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Whether the Special Tribunal for Lebanon is properly considered to be more a civil law institution or a common law institution.

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
SPECIAL TRIBUNAL FOR LEBANON

ISSUE: Whether the Special Tribunal for Lebanon is properly considered to be more a civil law institution or a common law institution.

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I. Introduction and Summary of Conclusions

A. Issue:

This memorandum addresses whether the Special Tribunal for Lebanon (hereinafter STL) is properly considered to be more a civil law institution or a common law institution.

Regarding the relationship of the STL's Rules of Procedure and Evidence (hereinafter RPE) to the RPE of the ad hoc tribunals and the International Criminal Court, the memorandum analyzes some of the STL's rules by considering the evolution of the various RPE's of the international criminal tribunals, and whether particular civil or common law practices were the driving force behind particular approaches to the broader topics addressed in the various RPE's of the international criminal tribunals. *

B. Summary of Conclusions:

i. The legal basis for the establishment of the special tribunal is an international agreement that makes it a tribunal with international character. However, its subject matter jurisdiction and the applicable law are inspired by the civil law tradition followed by Lebanon. Thus, several procedural features are drawn from civil law system, including trials in absentia, the expectation of more proactive judges and the admissibility of written evidence.

The international character of the Special Tribunal for Lebanon was explicitly stipulated in the request submitted by the Government of Lebanon to the Secretary-General of the United Nations to establish a Tribunal.[1] Consequently, the UN and the Lebanese

* As the result of increase argumentation from certain parties concerning whether the STL is properly considered to be more a civil law institution or common law institution, the OTP is interested in research on the civil or common law origins of the STLs various Rules of Procedure and Evidence.

[1] Annex UNSC R1757 - Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon [Electronic copy provided in accompanying CD-ROM at Source 1].

Government agreed that the Tribunal would have a mixed composition with the participation of Lebanese and international judges, as well as an international Prosecutor. Moreover, the Tribunal's standards of justice are based on the highest international standards of criminal justice as applied in other international tribunals.

However, despite the international character, the particular systems of international criminal procedure have been shaped and been subject to change through an interaction of ideologies, cultures and policies.[2]

Along these lines, it should be stressed out that the STL is the only international tribunal exercising jurisdiction exclusively over crimes defined under national law. The Statute stipulates that the Special Tribunal has to apply provisions of the Lebanese Criminal Code, making the applicable law for the Special Tribunal remains national in character. Thus, despite the international character of the tribunal, the RPE demonstrate the STL's incorporation of several aspects of the civil law tradition followed by Lebanon. In fact, given these characteristics taken from the Lebanese legal system, the STL has been considered as hybrid in the sense of an international institution with strong domestic influences.[3]

ii. While the Special Tribunal for Lebanon is considered to be essentially inquisitorial, the Rules of Procedure and Evidence demonstrate that the incorporation of aspects of both the civil and common law system goes further when compared with any of the other international or hybrid tribunals.

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[2] Mark Klamberg, *What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime*, Nordic Journal of International Law, Vol. 79, No. 2 (2010) 279-302 [Electronic copy provided in accompanying CD-ROM at Source 24].

[3] Matthew Gillett and Matthias Schuster, *The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, Journal of International Criminal Justice 7 (2009) [Electronic copy provided in accompanying CD-ROM at Source 25].

Article 28 (2) of the Statute establishes that Judges must create their Rules of Procedure and Evidence in accordance with the Lebanese Code of Criminal Procedure (LCCP) and other "reference materials".[4]

The Lebanese legal system is in the civil law tradition, for the greater part created at a time when Lebanon was under French mandate in 1918-1943. Thus, the RPE incorporates many important elements from the Romano Germanic or "civil law" tradition followed by Lebanon.[5] However, in practice, it may be difficult to include elements taken only from civil law tradition in an international field mainly influenced by the common law system.

Hence, the RPE incorporates characteristics of each system and harmoniously combine them.[6] In this way, whereas the conduct of trials in absentia and the victim participation exemplifies the Tribunal's civil law influences, other provisions such as the conduct of hearings, show also a common law tradition usually applied in most of other international tribunals.

Given this unusual combination of both the influence of the civil law tradition followed by the Lebanon and the common law system prevailing in the field of international criminal law, the RPE of the STL goes further when compared with any of the other international or hybrid criminal jurisdictions.

iii. The merger between civil and common-law principles is one of the major innovations of the Special Tribunal, which drastically enhance the efficiency of the Tribunal compared with other international criminal tribunals.

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[4] Statute of the Special Tribunal for Lebanon, art. 2(a), U.N. Doc. S/RES/1757 (May 30, 2007), Article 21(3) [Electronic copy provided in accompanying CD-ROM at Source 2].
[5] Cècile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, Journal of International Criminal Justice 5 (2007) at 1117 [Electronic copy provided in accompanying CD-ROM at Source 14].
[6] *Id.*

One of the most important novelties of the STL's creation is the merger between both the civil and common law systems. Assuming the fact that the court has been influenced by the civil law tradition followed by Lebanon and the common law system predominant in international law, the STL provides important innovations regarding the tribunal's procedure.

