fall off the radar screen."[7]

The closing of proceedings against a former dictator charged with international crimes following his death is not unique to the Duvalier case. A combination of the length of trials and the late age at which defendants tend to be indicted has resulted in a number of high-level human rights trials being terminated prior to the court reaching a verdict due to the death of the defendant.[8] Other examples include the trials of Slobodan Milošević and Augusto Pinochet. At present, many persons accused of gross state-sponsored human rights violations who have had court proceedings initiated against them are aging and in ill health. Ao An and Yim Tith, deputy secretaries during the Pol Pot dictatorship in Cambodia, are

[3] Jim Wyss and Jacqueline Charles, "After Death of Jean-Claude 'Baby Doc' Duvalier, Calls for Justice Remain in Haiti," *Miami Herald*, October 4, 2014, http://www.miamiherald.com/news/nation-world/world/americas/haiti/article2510234.html.
[4] "It's a Shame Jean-Claude Duvalier Died a Free Man, Says Ex-UN Prosecutor," *CBC News*, October 4, 2014, http://www.cbc.ca/news/canada/montreal/it-s-a-shame-jean-claude-duvalier-died-a-free-man-says-ex-un-prosecutor-1.2787931.
[5] Philip J. Victor, "Duvalier's Death Derails Haiti's Hope to Find Closure," *Al Jazeera America*, October 10, 2014, http://america.aljazeera.com/articles/2014/10/8/duvalier-haiti-babydoc.html.
[6] Laurent Dubois, "How Will Haiti Reckon with the Duvalier Years?," *The New Yorker*, October 6, 2014, http://www.newyorker.com/news/news-desk/will-haiti-reckon-duvalier-years.
[7] Organizations include Amnesty International, Human Rights Watch, International Federation for Human Rights, and Lawyers Without Boarders Canada. Quote by Amanda Klasing, women's rights researcher at Human Rights Watch. *Supra*, n2.
[8] I will primarily refer to the subject of an international criminal trial as a "defendant;" however, I will refer to the subject as the "accused" in relation to pre-trial proceedings. When referring to a subject already convicted, I will use the term "perpetrator." By "high-level human rights trials," I refer to cases where the defendant is accused of one or more of the international core crimes common to the statutes of all international tribunals: genocide, crimes against humanity, and war crimes. I will use this term interchangeably along with the terms "trials of gross, state-sponsored human rights violations" and "international criminal trials."

both aged 83. Since proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC) began in 2009, they have been charged, but their case remains under investigation.[9] José Efraín Ríos Montt, former President of Guatemala, whose retrial before Guatemalan national courts began in January 2015 and remains ongoing, is 90 years old.[10] Many other defendants indicted by war crimes tribunals and the International Criminal Court are in their 70's. Furthermore—as one notes with the Duvalier case, where the defendant was hardly in his twilight years, and, indeed, with the case of Milošević, who died at age 62—the unfortunate possibility that an individual accused of international crimes may pass away before the court makes a verdict is always present, irrespective of age.

This thesis proposes that continuing a trial *in absentia* may serve as an alternative to closing proceedings after the death of the defendant in cases of gross human rights violations. I ground this proposal in an understanding of the goals of transitional justice, and the alternative measures available to meet these goals. Coming to a final verdict in an international criminal trial is an important step toward meeting transitional justice goals including the utilitarian and retributive goals achieved through ruling on liability, and symbolic justice for victims. Legal theory and precedent shows that international criminal law allows for some procedural flexibility in favor victim's rights, due to the gravity of international core crimes and the *sui generis* nature of international tribunals.

Since the founding of the International Criminal Court and entry into force of the Rome Statute in 2002, human rights trials have become increasingly centered around victims. Rules of procedure at the ICC recognize victims' rights, including entitlement to

[9] Case 004, Extraordinary Chambers in the Courts of Cambodia.

[10] A Guatemalan court sentenced Ríos Montt to 80 years in prison for crimes against humanity in 2013, but his conviction was overturned by the Constitutional Court of Guatemala shortly afterwards because of a procedural issue. Due to dementia and severe hypertension, he cannot attend the renewed trial proceedings. The court has decided that the state of the former dictator's health precludes sentencing, though a judgment will still be made. See Associated Press, "Guatemala Court: Former Dictator Can Be Tried for Genocide – But Not Sentenced," *The Guardian*, August 25, 2015, sec. World News, http://www.theguardian.com/world/2015/aug/25/guatemala-rios-montt-genocide-trial-not-sentenced.

representation, participation, and reparations. Other international courts and tribunals founded since 2002 also incorporate victims to varying degrees.[11] The closure of the Duvalier trial is especially significant due to the degree of victim support surrounding the proceedings. Along with the trials of Ríos Montt and Hissène Habré,[12] human rights lawyer Reed Brody sees the initial stages of the Duvalier trial, despite being discontinued, as representative of a recent wave of "victim-driven prosecutions."[13] Those involved in contributing evidence to the investigating judge for the Duvalier case include Bobby Duval, who witnessed 180 deaths from torture, starvation, and illness in his prison cell at the notorious Fort Dimanche, and Michèle Montas, a journalist who had to flee the country during the Duvalier regime. With involvement of prominent victims, a trial gains important symbolic value for the affected community. Moreover, victim participation highlights a set of needs—perhaps rights—separate from the fair trial rights of the defendant. The trend toward acknowledging the victim's a role in international human rights proceedings is generally seen by scholars and affected communities as a positive development. The trend, however, also engenders a difficult discussion surrounding whether it is possible to accommodate victims' rights and at the same time maintain fair trial guarantees. Given the centrality of fair trial rights to international courts, mechanisms expanding the rights of the victim must be carefully considered in light of existing norms and legal theory.

The proposal of continuing a trial *in absentia* after the death of the defendant may be viewed as adding to a widening array of mechanisms intended to support victims. While some consider such mechanisms to be diametrically opposed to defendants' rights, this thesis will attempt to understand, through examination of theory and case-law, how trial *in absentia*

[11] For a discussion of the shift in emphasis on victim participation before international tribunals, see Christoph Safferling, "The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law?," *International Criminal Law Review* 11, no. 2 (March 2011): 183–215.
[12] President of Chad from 1982-1990; convicted of crimes against humanity in 2016 by a court in Senegal specially created for his trial.
[13] Reed Brody, "The ICC Needs to Ally with Victims," *openDemocracy*, November 15, 2016, https://www.opendemocracy.net/openglobalrights/reed-brody/icc-needs-to-ally-with-victims.

after the death of the defendant can meet fair trial guarantees under international law. The author considers international and regional standards surrounding trial *in absentia*, including case-law from the Human Rights Committee (HRC), International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and European Court of Human Rights (ECtHR). In comparison, the author also considers two international jurisdictions under which trial *in absentia* is explicitly allowed: the International Military Tribunal (IMT) at Nuremberg and the Special Tribunal for Lebanon (STL).[14] The author then examines how trial *in absentia*—usually resulting from the flight of the defendant, the defendant's refusal to appear at his or her trial, or the defendant's disruption of the courtroom—can apply to cases where the defendant has died, without violating human rights norms. This thesis ultimately advocates for the adoption of a waiver system in which the defendant may agree to the continuation of his or her trial after death.

[14] I recognize that many national jurisdictions allow trial *in absentia*, including in relation to human rights issues, but for the purposes of this thesis prefer to examine international jurisprudence, which is seen as standard-setting, and often reflects shifts in customary international law.

CHAPTER 1: GOALS AND METHODS OF TRANSITIONAL JUSTICE

In order to suggest an alternative procedure addressing the disruption of the transitional justice process that results from ending a high-level human rights trial following the death of the defendant, one must first consider the objectives of prosecuting those suspected of committing gross, state-sponsored human rights violations, and, to a certain degree, the aims of transitional justice as a whole. When doing so, one must also weigh the relative value of each goal in the context of the method considered, since, as Mirjan Damaska argues, it may not be possible to meet each one, or to do so thoroughly.[15] It is important, moreover, to survey the range of transitional justice mechanisms available, comparing their effectiveness in meeting the goals described. Such a survey will help assess the efficacy of the proposed alternative to ending a trial after the death of the defendant, based on how it meets the goals described, in comparison to other options. In light of such analysis, I argue that trial *in absentia* is a productive—perhaps necessary—step toward realizing transitional justice after the death of the defendant in a case of gross human rights violations.

Legal theory and case-law support procedural flexibility in cases of gross, state-sponsored human rights violations. While international law is often viewed as adhering to a due-process model, it also reflects many elements of Herbert Packer's crime control model, which emphasizes bringing a case to conclusion. The ECtHR cases *X. v. Germany*, *Klaus Altmann (Barbie) v. France*, and *Sawoniuk v. The United Kingdom* illustrate how certain norms may be loosened to allow prosecution because of the exceptional nature of gross, state-sponsored human rights violations. Considering the reality of how and why international tribunals adopt procedure, introducing trial *in absentia* after the death of the defendant begins to seem possible.

[15] In the Henry Morris Lecture "What is the Point of International Criminal Justice?" Damaska proposes ranking the goals of international criminal trials both to improve court efficacy, and to facilitate balancing them when at odds. He suggests scaling down some of the goals, with the understanding that they may be better met by other means. *Chicago-Kent Law Review* 83 (January 1, 2008): 329.

1.1 GOALS

The goals of international criminal law—that is, of prosecuting those suspected of committing the international core crimes of genocide, crimes against humanity, and war crimes—can be defined as the following:

1. Ruling on the individual liability of those accused, and imposing sanctions on those convicted in an effort to meet utilitarian goals (reform, deterrence) and achieve retribution
2. Establishing rule of law in the aftermath of a conflict
3. Achieving peace and reconciliation
4. Providing a forum for victims to speak
5. Providing compensation to victims
6. Representing international and regional commitments to justice ("symbolic justice")
7. Documenting human rights violations ("writing history")
8. Developing international human rights and criminal law

The goals of international criminal law more or less correspond to the goals of transitional justice as a wider discipline. The International Center for Transitional Justice, for example, lists similar aims on their website.[16] Their list also includes the expansive goal of "recognition of the dignity of individuals," which ties transitional justice to human rights dialogue, but also highlights the issue, common to the human rights field, of linguistic vagueness. On the other hand, the "Guidance Note of the Secretary General: United Nations Approach to Transitional Justice" reflects a set of goals concerned to a greater extent with

[16] "The aims of transitional justice will vary depending on the context but these features are constant: the recognition of the dignity of individuals; the redress and acknowledgment of violations; and the aim to prevent them happening again. Complementary aims may include: Establishing accountable institutions and restoring confidence in them; […] ensuring that that women and marginalized groups play an effective role in the pursuit of a just society; respect for the rule of law; facilitating peace processes, and fostering durable resolution of conflicts; […] advancing the cause of reconciliation." From "What Is Transitional Justice?," *International Center for Transitional Justice*, March 22, 2011, https://www.ictj.org/about/transitional-justice.

procedure than purpose.[17]

The above goals are most specific to international criminal law where they cannot be met by other means, or are most easily met through the legal process. Such specific goals include developing human rights law, and ruling on individual liability. The author accepts Mirjan Damaska's suggestion that international criminal trials should focus their greatest time and energy on the latter goal specific to criminal trials, seeking utilitarian and/or retributive outcomes.[18] However, the author of this thesis also believes that criminal trials are the best avenue to achieve representation of international and regional commitments to justice ("symbolic justice").