Neither common law nor civil law system is considered to be more efficient than the other: both contain advantages and disadvantage regarding its proceedings. Thus, having both legal systems and the chance to choose the proceeding that fits better with the purposes of the tribunal, is of great importance in order to provide efficiency.

It seems clear that this combination results from an effort to enhance the tribunal's procedure in practice, since taking characteristics only from the civil law tradition found in Lebanon will not result useful in its application. In fact, while analyzing the different RPE it is apparent that although a particular rule has its origins in one of the legal system, the practice has modified it to provide more advantages in the proceedings.

Thus, studying the STL's RPE one could realize that despite a specific legal system was the driving force behind a particular rule, it may had been adjusted or combined with other legal system, providing a more practical solution.

As Choucri Sader declared, the merging of the two traditions drastically improves efficiency of international criminal procedure.[7] For instance, the incursion of a pre-trial judge or the victim participation in proceedings, both originated in the inquisitorial systems but combined with common law approaches at the STL, are examples of innovations taken by the tribunal that clearly shows efficiency.

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[7] Choucri Sader, *A Lebanese Perspective on the Special Tribunal for Lebanon: Hopes and Disillusions*, Journal of International Criminal Justice 5 (2007) [Electronic copy provided in accompanying CD-ROM at Source 15].

iv. An analysis of the STL's rules by considering the evolution of the various RPE's of the international criminal tribunals, and whether particular civil or common law practices were the driving force behind particular approaches is of great importance in order to take lessons from both legal systems to make the STL and other international tribunals functioning better.

The benefits that may be gained from an analysis of the origins of the STL's RPE, and thus whether particular civil or common law practices were the driving force behind particular approaches of the STL, are significant.

It should be noted that although common law and civil law systems contain similar characteristics; the differences in some areas are substantial and the parties contemplating proceedings with a mix of both legal systems are advised to check those differences before taking action. Hence, an awareness of these differences is necessary for any lawyer dealing in international law.

Indeed, the merger of the two traditions in the STL may have an impact on procedural issues. For example, it could prove awkward for defense counsel, with all that implies for the accused, unless the defense counsel is accustomed to practicing in such a merger.[8]

Thus, this comparative analysis could be of great importance in order to know which legal system and which characteristics from those systems may be applicable when dealing with the STL's RPE. Based on this study, one could apply lessons from both legal systems to make the STL and other international tribunals to function better.[9]

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[8] Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction.* Anderbilt journal of transnational law [Vol. 41:1083] [Electronic copy provided in accompanying CD-ROM at Source 17].

[9] See Linda Carter, *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, [Edward Elgar Pub] (January 29, 2014), at 10 [Electronic copy provided in accompanying CD-ROM at Source 12].

II. Factual Background

A. Creation of the tribunal

Following the attacks against former Prime Minister Rafiq Hariri and other Lebanese public figures, on 13 December 2005 the Government of Lebanon requested the UN to establish a "tribunal of an international character". As a result of that request, on 29 March 2006 the Security Council mandated the Secretary-General to conduct negotiations with the Government of Lebanon to establish such a tribunal.

On 30 May 2007, the Security Council adopted Resolution 1757 (2007) that established the Special Tribunal for Lebanon (STL), under Chapter VII of the United Nations Charter. This resolution enforces the bilateral treaty between the United Nations and Lebanon establishing a mixed tribunal.[10] Besides, as a treaty-based organ, the special tribunal is neither a subsidiary organ of the United Nations, nor is it a part of the Lebanese court system.[11]

As stated above, the international character of the Special Tribunal for Lebanon was explicitly stipulated in the request submitted by the Government of Lebanon to the Secretary-General of the United Nations to establish a Tribunal.[12]

Consequently, like the Special Chamber (of Kosovo), the Panels (East Timor), and the ECC; the STL has a combination of national and internationally appointed judges and an independent, internationally appointed prosecutor. Moreover, the Tribunal's standards of

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[10] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, *Supra note 1*

[11] See Nidal Nabil Jurdi, and David Tolbert, *The Special Tribunal for Lebanon: Law and Practice* [Amal Alamuddin] (27 March 2014), at Chapter 1 [Electronic copy provided in accompanying CD-ROM at Source 13].

[12] *Id.* at Chapter 2

justice, including principles of due process of law, will be based on the highest international standards of criminal justice as applied in other international tribunals.

However, the STL is the first international criminal jurisdiction to exercise jurisdiction solely over domestic crimes.[13] Thus, despite being an international tribunal, the applicable law for the Special Tribunal is national in character, as the Statute stipulates that the Special Tribunal shall apply provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism and crimes and offences against life and personal integrity.[14]

B. Rules of Procedure and Evidence

The Statute of the STL incorporates some procedural elements that follow the Romano-Germanic or civil law system on which the Lebanese legal system is based; but it also incorporates some elements of the common law system.[15]

Nevertheless, Article 28 (2) of the Statute mandates the Judges to adopt its own Rules of Procedure and Evidence (RPE) to guide the legal operations of the court.[16]

On 20 March 2009, the Judges of the STL adopted a comprehensive set of 196 rules containing detailed outlines of the various legal procedures that will arise in connection with

[13] Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, Journal of International Criminal Justice 5 (2007) [Electronic copy provided in accompanying CD-ROM at Source 26].
[14] Helmut Satzger, *The Special Tribunal for Lebanon*, VHB-Kurs Internationales Strafrecht [Electronic copy provided in accompanying CD-ROM at Source 19].
[15] Marieke Wierda, Lynn Maalouf, Cecile Aptel and Caitlin Reiger, *Handbook on the Special Tribunal for Lebanon*, International Center for Transitional Justice (2008) [Electronic copy provided in accompanying CD-ROM at Source 23].
[16] STL Statute, *Supra note 3*, Art. 28(2)

the Tribunal's work. Given the influences from both legal systems, the RPE demonstrate a merger between adversarial and inquisitorial approaches.[17]

III. Legal Analysis

A. Rules of Procedure and Evidence. General Provisions

Similar to the ICTY, ICTR, as well as the SCSL and the ECCC, the STL applies rules that the judges themselves drew up: the "Rules of Procedure and Evidence." Thus, after the UNSC issued Resolution 1757, it fell to the Judges to adopt Rules of Procedure and Evidence (RPE) to guide the legal operations of the court.

Article 28 (2) of the Statute mandates the Judges to be guided by the Lebanese Code of Criminal Procedure (LCCP) and other "reference materials" reflecting the highest standards of international criminal procedure when adopting the RPE.

As state by the Tribunal's President on his Explanatory Memorandum[18], the notion of "other reference materials" clearly refers to the Rules of Procedure and Evidence of other international criminal tribunals and courts such as the ICC, the ICTY and the ICTR, and of mixed tribunals such as the Special Court for Sierra Leone (SCSL), the Timor Leste Special Panels and the Extraordinary Chambers in the Courts of Cambodia. Therefore, the Judges took into account the various RPE of the various international tribunals and courts when drafting the Rules.

Accordingly, when analyzing the RPE of the tribunal, two procedure models must be considered: the Lebanese civil law model and the system adopted by the international tribunals.

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[17] William A. Schabas, *The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?,* Leiden Journal of International Law, 21 (2008) [Electronic copy provided in accompanying CD-ROM at Source 31].
[18] Explanatory memorandum, *supra note 17*

The RPE demonstrate the STL's incorporation of aspects of both the inquisitorial and the adversarial underpinnings inherent in the Tribunal's conception. Thus, despite being influence by the civil law tradition followed by Lebanon, the RPE also includes many aspects from the common law system.

B. Role of the Pre-Trial Judge

Regarding the developments in the procedure of other international tribunals, which have seen the delegation of pre-trial judicial functions to designated Judges of trial chambers, Article 8(1)(a) of the STL Statute provides that a single international judge shall serve as a pre-trial judge.[19]

The role of the pre-trial judge is defined under Article 18 of the Statute of the STL: he or she reviews and confirms the indictment if satisfied that a prima facie case has been established by the international prosecutor. He or she may also, at the request of the Prosecutor, issue orders required for the conduct of the investigation and for the preparation of a fair and expeditious trial, including warrants for the arrest or transfer of persons.[20]

In other words, this provision enables the Pre-Trial Judge to take on the role of an independent and neutral actor operating in the exclusive interest of justice and it empower him or her to: (1) expedite the pre-trial proceedings; (2) organize the evidentiary material in order to facilitate the work of the Trial Chamber; and (3) assist the parties collecting evidence. Hence, the Pre-Trial Judge is empowered by the RPE to be highly pro-active.[21]

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[19] STL Statute, *Supra note 3*, Article 8(1)(a)
[20] Cècile Aptel, *supra note 4*
[21] Explanatory memorandum, *supra note 17*

He also possesses the power to exceptionally gather evidence at the request of a party, or proprio motu, if it is imperative for other reasons, such as when there is a need to preserve evidence.[22]

In addition, Rule 88 also establishes a mechanism for the Prosecutor to provide the Pre-Trial Judge during the investigative stage with documents and information with the purpose of enabling the Pre-Trial Judge to carry out his duties in the preparation of the case more efficiently. Therefore, the pre-trial judge of the STL will combine both the responsibility attributed, before the ICTY and the ICTR, to the reviewing judge seized of indictments and to the judges responsible for pre-trial procedures.

This differs from the common law system approach, which is substantially based on the notion that a trial unfolds as a contest between two opposing parties.