1.2 METHODS

Transitional justice emerged as a field in the wake of conflicts in Latin America and the collapse of the Soviet Union. International law had already outlawed the summary execution of former leaders, and established a precedent for trying international crimes. However, the two unique situations, in Latin America, and in the former Soviet Union, led to new techniques for dealing with the legacy of human rights violations: amnesty, and lustration. Recent developments in transitional justice include national compensation schemes and restorative justice practices such as truth commissions. In each case, the option may meet one or two of the goals proposed, but not more.

Granting amnesty to those involved with a previous regime has been a common solution for transitional societies, especially in Latin America. For example, Argentina's *Ley de Punto Final*[19] and *Ley de Obediencia Debida*[20] were passed after the seven-year *Proceso de Reorganización Nacional* dictatorship; El Salvador's *Ley de Amnistía General para la*

[17] See Appendix I: Excerpt from United Nations, Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010.
[18] Damaska, "Henry Morris Lecture," 345.
[19] National Congress of Argentina, Law No. 23492 (24 December 1986).
[20] National Congress of Argentina, Law No. 23521 (4 June 1987).

Consolidación de la Paz[21] was passed after a twelve-year civil war. These laws prohibited the investigation and prosecution of individuals involved in political violence before the two countries transitioned to democracy. Theoretically, amnesty has the potential to meet the third goal above, of achieving peace and reconciliation. However, the peace achieved is superficial, and reconciliation a product of demanding that victims forget the past. Ultimately, amnesty cannot extinguish the desire for justice. In fact, the origins of the ICC Statute, according to George P. Fletcher, are found in reflections on the impunity seen in 1980's Latin America.[22] Today, for the most part, amnesties are condemned in international law, and many amnesties have been annulled over the past two decades. The Supreme Court in Argentina struck down the *Ley De Punto Final* and *Ley De Obediencia Debida* in 2005, and the Supreme Court in El Salvador struck down the *Ley de Amnistía* in 2016.

Following the collapse of the Soviet Union, a number of countries adopted lustration policies in order to prevent officials of previous regimes, as well as civilian collaborators, from entering into the new government. Based on criteria differing from state to state, the policies exclude such individuals from obtaining government or civil service positions. In Czechoslovakia, and later the Czech Republic, Act No. 451/1991 Coll. grouped former security officers, informers and collaborators of the security services, Communist Party secretaries, People's Militia members, and those who attended one of three universities for the security services together as a restricted class.[23] They were barred from political offices and positions in the state administration, the army, the police force and restructured security service, public television, radio, and press, state monetary institutions, and state railways.[24] Lustration, like amnesty, may contribute to achieving peace and reconciliation, since those

[21] Legislative Assembly of El Salvador, Law No. 486 (20 March 1993).
[22] George P. Fletcher, "Justice and Fairness in the Protection of Crime Victims," *Lewis & Clark Law Review*, no. 3 (2005): 547, 555.
[23] Act of 4th October 1991 determining some further prerequisites for certain positions in state bodies and organizations of the Czech and Slovak Federative Republic, the Czech Republic and the Slovak Republic, Federal Assembly of the Czech and Slovak Federative Republic, Act No. 451/1991 Coll. (4 October 1991).
[24] *Ibid*.

who might have committed wrongs as members of a group are named and penalized. The naming process also contributes to history writing, and, based on the government's willingness to acknowledge the occurrence of wrongdoing, has a symbolic value. The emphasis of discussion surrounding lustration policies, moreover, has often centered on preventing recurrence of structural violence and oppression, which falls under the goal of establishing rule of law in the aftermath of a conflict. The laws perhaps can be considered to reflect the concept of militant democracy, introduced by Karl Loewenstein and expanded by Karl Popper. Popper writes, "if we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed and tolerance with them," and suggests that intolerance be considered criminal.[25] At the same time, barring individuals from public employment based on previous non-criminal acts seems contrary to rule of law values.

More recently, some countries have instituted financial compensation schemes for those affected by the human rights violations of a former regime. For example, the *Law on Missing Persons in Bosnia and Herzegovina*[26] establishes a pension plan for family members of those known to be missing or dead as a result of the war lasting from 1992-1995. This solution meets the fifth, and to some degree third and sixth goals above: firstly, providing financial compensation to victims, but also fostering reconciliation, and providing a minor symbolic victory.

Truth commissions may fulfill the third, fourth, and seventh proposed goals: of achieving peace and reconciliation, providing a forum for victims to speak, and documenting human rights violations ("writing history"). Truth commissions have been formed in over 30 countries, the most famous of which occurred in South Africa following apartheid. Commissions usually collect testimony from both victims and perpetrators, and conclude

[25] Karl Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press, 1950), 293.
[26] Parliamentary Assembly of Bosnia and Herzegovina, Official Gazette, no. 50/04, Article 2 (17 November 2004).

with a report. In some cases, full and honest disclosure in a public setting will guarantee immunity for individuals who may otherwise fear prosecution following testimony. In other cases, interviews are conducted behind closed doors, and the identities of those who testify are kept confidential, though future trials are not barred. While truth commissions do not allow for establishing guilt or imposing sanctions, the truth commission process may allow for recording a more complete version of what happened than would be elicited, for example, in a trial.

An international criminal trial that is conducted successfully from start to finish, however, accomplishes to some degree each of the above goals. Among them, certain goals may *only* be achieved through a criminal trial. Those central to and best accomplished by conducting an international criminal trial, as mentioned above, are ruling on individual liability, and providing symbolic justice for victims. The death of the defendant, resulting in the termination of proceedings, may affect whether and how the goals of conducting a criminal trial are met. I propose that continuing a criminal trial *in absentia* following the death of the defendant allows for fulfillment, in particular, of those goals I have already established are central to conducting a trial in the first place.

Achieving retribution, one aspect of ruling on liability, is barred straightforwardly by discontinuing a trial after the defendant's death. According to Brianne McGonigle Leyh,

> The retributive approach at the international level holds that the crimes falling under the jurisdiction of international courts are crimes that shock the conscience of mankind and therefore individuals who commit these crimes deserve to be punished if for no other reason than for the fact that they committed these crimes.[27]

Of course, punishment cannot occur without a verdict. Even if the court does reach a verdict, one might question whether punishment can occur following the death of the defendant.

[27] Brianne McGonigle Leyh, *Procedural Justice?: Victim Participation in International Criminal Proceedings*, School of Human Rights Research Series: 42 (Cambridge: Intersentia, 2011), 60.

Certainly the many other reasons I will enumerate below may be seen to justify trial *in absentia* after the death of the defendant even if punishment as such is impossible. Yet, if one stops to think about the nature of punishment for international crimes, one easily sees that the aspects of punishment carried out on a perpetrator in the physical sense—confinement, predominantly—are by far less grave than the abstract "punishment" of a tarnished reputation and discredit of the perpetrator's ideas throughout society, which, if not instigated by a guilty verdict alone, are importantly reinforced and perpetuated by the court's decision. Emmanuel Melissaris explains that the aspects of personhood connected to such abstract "punishment" survive an individual's physical existence:

> Our reputation, the ways in which we have interacted with others and the relations that we have forged, the things we have created, exist after our physical demise and still bear our mark. All these things that we leave behind can be interfered with and this is an interference with the extension of our person. This is what makes it meaningful […] to still speak of the dead as persons and to say that they deserve praise, reward or blame. Interference with our extensions after our death also amounts to us […] being treated kindly or harshly, even though we are unaware of it.[28]

Even so, the international community is hesitant to proceed in the absence of the defendant following his or her death. Because both the prospect of the defendant's testimony and the presence of the defendant as an object of scrutiny no longer exist after his or her death, the deceased defendant becomes representative of missing information without which it is impossible make a determination of fact, especially in relation to guilt or innocence. Victims and the affected community imagine that the death of the defendant has resulted in a permanent loss of vital information with "agency to settle competing versions of history."[29]

[28] Melissaris, Emmanuel. "Posthumous 'Punishment': What May Be Done About Criminal Wrongs After the Wrongdoer's Death?" *Criminal Law & Philosophy* 11, no. 2 (June 2017): 313, 316.
[29] Michelle Caswell and Anne Gilliland, "False Promise and New Hope: Dead Perpetrators, Imagined Documents and Emergent Archival Evidence," *International Journal of Human Rights* 19, no. 5 (June 2015): 617, 617.

Such a perception extends to the realm of international law, making up part of the rationale for discontinuing a trial after the death of the defendant. The information thought to be lost, however, is imaginary. Human rights trials invariably rely on copious documentary evidence. The defendant often does not speak during the trial, preferring that counsel represent the arguments of the defense. Furthermore, arguments are frequently determined in advance, as the defense counsel is provided with a list of the prospective witnesses as well as the evidence that will be drawn upon by the prosecutor.

While little is lost of the defendant's voice after his or her death, much more is jeopardized when a trial is discontinued. Michelle Caswell and Anne Gilliland describe the reticence of scholars in Cambodia when it comes to discussing the role of former Khmer Rouge official Ieng Sary in human rights violations following his death from a heart attack while under indictment by the ECCC.[30] Some have expressed that they feel unable to comment on the culpability of Sary for human rights abuses—even in a historical context—because the court was unable to come to a verdict.[31] The chilling effect a trial's closure has on the dialogue surrounding specific human rights abuses relates to the unmet didactic goal associated with ruling on liability in criminal trials. Making a verdict serves a utilitarian purpose not only in that it "teaches" potential perpetrators they will face judgment and punishment for human rights crimes—even posthumous punishment, according to Melissaris, affects the would-be perpetrator "because I know that punishment after death will frustrate the desires and plans that I form during my lifetime"[32]—but also in that it illustrates the international community's perception of the crime (as unacceptable) to historians, governments, and future generations.