However, although the power of the Pre-Trial Judge at the STL is more extensive than the power conferred to the Pre-Trial Judges in other international tribunals, they don't have the same status as the classical juge d'instruction of many civil law systems.[23] For instance, in France- with civil law tradition- Article 81 du Code de Procédure Pénale[24] (French code of criminal procedure) establishes an "investigation judge", empowering the Judge to investigate and search the truth. Likewise, in Spain – with civil law tradition- Article 299 de la Ley de Enjuiciamiento Criminal[25] (Spanish code of criminal procedure) also provides an investigation judge to investigate criminal procedures. The STL does not enable the Pre-Trial

[22] STL Rules of Procedure and Evidence, STL-BD-209-01-Rev.6-Cor.1, as corrected on 3 April 2014; Rules 101-102 [Electronic copy provided in accompanying CD-ROM at Source 3].
[23] Vladimir Tochilovsky, *The nature and evolution of the rules of procedure and evidence, Principles of Evidence in International Criminal Justice*, Oxford University Press (2010) [Electronic copy provided in accompanying CD-ROM at Source 29].
[24] Code de Procédure Pénale, Version consolidée au 15 novembre 2014 [Electronic copy provided in accompanying CD-ROM at Source 8].
[25] Ley de Enjuiciamiento Criminal, Real Decreto de 14 septiembre 1882. LEG 1882\16

Judge with this investigation role. Nevertheless, the Pre-Trial Judge at the STL is more independent and neutral than the civil law juge d'instruction.

The incursion of the Pre-trial Judge constitutes an evolution of international criminal procedural law. In fact, neither the Statute of the ICTY or the ICTR and their initial Rules of Procedure and Evidence, contemplate pre-trial judges or chambers.[26] However, given the practical problems and their evolution, the judges amended their RPE and created provisions regarding pre-trial proceedings.[27]

Along these lines, it must be stressed out that the RPE's focus on making the proceedings at the Tribunal as expeditious and practical as possible by merging both aspects from civil law and common law systems. Thus, although the Pre-Trial Judge has its roots on the inquisitorial model, the STL Pre-Trial Judge also contains some characteristics taken from the common law system, making a distinction from the civil law juge d'instruction, which undoubtedly enhances the tribunal's efficiency.

C. Role of Victims participating in the Proceedings

Article 17 of the Statute of the STL states that "where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge

[26] Cècile Aptel, *supra note 4* [Electronic copy provided in accompanying CD-ROM at Source 7].
[27] ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev.49, as amended on May 2013- Rule 65 ter "Pre-trial judge" [Electronic copy provided in accompanying CD-ROM at Source 4].

or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[28]

When explaining the role and status of victims, Article 28(2) states that the judges shall be guided by the Lebanese Code of Criminal Procedure which, in accordance with its civil law tradition, confers the status of "parties civiles" to the victims giving them the right to participate in proceedings. Nevertheless, in contrast to the Lebanese Code of Criminal Procedure, which allows victims to initiate proceedings, Rule 86(A) of the STL RPE does not authorize victims to participate before the confirmation of an indictment.[29] Likewise, in contrast with the Lebanese Code of Criminal Procedure and its definition of "parties civiles", Article 25 rejects the possibility for the victims to claim compensation for damages before the STL.

However, during trial, victims participating in the proceedings have been granted significant powers. In accordance with Rule 143 and the Trial Chamber's oral ruling at the Status Conference of 29 October 2013[30], they are allowed to make opening and closing statements; to call witnesses and tender evidence. Victims are also empowered to examine or cross-examine witnesses, to pose questions to the accused and to file motions and briefs.[31] For that reason and influenced by the civil law tradition, the victim's participation in proceedings is greater compared with common law systems.

[28] STL Statute, *Supra note 3*, Article 17
[29] STL Rules of Procedure and Evidence, as amended 31 May 2012, Rule 86(A) [Electronic copy provided in accompanying CD-ROM at Source 3].

[30] STL, *Prosecutor v. Ayyash et al*., Case No. STL-11-01/PT/TC, p. 30, lines 6-11 [Electronic copy provided in accompanying CD-ROM at Source 9].
[31] STL Rules of Procedure and Evidence, *supra note 19*

Nevertheless, strictly speaking, victims cannot be said to have been given the status of "parties civiles".[32] As stated above, since they are not allowed to participate before the confirmation of the indictment nor claim compensation before the STL, they cannot be considered as real "parties civiles"

The concept of victims participating in criminal trials as civil parties is based on the civil law system. Countries such as France includes provisions for victims to testify, to file a complaint, to bring a civil action jointly with criminal procedures to the court, and to seek reparation for injuries suffered.[33] Moreover, the ECCC is the first internationalized tribunal to explicitly provide for civil party participation since victims are allowed to participate in the proceeding even during investigations.[34]

Consequently, although the STL provides for enhanced victim participation, its scheme purposefully does not rise to the level of civil party participation. Additionally, the ICC approach is similar to the STL. As well as in the Statute of the STL, Article 68(3) of the Rome Statute establishes a general right of victims whose personal interests are affected to present their "views and concerns" to the ICC and have them "considered" by the Court at appropriate stages of the proceedings. In addition, the Rome Statute and ICC Rules include a number of more targeted provisions designed to secure victims' access to the Court in circumstances identified as particularly important to victims' interests. However, the victim participation model at the ICC does not go as far as this in place at the ECCC. Thus, at the ICC, victims are not considered to be civil parties.

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[32] Explanatory memorandum, *supra note 17*
[33] Code de Procédure Pénale, *supra note 21*
[34] Jèrôme de Hemptinne, *Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon*, Journal of International Criminal Justice 8 (2010) [Electronic copy provided in accompanying CD-ROM at Source 20].

Nevertheless, both the ICC and the STL go further granting rights to victims when compared with other international tribunals. In fact, the Rome Statute drafters were heavily influenced by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[35] an instrument designed to support victims' access to justice.[36]

In fact, victims within the ICTY and ICTR were neither allowed to participate in their personal capacity within the criminal proceeding nor entitled to receive reparations or compensation for damages suffered from the atrocities perpetrated against them.[37]

However, victims' participation may seriously impact on the efficiency, fairness and costs of trials if it is not properly regulated. In this manner, it can violate the principle of equality of arms by confronting the accused with two accusers: the prosecutor and the victims. Likewise, allowing victims to participate at trial can cause prejudice to the victims themselves by unduly delaying the proceedings and putting their security at risk, which is particularly difficult to preserve in the volatile context of Lebanon. For instance, in the Bemba case, Trial Chamber III received over 1,300 applications to participate in the proceedings, delaying the proceedings and causing prejudice to the victims themselves.[38]

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[35] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November, 1985 - A/RES/40/34) [Electronic copy provided in accompanying CD-ROM at Source 34].
[36] Christine Van den Wyngaert, *Victims before international criminal courts: some views and concerns of an ICC trial judge*, Case W. Res. J. Int'l L (2012) [Electronic copy provided in accompanying CD-ROM at Source 16].
[37] Gerard J. Mekjian and Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, Pace International Law Review, Volume 17 (2005) [Electronic copy provided in accompanying CD-ROM at Source 18].
[38] War Crimes Research Office. International Criminal Court, *Expediting proceedings at the International Criminal Court* (June 2011) at 69 [Electronic copy provided in accompanying CD-ROM at Source 35].

In light of the experience taking from the ICC and the ICTY and ICTR, the STL sought to reach a balance between the interests of victims on the one hand and the efficiency of the proceedings on the other. The STL grants victims with significant right to participate in proceedings; however, these rights can only be exercised with specific strict modalities: after the confirmation of an indictment and through legal representatives. Moreover, in order to preserve the rights of the accused and to ensure the efficiency of the proceedings, not all victims can necessarily participate in the trial. They must have been authorized in advance by the Pre-Trial Judge or the Trial Chamber.

The judges at the STL have made efforts through creative procedural solutions more likely to safeguard the efficiency, fairness, and integrity of the overall proceedings. Thus, victims' participation is a positive innovation of the STL system.

D. Role and rights of suspects and accused

Article 15 of the Statute of the STL grants rights to the suspect during investigation. The Article establishes that a suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. Likewise, Article 16 of the Statute contemplates the rights of the accused, stating that all accused shall be equal before the Tribunal. Moreover, the accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.

These two Articles grant a role typically found in inquisitorial systems, making it possible for an accused to answer questions of the Judges, the parties and of the victims

participating in the proceedings, without having to acquire the formal status of a witness on his own behalf.[39]

The goal of both the adversarial system and the inquisitorial system is to find the truth. However, the adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it. Thus, common law systems are viewed as placing a greater emphasis on the rights of the accused, which may compromise the search for absolute truth.

On the other hand, the inquisitorial system places the rights of the accused secondary to the search for truth, seeking the truth by questioning those most familiar with the events in dispute. However, civil law system today also places an increasing emphasis on the rights of the accused.

i. Self representation

Article 16(4)(d) of the STL Statute grants the accused with the right to defend himself as well as the right of the accused to ask questions, call witnesses or examine or cross-examine witnesses either himself or with the assistance of defense counsel. The purpose of the right to self-representation is to assure an accused the right to participate in his defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances.

The right to self-representation first began during the post-Nuremberg era. It later became recognized in international law through the common law system.

Regarding the concept of self-representation, in common law systems the accused has the right to act as the sole counsel that is by conducting his case entirely. On the contrary,

[39] Explanatory memorandum, *supra note 17*

civil-law jurisdictions require that in serious criminal cases an accused must not appear in court without the assistance of defense counsel.