Sary represents a compelling example where weighing the loss associated with the defendant's inability to participate, against the benefits of reaching a verdict, results in a clear

[30] Case 002.
[31] Caswell and Gilliland, 619.
[32] Melissaris, 322.

pitch toward the latter. Sary refused to give testimony during his trial, and often viewed trial proceedings virtually from his cell.[33] While the right to be present predicates observance of other fair trial rights, including the right of the accused to defend him or herself and the right of the accused to cross-examine witnesses, the argument that a defendant *must* be present is weakened by the fact that the defendant may remain silent, and, according to Judge Bonello in a concurring opinion for European Court of Human Rights case *Van Geyseghem v. Belgium,* "a mute defendant is almost as productive as an absent defendant."[34] At the same time, a great deal of documentary evidence, including Sary's own speeches and statements, chronicles Sary's involvement in the death of 1.7 million Cambodians.[35] Melissaris notes that while allowing the defendant to speak at his or her trial fulfills the requirement of treating the defendant as a "free and equal" member of society, the more important function of testimony is its contribution to understanding the "truth" of what happened.[36] In the latter sense, testimony by the defendant may not be as valuable as testimony by others, "because the information provided by [the defendant] lacks the objective strength to determine the outcome of the fact-finding process, if uncorroborated by objectively ascertainable data."[37] Not only would coming to a verdict serve a didactic purpose in Sary's case: it would allow the state to claim the equivalent of 20 million dollars from Sary's estate that he accrued illegally. Some have suggested the money be used to ensure victims receive adequate mental health care.[38]

Naomi Roht-Arriaza confirms the importance of ending impunity in a post-conflict society in her book *Impunity and Human Rights in International Law and Practice*. She emphasizes that trials achieve this most effectively, writing:

[33] Caswell and Gilliland, 618.
[34] App. No. 26103/95 (ECtHR, 21 January 1999), para. 145, in Bose, 501.
[35] Caswell and Gilliland, 621.
[36] Melissaris, 328.
[37] *Ibid*.
[38] Caswell and Gilliland, 621.

> Societies in which massive human rights violations occur with impunity are by definition lawless societies. […] As societies attempt to recover from these periods of lawlessness, one of the first opportunities to reestablish the primacy of law over individuals comes in the treatment of former rulers, torturers, and jailers.[39]

This passage may sound like praise for judicial proceedings against those accused of grave human rights violations as a transitional justice mechanism that promotes rule of law, which I categorize as a goal in and of itself. While conducting trials in regard to international core crimes does promote rule of law, "reestablishing the primacy of law over individuals," or ending impunity, also has incredible symbolic value. Oldenquist writes, "Serious crimes, when they go unpunished, diminish the value we place on our social identities, and hence our valuation of ourselves."[40] Reversing impunity, therefore, restores value to social identities: "[A]ny conviction, in absentia or not, constitutes a public 'moral sanction' […] against the most heinous of crimes,"[41] as well as an official acknowledgment of victims' experiences.

Making full and just verdicts on the liability of suspected perpetrators of grave human rights abuses not only achieves justice for the crimes addressed in each trial, but also establishes trust in the justice system among victims and the international community, and sets a high bar for the justice system in the affected post-conflict society. Even despite the many transitional justice procedures available, societies often view international criminal proceedings as the only tenable option. Caswell and Gilliland point out that almost everyone interviewed for the 2010 report on the impact of the International Criminal Tribunal for the Former Yugoslavia, written by Diane Orentlicher of the Open Society Foundation, expressed that they felt the ICTY was the only opportunity for justice following the Yugoslav Wars.[42] Prosecution reassures the community, both local and international, that the duty of the state

[39] Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), 4.
[40] Oldenquist in McGonigle Leyh, 60.
[41] Shaw, 138.
[42] Diane Orentlicher in Caswell and Gilliland, 622.

and international bodies to respond to wrongdoing is taken seriously; prosecution also addresses the consequences of victimization.[43] Discontinuing the trial of a deceased defendant denies the community an opportunity for justice, and moreover lessens faith in the court system, which is crucial to its survival. Further, many restorative practices such as truth and reconciliation commissions can only begin functioning, or will function more effectively after establishing the guilt (or innocence) of suspected perpetrators.[44] On the other hand, the death of the defendant does not curtail the need to address wrongdoing, nor does it forestall the possibility of doing so: "Since this aim of responding to wrongdoing is not directed at the wrongdoer as a conscious agent, his or her death makes little difference."[45]

1.3 CRIME CONTROL & DUE-PROCESS MODELS

In his famous 1964 article "Two Models of the Criminal Process," Herbert Packer describes two alternate approaches to criminality, based on the American experience: the due-process model, and the crime control model. Packer's article has influenced the way scholars look at criminal justice systems across decades. Because the article focuses on a national legal system, there are limits to the application of his models in an international law context. For example, Packer does not discuss the role of victims whatsoever. Nevertheless, indentifying the elements of the two models that international criminal law adheres to, in compliment to a more victim-centered approach, provides a way identify the reasons behind use of specific measures in international criminal law as it seeks to meet the goals described earlier in this chapter. Understanding these fundamental assumptions makes it possible to formulate guidelines and parameters for considered changes in procedure. Specifically, the following analysis will lead to a definition of both the limits of flexibility within the law, as well as the scenarios in which flexibility is justified. Interpretation along the lines of this

[43] Melissaris, 329.
[44] Gromet and Darley, Garvey in McGonigle Leyh, 63.
[45] *Supra*, n43.

definition allows one to determine whether procedural measures proposed to meet transitional justice goals fall within the rationale of international criminal law as such.

The crime control model rests on an understanding that repressing criminal activity is the foremost goal of the criminal process.[46] The reason behind such an understanding lies in the theory, according to Packer, that "if the laws go unenforced, which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop."[47] In international law, the necessity of enforcement is certainly a central belief. Both the ECtHR and IACHR have extended the duty to ensure effective enjoyment of rights and to protect against human rights violations, in grave instances, not only to include the requirement for effective investigation, but also to include punishment of responsible individuals.[48] In other words, under the European and American systems, states have the duty to investigate and prosecute grave human rights violations, and to punish those found guilty. The United Nations *Basic principles and guidelines of the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of International Humanitarian Law* also includes the duty to investigate violations, submit suspects to prosecution, and punish the defendant if found guilty.[49] International tribunals exist to ensure prosecution when the state is unable to do so. While on a national level, in the case of ordinary crimes, insistence on near-absolute enforcement may be abused to justify police repression, international law cannot forego strict enforcement; the result would be impunity, and further human rights abuse. As Shaw explains, "While citizens within national legal systems often accept that some crimes will go unprosecuted, it is less likely that the world

[46] Herbert L. Packer, "Two Models of the Criminal Process," *University of Pennsylvania Law Review*, no. 1 (1964): 1, 9.
[47] *Ibid*.
[48] Carlos Fernández de Casadevante Romani, *International Law of Victims* (Berlin; New York: Springer, 2012), 139.
[49] Fernández de Casadevante Romani, 139.

community will tolerate such inaction for crimes like genocide and crimes against humanity."[50]

To facilitate enforcement, advocates of the crime control model insist on efficiency within legal systems. In this context, "efficiency" is defined as a high capacity to "apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known."[51] Doing so involves processing a large number of cases in a short period of time, preferably with a high conviction rate. The emphasis on efficiency within the crime control model, according to Packer, leads to increasing informality of operations, and disregard for fair trial rights.[52] In international criminal law, efficiency as understood by the crime control model has not been a central concern. Fair trial standards, in fact, are elevated in the international setting, which often extends the length of trials. The ICC, for example, has carefully selected a moderate number of cases over its fifteen years of operation, and completed only a fraction of them.[53] Proceedings at the International Criminal Court stretch over a long period of time—from indictment, to trial, to judgment and sentencing—and many of those indicted are still at large. Of the first five individuals indicted by the court, two died before a verdict, two are at large, and the fifth's trial proceedings remain ongoing. While increased efficiency is often called for in international law, international courts and tribunals are not willing to forego careful consideration of each case.

Related to efficiency, the crime control model is oriented toward bringing a case to a "successful conclusion." The process, Packer explains,

> [T]hrows off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible,

[50] Shaw, 137.
[51] Packer, 10.
[52] Packer, 11.
[53] The ICC has issued 41 indictments, and completed proceedings against 17 individuals, only three of which resulted in convictions.

> the conviction of the rest with a minimum of occasions for challenge, let alone postaudit.[54]

The importance placed on reaching a "successful conclusion" leads to what Packer considers "an early determination of probable innocence or guilt" outside of the courtroom, which he defines as the "presumption of guilt."[55] As soon as the system determines that enough evidence exists for a suspect to be taken to trial instead of being released, all following processes reflect the view that the suspect is likely guilty.[56] It is crucial to note that Packer does not see this "presumption of guilt" as the antithesis of the presumption of innocence. The presumption of guilt is a descriptive mechanism, used to indicate when the accused more likely than not to have committed a given crime, based on fact-finding. The presumption of innocence, on the other hand, is a directive that instructs officials how to act toward the accused, disregarding his or her probable guilt.[57]

Despite the high standard of fairness guarantees provided by international courts and tribunals, the "presumption of guilt" may indeed be observed in international legal proceedings. In fact, Frederic Mégret notes that international criminal law "Over time […] seems to exhibit certain authoritarian features, or at least a tendency to distance itself from liberal archetypes."[58] The ICTY, moreover, has acknowledged that "the International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due-process and more lenient rules of evidence."[59] This tendency relates to the fact that a primary goal of the international criminal trial, as discussed above, is a verdict.

[54] Packer, 11.
[55] *Ibid*.
[56] *Ibid*.
[57] Packer, 12.
[58] Frederic Mégret, "Beyond Fairness: Understanding the Determinants of International Criminal Procedure," *UCLA Journal of International Law and Foreign Affairs*, no. 1 (2009): 37, 39. Quote from Prosecutor v. Tadic, Case No. lT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 28 (Aug. 10, 1995).
[59] *Prosecutor v. Tadic*, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses," Case No. lT-94-1(ICTY, 10 August 1995), para. 28, in Mégret, 39.

One major difference between the tenets of the crime control model and the current system of international criminal law is that while the crime control model sees fact-finding mechanisms as being more reliable than trials in establishing truth, international law places great importance on the adjudicative process.[60] Despite having confidence in fact-finding processes, the crime control model, according to Packer, is fairly comfortable with the possibility of error. Reliability is equated to a greater degree with the system's efficiency than with a low level of factual inaccuracy.[61] On the other hand, in international law, the right to truth is recognized in the context of grave human rights violations.[62] The Case of *Almonacid-Arellano et al. v. Chile* before the Inter-American Court of Human Rights establishes that historical truth "is no substitute for the duty of the State to reach the truth through judicial proceedings."[63]

While in a national context, the value of "forc[ing] the state to prove its case against the accused in an adjudicative context" relates to the due-process ideal of "the primacy of the individual and the complementary concept of limitation of official power,"[64] in an international setting, the necessity of proving a case before a court is linked to other transitional justice goals such as recording history and providing a forum for victims to speak; it does not stem from a need to limit state power. This alternative emphasis—while still retaining its important purpose of protecting against procedural violations, and in doing so, helping to establish or uphold rule of law—allows for some flexibility in procedure.