Given that the relevant provisions in the statutes of international tribunals have been interpreted as providing an accused with a right to self-representation, the right to self-representation seems consistent with that of most common law jurisdictions.

As mentioned before, in contrast to the common law system, the criminal codes of civil law countries provide for the imposition of defense counsel on an accused charged with serious criminal offences. For instance, the German Code of Criminal Procedure Section 140(2)70 requires mandatory assistance of defense counsel if the accused is charged with serious criminal offence.

The position of ICTY, ICTR and ICC,[40] as well as the STL is different to both systems: their Statutes allow the accused a choice of self-representation or to be assigned a counsel. In the Statutes of other international criminal tribunals, the right to self-representation is also mentioned. For example, Article 17(4)(b) of the Special Court for Sierra Leone (SCSL) and the Iraqi Special Tribunal contain identical provisions of self-representation.

However, the perception of self-representation in international criminal law differs from domestic law. Under international criminal law, where former leaders and war criminals are tried, the likelihood that a defendant will act in a disruptive manner is greater. Indeed, such a conduct may be inherent with certain types of defendants, especially former leaders who publicly challenge the court's authority to try them.

[40] ICTY Rules of Procedure and Evidence, *supra note 24*

Thus, the law of self-representation has been developed in case law, particularly at the ICTY and ICTR, concluding that the assignment of counsel to an unwilling defendant is permissible under international law and is sometimes necessary to safeguard the legitimacy of the proceedings.[41]

The ICTR first face the question of a defendant's right to self-representation in the case of Jean-Bosco Barayagiwaza holding that defense counsel could be assigned over the objection of the accused.[42] Besides, in Milosevic case, the trial chamber ruled proprio motu against the wishes of the accused that the right to a fair trial required it to appoint amicus curiae "not to represent the accused, but to assist in the proper determination of the case".[43]

In closing, although the right to self-representation is recognize trough the common law system, some innovations had been made in the tribunal in order to solve particular problems that may arise.

E. Conduct of Trial Process

ii. Hearings

The RPE of the STL provide that questioning of witnesses would commence with the Presiding Judge, followed by other members of the Trial Chamber, before passing to the parties, unless the interests of justice required otherwise. Such a process reflected the inquisitorial system.

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[41] ICTY, *Prosecutor v. Milosevic*, IT-02-54, ICTY, Order inviting designation of Amicus Curiae 30 (2001) [Electronic copy provided in accompanying CD-ROM at Source 10].
[42] ICTR, *Prosecutor v. Barayagwiza*, ICTR -97-19-T, Decision on defense Counsel Motion to Withdraw (2000) [Electronic copy provided in accompanying CD-ROM at Source 11].
[43] *Prosecutor v. Milosevic, supra note 36*

Therefore, the role of judges of the STL resembles the inquisitorial systems, where judges direct the examination of witnesses in court, on the basis of a "dossier" which has been compiled by an investigating judge.

This differs from the criminal procedure and practice followed before the ICTY, ICTR, SCSL and ICC, where the witnesses are first examined by the party which called them, then cross-examined by the other party, while the judges may at any stage put any questions to any witnesses or requests the presentation of additional evidence.[44] However, the RPE also allow the Trial Chamber to apply the common law proceeding if the case file received from the Pre-Trial Judge does not put them in a position to lead the questioning. Thus, Rule 145(B) establishes the common law order, whereby the witnesses will first be questioned by the party that called them and will then be cross-examined by the other party, and finally reexamined.[45]

This demonstrates again that the tribunal's approach is to reinforce efficiency: although a rule can have its origins in a specific legal system, the RPE combine both legal systems in order to provide a better procedure and, thus, improve the tribunal's proceedings.

iii. Sentencing proceeding

The RPE, in Rule 171, split the proceedings into two different sets:[46] one designed to establish the guilt or innocence of the accused and the other aimed at sentencing.[47]

This separate sentencing proceeding is used in common law tradition for a simple reason: a trial is generally by jury, and the jury is only entitled to decide whether the defendant is guilty or innocent; if the jury convicts the accused, it then falls to a judge to pronounce on the sentence in a different set of proceedings.

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[44] ICTY Rules of Procedure and Evidence, *supra note 24*
[45] STL Rules of Procedure and Evidence, *supra note 29*, Rule 145 (B)
[46] *Id.* Rule 171
[47] Explanatory memorandum, *supra note 17*

Thus, common law systems such as the one in Canada include a sentencing hearing that is distinct from the part of the trial in which the judge or jury determines the guilt or innocence of the defendant.

Both the ICTY and ICTR formerly held separate sentencing hearings and issued separate sentencing decisions in their initial cases. However, at the behest of some Judges coming from the civil law tradition, the two sets of proceedings were merged: the Judges eliminated any suggestion of a separate sentencing phase from the Rules and added language requiring that the guilt or innocence and sentencing phases occur as part of the same proceeding.

The elimination of separate sentencing proceeding has been view as mistake. Hence, the STL Tribunal's President in his explanatory memorandum proves that there may arise some confusion when Judges have to hear at the same trial stage both fact witnesses and character witnesses. Moreover, during trial, the Trial Chamber may have to hear many "character witnesses" concerning an accused even when it may ultimately decide to acquit that accused. [48] Also as stated by Andrew N. Keller, their decision to eliminate a separate sentencing may put an accused at a serious disadvantage by limiting possible strategies for his defense as well as by jeopardizing an accused's right to be tried by neutral and objective Judges.

Nevertheless, the STL revert to the common law system, adopting a separate sentencing proceeding.[49] This illustrates the tribunal's attempt to apply the most efficient approach, regardless of its civil law influence.

[48] Explanatory memorandum, *supra note 17*
[49] Explanatory memorandum, *supra note 17*

iv. Motions

According to Rule 167 STL RPE, at the conclusion of the prosecution case, the Trial Chamber may enter a judgment of acquittal on any or all counts if there is no evidence capable of supporting a conviction against the accused on that or those counts.[50] Similarly, Rule 98bis of the ICTY and ICTR Rules provides that a trial chamber shall enter a judgment of acquittal on a charge if the evidence is insufficient to sustain a conviction.

All these provisions reflect the common law concept of "no case to answer," the issue which is raised and determined after the close of the prosecution case, but before the defense presents its case. In fact, there is no equivalent of this concept in civil law systems.

Again, one can conclude that although the tribunal is mostly influenced by the civil law tradition, there are several aspects that, in view of its advantages, are taken from the common law tradition.

v. Evidence

According to Article 21(3) of the Statute judges may decide whether witnesses are called to give oral evidence, or whether their evidence can be received in written form.[51]

The recognition under the Statute of the STL of the possibility of admitting written evidence shows an evolution of international criminal procedural law where this has been progressively accepted, notably at the ICTY and ICTR.

Trials before international criminal tribunals are normally based on the adversarial system. Consequently, they follow the oral tradition and do not allow written evidence, except under strict conditions and only if it goes to proof of a matter other than the acts and

[50] STL Rules of Procedure and Evidence, *supra note 29*, Rule 167
[51] STL Statute, *Supra note 3*, Article 21(3)

conduct of the accused (see, for example, Rule 92 bis of the ICTY RPE). In contrast, criminal systems such as that of Lebanon, based on the Romano- Germanic tradition, although envisaging the oral examination and cross- examination of witnesses, tend to admit, subject to certain conditions, written evidence without cross-examination of the relevant witnesses. They leaeve the determination of the probative value of written evidence to the evaluation of Judges, based on the notion of "intime conviction du juge" (intimate conviction of the judges).

It should be stressed that the Nuremberg International Military Tribunal allowed the Prosecution to admit into evidence a wide range of affidavits and written documents. Presumably this was due to the fact that most of these documents tended to prove facts that were part of a widespread pattern of criminality.

vi. Proceedings in Absentia

The Statute of the STL allows trials be held in the absence of the accused. The possibility of trials in absentia is expressly provided for in Article 22, which distinguishes three situations: (1) the accused has expressly and in writing waived his right to be present; (2) the accused has not been handed over to the Tribunal by the state authorities concerned; and (3) the accused has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges against him.[52] This provision represents a departure from most of other international criminal tribunals, which have not provided for such trials owing to the significant influence of the common law model.[53]

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[52] Paola Gaeta, To Be (Present) or Not To Be (Present). *Trials In Absentia before the Special Tribunal for Lebanon*, Journal of International Criminal Justice 5 (2007) [Electronic copy provided in accompanying CD-ROM at Source 27].
[53] STL Statute, *Supra note 3*, Article 22

Hence, although the possibility of trials in absentia was ruled out when drafting the ICTY and ICTR Statutes, in the drafting process of the Rules of Procedure and Evidence of the ICTY, it became clear that some judges were still in favor of including some provisions on trials in absentia. The judges created a sort of settlement, which was laid down in Rule 61.[54]

The reason was, perhaps, the fact that many commentators have raised concerns about trial in absentia, and they have concluded that such trials will only delegitimize the Tribunals and harm the overall project of international criminal law.

Along these lines, the International Covenant on Civil and Political Rights ("ICCPR"), provides in Article 14 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."[55] Likewise, the European Convention on Human Rights and Fundamental Freedoms (ECHRFF) provides in Article 6(1) that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal," establishing that the accused have the right to participate in such hearings.[56] Thus, these provisions seem to preclude trials in absentia.

However, despite the apparently mandatory language of these provisions, there is an international consensus establishing that the right is not absolute and may be subject to certain restrictions. In fact, the UN Human Rights Committee (the HRC) opined in the Mbenge v. Zaire Communication that: "Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused

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[54] Wayne Jordash and Tim Parker, *Trials in Absentia at the Special Tribunal for Lebanon. Incompatibility with International Human Rights Law*, Journal of International Criminal Justice, 8 (2010) [Electronic copy provided in accompanying CD-ROM at Source 30].
[55] Maggie Gardner, *Reconsidering trials in absentia at the Special Tribunal for Lebanon: an application of the tribunal's early jurisprudence*, The Geo. Wash. Int'l L. Rev. [Vol. 43, at 99 [Electronic copy provided in accompanying CD-ROM at Source 22].
[56] *Id*. at 100

person's absence. Indeed, proceedings in absentia are in some circumstances permissible in the interest of the proper administration of justice"[57]

Moreover, trials in absentia are not new in international criminal law: also under Article 12 of the Nuremberg Charter, trials in absentia were permissible. In fact, Martin Bormann was actually tried and convicted by the International Military Tribunal although he was not present at the proceedings.[58] Likewise, trials before the SCSL can be held in absentia, but under very narrow circumstances: when, after having made his initial appearance, the accused refuses to appear at his own trial, or is at large and does not appear in court.[59]

In the civil law tradition, trials in absentia are usually a normal part of the criminal system. However, not all countries with civil law traditions allow for trials in absentia. For instance, Germany does not allow for trials in absentia, whereas the French Code of Criminal Procedure permits it in serious/major crime. In fact, the actual roots of trials in absentia are to be found in French law in the Criminal Ordinance of 1670. Contrary, in countries that have a common law tradition, trials in absentia are not a common part of the legal system. Thus, in the United States, based on Rule 43 of the Federal Rules of Criminal Procedure, the defendant automatically waives his or her right to be present when (s)he is voluntarily absent after the trial has begun.[60]

However, the possibility of holding trials in absentia at the STL does not mean that these kinds of trials are allowed for under all circumstances. Article 22 of the Statute of the STL

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[57] *Id.*
[58] Ralph Riachy, *Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon. Challenge or Evolution?,* Journal of International Criminal Justice 8 (2010) [Electronic copy provided in accompanying CD-ROM at Source 28].
[59] Katrín Ólöf Einarsdóttir, *Comparing the Rules of Evidence Applicable Before the ICTY*, ICTR and the ICC (2010) [Electronic copy provided in accompanying CD-ROM at Source 21].
[60] Federal Rules of Criminal Procedure (USA), Rule 43 (c) (1) [Electronic copy provided in accompanying CD-ROM at Source 6].

makes clear that a trial proceeding in the absence of the accused shall only be conducted under strict conditions, such as an accused's waiver of his right to be present, if he has not been handed over to the Tribunal, or if he has otherwise absconded or cannot be found. Article 22 of the STL is laudable for combining respect for the legal traditions of civil law countries, such as Lebanon, and for compliance with international standards crafted by institutions such as the ECtHR to ensure that, even when the accused is absent, he is afforded a fair trial.

Therefore, the STL's RPE attempt to use the advantages of trials in absentia but always in accordance with international standards. In fact, trials in absentia are a very effective tool to STL's proceedings. As the Secretary-General stated, inter alia, that: "The institution of trials in absentia is common in a number of civil law legal systems, including Lebanon's. In addition, in the present case, where the conduct of joint trials for some or all of the cases falling within the jurisdiction of the tribunal is likely, it would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused"[61]

IV. Conclusion

The STL's unusual history, structure, and the various innovations of its statute make the STL a very "special" tribunal, distinct from all the previous international or hybrid criminal jurisdictions.[62] Given the influence from both the civil law tradition followed by Lebanon and the common law system predominant in international law, the STL Rules of Procedure and Evidence incorporate characteristics of each system and combines them.[63]

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[61] Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon. UN Doc. S/2006/893, Nov. 15, 2006 [Electronic copy provided in accompanying CD-ROM at Source 33].
[62] Nidal Nabil Jurdi, and David Tolbert, *Supra note 10*
[63] Matthew Gillett and Matthias Schuster, *Supra note 3*, at 909

Consequently, the question of whether the STL is more a civil law or a common law institution is not as easy as one could expect. Although the RPE contain numerous procedures taken from inquisitorial system- i.e. the Pre-Trial Judge- they had been modified adding some of the characteristic from the common law system in order to provide more advantages in practice.

The STL cannot be seen as belonging only to one specific system. In contrast, given this unusual combination of both civil law and common law tradition, the RPE of the STL goes further when compared with any of the other international or hybrid criminal jurisdictions. Thus, while in the very first moment one could consider that the STL is more a civil law institution, a deep analysis of its RPE clearly shows that it has strong influence from both legal systems. The reason could be that taking characteristics only from the civil law tradition will not result useful in its application and, thus, the incorporation of aspects taken from the common law tradition provides important innovations regarding the tribunal's procedure.

In conclusion, this merger that provides an extensive and innovative procedural framework for a Tribunal can reinforce the characteristics of both traditions, ensuring that proceedings at the STL are as fair and expeditious as possible.