In an alternate take on the importance of proving a case in the adjudictive context, Stefan Trechsel describes Niklas Luhmann's understanding of the sociological purpose of procedural justice in his article "Why Must Trials Be Fair?"[65] Luhmann's theory is based on

[60] Packer, 13.
[61] Packer, 15.
[62] Fernández de Casadevante Romani, 224.
[63] Series C No. 154 (IACHR, 26 September 2006) in Fernández de Casadevante Romani, 231.
[64] Packer, 16-17.
[65] Stefan Trechsel, "Why Must Trials Be Fair?," *Israel Law Review*, Issues 1-3 (1997): 94, 112.

the idea that people still accept court verdicts even though there is no guarantee that a verdict is fully just in every case. He argues that transparent, fair proceedings make such acceptance possible. In other words, the trial itself is *symbolic and well as substantive*. He maintains, "The visible fairness is […] not only of essential importance for the respective proceedings but also for maintaining the authority of the administration of the law in general."[66] In this sense, terminating proceedings after the death of the defendant may be dangerous to the overall success of human rights law: the public sees an incomplete process, which signals that a failure has occurred, whether real or merely perceived, within the legal system. Trechsel goes so far as to assert that the appearance of justice may indeed be the crucial aspect of fair trial.[67] He asks, "Is there any independent, invisible justice?" and answers, "In a moral sense, most certainly. However, if we look at the administration of criminal justice as a means of dealing with social conflict,"—which is certainly the case in the context of international criminal law—"it is only the appearance that counts, although, of course, this includes the outcome."[68] With an active defense team, continuing a trial *in absentia* after the death of the defendant allows for the visualization of procedural fairness in a way that ending the trial never can.

I set out, in this section, to use Packer's two models to explore the limits of flexibility within international law, as well as the scenarios in which flexibility is justified. In conclusion, the fundamental assumption in international law that truth should be established through the adjudicative process, combined with the importance of reaching a verdict in cases of grave human rights violations, leads to a willingness within the international community take measures that allow human rights trials to begin, and subsequently, to be completed. As will be discussed in the next section, courts may also allow for the submission of evidence beyond what is normally allowed in a national context. Because this widens, rather than

[66] Trechsel, 113.
[67] Trechsel, 117.
[68] Trechsel, 117-118.

narrows, the scope of content considered before the court, such measures do not contradict the reasoning for flexibility. On the other hand, the system of international law will not permit compromising the integrity of the judicial process through measures taken toward "efficiency." While trials may extend over an unusual length of time, for example, international courts and tribunals will not sacrifice elements of procedure to shorten trials. Trial *in absentia* after the death of the defendant fits within this definition of scenarios where flexibility can be considered, because it is a measure aimed at allowing the continuation of a trial, but it does not substantially alter the content of proceedings for the sake of efficiency.

1.4 EXCEPTIONALITY

When proposing procedural changes in international criminal law, even within the above limits, it is necessary to consider the needs of victims and the post-conflict community, while at the same time keeping in mind defendants' rights and fair trial guarantees. The origin of the belief that victims' rights and defendants' rights are irreconcilable lies in ordinary criminal law. Indeed, it appears quite difficult to reconcile those rights on a national level. However, there has already been some exploration of how to accommodate both victims' and defendants' rights in international law. A number of decisions in international tribunals indicate that special considerations arising from the nature of international crimes allow for flexibility in the interpretation of fair trial rights, and in some cases, suspension of specific fair trial norms.

When Jonathan Doak discusses the tension between victims' and defendants' rights in national law, he cites two articles from the book *Reconcilable Rights? Analysing the Tension Between Victims and Defendants*. First, he explains John Jackson's view that "the risks of injustice are not the same for the victim and defendant, and, as such, the accused must always

be at the center of proceedings."[69] In other words, because the defendant has more to loose, the balance of rights should weigh in his or her favor. However, Jackson continues on to say that "this does not mean the criminal justice system should not take into account other interests or objectives."[70] Such other interests may include those of victims. Alternatively, Doak describes J.R. Spencer's argument that "the subsidiary aim of proceedings should be to inflict 'as little pain as possible … to everyone concerned.'"[71] This aim would necessarily reflect the possibility of re-victimization in elevating the defendant to a privileged status.

While much of the legal theory surrounding fair trial rights comes out of examining national criminal law, according to scholars such as Mirjan Damaska and Frederic Mégret, it is difficult to compare national procedure with international criminal law: "the complexity of problems involved in processing [international criminal cases] has few parallels with the prosecution of ordinary crimes by national criminal courts."[72] Disparity stems from the primarily political nature of international crimes,[73] the "mass victimization and systemic perpetration that characterize international criminality," and the multiplicity of goals attributed to the international criminal trial.[74] The ICTY, for example, has characterized the conflict in the former Yugoslavia as "representing 'exceptional circumstances par excellence' prone to justify 'derogations' to what would normally be guaranteed rights under applicable international instruments."[75]

In his article "The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals," Damaska's central question is whether some flexibility in observance of fair procedure is warranted by, and acceptable because of the central purpose of international

[69] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. (Oxford: Hart, 2008), 26.
[70] *Ibid*.
[71] *Ibid*.
[72] Mirjan Damaska, "The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals," *North Carolina Journal of International Law and Commercial Regulation*, no. 2 (2010): 365.
[73] Mégret, 61.
[74] Damaska, "The Competing Visions of Fairness," 365.
[75] Faiza Patel King and Ann-Marie La Rosa in Mégret, 61.

criminal law: "to put an end to the impunity of individuals who are most responsible for horrendous crimes that threaten the well-being of the international community."[76] Damaska claims that as procedural justice increases in importance within international law, the legal process' "substantive antipode," to make an accurate determination of guilt or innocence, may suffer. In other words, Damaska sees "factual accuracy" as being subordinated to "solicitude towards the interest of the defendant."[77] Damaska discusses the example of plea-bargaining, where, he argues, the defendant's rights are upheld, but the truth-finding process is curtailed. Interestingly, Herbert Packer sees plea-bargaining as a way to facilitate efficiency, in the context of the crime control model, at the expense of the defendant's right to a trial. While they approach this specific issue differently, both scholars lament the same loss: of the opportunity to determine guilt or innocence through a dialogic judicial process. Following strict formal rules that allow for a guilty plea, while paying little heed to the purpose behind a given law, or the principles of law in general, is an exercise of little value.

Damaska counters the negative responses by some human rights scholars to decisions by international court judges that seem to limit the procedural rights of the defendant. When it comes to striking a balance between defendants' rights and victims' rights, Damaska points out that "good things are not always compatible."[78] Looking at the clash of rights from the perspective of a victim, he imagines that:

> Aside from the absence of closure, why should [victims] be exposed to the risk of repeated victimization by the actually guilty who could return to their midst? Again, while this problem occurs in contemporary national criminal courts as well, in international criminal justice it is much more serious because of the enormity of international crimes and the multiplicity of victims they cause.[79]

[76] *Supra*, n74.
[77] Damaska, "The Competing Visions of Fairness," 370.
[78] Damaska, "The Competing Visions of Fairness," 374.
[79] Damaska, "The Competing Visions of Fairness," 375.

However, it is not necessary to accept that the legal concept of fairness includes victims. Damaska writes, "[I]f the standards of fairness in international criminal justice relate solely to defendants, this does not mean that they cannot be fashioned in ways that depart from those accepted by national criminal courts."[80]

The European Court of Human Rights has affirmed several procedural exceptions in reference to the prosecution of those accused of international core crimes, based on the gravity of the charges and the unique nature of human rights law. In most of the cases, the procedural norm under consideration, if not circumvented at the national level, would have halted proceedings against the accused. National courts, considering in part the importance of trying those accused of grave human rights violations, have insisted in such cases on prosecution. The arguments presented by the European Court of Human Rights when invariably declaring applications that challenge decisions to proceed inadmissible, strengthen the case for trial *in absentia* after the death of the defendant. While case-law of other legal bodies may also support my argument, I look to the ECtHR as the oldest regional court, and, aside from Nuremberg, the main international court to examine war crimes cases dating to World War II. Though the ECtHR is not in a place to assess the substantive issues in a given case, the judgments deal with questions of how to try those accused of genocide, crimes against humanity, and war crimes.

The case of *X. v. Germany*[81] marks the earliest judgment by the ECtHR addressing the "exceptional character" of proceedings surrounding international core crimes. The case deals with the length of trials. Trials of individuals accused of international core crimes often extend over many years, with delays usually for the purpose of obtaining evidence. Because of such a delay, the applicant in *X. v. Germany* complained of a violation under Article 6.1 of the Convention, the right to be tried within a reasonable amount of time. The ECtHR explains

[80] Damaska, "The Competing Visions of Fairness," 379.
[81] App. no. 6946/75 (ECtHR, 6 June 1976).

that the unique nature of the case justifies deviation from standard principles. The judgment states:

> [T]he exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences.[82]

The 1976 judgment serves as a precedent for the following cases.

In the 1984 case of *Klaus Altmann (Barbie) v. France*,[83] the ECtHR considered a claim of Article 5.1 of the European Convention, regarding liberty and security of person, after the former Nazi intelligence officer and head of the Gestapo in Lyon, France was expelled from Bolivia due to immigration fraud,[84] and taken by Bolivian officials to French Guiana, where he was arrested and charged with crimes against humanity. The Court determined the claim inadmissible. While Barbie argued that the procedure was disguised illegal extradition, and therefore against the Convention, the decision by the French Court of Cassation emphasized that the system of international criminal law does not rest necessarily on the same assumptions as national law, and that the exceptional nature of international crimes may ease particular legal norms. The Court stated:

> By their very nature the crimes against humanity with which Klaus Barbie […] is charged in France […] fall within the jurisdiction not only of French domestic law but also that of a system of international criminality, to which the notion of frontiers and the rules of extradition which stem from it are fundamentally alien.[85]

In finding the original verdict tolerable, the European Court of Human Rights confirmed that

[82] *X. v. Germany*, para. 1.
[83] App. no. 10689/83 (ECtHR, 4 July 1984).
[84] *The New York Times* writes, "For a fee, a Croatian priest in Rome produced a false passport from the International Red Cross and a Bolivian visa for Mr. Barbie, his wife, and their two children. Mr. Barbie became Klaus Altmann and sailed from Genoa in March 1951." Barbie became a Bolivian citizen under his false name in 1957. Wolfgang Saxon, "Klaus Barbie, 77, Lyons Gestapo Chief," *The New York Times*, September 26, 1991, http://www.nytimes.com/1991/09/26/world/klaus-barbie-77-lyons-gestapo-chief.html.
[85] *Klaus Altmann (Barbie) v. France*, no para.

standard rules of international procedure and customs of jurisdiction may not be applicable when an individual is charged with international crimes.

Sawoniuk v. The United Kingdom,[86] 2001, examines whether evidence may pertain to acts outside the counts alleged in a given trial, as well as whether a statute of limitations applies in the case of international crimes. Sawoniuk, a Polish Nazi collaborator who was tried and convicted in the United Kingdom under the War Crimes Act 1991, claimed the following under Article 6 of the Convention, concerning his fair trial rights:

> a) The time between the acts alleged and the trial was of such a length that combined with the nature of the evidence against the applicant, his ability to defend himself was so significantly impaired that he was unable to receive a fair trial. […]
>
> b) Evidence was adduced of wrong doing beyond the indictment. The power and volume of this evidence gave rise to such a high possibility of prejudice and presumption of guilt so as to render the trial as a whole unfair and to breach the applicant's right to the presumption of innocence. […]
>
> c) Untested evidence of a very prejudicial nature (a Waffen SS document) was adduced which the applicant was unable to challenge.[87]

The European Court dismissed Sawoniuk's first claim easily, arguing that the Convention imposes no time limitation for war crimes prosecutions. Additionally, the Court cited the United Nations *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, and the *European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*.[88] Regarding the second and third claims, the Court stressed that events occurring outside of the counts alleged, in the case of war crimes, may be relevant to the prosecution of the crimes under consideration:

> [I]n the trial of a person for war crimes, it is not realistic to expect that the evidence can be restricted wholly to the specific counts alleged. It indeed may be

[86] App. no. 63716/00 (ECtHR, 5 May 2001).
[87] *Sawoniuk v. The United Kingdom*, para. 1.
[88] *Ibid*.

> relevant and necessary for a proper understanding of events that the context of the incidents be examined.[89]

Thus, the application, under Article 6, was dismissed. Sawoniuk also made claims under Article 5 and Article 3 of the European Convention. One of these claims interests us, as the applicant asserted that the imposition of a mandatory life sentence was "arbitrary and disproportionate."[90] The Court is certainly cautious regarding life imprisonment sentences,[91] however, in the case of Sawoniuk, found that "given the seriousness of the offences for which the applicant was convicted, […] a sentence of life imprisonment [cannot] be regarded as arbitrary or disproportionate."[92] Again, the Court emphasizes the gravity of international core crimes in coming to its decision.

I will note, finally, that in addition to the loosening of fair trial guarantees that would prevent a trial from commencing, courts also observe more lenient evidentiary rules that support the defendant in the context of international core crimes. The flexible practices surrounding evidence counterbalance the exceptions made to allow prosecution. Departing from the jurisprudence of the ECtHR, both the Canadian case *R. v. Finta*,[93] and the case of *Demjanjuk*, conducted in Germany and Israel,[94] accepted hearsay evidence on behalf of the defendant.

[89] *Ibid*.
[90] *Sawoniuk v. The United Kingdom*, para. 3.
[91] In *Vinter and Others v. The UK* the ECtHR found that an irreducible life sentence, for example, violates Article 3 of the European Convention.
[92] *Sawoniuk v. the United Kingdom*, para. 3.
[93] *Finta*, a commander of the Gendarmerie in Szeged, Hungary during World War II, was charged with participating in the deportation of Hungarian Jews.
[94] The case surrounds a suspected Waffen SS prison guard.

CHAPTER 2: REGIONAL AND INTERNATIONAL STANDARDS

2.1 PROCEEDINGS AGAINST DECEASED DEFENDANTS

Before considering trial *in absentia*, let us first address the obvious difficulty of my proposal to continue trials of gross, state sponsored human rights violations *in absentia* after the death of the defendant: Is it not impossible to try someone after his or her death? In general, law assumes that criminal liability does not survive the death of the person who committed a given crime. This assumption is based in part on the belief that punishment for a crime may only be conferred upon a living person, and may not be transferred to a different person after the perpetrator's death.[95] As discussed in the previous chapter, however, the value of a verdict in an international criminal trial reaches beyond what can be achieved by the real and immediate punishment of an individual. Moreover, posthumous "punishment" meets retributive and utilitarian goals, even if the perpetrator is not conscious of it.

While no international court or tribunal has ever continued a trial after the known death of the defendant,[96] rules of procedure that would suggest terminating proceedings without a judgment following the death of the defendant have been interpreted leniently in some cases. For example, in the ICTR case *Prosecutor v Karemera et al.*, a deceased defendant's trial records were retained for reference in the continuing trial of two other defendants.[97] The case of *Prosecutor v Rasim Delić* before the ICTY was terminated during appeal proceedings following the defendant's death, but the original verdict was declared final, rather than expunged.[98] In other cases, rules of procedure were considered at length before being followed. For example, the ICTY Trial Chamber even considered releasing a

[95] See *AP, MP, and TP v Switzerland*, Case No. 71/1996/690/882 (ECtHR, 29 August 1997), Article 7(3) of the African Charter on Human and Peoples' Rights, and Article 5(3) of the American Convention on Human Rights.
[96] The International Military Tribunal in fact tried Martin Bormann after his death, though at the time it was unconfirmed. I will return to the details of this case in Chapter 3.
[97] Björn Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography*, Studies in International and Comparative Criminal Law (Oxford: Hart, 2012), 16.
[98] *Ibid*.

judgment on the case *Prosecutor v Dokmanović*, which had concluded just prior to the defendant's suicide.[99] Furthermore, cases will often remain active for a long period of time after the actual death of the defendant while the court seeks confirmation that the person is indeed deceased. At the ICC, the Pretrial Chamber closed proceedings against Raska Lukwiya of Uganda almost a full year after his death in combat, in part due to efforts to ensure that he had died.[100] Although most international courts and ad-hoc tribunals lay out rules regarding procedure following the death of a defendant, some do not address the circumstance directly. The Special Tribunal for Lebanon, for example, does not have a rule on the subject, though the Tribunal has terminated proceedings after the death of a defendant.

Emmanuel Melissaris argues that civil society practices toward deceased criminal suspects who had occupied a public role, such as renaming buildings and streets or revoking awards, illustrates an "intuition" that "criminal wrongs do not disappear with the wrongdoer's death nor is the need to condemn the wrongdoer eliminated."[101] This intuition is supported by theory. If the retributive understanding of punishment poses that a guilty party must be punished as his or her just deserts, that "desert relation" does not disappear upon the death of the guilty party, in part because, as discussed in the previous chapter, an individual's "personhood" survives beyond physical existence in the form of his or her legacy.[102] Similarly, the didactic purpose of punishment remains compelling, and is not curtailed by death, given continued personhood through legacy. Further, as "[t]he trial is also meant to protect [the defendant] against unwarranted, not properly public accountability-seeking practices and punitive measures," there is arguably a *duty* to prosecute even after death.[103]

Considering the flexibility of international law detailed in the previous chapter, as well as the arguments presented above, let us suspend disbelief to imagine that it may be

[99] Kerr in Elberling, 16.
[100] Elberling, 16.
[101] Melissaris, 315.
[102] Merlissaris, 216.
[103] Melissaris, 328.

found death does not bar the continuation of already in-progress proceedings surrounding grave human rights violations. The more nuanced question with regard to human rights norms, then, relates to the absence of the defendant because of his or her death.

2.2 COMMON LAW AND CIVIL LAW TRADITIONS

Trial *in absentia* has been, and continues to be, a contested phenomenon in the field of law. While the institution is generally accepted in civil law jurisdictions, it is almost entirely absent from common law. Scholars have different views on what fundamental assumptions cause the divergence in opinion between civil law and common law jurisdictions on trial *in absentia*. Zakerhossein and Brouwer point to the understanding of truth within the two systems as the most significant diverging assumption.[104] In civil law, truth is seen as objective; a judge may discover the truth from the evidence and witness testimony even in the absence of the accused. In common law, on the other hand, truth is seen as subjective and contextual, and must be ascertained during the course of the trial though confrontational proceedings that involve questioning the accused along with witnesses. In a roundtable discussion on trial *in absentia* held by the International Bar Association, experts offered the view that the difference relates to how the two systems understand jurisdiction. In civil law, "jurisdiction is understood as the power of the court to state the law," a task that does not strictly require the presence of the accused.[105] Alternatively, in common law, jurisdiction entails "the state's ability to exercise its power, as well as to enforce punishment," which may occur only when the accused is in the custody of the court.[106]

Conflict tends to arise when establishing international human rights tribunals, because representatives from both civil and common law countries must agree on rules of the court.

[104] Mohammad Zakerhossein and Anne-Marie Brouwer, "Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals," *Criminal Law Forum* 26, no. 2 (June 2015): 181, 206.
[105] "Report on the 'Experts' Roundtable on Trials in Absentia in International Criminal Justice*," IBA International Criminal Court and International Criminal Law Programme* (The Hague Institute for Global Justice: International Bar Association, September 2016), 3.
[106] "Report on the 'Experts' Roundtable," 2.

According to Gary J. Shaw, "Every ad hoc tribunal created since Nuremburg has considered whether or not to hold trials in the absence of the accused."[107] While the statutes of all international courts and tribunals integrate civil and common law procedures and values, Frederic Mégret explains, "according to the accepted and generally adequate wisdom, international criminal justice begins as very tilted toward the adversarial tradition and moves increasingly toward the adoption of some features of the inquisitorial."[108] Because common law does predominate in the international context, it is particularly important to justify procedural changes that would favor the civil law tradition. The skeptical view of trial *in absentia* taken by common law countries intensifies the discussion surrounding fair trial rights in respect to trial *in absentia* in international law, and will affect how the legal community perceives any proposal for trial *in absentia* after the death of the defendant.

2.3 TYPES OF TRIAL IN ABSENTIA

When examining the practice of trial *in absentia*, one must recognize that a diverse array of situations may necessitate that a trial proceeds in the absence of the defendant. Zakerhossein and Brouwer note, "The legal literature tends to lump different types of *in absentia* trials together and study them from a normative perspective. This leads to some incoherence and misunderstanding as to the phenomenon."[109] A few of the different scenarios that may result in a trial occurring in the absence of the defendant include when the defendant remains at large, never appearing in court; when the defendant, in custody, refuses to appear in court; and when the defendant disrupts court proceedings, and is removed from the courtroom. Many other circumstances can also lead to a trial in the absence of the defendant.

According to Maggie Gardener, those in civil law jurisdictions will often only

[107] Gary J. Shaw, "Convicting Inhumanity in Absentia: Holding Trials in Absentia at the International Criminal Court," *George Washington International Law Review* 44 (January 1, 2012): 107, 118.
[108] Mégret, 39.
[109] Zakerhossein and Brouwer, 184.

categorize a trial as being *in absentia* if the defendant never appears before the court.[110] In fact, the Special Tribunal for Lebanon, which allows trial *in absentia*, specifically states that if the accused appears in court—seemingly only once, and even through video conference—the given trial will not be declared *in absentia*.[111] The ICTY, even while it does not accept any other instance of trial *in absentia*, including upon explicit waiver by the defendant, has carried out trial *in absentia* after the defendant "was unable or unwilling to attend after first making an initial appearance."[112] How can this be the case? Put simply in a summary of the IBA expert roundtable on trial *in absentia*, if the accused attended the beginning of the trial, "regardless of whether the [accused] refuses to listen, or chooses to turn his back on the court, the trial can still be called fair because the defendant has participated in it."[113]

Jenks confirms that "the concept of trial *in absentia* proceedings seems to mean different things to different people."[114] However, he reminds us that *in absentia* means "in the absence," arguing that technically any part of a trial conducted without the defendant has been conducted *in absentia*.[115] Like Jenks, I prefer to distinguish between total and partial *in absentia* proceedings, rather than determine whether a trial was conducted *in absentia* or not based on the notion of *semel praesens semper praesens* (to be present once means to be present forever), where an initial appearance by the defendant allows for a trial to avoid the designation of having occurred *in absentia*.

The closest scenario to trial *in absentia* after the death of the defendant is a trial that continues in the absence of the defendant due to illness. As is the case if the defendant dies, illness does not constitute voluntary waiver of attendance, such as disruption or flight does.

[110] Maggie Gardner, "Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence," *George Washington International Law Review*, no. 1 (2011): 91, 99.
[111] Special Tribunal for Lebanon, *Rules of Procedure and Evidence (as amended on 3 April 2017)*, as discussed in Gardner, 99.
[112] Shaw, 120.
[113] "Report on the 'Experts' Roundtable," 7.
[114] Jenks, 68.
[115] *Ibid*.

When a defendant becomes ill, the condition is often terminal; there can be no real expectation that the defendant will return to testify further, or live to serve a sentence if found guilty. In essence, therefore, trial *in absentia* due to illness must confront some of the same questions as trial *in absentia* after death: Does the trial serve a purpose if little or no punishment, in the traditional sense, will accompany the verdict? Can the defendant unequivocally, and without coercion, waive his or her right to be present? Does counsel effectively substitute the defendant, even without his or her guidance? Is the trial fair if there is no realistic chance of appeal? The international community simply has not confronted these questions in any direct manner.

2.4 THE RIGHT TO BE PRESENT

In this section, I will discuss the regional and international standards surrounding whether and when trial *in absentia* can be considered fair, particularly in relation to the right to be present. Interestingly, both the first international human rights tribunal, the International Military Tribunal (IMT), and the most recently formed international human rights tribunal, the Special Tribunal for Lebanon (STL), explicitly allow total *in absentia* proceedings. I will devote a separate chapter to discussing trial *in absentia* under these two jurisdictions.

2.4(a) The Human Rights Committee

Among international instruments enumerating fair trial rights, only the International Covenant on Civil and Political Rights (ICCPR) sets out the right of the defendant to be present at his or her trial as such.[116] Article 14(3)(d) states 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."[117] Paola Gaeta notes, however, that during the drafting, no states that practice

[116] M. Cherif Bassiouni in Karoly Bard, *Fairness in Criminal Proceedings: Article Six of the European Human Rights Convention in a Comparative Perspective* (Budapest : Magyar Közlöny Kiadó, 2008), 195.
[117] *International Covenant on Civil and Political Rights*, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

trial *in absentia* objected to the provision—signaling an understanding that the right of the accused to be present does not conflict with the convention of trial *in absentia*.[118] Moreover, the Human Rights Committee, monitoring body for the International Covenant for Civil and Political Rights, recognizes that:

> [Article 14] cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.[119]

Gaeta argues that the main reason behind opposition to trial *in absentia* among human rights groups stems from mistaking trial *in absentia* for trial by default.[120] While trial by default occurs automatically, trial *in absentia* requires adherence to a number of strict safeguards designed to protect the defendant. Although Human Rights Committee recognizes the right to be present, the Committee will find full trial *in absentia* fair provided that safeguards are met.

In its case-law, the Committee emphasizes the importance of notifying the accused of criminal proceedings. Indeed, the HRC requires that the accused be notified directly, and in a timely manner, if a state is to allow trial *in absentia*. The case of *Mbenge v. Zaire*, for example, addresses two trials held *in absentia* by a Zaire court after the author of the case had sought refuge in Belgium, both of which resulted in a sentence of capital punishment. The author learned of the proceedings only after the fact, through the press. In the first case, because the Zaire court neglected to transmit summonses to the defendant, whose address in Belgium was known, and in the second case, because the Court issued the summonses just three days before the proceedings were to occur, the Committee found that the State did not

[118] Paola Gaeta, "Trial In Absentia Before the Special Tribunal for Lebanon," in *Special Tribunal for Lebanon: Law and Practice*, ed. Alamuddin Amal, Nidal Nabil Jurdi, and David Tolbert (Oxford: Oxford University Press, 2014), 239.
[119] *Mbenge v. Zaire*, Comm no 16/1977 (HRC, 25 March 1983), para. 14.1.
[120] Gaeta, 230.

fulfill its obligation to respect the defendant's rights under the Convention. While there must be reasonable limits on the efforts expected from the State, situations such as that of *Mbenge* clearly constitute a violation. Similarly, in the 1999 case *Maleki v. Italy*, the State's assumption that the defense counsel, in Italy, would notify the accused, in Iran, of proceedings, without any subsequent effort by the State to confirm that this occurred, also constituted a violation of the right to be present.[121]

Another important safeguard highlighted by the HRC's case-law requires that if the accused did not attend any portion of his or her trial without making an explicit waiver, he or she must be able to request a retrial ex-novo in his or her presence. In *Maleki v. Italy*, mentioned above, the State had an opportunity to remedy the situation by allowing the author of the case to apply for a retrial in his presence.[122] However, the State did not respond to the Committee's inquiries regarding a letter where the Iranian author's Italian lawyer informed him that he was not entitled to a retrial. Even though retrial was formally allowed, the existence of such provisions, when taking into account the legal advice that was not refuted by the State, "cannot be considered to have provided the author with a potential remedy."[123]

2.4(b) The European Court of Human Rights

The European Convention on Human Rights (ECHR) does not overtly mention the right to be present. Case-law of the ECtHR has established, however, that Article 6(3) on the right to fair trial includes the implicit right of the defendant to be present during proceedings. According to the Court in *Colozza v. Italy*:

> Sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in

[121] *Maleki v. Italy*, Comm no 699/1996 (HRC, 15 July 1999), para. 9.4.
[122] *Maleki v. Italy*, para. 9.5.
[123] *Ibid*.

> court', and it is difficult to see how he could exercise these rights without being present.[124]

Indeed, the defendant's presence is a precondition for exercise of other fair trial rights.[125] The presence of the defendant furthermore adds an important element to the trial, allowing for character assessment through observation of the interactions between the defendant and other trial participants.[126] Still, the omission of the right of the defendant to be present at his or her trial from the majority of international instruments, as well as national constitutions, viewed in conjunction with exceptions in law that allow trial *in absentia*, implies that the right to be present is not an absolute right.[127]

The ECtHR requires the presence of three safeguards in national law if trial *in absentia* is to be allowed.[128] These safeguards are accepted widely, including, for example, within the *Framework Decision on the European Arrest Warrant*. First, the accused must be notified of the charges and trial date;[129] second, the accused must be represented by counsel;[130] and third, the accused must be able to request a re-trial in his or her presence.[131] However, the ECHR does not present obligations but rights conferred on the individual, who can choose whether or not to exercise them. According to the ECtHR, trial *in absentia* may therefore occur if the defendant has waived the right to be present at the trial.[132]

To grasp the rationale behind the possibility of a waiver, let us consider the following: In the case of personal rights, the imposition of guarantees against the will of the individual is counter to their purpose—If fair trial rights are personal rights, is allowing their waiver a

[124] App. no. 9024/80 (ECtHR, 12 February 1985), para. 27.
[125] Hungarian Constitutional Court in Bard, 195.
[126] Bard, 195.
[127] Bassiouni in Bard, 196.
[128] "Report on the 'Experts' Roundtable," 5.
[129] *Colozza v. Italy*. *Supra*, n128.
[130] *Lala v. The Netherlands*, App. no. 14861/89 (ECtHR, 22 September 1994), and *Pelladoah v. the Netherlands*, App. no. 16737/90 (ECtHR, 22 September 1994).
[131] *Sejdovic v. Italy*, App. no. 56581/00 (ECtHR, 1 March 2006).
[132] Martin Bose, "Harmonizing Procedural Rights Indirectly: The Framework on Trials in Absentia," *North Carolina Journal of International Law and Commercial Regulation*, no. 2 (2011): 489, 500.

requirement? In most scenarios, the waiver of the right to be present at one's trial is, and must be, a possibility. However, in a comparative analysis of Article 6 of the ECHR, Karoly Bard argues that some aspects of fair trial rights are not exclusively personal.[133] He considers whether the right to be present is similar to the right to an impartial tribunal, for example, which forms a basis of procedural law, and ensures both the veracity of information discovered in the fact-finding process, as well as a reliable judgment on guilt. While the right to be present is a precondition to other fair trial rights, its connection to the "structure and administration of justice" is indirect, the primary trial element forfeited being immediacy or directness.[134] Therefore, the possibility of waiving the right to be present may be allowed.

Waiver by the accused of the right to be present at his or her trial can be established in two ways. The accused can make an explicit waiver, notifying the court through his or her counsel that he or she declines to attend. Both the Human Rights Committee and the International Criminal Tribunal for Rwanda, in addition to the ECtHR, accept this standard.[135] Alternatively, the ECtHR considers that in cases where the defendant either does not appear, ceases to appear, or disrupts the proceedings, he or she may have forfeited the right to be present; however, the intent not to appear must be established unequivocally in order for a national court to make this presumption.[136]

Notification is crucial to understanding non-attendance as "forfeiture." If the defendant has been notified of his or her trial, the Court may assume that the defendant understands the consequences of not attending. One such consequence may be that the trial continues in his or her absence. In *Makarenko v. Russia*, for example, ECtHR found that during the course of the trial in Russia evaluated by the Court for fairness, the applicant had forfeited his right to be present after refusing to participate and rescinding permission for his

[133] Bard, 209.
[134] Bard, 212.
[135] Shaw, 131.
[136] *F.C.B. v. Italy*, App. no. 12151/86 (ECtHR, 28 August 1991).

counsel to represent him.[137] The Court ruled that there was no violation of Article 6(1) and 6(3). In *Poitrimol v. France*, the defendant did not appear at an appellate proceeding, and his appeal was ultimately denied. This also was found to be consistent with the European Convention.

2.4(c) The International Criminal Court

The International Criminal Court requires the defendant's presence under Article 63(1) of the Rome Statute, which explicitly states: "The accused shall be present during the trial." Article 63(2) goes on to describe the procedure for removing the defendant from the courtroom in cases of disruption. This procedure, according to the Statute, should be invoked only "in exceptional circumstances," and ensures that the defendant may observe the trial by alternative means.[138] Article 63(1) seems to clearly rule out all other reasons for trial *in absentia*. However, as Gaeta recounts, the ICC Trial Chamber in *Prosecutor v. Ruto and Sang* found, "in exceptional circumstances […] the Chamber may exercise its discretion under article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial."[139] In the same case, the Chamber admitted that an ongoing trial would likely not be curtailed in the event that a defendant absconds following an initial appearance.[140] The first draft of the Rome Statute in fact allowed for several exceptional situations where a trial could proceed without the defendant: in the case of disruptive behavior, in the interest of the defendant's security or health, or when the defendant had absconded.[141]

[137] App. no. 5962/03 (ECtHR, 22 December 2009).
[138] Rome Statute, Article 63(2): "If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required."
[139] *Prosecutor v. Ruto and Sang*, "Public Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial," Case no. ICC-01/09-01/11, in Gaeta, 232.
[140] *Ibid*.
[141] Bassiouni in Bard, 196.

2.4(d) The International Criminal Tribunal for the Former Yugoslavia

Statues of *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda do not have similarly strong provisions surrounding the defendant's presence at his or her trial as the ICC Statute. Article 21(4)(d) of the Statute of the ICTY mentions the right of the accused "to be tried in his presence."[142] Moreover, the Secretary General's Report upon establishing the tribunal states, "A trial should not commence until the accused is physically present before the International Tribunal,"[143] reflecting the principle of *semel praesens semper praesens*. However, Rule 80(B) of the Rules of Procedure and Evidence details the possibility of a defendant being removed from the courtroom due to disruption, stating:

> (B) The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.[144]

Former President of the Yugoslav Tribunal Antonio Cassese, furthermore, argued counter to the Secretary General's report, making a case not merely for full trial *in absentia*, but in fact for trial by default, "in exceptional circumstances."[145] In his opinion, it is not correct that trial *in absentia* is inconsistent with ICCPR Article 14.[146] The ICTY in fact held parts of the Milošević trial in his absence due to accused's illness.

The ICTY also provides a special procedure for collecting evidence in the absence of the accused under Rule 61 of the Rules of Procedure and Evidence, "[if] the Registrar and the

[142] *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, Article 21(4)(d): "[T]he accused shall be entitled to the following minimum guarantees, in full equality: […] (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it[.]"
[143] United Nations, Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (3 May 1993).
[144] International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev. 48 (11 February 1994).
[145] Antonio Cassese, Personal Notes on Debates at the Second Session of the ICTY Plenary (on file with author) in Gaeta, 233.
[146] *Ibid*.

Prosecutor have taken all reasonable steps to secure the [whereabouts and] arrest of the accused." Upon hearing the evidence, the Trial Chamber may determine that "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment," and issue an international arrest warrant for the accused. In general, the Statute and Rules of Procedure and Evidence of the ICTR mirror the language of the ICTY documents. Although no rule similar to the ICTY's Rule 61 originally existed in the context of the ICTR, in 2009 the introduction of Rule 71*bis* provided for the court to hear witness testimony when the defendant is stubbornly at large, in order to preserve evidence.[147]

2.4(e) The International Criminal Tribunal for Rwanda

The provisions surrounding trial *in absentia* in the Statute and Rules of Procedure of the International Criminal Tribunal for Rwanda mirror those of the ICTY. However, the ICTR breaks from the jurisprudence of the Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Barayagwiza*. In this case, the Trial Chamber of the International Criminal Tribunal for Rwanda denied a request by the defense counsel to withdraw their mandate due to fair trial concerns following the accused's decision to boycott the trial. The Chamber states, "where the accused has been duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence."[148]

Due to Mr. Barayagwiza's belief that the ICTR is not an impartial tribunal, but is dependent on the "dictatorial anti-Hutu regime in Kigali,"[149] the accused refused to attend his trial. He requested that his lawyers continue to represent him, but not provide an active defense. Following the accused's instruction, the defense counsel sought to be absent from the proceedings, but the Tribunal denied their request. Subsequently, the defense counsel made a motion to withdraw their mandate to represent the defendant.

[147] Gardner, 108.
[148] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case no ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw (ICTR, 2 November 2000), para. 6.
[149] *Prosecutor v. Barayagwiza*, para. 1.

In response, the Trial Chamber explained that trial *in absentia* is allowed when the defendant has been notified of the trial's occurrence, basing their argument on *Maleki v. Italy*.[150] The Chamber referred to Rule 45(I) and 45*ter*(A) of the Rules of Procedure to establish that the defense counsel is only allowed to withdraw in "most exceptional circumstances."[151] The Chamber ultimately denied that Mr. Barayagwiza's decision amounted to an "exceptional circumstance" because, according to the Chamber, the Tribunal is not in reality subject to political influences. Article 6 of the Code of Professional Conduct for Defence Counsel of the ICTR, according to the judgment, details a duty of the defense to represent the accused "diligently in order to protect the client's best interest."[152] The Chamber interpreted this provision to mean that counsel must take active part in defending the accused during trial.[153] Moreover, because the counsel was not selected by the defendant, but assigned by the Tribunal, the Chamber argued that counsel had dual obligations to the client and the Tribunal, in part representing "the interest of the Tribunal to ensure that the Accused receives a fair trial."[154] The Chamber rejected the lawyers' argument regarding the ethics codes of their home jurisdictions—that Canada (Quebec Province) and the United States (Washington State), both common law systems, would not allow that they continue to represent the defendant in spite of his wishes—stating that the Tribunal's provisions prevail in the cases before it.[155] Finally, the Tribunal interpreted the defendant's request for his counsel to provide no defense as, in fact, equivalent to the absence of instructions to the counsel, which results in the understanding that the counsel need not follow his order.[156] Ultimately, the many arguments presented illustrate the Chamber's insistence on trial *in absentia* as a method of bypassing the accused's contempt of court.

[150] *Prosecutor v. Barayagwiza*, para. 7.
[151] *Prosecutor v. Barayagwiza*, para. 10.
[152] No version of the code found by the author includes this exact wording, which is taken from the judgment.
[153] *Prosecutor v. Barayagwiza*, para. 21.
[154] *Ibid.*
[155] *Prosecutor v. Barayagwiza*, para. 22.
[156] *Prosecutor v. Barayagwiza*, para. 24.

2.4(f) Other International Courts and Tribunals

The Special Court for Sierra Leone (SCSL), Extraordinary Chambers The Special Panels for East Timor (SPSC), and Extraordinary Chambers in the Courts of Cambodia (ECCC) all allow trial *in absentia* after the initial appearance of the defendant before the court, however, at present, the SPSC has never conducted proceedings in the absence of the accused, and although the ECCC has charged two people in their absence, the court has not initiated trial proceedings.[157]

[157] Meas Muth in Case 003, and Im Chaim in Case 004.

CHAPTER 3: THE INTERNATIONAL MILITARY TRIBUNAL AND SPECIAL TRIBUNAL FOR LEBANON

Both Cécile Aptel and Chris Jenks see an evolution toward allowing trial *in absentia* in international law.[158] While the ICTY and ICTR only implicitly allowed trial *in absentia* in certain situations, the UNTAET, SCSL, and ECCC all included specifications on partial trial *in absentia*. This chapter will examine the only two examples of full trial *in absentia* in international law.

3.1 THE INTERNATIONAL MILITARY TRIBUNAL

The International Military Tribunal, which opened on November 19, 1945 in Nuremberg, Germany, was the first international war crimes tribunal. It was tasked with the prosecution of twenty-four leaders and seven prominent organizations of the Third Reich for atrocities committed during World War II. After meetings in Tehran, Yalta, and Potsdam, the European Advisory Commission, composed of delegates from the United Kingdom, the Soviet Union, and the United States, drafted the London Charter,[159] defining categories of crimes to be tried as well as court procedure. The Charter was ratified by the aforementioned countries, in addition to France and 19 other allied states, on August 8, 1945, and the tribunal was established. Article 12 of the Charter of the International Military Tribunal allows trial *in absentia*. It states:

> 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.

This provision was applied in order to try Nazi official Martin Bormann, Chief of the Party Chancellery and Secretary to the Führer, after his disappearance.

[158] Cécile Aptel in Schabas, 355-356. Jenks, 71.
[159] Also known as the Charter of the International Military Tribunal or Nuremberg Charter.

In the case of Bormann, the Tribunal dealt with the requirement of notification, specified in Rule 2(b) of the Rules of Procedure,[160] by ordering a notice stating that he would be charged and tried *in absentia* if he did not appear before the Tribunal to be read over the radio every week for four weeks, and to be circulated in four issues of the newspaper in his home town.[161] Additionally, posters containing the notice were disseminated throughout Germany.[162]

Deputy Chief Prosecutor for the United Kingdom David Maxwell-Fyfe found the case to fall under Article 12 not only because Bormann had evaded justice, but because, in his words, "the Prosecution cannot say that matter is beyond probability that Bormann is dead. There is the clear possibility that he is alive."[163] The American, French, and Soviet Prosecutors agreed with Maxwell-Fyfe, and following the decision to try Bormann in his absence, a motion by Bormann's counsel to postpone proceedings was rejected. However, Assistant Trial Counsel for the United States Lieutenant Thomas F. Lambert Jr. demonstrated the awareness among IMT participants that a trial *in absentia* posed special legal challenges, stating, "we should make an extra effort to make a solid record in the case against Bormann, out of fairness to the Defence Counsel and for the convenience of the Tribunal."[164]

During the trial, the defense counsel Dr. Freidrich Bergold attempted to establish that Bormann was, indeed, dead. While it was his view that "sentence cannot be passed on a dead man," the President of the Tribunal argued that whether the defendant is alive "does not seem to be a very relevant fact. It is very remotely relevant whether he is dead or whether he is

[160] "Any individual defendant not in custody shall be informed of the indictment against him and of his right to receive the documents specified in sub-paragraph (a) above, by notice in such form and manner as the Tribunal may prescribe." International Military Tribunal, *Rules of Procedure* (29 October 1945).
[161] "Order of the Tribunal Regarding Notice to Defendant Bormann" (IMT, 18 October 1947).
[162] Dissemination of Notices in the American Zone, 23 November 1945, in William A. Schabas, "In Absentia Proceedings Before International Criminal Courts," in *International Criminal Procedure: Towards a Coherent Body of Law*, by Göran Sluiter and Sergey Vasiliev (London : Cameron May International Law & Policy, 2009), 337.
[163] Preliminary Hearing, 17 November 1945, in Schabas, 337-338.
[164] Nuremberg Trial Proceedings in Schabas, 338-339.

alive. The question is whether his is guilty or innocent."[165] This statement directly supports trial *in absentia* after the death of the defendant.

After his initial approach failed, Dr. Bergold called for suspension of the trial, first arguing that difficulty of preparing a defense in the absence of the defendant, and second that the Charter's omission of any framework allowing re-trial in the defendant's presence, made the trial unfair.[166] In the final judgment, the tribunal addressed the defendant's absence with the following statement: "[Bormann's] counsel, who has laboured under difficulties, was unable to refute [the documentary] evidence. In the face of these documents which bear Bormann's signature it is difficult to see how he could do so even were the defendant present."[167] Again, the argument of this thesis is unequivocally supported by IMT proceedings.

While international law has progressed substantially since 1945, the categories of crimes and rules of procedure established at Nuremberg are the basis for all other international tribunals. The clear support for trial *in absentia* and the explicit dismissal of key counter-arguments during proceedings is significant. Additionally, the court's willingness to disregard claims of Bormann's death points to implicit support for trial *in absentia* after the death of the defendant within IMT case-law.

3.2 THE SPECIAL TRIBUNAL FOR LEBANON

The Special Tribunal for Lebanon (STL) was formed by Security Council Resolution 1664 (2006) to prosecute those involved in the February 14, 2005 assassination of Lebanese Prime Minister Rafic Hariri and related attacks from October 1, 2004 to December 12, 2005. The explosion in downtown Beirut that killed Hariri also resulted in the death of twenty-one others, and injured over two hundred. In the following months, seventeen more attacks were

[165] Nuremberg Trial Proceedings in Schabas, 339.
[166] Nuremberg Trial Proceedings, Volume 14, One Hundred and Fortieth Day, 28 May 1946, and Nuremberg Trial Proceedings, Volume 19, One Hundred and Eighty-Third Day, 22 July 1946, consecutively.
[167] Judgment: Bormann (IMT, 30 September and 1 October 1946).

carried out in Beirut. While the Tribunal does not deal with crimes traditionally considered among international core crimes—the acts in question are terrorist acts—the internationalized character of the Tribunal places it within the scope of this study.[168] The Tribunal is based on an agreement between Lebanon and the United Nations, and functions in The Hague as an independent body. The Statute of the Special Tribunal for Lebanon allows trial *in absentia* under Article 22:

> 1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
>
> (a) Has expressly and in writing waived his or her right to be present;
>
> (b) Has not been handed over to the Tribunal by the State authorities concerned;
>
> (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.
>
> 2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
>
> (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
>
> (b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
>
> (c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

[168] Indeed, some controversy has surrounded the Tribunal's designation of terrorism as a matter of customary international law. Gardner (110) cites articles by Stefan Kirsch and Anna Oehmichen, Ben Saul, and Michael P. Scharf.

> 3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

The STL has conducted *in absentia* proceedings against five individuals: Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra. Ayyash, Bedreddine, Oneissi, and Hassan comprise the original core of the *Ayyash et al.* case. The four men were each charged with nine criminal counts in respect to the assassination of Prime Minister Hariri, including conspiracy to commit a terrorist act, committing a terrorist act by using explosive materials, the premeditated intentional homicide of Rafik Hariri and 21 others, and the premeditated intentional attempted homicide of 231 people by using explosives.[169] In other words, the four accused are suspected to be the central figures behind the attack that the Tribunal was formed to address.

The Prosecutor submitted their indictment to the Trial Chamber on January 17, 2011. The Pre-Trial Judge sent the Government of Lebanon the indictment and arrest warrants in June of the same year. The Judge also issued international arrest warrants for the suspects. Lebanese authorities were unable to serve the indictment to or effect the arrest of any of the accused, however. The President of the Tribunal made a public statement in August 2011 detailing the indictment, which was published on the Tribunal's website. He also requested that the Government of Lebanon take further steps to apprehend the accused, and a poster containing information on the indictment circulated in five newspapers. Finally, the Tribunal held a public hearing on the Rule 106 requirements to begin trial *in absentia*. The case was found to fall under Article 22(1)(c), with safeguards having been met.[170]

A number of modifications to the case occurred after it was submitted to the Trial Chamber. In February 2014, the case of Hassan Habib Merhi was joined with the *Ayyash et*

[169] *The Prosecutor v. Ayyash et al.*, "Decision to Hold Trial in Absentia" Case no. STL-11-01/I/TC (STL, 1 February 2012).
[170] *Ibid*.

al. case. The trial began on January 16, 2014, but was adjourned to provide the Merhi counsel time for preparation. The trial resumed on June 16, 2014. In July 2016, the Appeals Chamber was called upon to rule on evidence that Mustafa Amine Badreddine had died. After finding the evidence had "proven [the death] to the requisite standard," the Appeals Chamber ruled that proceedings should be terminated against Mr. Badreddine, "without prejudice to resume the proceedings should evidence that he is alive be adduced in the future."[171] The trial remains ongoing, without any of the defendants.

The Tribunal has not addressed theoretical concerns surrounding trial *in absentia* during proceedings, but, in *Ayyash et al.*, has rather focused on illustrating that its decision meets internationally recognized standards surrounding attempts to notify and arrest the suspects. However, both the founding and current presidents of the Tribunal, Judge Antonio Cassese and Judge Ivana Hrdličková, have expressed their support for trial *in absentia*. Casesse, you may recall from Section 2.4 of this thesis, advocated for trial *in absentia* as President of the ICTY. More recently, Judge Hrdličková explained,

> At its core international criminal justice aims to do much more than to punish individual perpetrators of crimes if they are found guilty. In absentia trials are a way of allowing the international community to pursue justice for grave crimes without permitting the absence of the accused to hamper its aims, and to fight against impunity.[172]

In her hypothesis for why the Tribunal adopted Rule 22, Maggie Gardener cites the Tribunal's use of Lebanese law and the possibility that suspects may never be apprehended for trial.[173] Gardener notes the shift toward civil law discussed in Section 2.3 of this thesis. More importantly, however, she emphasizes that with all key suspects at large, the Tribunal simply could not accomplish its work without resorting to trial *in absentia*. Along similar

[171] *The Prosecutor v. Ayyash et al.*, "Decision on Badreddine Defence Interlocutory Appeal Of The 'Interim Decision On The Death Of Mr Mustafa Amine Badreddine And Possible Termination Of Proceedings,'" Case no. STL-11-01/T/AC/AR126.11 (STL, 11 July 2016).
[172] Expert Report, 1.
[173] Gardner, 107.

lines, I suggest that the work of any court addressing grave human rights abuses would be hampered by a strict ban on *in absentia* proceedings, including those after the death of the defendant.

CONCLUSION

I mentioned at the outset of the previous chapter that several scholars identify a trend toward allowing trial *in absentia* in international law. Jenks suggests that provisions on trial *in absentia* have increasingly been included in statutes because "the international community wanted clearly stated authority to proceed if an accused initially appears before the court but later disrupts the proceedings or refuses to attend, as Slobodan Milošević did at the ICTY."[174] It is interesting that Jenks references Milošević here. Milošević was first ill, then died during his trial. If there is an intuition, as Melissaris suggests, that the need to reach a verdict and condemn the perpetrator of grave human rights crimes is not eliminated with the death of the defendant, Jenks may be subconsciously voicing this intuition here. It perhaps is not a stretch to say that the international community wants an authority to proceed if the accused initially appears before the court and dies before the end of proceedings.

My final task is to evaluate whether trial *in absentia* after the death of the defendant would meet the safeguards required by international tribunals. The requirement of notification is not an issue for trial *in absentia* after the death of the defendant in the way that it might be for traditional trial *in absentia*: the defendant knows of the proceedings, as he or she has been attending them. However, in order to meet the requirement of notification as established by HRC and ECtHR case-law, I suggest that the defendant must be informed that the trial will continue after his or her death. To meet the requirement of counsel, of course, the defendant's original counsel must continue to represent the defendant after his or her death. Importantly, however, it is not the duty of counsel to protect the dignity, honor, or reputation of the deceased. Ensuring such protection may require an additional representative on behalf of the deceased, such as the subsidiary prosecutor (*Nebenklaeger*) in German law, where the victim participates in a trial to protect his or her honor from attacks by the

[174] Jenks, 71.

defendant. If the defendant knows the trial will continue after his or her death, and an additional representative is allowed to attend, it so far seems possible that trial *in absentia* after the death of the defendant may occur at the court's decision and meet human rights requirements. However, one more safeguard must be met: the possibility of retrial in the defendant's presence. It is self-evident that this is simply not possible.

The fact that trial *in absentia* after the death of the defendant meets the first two safeguards does not overshadow that the third safeguard cannot be met. However, if the accused is notified, and if he or she will be represented by counsel, the accused may waive the right to be present. Upon the unequivocal waiver of the accused, the possibility of retrial is no longer required. Therefore, trial *in absentia* after the death of the defendant falls within human rights norms if the defendant waives his or her right to be present. Given the arguments put forward in Chapter 1 as to the importance of reaching a verdict in an international criminal trial, I move to suggest that a waiver system be established.

Remaining questions include first whether any defendant would sign a waiver allowing the continuation of his or her trial after death, and if so, whether that waiver could be seen to be completely non-coerced; and second whether states would extradite an individual in their custody to a court that allows trial *in absentia* after the death of the defendant, even given a waiver system. Finally, there are times when a defendant may purposefully take steps to shorten their life in the hope of dying before a verdict. This was considered to be a motive when Slobodan Milošević ceased taking prescribed high blood pressure medication during his trial.[175] Can this be construed as a waiver of the right to be present in the same way that absconding may before the ECtHR? Answering these questions, if at all possible, would take many more pages, and must be retained for a future project.

I find it important to point out that I am not advocating starting new trials of dead

[175] Elberling, 30.

defendants. That would be financially unviable, and take away from the timely trial of the still-living accused. On the other hand, it is logistically much easier to continue a trial that has already started than form a truth commission or some other body after the death of the defendant, which has never been seen. It makes a great deal of sense to follow through to a conclusion something that has already had investments of a great deal of time and money. It wouldn't be wasteful to continue a trial of gross, state-sponsored human rights violations after the death of the defendant, it is wasteful not to continue.

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APPENDIX I

Excerpt from *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010

A. Guiding Principles

1. Support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms

2. Take account of the political context when designing and implementing transitional justice processes and mechanisms

3. Base assistance for transitional justice on the unique country context and strengthen national capacity to carry out community-wide transitional justice processes

4. Strive to ensure women's rights

5. Support a child-sensitive approach

6. Ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms

7. Coordinate transitional justice programmes with the broader rule of law initiatives

8. Encourage a comprehensive approach integrating an appropriate combination of transitional justice processes and mechanisms

9. Strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights

10. Engage in effective coordination and partnerships

B. Components of Transitional Justice

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations.