The Right to be Present at Trial in International Criminal Law

A Thesis Submitted to Middlesex University

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Caleb Henry Wheeler

School of Law
Middlesex University

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Abstract - The Right to be Present at Trial in International Criminal Law
By Caleb Henry Wheeler

International criminal law considers the accused's right to be present at trial to be a key component of his or her right to a fair trial at international and internationalised criminal courts and tribunals. The central research question this thesis explores is: what does the accused's right to be present at trial mean in international criminal law and are the accused at international and internationalised criminal courts and tribunals receiving the benefits of its protection? This thesis answers that question in eight substantive chapters examining a variety of issues relating to the right to be present at trial.

In answering the research question this thesis makes four different contributions to knowledge. First, it brings together the rules and practices of all of the international and internationalised criminal courts and tribunals and provides analysis about how each one treats the right to be present at trial. Second, it challenges existing assumptions about how different courts and tribunals protect the right to be present at trial and show that even those courts and tribunals that are thought to emphasise the right also allow trial to continue in the accused's absence under some circumstances. Third, it takes a more nuanced approach to trial absences by breaking absence into four categories and examining how the differences in the type of absence may affect the right to be present. Finally, it considers the procedures of the international and internationalised criminal courts and tribunals established since the introduction of the Special Tribunal for Lebanon's Statute and finds that they generally take a more flexible approach to the accused's right to be present.

This thesis concludes that international criminal law provides the accused with a qualified right to be present at trial. The right confers on the accused the choice to attend trial and is coupled with a duty imposed on the court or tribunal attempting to conduct the trial whereby it cannot prevent the accused from attending trial if he or she so desires. The right to be present can be voluntarily waived by the accused if he or she has received notice sufficient to make an informed decision about whether he or she wants to appear. This approach creates a balance between respecting the accused's right to be present while also allowing trial to continue if the accused does not wish to participate.

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‘Proposal of Colombia submitted on 25 June 1998 regarding Article 63’, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol 3 (United Nations, 2002) UN Doc. A/CONF.183/C.1/WGPM/L.17, 304.

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Code of Procedure and Evidence, Yugoslavia (1 July 1951)

Code of Criminal Procedure, Senegal (21 July 1965)

Criminal Procedure and Evidence Code, Malawi (1 February 1968)

Code of Criminal Procedure, Italy (adopted on 24 October 1989)

New Code of Criminal Procedure, Lebanon (7 August 2001)

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Code of Criminal Procedure, Germany (as amended 23 April 2014)

Code of Criminal Procedure, Kenya (revised 2015) art 194

Code of Criminal Procedure France (as amended 1 July 2017)

Federal Rules of Criminal Procedure, United States of America (2017)

OTHER DOMESTIC LEGISLATION

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The Criminal Ordinance France (1670)

Basic Law for the Federal Republic of Germany (1949)

Criminal Justice Act, 2003 (England and Wales) (2003)

Law No 2014-28 of 3 November 2014 Modifying Law No 065-61 of 21 July 1965 about the Code of Criminal Procedure, National Assembly of the Republic of Senegal (3 November 2014)

Chapter 1: Introduction

This thesis examines the accused's right to be present at trial in international criminal law and how that right functions at international and internationalised criminal courts and tribunals. The main research question is: What does the accused's right to be present at trial mean in international criminal law and are the accused at international and internationalised criminal courts and tribunals receiving the benefits of its protection? To provide an answer it assesses several other questions and issues including: Is presence at trial a right, a duty or both? How did the right to be present become part of international criminal law? Does trying an accused *in absentia* serve the goals of international criminal law? What are the different types of absences from trial and how does accused's right to be present change depending on the manner of his or her absence from trial? How has the right evolved since it first became part if international criminal law?

This thesis is made up of eight substantive chapters designed to answer the questions set out above. The first three chapters are grouped together because they each address more theoretical aspects of the accused's presence at trial. The first chapter discusses whether the accused's presence at trial is a right, a duty or both under international criminal law. It also considers whether the right to be present and the duty to be present are co-extensive or if they actually pertain to different aspects of presence. The second chapter examines how the right to be present developed in international criminal law. It specifically looks at the impact different legal systems, particularly those rooted in the accusatorial and inquisitorial traditions, have on how the right to be present was interpreted during the creation of different international and internationalised criminal courts and tribunals. The third chapter considers how trials *in absentia* serve the goals of international criminal law with a particular focus on the needs of the different participants in the international criminal process. It also attempts to understand how trials conducted in the absence of the accused can meet the needs of those different participants.

The fourth through seventh chapters introduce the idea that there are four different types of absences from trial and that the right to be present requires the trial court to deal with each type differently. The fourth chapter specifically considers trial *in absentia*, defined as a trial occurring entirely in the absence of the accused where the accused knows the trial is taking place but chooses not to attend. It also discusses the issues of notice and waiver and the role they play in ensuring that the accused's absence is

voluntary. The fifth chapter follows on from the previous chapter and looks at trials by default, defined as a trial taking place in the accused's absence, but where the accused either has not received notice about the proceedings or notice is uncertain. It questions the voluntary nature of the resulting absence and whether conducting trial under such circumstances complies with the right to be present. The sixth chapter studies short-term absences from trial and how the perceived voluntariness of those actions impacts whether trial can continue in the accused's absence. It also looks at the manner through which international and internationalised criminal courts and tribunals find an implied waiver of the accused's right to be present. The seventh chapter examines the last of the four categories of absence; situations in which the accused is physically present in the courtroom during trial but unable to understand and participate in the proceedings. It explores the idea that the right to be present requires more than just the physical presence of the accused in the courtroom and instead emphasises the importance of the accused's participation in the trial. The final chapter examines how the right to be present has continued to evolve since the inclusion of a trial *in absentia* procedure in the Special Tribunal for Lebanon's Statute. It studies five international or internationalised courts and tribunals that have been established or proposed since the Special Tribunal for Lebanon and how the right to be present has continued to evolve at those institutions.

The issues raised in each chapter are examined through an analysis of primary and secondary sources. Most of the issues are first approached through a consideration of the primary source material, particularly: international and regional human rights treaties and conventions, statutes of the different international and internationalised criminal courts, domestic constitutions and statutes, United Nations General Assembly and Security Council resolutions, other law-making instruments including rules of procedure and evidence and case law. The statutes, rules and case law of the International Military Tribunal, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the European Court of Human Rights and the Human Rights Committee all receive in-depth consideration. These particular institutions have made the most significant contribution towards understanding and interpreting the accused's right to be present in international criminal law. Other courts and tribunals, including the International Military Tribunal for the Far East, the American Court of Human Rights and the African Court of Human Rights receive some attention as well. Secondary

sources are used to support and challenge the analysis and conclusions derived from the primary sources.

This thesis contributes to knowledge in multiple ways. First, it brings together the practise of the various international and internationalised criminal courts and tribunals with regard to the accused's right to be present in one place, which has never been done before. To date there is no existing comprehensive look at the accused's right to be present at trial at the various international and internationalised courts and tribunals. Generally, analysis of this issue has been done in a cursory way, or focused largely on the practise of one or a few courts without looking at the overarching picture. This thesis conducts a critical analysis of the practise of all of the various international and internationalised criminal courts and tribunals to gain an overall picture of the right. This thesis brings together information about how all of the courts and tribunals have considered and applied the right to be present at trial to give a wide-ranging picture of the right to be present at trial.

Second, this thesis challenges some of the existing assumptions about the right in an effort to better understand what it means to be present, or absent, from trial, and the real implications of those designations. This thesis also contributes to knowledge in that it challenges some of the existing orthodoxies about the right to be present at trial. It is generally believed that those international and internationalised criminal court and tribunals that do not permit trials *in absentia* strongly protect the right to be present that the Special Tribunal for Lebanon is less interested in protecting the right to be present because it allows for trials *in absentia*. This thesis addresses these fallacies by showing that court hearings take place in the absence of the accused at every international and internationalised criminal court and tribunal and that a court or tribunal's commitment to protecting the accused's right to be present is largely dependent on other factors.

Third, it seeks to re-imagine the right to be present at trial in a less binary way and take a more multifaceted approach to understanding the different types of absence from trial. The term trial *in absentia* has been used to describe many different factual scenarios involving an accused's absence from trial and as a result has no set meaning in international criminal law.[1] It is used broadly to describe any situation in which trial

[1] Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1309; Chris Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham Intl L J 57, 68;

occurs outside of the accused's presence and more narrowly to describe a trial occurring in its entirety without the accused being present but where the accused is aware that trial is taking place in his or her absence. When used broadly, some commentators separate trial *in absentia* into two categories, partial *in absentia* and total *in absentia*, in an effort to describe the different legal rules that apply to each situation.[2] Total *in absentia* refers to a trial which entirely takes place in the absence of the accused while partial *in absentia* exists when the accused is present for some parts of the trial and absent for others.[3] However, this approach is too limiting to the extent that it does not adequately account for the difference types of total and partial absences from trial. This thesis introduces four categories of absence from trial and analyses them individually in an effort to better explore the contours of how the right to be present can accommodate an accused's absence from trial.

Finally, this thesis considers the ways in which the right to be present has developed since the Special Tribunal for Lebanon's Statute was introduced. It finds that those international and internationalised criminal courts and tribunals introduced or proposed since the Special Tribunal for Lebanon have taken a more nuanced approach to the right to be present and have attempted to employ methods that respect that right that also make sense in the context of the overall practices of the particular court or tribunal. It also finds that the right to be present, which had been fairly static prior to the introduction of the Special Tribunal for Lebanon's Statute, is now approached with greater flexibility. This indicates that the strict adherence to the International Covenant on Civil and Political Rights approach to presence at trial is diminishing in favour of adopting practices that respect the interests of the accused while also fulfilling the needs of other trial participants. This change is a good one as it appreciates the important purpose of supplying the victims of atrocity crimes with a sense that justice has been done.

Stan Starygin and Johanna Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the *Draft Criminal Procedure Code*' [2005] Singapore J Legal Stud 170, 171.

[2] Jenks *supra* note 1 at 67-9; Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 183; Alexander Schwarz 'The Legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal Court and Their Compatibility with Human Rights' (2016) 16 African Human Rights Law Journal 99, 102.

[3] Zakerhossein and de Brouwer *supra* note 2 at 183; Schwarz *supra* note 2 at 102.

This thesis concludes that international criminal law provides the accused with a qualified right to be present at trial. The right confers on the accused the choice to attend trial and is coupled with a duty imposed on the court or tribunal attempting to conduct the trial whereby it cannot prevent the accused from attending trial if he or she so desires. That right can be voluntarily waived by the accused if he or she has received notice sufficient to make an informed decision about whether he or she wishes to appear. Trials *in absentia* are permissible so long as the accused's absence is the result of an informed decision on the part of the accused and does not constitute a deprivation of the right to be present. Trials by default may also be conducted, however an accused tried in this manner must have the right to a new trial or some other fresh assessment of the charges after he or she comes under the control of the responsible court or tribunal. This approach creates a balance between respecting the accused's right to be present, which can be instrumental to preserving the accused's fair trial rights, and ensuring that the interests of the other trial participants can also be fulfilled.

CHAPTER 2: IS PRESENCE AT TRIAL A RIGHT, A DUTY OR BOTH?

The right to a fair trial is a basic principle of a democratic society and is considered a central feature of the rule of law and a part of customary international law.[1] It is expressed as "a right to procedural safeguards to prevent an unjust conviction" the purpose of which is to achieve "the proper administration of justice."[2] Fair trials are realised by providing the participants, and particularly the defendant, with a set of rights.[3] One of the defining components of the right to a fair trial is the accused's right to be present at trial.[4]

The presence of the accused at trial is described as "an essential element of procedural equality" that gives meaning to the principle that "criminal defendants are legally entitled to be personally present at their own trials."[5] One reason it is thought important for the accused to be present during trial is to give him or her the opportunity to participate and understand the proceedings against them, particularly during the presentation and examination of the evidence.[6] Generally, the accused should be present

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[1] Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5 at para 33; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 396; Patrick L. Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley J L Intl L Publicist 1, 11; Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012) 161-62; *citing Prosecutor v Aleksovski* (Judgement) IT-95-14/1-A, A Ch (24 March 2000) para 104; *Prosecutor v Simić et al.* (Judgement) IT-95-9-T, T Ch II (17 October 2003) para 678.

[2] Kristen Campbell, 'The Making of Global Legal Culture and International Criminal Law' (2013) 26 LJIL 155, 167; United Nations Human Rights Committee, 'General Comment 13, Article 14: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', U.N. Doc. HRI/GEN/1/Rev.1 (1994) para 1.

[3] Mark Klamberg, 'What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' (2010) 79 Nord J Intl L 279, 286.

[4] Council Directive 2016/343 *supra* note 1 at para 33; Geert-Jan Alexander Knoops, *An Introduction to the Law of the International Criminal Tribunals: A Comparative Study* (Transnational Publishers, Inc 2003) 175; M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Intl L 235, 267.

[5] Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, Inc 2002) 280; Neil Cohen, 'Trial in Absentia Re-Examined' (1973) 40(2) Tenn L Rev 155, 156.

[6] Sarah J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the*

throughout the entirety of the proceedings so that he or she can exercise other fair trial rights including: assisting in his or her own defence; consulting, and in some cases selecting, his or her own counsel; confronting the witnesses or the evidence presented against him or her; and testifying on his or her own behalf at trial.[7]

It is generally believed that individuals accused of international crimes have a right to be present at his or her trial. This is evidenced by the fact that all of the modern international criminal statutes either explicitly refer to the accused's right to be present or describe the presence of the accused at trial as one of the minimum guarantees of a fair trial. However, international and internationalised criminal courts and tribunals also agree that the right to be present at a trial can be derogable under some circumstances. There is growing sentiment that an international criminal trial can continue outside of the accused's presence in recognition of his or her duty to be present at trial.

It is necessary, as a preliminary matter, to define the terms 'right' and 'duty'. Surprisingly, these terms are generally undefined in international law. None of the most influential human rights documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights, define a right or a duty in a general sense. The American Declaration of the Rights and Duties of Man rather unhelpfully states in its Preamble that "[w]hile rights exalt individual liberty, duties express the dignity of that liberty."[8] Therefore, recourse to more general legal sources is necessary to produce a working definition of these terms. A 'right' is "[s]omething that is due to a person by just claim, legal guarantee or moral principle" and is defined by the ability of the holder of the right to "decide whether to exercise it or not and to bear the consequences of that decision."[9] It is also a "recognized and protected interest the violation of which is a wrong."[10] By contrast, a duty is a "legal

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European Court of Human Rights (Hart Publishing 2007) 117; Fawzia Cassim, 'The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process' (2005) 38 Comp & Intl L J S Afr 285, 285-286.

[7] Daryl A. Mundis, 'Current Developments: Improving the Operation and Functioning of the International Criminal Tribunals' (2000) 94 AJIL 759, 761.

[8] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (2 May 1948) preamble.

[9] Bryan Garner (ed), *Black's Law Dictionary* (10th ed, Thomson Reuters 2014) 1517; Martin Böse, 'Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia' (2011) 37 NC J Intl L & Com Reg 489, 503.

[10] Garner *supra* note 9 at 1517.

obligation owed or due to another and that needs to be satisfied."[11] A duty is also connected to a corresponding right held by another and the person with the duty is bound to do perform the described activity.[12]

The definitions of these terms demonstrate the significant difference between the two. A right may be exercised freely while a duty creates an obligation, requiring the holder of the duty to act. Therefore, if the presence of the accused at trial is considered a right, the accused may decide to appear for trial of his or her own volition and cannot be unilaterally deprived of that choice. If it is considered a duty, the accused is required to appear at trial. Failure to comply with a duty can result in consequences. In the context of presence at trial those consequences can include the relevant tribunal conducting a trial *in absentia* against the accused.[13]

2.1 THE RIGHT TO BE PRESENT AT TRIAL

Historically, international criminal law did not guarantee the accused's right to be present at trial. Article 12 of the International Military Tribunal Charter, which formally established the International Military Tribunal at Nuremberg, specifically permitted proceedings to be conducted against an absent accused if that accused "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."[14] The Nuremberg Tribunal demonstrated its willingness to proceed in the absence of an accused by allowing Martin Bormann to be tried *in absentia*.[15] Bormann was convicted of war crimes and crimes against humanity and sentenced to death in his absence.[16]

The International Covenant on Civil and Political Rights was the first international instrument to address the accused's presence at trial as a right. The International Covenant sets out a wide-ranging rights regime impacting numerous areas

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[11] Ibid at 615.
[12] Ibid.
[13] Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1309.
[14] United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) art 12.
[15] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 2 (1947) 25.
[16] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 341, 366.

of life including the right to a fair trial. Article 14(3)(d) of the International Covenant specifically asserts that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) [t]o be tried in his presence…"[17] This article is significant for multiple reasons. First, and most importantly, it is the genesis of the notion that the accused has a right to be present at trial in international criminal law. Although the International Covenant does not explicitly call presence at trial a right, the Human Rights Committee later confirmed that it should be regarded as such.[18] Second, many of the Statutes of international and internationalised criminal courts and tribunals modelled their articles on the accused's right to be present on the International Covenant on Civil and Political Rights and, in some instances, copied Article 14(3)(d) almost verbatim. Finally, there are 168 State Parties and 7 signatories to the International Covenant on Civil and Political Rights making its provisions applicable to the vast majority of the world.[19]

Regional human rights bodies have also codified the accused's right to be present at trial. In 2007, the African Commission on Human and People's Rights issued its 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'. Those Principles and Guidelines specifically indicate that a person accused of a crime has "the right to be tried in his or her presence."[20] To give effect to that right the African Commission has found that the accused "has the right to appear in person" before the relevant judicial body and that "the accused may not be tried in absentia."[21] If the accused is tried *in absentia* the accused has the right to petition to have the proceedings re-opened on the grounds that there was inadequate notice of trial, that notice was not personally served or his or her failure to appear was the result of exigent circumstances.[22]

The language used by the African Commission when discussing trials *in absentia* highlights how important it is for the accused to be given the opportunity to choose

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[17] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(3)(d).
[18] *Mbenge v Zaire* Comm No 16/1977 (25 March 1983) para 14.2; *Maleki v Italy* Comm No 699/1996 (27 July 1999) para 9.3; 'General Comment 13 *supra* note 2 at para 11.
[19] Status of Ratification Dashboard, Office of the High Commissioner for Human Rights, http://indicators.ohchr.org (accessed 15 August 2016).
[20] The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003) section N(6)(c)(i)–(ii).
[21] Ibid.
[22] Ibid.

whether he or she will appear for trial. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa set out three grounds for re-opening proceedings conducted *in absentia*. All three involve situations in which the accused did not choose to absent themselves from trial and where their failure to appear was outside of their control. Trials conducted in the accused's absence are not strictly forbidden, rather, they are only considered illegitimate if they are conducted under circumstances that suggest the accused did not actively choose not to be present. This emphasis on the accused's choice confirms that the African Commission views presence at trial as a right.

The African Court on Human and Peoples' Rights reiterated the importance of the presence of the accused, particularly when he or she is unrepresented, in *Alex Thomas v Tanzania*. There, the African Court concluded that Article 7(1)(c) of the African Charter on Human and Peoples' Rights, as interpreted in light of the provisions of Article 14(3)(d) of the International Covenant on Civil and Political Rights, require that the accused be present at trial to defend himself.[23] Although there is no explicit mention of presence in Article 7(1)(c) of the African Charter, it is significant that the Court found that presence was implicitly required through the operation of the provisions of the International Covenant on Civil and Political Rights. This gives meaning to the African Commission's determination that courts and tribunals are obliged to conform to international human rights standards to ensure the accused is guaranteed a fair trial.[24]

Two other regional human rights bodies have also addressed the right to be present. The European Convention on Human Rights does not contain a specific reference to the right to be present at trial. However, the European Court of Human Rights has found that the accused's right to be present is implicit in the object and purpose of Article 6(1) of the European Convention because the accused is entitled to take part in a hearing against him or her.[25] The European Court of Human Rights has also specifically referred to the presence of the accused at trial as a right and concluded that "it is difficult to see" how the accused could exercise other explicit Convention rights, including "the right 'to defend himself in person' (Article 6(3)(c)), the right 'to examine or have examined witnesses' (Article 6(3)(d)) and the right 'to have the free

[23] *In The Matter of Alex Thomas v United Republic of Tanzania* (Judgment) App No 005/2013 (20 November 2015) para 91.
[24] *Avocats sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi* (Decision) App No 231/99 (6 November 2000) para 26.
[25] *Colozza v Italy* (1985) 7 EHRR 516, 12 February 1985 at paras 27-28.

assistance of an interpreter if he cannot understand or speak the language used in court' (Article 6(3)(e)), without being present during trial."[26] Based on this holding, even though the right to be present is not an enumerated right, it is implicit in the European Convention as it makes operative other important rights held by the accused, including the overarching right to a fair trial.[27]

The European Court of Human Rights' decision that a right to be present exists in the European Convention also focuses on the accused's ability to make a choice as to whether he or she wishes to participate in proceedings. Where the accused has no notion that criminal proceedings are being conducted against them, the accused cannot be found to have made an effective choice not to participate.[28] Absent the ability to make such a choice, the accused is entitled to a new determination of the charges. This indicates that an *in absentia* conviction is only valid if the accused makes an active choice to absent him or herself from court.

The European Parliament and the Council of the European Union have also identified presence at trial as a right. The European Council stated in a 2016 directive that presence at trial is a right held by the accused that directly emanates from the right to a fair trial.[29] It acknowledged that it is a qualified right that can be waived by the accused under appropriate conditions.[30] Such a waiver can be explicit or tacit, but it must always be unequivocal.[31] An accused can only be tried in his or her absence if he or she has been informed of the trial and the consequences of non-appearance and still decides not to attend trial or if he or she has been removed from the courtroom for being disruptive.[32] Limiting trials conducted in the absence of the accused to these narrow exceptions reinforces the notion that presence at trial is a right. In both instances the absence is the result of a conscious decision by the accused not to exercise the right to be present rather than a consequence for failing to comply with a duty.

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[26] Ibid.
[27] M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Intl L 235, 267; Sarah Podmaniczky, 'Order in the Court: Decorum, Rambunctious Defendants, and the Right to be Present at Trial' (2012) 14(5) U Pa J Con L 1283, 1289.
[28] *Colozza supra* note 25 at para 28.
[29] Council Directive 2016/343 *supra* note 1 at para 33.
[30] Ibid at para 35.
[31] Ibid.
[32] Ibid at paras 36 and 40.

The Inter-American Court of Human Rights less explicitly endorses the right of the accused to be present at trial in the *Case of Valle Jaramillo et al. v Colombia*. There, the Inter-American Court found, "the trial and conviction *in absentia* of members of paramilitary groups, who have benefited from the ineffectiveness of the punishment, because the warrants for their arrest have not been executed" reflected the impunity inherent in the situation.[33] Interestingly, this decision approaches presence at trial from a different direction. Rather than finding that the accused were deprived of an opportunity to effectively exercise their rights, the court determined that the *in absentia* trial was little more than a show trial held so that Colombia would appear to be complying with its international fair trial obligations set out in Article 8 of the American Convention on Human Rights.[34] The *in absentia* trial actually protected the accused because the authorities had no real intention of punishing them for their acts even after their conviction.[35] It can be extrapolated from the *Jaramillo* decision that the Inter-American Court prefers that trial take place in the presence of the accused, not only to ensure the rights of the accused are adequately protected, but also to guarantee that the trial will result in a sufficient remedy. The Inter-American Court has been largely silent as to whether it considers the accused's presence to be a right or a duty.

When the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (collectively, "the *ad hoc* tribunals") were established in the early 1990's, the Statutes of both tribunals closely followed the example of the International Covenant on Civil and Political Rights and indicated that the presence of the accused at trial was one of the minimum guarantees of a fair trial.[36] Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 20 of the International Criminal Tribunal for Rwanda's Statute are both titled 'Rights of the Accused' and both explicitly state that the accused is 'entitled' to be tried in his or her presence.[37] The use of the word entitled suggests that presence of the accused is regarded as a right held by the accused and not a duty to be imposed on him or

[33] *Case of Valle Jaramillo et al. v Colombia* (Judgment) Inter-American Court of Human Rights Series C No. 192 (27 November 2008) para 165.
[34] Ibid at para 168.
[35] Ibid.
[36] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 21(d)(4); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 20(d)(4).
[37] Ibid.

her. This interpretation is reinforced by former United Nations Secretary-General Boutros Boutros-Ghali's report issued in 1993 in which he asserted that the Statute of the International Criminal Tribunal for the former Yugoslavia reflects the fact that trials *in absentia* are not consistent with the accused's entitlement to be 'tried in his presence' as expressed in Article 14 of the International Convention on Civil and Political Rights.[38]

Like the Statutes of the *ad hoc* Tribunals, the Statute of the International Criminal Court also defines the accused's presence at trial as a right. Article 63(1) of the Rome Statute unequivocally states that "[t]he accused shall be present during the trial."[39] This statement, taken alone, does not indicate whether the accused has a right or a duty to be present at trial because it allows for the possibility that the accused's presence can be required rather than resulting from the exercise of a right. However, if the Statute is read as a whole, it becomes evident that the accused has a right to be present at trial. That is because Article 67, much like Article 21 of the International Criminal Tribunal for the former Yugoslavia's Statute and Article 20 of the International Criminal Tribunal for Rwanda's Statute, sets out the 'Rights of the Accused' and identifies presence at trial as one of the entitlements contained therein.[40]

The Trial Chamber decisions in *Prosecutor v Ruto et al* and *Prosecutor v Kenyatta* relating whether trial could continue in the absence of the accused confirmed that Article 67(1)(d) sets out the accused's right to be present at trial.[41] The *Ruto* Court found that "there is no doubt that presence at trial is a right for the accused" as expressed by Article 67(1)(d) of the Statute.[42] In a similar vein, the *Kenyatta* Court also announced that "[i]t is recognised that the presence of the accused during the trial is ... a right" and that the "[p]resence of the accused is the default position."[43] The *Ruto* Court, citing the Appeals Chamber of the International Criminal Tribunal for Rwanda, went on to explain that the purpose of the right to be present is to protect the accused from outside

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[38] Report of the Secretary-General, 'Pursuant to Paragraph 2 of Security Counsel Resolution 808' (3 May 1993) U.N. Doc. S/25704 at para 101.
[39] Rome Statute of the International Criminal Court (17 July 1998) art 63(1).
[40] Ibid at art 67(1)(d).
[41] *Prosecutor v Ruto et al.* (Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09-01/11, T Ch V(A) (13 June 2013) para 35; *Prosecutor v Kenyatta* (Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (18 October 2013) para 124.
[42] *Ruto* (Trial Chamber Decision) *supra* note 41 at para 35.
[43] *Kenyatta supra* note 41 at para 124.

interference that might prevent him or her from effectively participating in trial.[44] Implicit in this finding is that the decision to appear lies with the accused, and that absence is only permissible if it is the product of the accused's own free will. It further supports the position that presence at trial is dependent on the accused's active choice to participate in proceedings.

The Extraordinary Chambers in the Courts of Cambodia also has a strong preference in favour of conducting trial in the accused's presence. Like Article 63 of the Rome Statute, Rule 81 of the Extraordinary Chamber's Internal Rules stands for the general proposition that "the accused shall be tried in his or her presence" limited only by the exceptions contained therein.[45] Although that statement, taken alone, is largely neutral, the enumerated exceptions suggest that the Extraordinary Chambers require the accused to be present. Rules 81(2) and (3) include provisions authorising the arrest or the use of force to compel the accused to be present during trial.[46] The willingness of the Extraordinary Chambers in the Courts of Cambodia to use physical force to compel the accused's presence during trial demonstrates that, unlike many other international and internationalised criminal courts and tribunals, it does not consider the accused's unexplained absence from trial to be a valid waiver of the right to be present. The Internal Rules do allow trial to proceed in the accused's absence after he or she has made his or her initial appearance, and in the following situations: when the accused refuses or fails to appear for hearings; is expelled from the proceedings for causing disruptions; or is too ill to attend.[47] These scenarios, with the possible exception of absence due to illness, meet the criteria of notice and waiver suggesting that although the Extraordinary Chambers generally require the accused to be present, his or her absence can be interpreted as an exercise of his or her right to be present.

Article 17(4)(d) of the Special Court for Sierra Leone Statute mirrors the relevant Articles found in the Statutes of the *ad hoc* Tribunals.[48] It is interesting to note that although the Special Court for Sierra Leone's Statute was concluded three and half years

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[44] *Ruto* (Trial Chamber Decision) *supra* note 41 at para 37; *citing Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007) para 107.
[45] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 81(1).
[46] Ibid at rule 81(2)-(3).
[47] Ibid at rule 81(4)-(5).
[48] UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 17(4)(d).

after the International Criminal Court's Statute, the United Nations and Sierra Leone opted to follow the examples of the Statutes of the *ad hoc* Tribunals, and the International Covenant on Civil and Political Rights, and not the International Criminal Court. The Special Court for Sierra Leone ultimately found that Article 17(4)(d) was insufficient for its purposes. In 2003 it amended its Rules of Procedure and Evidence to specifically identify those situations in which trials may be conducted in the absence of the accused. Rule 60 authorises the Special Court for Sierra Leone to conduct trials *in absentia* in two situations, both arising after the accused has made his or her initial appearance before the court. The first arises when the accused has been afforded the right to appear but refuses to do so. The second occurs when the accused "is at large and refuses to appear in court. In both instances, the matter can proceed if the Judge or Trial Chamber "is satisfied that the accused has, expressly or impliedly, waived his right to be present."[49] By limiting trial *in absentia* to situations in which the accused has appeared before the court, and following a finding of an express or implied waiver on the part of the accused, the Court tacitly endorsed the accused's right to be present at trial.

Even the Special Tribunal for Lebanon's Statute, which famously contains a provision permitting trials *in absentia*, describes the accused as having a right to be present at trial. Article 16(4)(d) of the Statute is modelled on Article 14(3)(d) of the International Covenant on Civil and Political Rights and Articles 21 and 20 of the *ad hoc* Tribunals. Like the relevant provisions found in the Statutes of the *ad hoc* Tribunals, Article 16 is titled 'Rights of the Accused' and indicates that one of the minimum guarantees of a fair trial is that the accused "be tried in his or her presence."[50] However, the Special Tribunal for Lebanon makes the exercise of that right contingent on the terms of Article 22, the article that sets out the Tribunal's trial *in absentia* regime. Although the right to be present at trial at the Special Tribunal for Lebanon is circumscribed by its approval of trials *in absentia*, the Special Tribunal tried to create a system that respects both the accused's right to be present while also allowing trial in the absence of the accused.

It is clear from these Conventions and Statutes that a right to be present at trial exists in international criminal law. All of the Statutes governing the conduct of the

[49] Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) rule 60(B).
[50] UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 16(4)(d).

different international criminal courts and tribunals specifically indicate that the accused has the right to be present. Additionally, many courts and tribunals require clear evidence that the accused chose to be absent before trial can take place in their absence; the ability to choose being a hallmark of a right. Despite the apparent uniformity amongst these various foundational documents, different courts have interpreted that right in different ways. Some courts, including the International Criminal Tribunal for Rwanda and the International Criminal Court have also found that in addition to having a right to be present, the accused also has a duty to be present at trial.

2.2 THE DUTY TO BE PRESENT AT TRIAL

Although it is generally agreed that the accused has a right to be present at trial, some international and internationalised criminal courts and tribunals have also found a corresponding duty to be present at trial. No international or internationalised criminal court or tribunal recognising a duty to be present has done so in isolation; it has always been acknowledged together with the accused's right to be present. The idea that the accused's presence at trial is both a right and a duty found initial support in the jurisprudence of the European Court of Human Rights. In *Poitrimol v France*, the European Court of Human Rights found that the presence of the accused at trial gives meaning to two important aspects of criminal procedure. First, it guarantees the accused's right to a hearing, and second, it serves the evidentiary function of allowing the court to weigh the accused's testimony against that of the victims and witnesses.[51] The European Court observed that to achieve the second goal the legislature of the country in question "must accordingly be able to discourage unjustified absences" and suggests that the accused can be punished for his or her failure to appear.[52]

The *Poitrimol* decision does not explicitly impose a duty on the accused to be present but it does make clear that domestic legislatures have the authority to implement measures discouraging the accused from refusing to appear at trial.[53] Permitting governments to sanction an accused person for failing to appear at trial implies that the accused has some obligation to appear. A right, by its very nature, may be freely exercised by the right holder. Therefore, the imposition of a penalty on the accused for failing to appear demonstrates the existence of a duty because it infringes on the free

[51] *Poitrimol v France* (1994) 18 EHRR 130, 23 November 1993 at para 35.
[52] Ibid.
[53] Ibid.

exercise of the right. Although the European Court of Human Rights does not specify what sanctions are appropriate, it did later find that denying the accused the right to counsel if he or she does not appear is not a permissible sanction.[54]

The Council of Europe's Committee of Experts on the Operation of European Conventions in the Penal Field ("Committee of Experts") also explicitly identified the accused's duty to be present at trial in conjunction with recognising the right to be present. In a memorandum published in 1998 titled 'Judgments in Absentia', the Committee stated that the duty to be present at trial arises out of the requirement imposed on the defendant that he or she "give a personal account to the court", which it described as a requirement of justice.[55] The Committee of Experts did not offer any further comment on the duty to be present other then to acknowledge that linking the duty with an obligation to forgo one's liberty for the duration of trial may not comport with Article 5 of the European Convention on Human Rights. It also did not attempt to explain how the right to be present and the duty to be present interact with one another.

Several international and internationalised criminal courts and tribunals have also found that the accused has a duty to be present at trial. In *The Prosecutor v Barayagwiza*, the Appeals Chamber of the International Criminal Tribunal for Rwanda found that in order for the accused to make a fully knowledgeable waiver of the right to be present, he or she must be informed of certain facts including "his/her right to be present at trial" and to "be informed that his or her presence is required at trial."[56] This holding indicates that there is a dual purpose underlying presence at trial. However, it also mischaracterises the function of presence before the International Criminal Tribunal for Rwanda. Neither the Tribunal's Statute, nor its Rules of Procedure and Evidence, refer to a duty or requirement on the part of the accused to be present at trial. In fact, the use of the word entitlement in Article 20(4)(d) indicates that presence at trial is a right and not a duty. In the context of international human rights law, the terms 'right' and 'entitlement' are synonymous and to be entitled to something means one has a right to it.[57] Further, the French version of Article 20(4) uses the word *droit*, which can be translated as either

[54] *van Geyseghem v Belgium* (2001) 32 EHRR 24, 21 January 1999 at para 33.
[55] Council of Europe, Committee of Experts on the Operation of Conventions in the European Field, Judgments in Absentia (3 March 1998) COE Doc. PC-OC (98) 7.
[56] *Nahimana supra* note 44 at para 109.
[57] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed, Cornell UP 2013) 7.

right or entitlement.[58] This is a clear instance of the Appeals Chamber taking a position that is not based on the relevant law and importing it into its findings.

In reaching the conclusion that the accused's presence at trial constitutes both a right and a duty, the International Criminal Tribunal for Rwanda's Appeals Chamber relied on the Views expressed by the United Nations Human Rights Committee in *Mbenge v Zaire*.[59] The Appeals Chamber asserted that *Mbenge* stood for the proposition that waiver of the right to be present is permitted provided, "in the interest of the sound administration of justice, that the accused has been informed beforehand of the proceedings against him, as well as of the date and place of the trial, and that he has been notified that his attendance is required."[60] In fact, the *Mbenge* Views do not expressly contain the attendance requirement asserted by the Appeals Chamber of the International Criminal Tribunal for Rwanda. Instead, the *Mbenge* Views state that "[j]udgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial *and to request his attendance.*"[61] The substitution of the phrase "to request his attendance" with the phrase "notified that his attendance is required" substantively changes the nature of presence at trial from a right that can be freely exercised by the accused, to a duty required of the accused. Therefore, not only did the Appeals Chamber read a requirement into the Statute and the Rules of Procedure that does not exist, it did so on the basis of a faulty interpretation of the relied upon jurisprudence. The Appeals Chamber's holding may accurately reflect its position as to the issue of presence at trial, however, one should be cautious as to the amount of weight one gives to this aspect of the *Barayagwiza* opinion.

Trial Chamber V(A) and Trial Chamber V(B) of the International Criminal Court also found that the accused has a duty to be present at trial in addition to a right to be present.[62] Both Chambers stressed that the accused's presence at trial should be regarded as, and is a reflection of, the accused's duty to be present.[63] In *Ruto and Sang*, Trial Chamber V(A) announced that Article 63(1) does not express a right to be present

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[58] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) (French version) art 20(4)(d).
[59] *Mbenge supra* note 18.
[60] *Nahimana supra* note 44 at 108.
[61] *Mbenge supra* note 18 at para 14.1 (emphasis added).
[62] *Ruto et al.* (Trial Chamber Decision) *supra* note 41 at para 42; *Kenyatta supra* note 41 at para 124.
[63] *Ruto et al.* (Trial Chamber Decision) *supra* note 41 at para 104; *Kenyatta supra* note 41 at para 124.

because that right is already found in Article 67 and to construe both articles as setting out the same right would mean that Article 63 is redundant.[64] Instead, it was persuaded by the Prosecution's argument that Article 63 contains a duty to be present and connected the obligations implicit in that duty to the need for judicial control over the proceedings.[65] To further bolster its position, the Chamber also announced that Article 63(1) of the Statute provides a statutory basis for it "to make impositions on the time and whereabouts of the accused for the purposes of trial" and that it also authorised the imposition of "sanctions and forfeitures" on the accused if he or she failed to comply with the duty to be present.[66] The *Kenyatta* Court also determined that the accused has a duty to be present, although it did not clearly identify the basis for its conclusion. However, the language of the decision seems to imply that it is based, at least to some extent, on a concern that if the defendant were not obliged to appear at trial, the 'quest for justice' would be thwarted.[67]

The *Ruto and Sang* Court also found support for its position in Article 58 of the Statute which it claims stands for the proposition that "the accused's appearance at trial is an obligation, which can be enforced by means of arrest, if not voluntarily undertaken."[68] Article 58(1)(b)(i) permits the Pre-Trial Chamber to issue an arrest warrant where there are reasonable grounds to believe that the arrest of the suspect is necessary to ensure his or her appearance at trial.[69] The Trial Chamber's reliance on this section of the Statute to support the imposition of a duty to appear on the defendant may be inappropriate, as doing so requires an interpretation of the article that goes beyond the language of the text. Article 58 is designed to endow the Court with a tool to satisfy its own interest in conducting trial in the presence of the accused. It does not, however, oblige the accused to be present. A duty obligates an individual to act, or not act, in a particular way so that he or she is in compliance with that duty. Article 58(1)(B)(i), by contrast, does not impose anything upon the accused. To the extent the article imposes an obligation at all, it is on the Court, as the Article describes actions that can be taken by the Court and not the accused.

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[64] *Ruto et al.* (Trial Chamber Decision) *supra* note 41 at para 39.
[65] Ibid at para 42.
[66] Ibid.
[67] *Kenyatta supra* note 41 at para 108
[68] *Ruto et al.* (Trial Chamber Decision) *supra* note 41 at para 40.
[69] Rome Statute *supra* note 39 at art 58(1)(b)(1).

On appeal by the prosecution, the Appeals Chamber of the International Criminal Court declined to directly address the status of presence at trial as a right and a duty. It did disagree with the Trial Chamber's finding that Article 63(1) would be made redundant if it was expressing a right already contained in Article 67(1)(d).[70] Instead, the Appeals Chamber found that Article 63(1) was meant to reinforce the right to be present and "preclude any interpretation of Article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial."[71] The Appeals Chamber's explicit recognition that Article 63(1) reinforces the accused's right to be present at trial, without mentioning a corresponding duty to be present at trial, makes it reasonable to surmise that the Chamber does not believe that the Statute contains a duty to be present. However, its failure to specifically exclude the existence of a duty suggests that it is not prepared to rule out the idea entirely; particularly where, as here, it was able to reach its conclusion without having to rule on the existence of a duty. This divergence of opinion between the Trial Chamber and the Appeals Chamber leaves open the question of whether the International Criminal Court's Statute expresses a duty to be present along with the right to be present.

Commentators are also beginning to recognise the duty to attend trial contained in Article 63 of the Rome Statute. In the most recent edition of his commentary on the International Criminal Court's Statute, William Schabas states "Article 63 appears to treat presence at trial as a duty", an observation missing from the previous edition.[72] Kai Ambos also recently asserted, "Article 63 itself does not speak of a 'right' but the use of the term 'shall' (in para. 1) rather suggests a general presence requirement coming close to a duty."[73] This commentary, taken together with the case law, shows increased recognition of the idea that the accused has both a right and a duty to be present at trial.

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[70] *Prosecutor v Ruto et al.* (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(A) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 54.
[71] Ibid.
[72] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP 2016) 1035; *c.f.* William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 807.
[73] Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (OUP 2016) 164.

2.3 THE CONTRADICTION CREATED BY THE EXISTENCE OF BOTH A RIGHT AND A DUTY TO BE PRESENT

Viewing the accused's presence at trial as both a right and a duty creates an apparent contradiction. By definition, a right can be freely exercised by the accused, whereas the accused is required to perform a duty. Where a right and a duty overlap, the duty is necessarily dominant because it is compulsory. Put differently, if an accused has a right to decide whether or not he wishes to appear at trial, as well as a duty requiring his or her appearance, the right is extinguished, as it is optional, in favour of the duty, which is obligatory. If there is a duty to be present at trial, it could be argued that there is no right to be present. Clearly, that conclusion is not sustainable because the Statute of every international and internationalised criminal court and tribunal asserts that such a right exists. Therefore, the right to be present and the duty to be present must encompass different interests.

Reference to the text of the International Covenant on Civil and Political Rights is instructive when determining what the right to be present entails. The International Covenant grants the accused the minimum guarantee to be tried in his presence.[74] Describing the right to be present as a minimum guarantee implies that at a bare minimum the accused must have the opportunity to attend trial if he or she wishes. This interpretation of the right to be present was advanced by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Delalić et al.* ("*Čelebići Camp* case"), when the presiding judge, Adolphus Godwin Karibi-Whyte stated of an absent defendant "[i]f he wants to be here, he has a right to be here. There is no doubt about it."[75] As a result, the right to be present is essentially the right not to be unilaterally excluded from trial.[76] The existence of the right prevents courts from proceeding in the absence of the accused unless the accused waives his or her right to be present and the court accepts that waiver.[77]

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[74] International Covenant *supra* note 17 at art 14(3)(d).
[75] *Prosecutor v Delalić, et al.* (Trial Transcript) IT-96-21, T Ch (4 November 1997) 8973, lines 10-11.
[76] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010) 165; Thilo Marauhn, 'The Right of the Accused to be Tried in his or her Presence', in David Weissbrodt and Rüdiger Wolfrum (eds), *The Right to a Fair Trial* (Springer 1997) 764.
[77] Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 222.

This construction of the right is also supported by the case law of the European Court of Human Rights. In *Jelcovas v Lithuania*, the Court found that "a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance hearing."[78] Although the *Jelcovas* holding does not explicitly interpret the right to be present at trial as securing the accused's presence if he or she wishes to be present, that inference can be drawn if *Jelcovas* is read together with *Stoichkov v Bulgaria*. There, the European Court of Human Rights found that the State has a duty "to guarantee the right of the criminal defendant to be present in the courtroom" and also held that it is one of the "essential requirements of Article 6".[79] That the State would be required to guarantee the right of the accused, that is, not prevent the accused from being present, indicates that the accused's right to be present should be understood as requiring trial to take place in his or her presence if he or she wishes to attend.

In international criminal law, the right to be present at trial is not an absolute right as evidenced by the fact that under certain circumstances it can be waived by the accused.[80] The European Court of Human Rights has found that trials conducted in the absence of the accused comply with the right to be present when the accused has either explicitly or implicitly waived the right to be present.[81] That the accused can choose to waive his or her presence at trial indicates that it is a right and not a duty as the accused has control over the decision of whether or not to exercise the right.[82] This is reflected in the rules at the International Criminal Court. In 2013, the International Criminal Court changed its Rules of Procedure and Evidence to permit portions of the trial to continue in the absence of the accused. Rules 134 *bis*, 134 *ter* and 134 *quater* all emphasise the importance of the accused waiving his or her right to be physically present in the court

[78] *Jelcovas v Lithuania* App No 16913/04 (ECtHR, 19 October 2011) para 108; *citing Sejdovic v Italy* (2006) 42 EHRR 17, 1 March 2006 para 81.
[79] *Stoichkov v Bulgaria* (2007) 44 E.H.R.R. 14, 24 June 2005 at para 56.
[80] Council Directive 2016/343 *supra* note 1 at para 35; *Ruto et al.* (Trial Chamber Decision) *supra* note 37 at para 37.
[81] *Sejdovic supra* note 78 at para 86; *Poitrimol supra* note 51 at para 31; *Kwiatkowska v Italy* App No 52868/99 (ECtHR, 30 November 2000).
[82] Coral Arangüena Fanego, 'Requirements in Relation to the Right to a Defence: The Right to Defend Oneself, to Legal Assistance and Legal Aid', in Javier Garcia Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff Publishers 2012) 270.

before trial can take place in his or her absence.[83] Rule 134 *bis* permits the defendant to request that he or she be permitted to appear at "part or parts" of his or her trial via video technology.[84] Rule 134 *ter* and Rule 134 *quater* require that any absence on the part of the accused be accompanied by an explicit waiver of his or her right to be present at trial.[85] By placing the power in the hands of the accused to explicitly waive his or her presence at trial, the Assembly of State Parties recognised that trial can only take place without the accused being present when the accused has specifically authorised that absence.

These new rules conflict with the *Ruto* Trial Chamber's finding that Article 63(1) establishes a duty to be present at trial. The purposes supporting a finding that an accused has a duty to be present, recognition of his or her active role as a participant in proceedings and protecting the interests of justice, are undermined if the accused can voluntarily absent him or herself from trial. By making trial contingent on the accused's appearance or waiver of appearance, the condition under which trial takes place is entirely within the control of the accused and is a strong indication that presence at trial is a right. It also reinforces the idea that the right to be present is defined by the right not to be excluded from trial. It logically follows that if the accused must agree to trial taking place in his or her absence then the accused cannot be prevented from attending trial if he or she wishes to attend. If there is no consent, i.e. no waiver, trial cannot lawfully occur. Therefore, the right to be present must be defined as the right not to be excluded.

The accused's ability to decide whether trial can be conducted in his or her absence through the exercise of a waiver may be a strong indicator that the accused has a right to be present at trial but it is not conclusive. Waiver can also indicate a duty to be present depending on how that waiver is established. The Special Tribunal for Lebanon opened itself up to criticism by permitting trials in the absence of the accused based on a waiver presumed through the non-appearance of the accused following notice by publication.[86] The Special Tribunal concluded that notice could be assumed due to the

[83] Rules of Procedure and Evidence, International Criminal Court (as amended 2013) rule 134 *bis*, rule 134 *ter* and rule 134 *quater*.
[84] Ibid at rule 134 *bis*(1).
[85] Ibid at rule 134 *ter*(2)(a) and rule 134 *quater*(1).
[86] Björn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly how Tailor-made is the Special Tribunal for Lebanon' (2008) 21(2) LJIL 529, 537; Wayne Jordash and Tim Parker; 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 491.

fact that the efforts undertaken in Lebanon to publicise the Tribunal's first indictment made it "inconceivable that [the four accused] could be unaware that they had been indicted".[87] The Special Tribunal for Lebanon's Trial Chamber took this supposition one step further in the *Merhi* case and found that "[t]he fact that [Mr. Merhi] has failed to respond to the charges either in person or through a lawyer leads to the conclusion that he has elected not to attend the hearing and has therefore waived his right to be present."[88]

Assuming waiver based on less than conclusive evidence raises questions as to whether the accused's absence is the result of an active choice not to attend trial. Because there is no clear indication that the accused's absence is the result of a choice not to be present, trials *in absentia* conducted under these circumstances can best be described as the result of the accused's failure to comply with the duty to be present. Waiver implied through silence or inaction indicates a duty to appear couched as a failure to exercise the right to appear. However, failing to exercise a right is different from declining to exercise a right. When an accused waives his or her right to be present, either explicitly or implicitly, it must be unequivocal and it is seen as an informed decision not to exercise the right to be present. Failure to exercise a right through silence or inaction does not carry with it the same indicia that it was the product of an informed decision. It suggests an obligation because it reverses how the right is understood. Rather than approaching trial in the absence of the accused as the result of an accused's decision not to attend, it views trial *in absentia* as the natural result of a failure to act. In this way, trial *in absentia* is seen as a legitimate exercise of a court's powers.[89]

When trial *in absentia* is utilised, it is often justified on the grounds that the accused's wilful absence from trial constitutes "bad faith conduct" by the accused and that such actions should not be allowed to delay or frustrate the smooth progress of trial.[90]

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[87] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *in Absentia* Decision) STL-11-01/PT/AC/AR126.1, A Ch (1 November 2012) para 45; *quoting Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) STL-11-01/I/TC, T Ch (1 February 2012) para 106.

[88] *Prosecutor v Merhi* (Decision to Hold Trial *in Absentia*) STL-13-04/I/TC, T Ch (20 December 2013) para 103.

[89] Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 237.

[90] Ekaterina Trendafilova, 'Fairness and Expeditiousness in the International Criminal Court's Pre-Trial Proceedings', in Carsten Stahn and Göran Sluiter (eds), *The Emerging*

From that perspective, the overriding interest in justice belongs to the public and the goal of criminal prosecution is to arrive at the truth.[91] It perceives the defendant's absence as "halting the course of justice" which must be allowed to proceed so the social peace disturbed by the criminal offence can be restored.[92] This approach understands justice as something that is only available to the victims of atrocity crimes because the accused can only thwart justice and not be protected by it.[93] The failure of the accused to appear at trial is understood as a disruption to the course of justice and by not appearing the accused forfeits his or her right to participate in trial.[94] This position directly conflicts with the general understanding that trial should only proceed following the accused's unequivocal waiver of his or her right to be present. Viewing trial *in absentia* as the natural result of a failure to act deprives the accused of the ability to exercise his or her waiver of the right to be present.

The proper administration of justice is often cited as one of the key reasons why courts should require the accused's attendance during trial and be allowed to proceed in his or her absence as punishment for his or her failure to attend. If the right to be present prevents the court from conducting proceedings without first affording the accused the opportunity to attend if he or she so pleases, then the duty to be present requires the presence of the accused at trial in recognition of his or her active role as a participant in proceedings and "the wider significance of the presence of the accused for the administration of justice."[95] Presence at trial as a duty is seen as a choice to respect the "institutions of justice" above the rights of the accused.[96] A key determination is whether holding trial in the absence of the accused is in the interests of justice.

The fear that the interests of justice might be subverted is the main driving force behind much of the commentary supporting a finding that the accused's presence at trial is a duty. This argument is rooted in the Human Rights Committee's Views in *Mbenge v*

Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 449; Gaeta *supra* note 89 at 237.

[91] Ralph Riachy 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon' (2010) 8 JICJ 1295, 1297.

[92] *Ibid*, *see also* Gaeta *supra* note 89 at 237.

[93] Dov Jacobs, 'The Unique Rules of Procedure of the STL', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 115.

[94] Gaeta *supra* note 89 at 237.

[95] *Ruto et al.* (Appeals Chamber Decision) *supra* note 70 at para 49.

[96] Summers *supra* note 6 at 114.

Zaire. There the Committee stated that *in absentia* proceedings "are in some circumstances… permissible in the interest of the proper administration of justice."[97] The Human Rights Committee only identified one circumstance, where the accused is informed of the proceedings against him or her but declines to attend, in which the interest of the proper administration of justice is implicated.[98] However, its use of the word 'circumstance' in its plural form indicates that there are other, unenumerated situations, in which the proper administration of justice permits courts and tribunals to proceed in the absence of the accused. It has been left to the individual courts and tribunals to conclude when those circumstances arise.

A determination as to what is meant by "the proper administration of justice" is necessarily a theoretical inquiry as it has no firm meaning and an understanding of the issue depends on an individual's perception of what constitutes justice.[99] On one side is the assertion that *in absentia* trials may be conducted under any circumstances so long as doing so would be within the "proper administration of justice."[100] From that perspective, justice is understood as righting a wrong committed by the accused and the accused is viewed as being "brought" to justice for the crimes he or she is alleged to have committed.[101] The rationale behind this position is that the course of justice must proceed even if the accused refuses to participate in the proceedings.[102] This view does not countenance the notion that failing to provide the accused with all of the rights to which he or she is entitled could also lead to injustice. The injustice being addressed is the one the accused is alleged to have committed and does not pertain to any injustice that might be committed against the accused. Rather, presence at trial is plainly understood as a duty rather than a right because justice can only be achieved if the accused is present in court and available for punishment.

The Special Court for Sierra Leone subscribed to the latter position. In *The Prosecutor v Issa Hassan Sesay et al.*, the Special Court for Sierra Leone's Trial

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[97] *Mbenge supra* note 18 at para 14.1.
[98] Ibid.
[99] Nina Jørgensen, 'The Right of the Accused to Self-Representation Before International Criminal Tribunals' (2004) 98 AJIL 711, 722; Hans F.M. Crombag, 'Adversarial or Inquisitorial: Do we Have a Choice?', in Peter J. van Koppen and Steven D. Penrod (eds), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic 2003) 23-24.
[100] Pons *supra* note 13 at 1318.
[101] Gaeta *supra* note 89 at 250.
[102] Ibid at 237.

Chamber observed that criminal law does not allow an absent or disruptive accused "to impede the administration of justice or frustrate the ends of justice."[103] This ruling was in response to Defendant Augustine Gbao's refusal to attend any further hearings because he did not recognise the legitimacy of the Special Court for Sierra Leone.[104] To halt trial under these circumstances would have been "tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification."[105] By ascribing its position to criminal law generally, it suggests that the Trial Chamber viewed this notion as being a general principle of law. The Court echoed this sentiment in *The Prosecutor v Samuel Hinga Norman et al.* when it found that it is not "in the interests of justice to allow the Accused's deliberate absence from the courtroom to interrupt the trial" and that any deliberate absence "will certainly undermine the integrity of the trial and will not be in the interests of justice."[106]

Others have taken the contrary position and asserted that 'the interests of justice' includes respecting the accused's right to a fair trial.[107] This belief encompasses a concern that conducting trials *in absentia* as punishment for failing to appear at trial will result in delegitimizing international tribunals, as doing so will call into question any verdicts entered against the accused in those circumstances.[108] Antonio Cassese recognised that the accused's failure to appear at trial could prevent trials from occurring and "make a mockery of international justice", but he also believed that the "paucity and inconsistency of international rules" regarding trial *in absentia* demonstrated that it was in the interests of justice not to construe presence at trial as a duty.[109]

In *Prosecutor v Blăskić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia found that generally speaking conducting a trial *in absentia* "would not be appropriate" even when the accused has waived the right to be

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[103] *Prosecutor v Sesay et al.* (Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days) SCSL-04-15-T, T Ch (12 July 2004) para 8.
[104] Ibid at para 2.
[105] Ibid at para 8.
[106] *Prosecutor v Norman et al.* (Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, The Second Accused, Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings) SCSL-04-14-PT (1 October 2004) para 22.
[107] Jørgensen *supra* note 99 at 722.
[108] James Sloan, 'The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look' (1996) 9(2) LJIL 479, 479-80.
[109] Antonio Cassese, *International Criminal Law* (OUP 2003) 402-3.

tried in his or her presence.[110] However, the Appeals Chamber did find that it could conduct *in absentia* proceedings in matters involving the secondary jurisdiction of the tribunal, like contempt proceedings, because those matters involved "obstructing the administration of justice."[111] The logical interpretation of this holding is that *in absentia* trials are justified when it is alleged that the accused obstructed the administration of justice. Because the Tribunal found that *in absentia* trials were not permissible when prosecuting crimes under the primary jurisdiction of the court, it follows that the Tribunal does not believe that the absence of the accused from trial when accused of primary jurisdiction crimes constitutes an obstruction of the administration of justice.

There is no clear agreement as to whether the interests of justice are impaired if the accused is not present during trial. In the face of such a disagreement, it is difficult to impose a duty on the accused to be present since the evidence does not wholly support the imposition of that duty. Therefore, any duty imposed on the accused to appear at trial cannot be derived out of a concern that his or her absence will undermine the interests of justice, because it is unclear whether the available evidence supports such a conclusion.

2.4 CONCLUSION

It is indisputable that the accused has a generally recognized right to be present at trial. However, the recent jurisprudence of the International Criminal Court in the *Ruto and Sang* case indicates that the accused may also have a duty to appear at trial. This initially suggests a contradiction in the law, however, the right and the duty to be present actually relate to different interests and are therefore not in conflict. The accused's right to be present is better understood as the right not to be excluded from trial if the accused wishes to attend. This does not prevent trial from taking place in the absence of the accused as the accused may waive his or her right to be present.

The duty to be present recognizes the accused's active role in trial proceedings and the important place that role occupies in the proper administration of justice. If the accused fails to appear, the court may conduct trial *in absentia* in acknowledgment of the accused's responsibilities and as punishment for failing to appear.[112] However,

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[110] *Prosecutor v Blaškić* (Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108bis, A Ch (29 October 1997) para 59.
[111] Ibid.
[112] Pons *supra* note 13 at 1309.

conducting trial in the absence of the accused as a punishment for his or her failure to appear directly conflicts with the fundamental responsibility of a criminal court to carry out its duties "with due regard to the rights of the accused."[113] If criminal courts are required to function with due regard for the rights of the accused, those same courts cannot inflict punishment on the accused if they disagree with the manner in which the accused chooses to exercise his or her rights.

As a result, although courts have found that the presence of the accused at trial is both a right and a duty, courts should be wary of allowing the right to be consumed by the duty. When weighing the decision to proceed in the absence of the accused, the court should heed Mirjan Damaška's concern that de-emphasising the importance of defence rights in favour of other interests might result in those rights becoming undervalued and lead to the conviction of innocent defendants.[114] While the interests of the public are important, they must give way if they create a danger of convicting innocent defendants. Placing the efficient operation of the justice system ahead of defence rights is a slippery slope because an argument can be made that the system would function most effectively if the accused had no rights at all. Once the rights of the accused are compromised to a small extent it becomes easier and easier to further limit those rights in the pursuit of other interests. Rights should not be restricted or impaired in such a way as to compromise the basic purpose of that right.[115] If one accepts that the accused has a duty to be present under international criminal law, one must also accept that it cannot be applied so as to invalidate any of the rights of the accused.

[113] Jordash and Parker *supra* note 86 at 500.
[114] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 JICJ 611, 615.
[115] L.G. Loucaides, 'Questions of Fair Trial Under the European Convention on Human Rights' (2003) 3 HR L Rev 27, 41.

CHAPTER 3: THE ROLE OF DIFFERENT LEGAL SYSTEMS IN FORMULATING THE RIGHT TO BE PRESENT AT TRIAL IN INTERNATIONAL CRIMINAL LAW

The question of why the accused should be present at trial has generally been approached from two different perspectives. The first looks at presence at trial from the standpoint of the accused. This defence-oriented perspective asserts that the accused should be present at trial so that he or she might understand the case against him or her and be afforded the opportunity to answer the charges. The second perspective is less concerned with fairness to the accused and more interested in the part the accused plays in trial. It values the accused's presence as recognition of his or her active role as a participant and "the wider significance of the presence of the accused for the administration of justice."[1] These two different approaches to why the accused should be present are often attributed to the type of criminal law system followed by the court in question.

There are two dominant criminal procedure systems, the inquisitorial system (also called 'the civil law system", "the Romano-Germanic System" or the "continental system") and the accusatorial system (also known as "the common law system," "the adversarial system," or "the Anglo/American system"). The inquisitorial system is oriented towards protecting "the interests of society", achieving an objective understanding of the truth and applying legal principles based on written law.[2] The adversarial system "is bent on enhancing the rights of the accused" and "ensuring respect for the fundamentals of "due process"".[3] The two systems are also distinguished by the form of proceedings, with the inquisitorial system taking the shape of an official inquiry

[1] *Prosecutor v Ruto et al.* (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(A) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 49.

[2] Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (OUP 2016) 2; Antonio Cassese, *International Criminal Law* (OUP 2003) 383; Thomas Volkmann-Schluck, 'Continental European Criminal Procedures: True of Illusive Model?' (1981) 9 Am J Crim L 1, 1, 4-5; Megan Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit' (2004) 4 Intl Crim L Rev 243, 252; Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 206-7.

[3] Cassese *supra* note 2 at 383; Volkmann-Schluck *supra* note 2 at 1, 4-5; Fairlie *supra* note 2 at 252; Zakerhossein and de Brouwer *supra* note 2 at 206-7.

and the accusatorial system progressing as a contest between competing parties.[4] A further distinction involves how evidence is introduced at trial in each system. In the inquisitorial system the judge has access to all of the available evidence and is generally charged with determining the probity of the evidence.[5] By contrast, the parties in the adversarial system control what admissible evidence will be introduced during trial and some evidence is automatically excluded from consideration due to concerns about its reliability.[6]

This consideration of the accusatorial and inquisitorial systems should not be viewed as a value judgment whereby these systems are being elevated over other legal systems. These two systems are examined due to their relevance to the debate about how the right to be present should be applied by international and internationalised criminal courts and tribunals. However, efforts are now being made to define international criminal procedure on its own terms and as a reflection of policy determinations designed to meet the needs of international criminal justice.[7] Commentators have begun to reject the importance of the inquisitorial and accusatorial distinction in the international criminal law context, and a move is afoot to do away with them altogether as they are viewed as largely a distinction without a difference.[8] It is thought that these different legal systems share so many characteristics that the distinctions that once distinguished the inquisitorial and accusatorial systems have become blurred and that there is no longer

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[4] Mirjan Damaška, *The Faces of Justice and State Authority* (Yale UP 1986) 3-4.
[5] Patrick Matthew Hassan-Morlai, 'Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone' (2009) 3 Afr J L Stud 96, 101.
[6] Ibid.
[7] Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) 14 UCLA J Intl L & For Aff 77, 81; Frédéric Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 UCLA J Intl L & For Aff 37, 43.
[8] Fairlie *supra* note 2 at 246; Håkan Friman, 'Rights of Persons Suspected or Accused of a Crime', in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 256; William A. Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 305; Salvatore Mancuso, 'The New African Law: Beyond the Difference Between Common Law and Civil Law' (2008) 14 Ann Sur Intl & Comp L 39, 58; Simon de Smet, 'A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC', in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 414; Michael Bohlander, 'Language, Culture, Legal Traditions, and International Criminal Justice' (2014) 12 JICJ 491, 493.

any true expression of either system.[9] What system a particular rule comes from before being incorporated into the procedure of a court or tribunal is thought to be less important than whether its incorporation "is consistent with international standards of fairness."[10]

3.1 INQUISITORIAL AND ACCUSATORIAL APPROACHES TO THE RIGHT TO BE PRESENT

Within the context of presence at trial, domestic courts using the inquisitorial system often permit trials *in absentia* on the basis that justice should not be "thwarted" by an accused who refuses to appear for or participate in trial.[11] This does not suggest that the accused is not entitled to appear at trial in the inquisitorial system. Rather, an accused who fails to appear for trial or is disruptive during trial is viewed as having waived that right. Conversely, countries that adhere to the accusatorial system, and its focus on due process and the rights of the accused, generally do not permit trials *in absentia*, although there are exceptions.[12] This is because the accusatorial system necessarily requires the interplay between the parties with each side, prosecution and defence, having a role to play in how trial is conducted.[13]

Many civil law countries permit trials *in absentia*, but the decision to do so should not necessarily be connected with the inquisitorial system.[14] Germany, a country that follows the inquisitorial system, generally does not allow trials *in absentia*.[15] At the same time, Italy, which adopted adversarial procedures in 1989, allows trial to take place in the

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[9] Françoise Tulkens, 'Criminal Procedure: Main Comparable Features of the National Systems', in Mireille Delmas-Marty (ed), *The Criminal Process and Human Rights: Towards a European Consciousness* (Martinus Nijhoff Publishers 1995) 8; Peter J. van Koppen and Steven D. Penrod, 'Adversarial or Inquisitorial: Comparing Systems", in Peter J. van Koppen and Steven D. Penrod (eds) *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic 2003) 2; Richard Vogler, 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 Wash U Global Stud L Rev 631, 631; de Smet *supra* note 8 at 414.
[10] Patrick L. Robinson, 'Rough Edges in the Alignment of Legal Systems in the Proceedings of the ICTY' (2005) 3 JICJ 1037, 1056.
[11] Cassese *supra* note 2 at 402.
[12] Alphons Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (OUP 2002) 1446.
[13] Cassese *supra* note 2 at 371.
[14] Antonio Cassese, *International Criminal Law* (2nd Ed, OUP 2008) 389.
[15] The German Code of Criminal Procedure (as amended 23 April 2014) art 230.

absence of the accused.[16] Although trials *in absentia* are most commonly associated with the inquisitorial system, it can be argued that the most genuine manifestation of that system rejects such trials. It is often said that the core goal of the inquisitorial system is to determine the objective, material or real truth.[17] However, Germany recognises that the accused is a necessary participant in the search for the truth. If one thinks of the truth as a puzzle, with each bit of evidence constituting a piece, some of those pieces are in the sole possession of the accused. His or her absence, and resulting inability to add those pieces, prevents the puzzle of truth from being completed. The German and Spanish legal systems are aware of this and do not countenance trials in which the whole truth can never be ascertained because the accused is not present. Therefore, the German and Spanish systems may be the most inquisitorial in their approach to the presence of the accused, as those systems have the greatest commitment to finding the objective truth.

Another inquisitorial approach is found in he French criminal justice system. The French system also recognises the important function played by the accused in the trial process and the questioning of the accused is considered a central element of the trial as the accused is expected to contribute to the process of learning the truth.[18] Despite the important role the accused plays in trial, the French system is willing occasionally willing to dispense with the important role played by the accused and proceed in his or her absence for two reasons. First, the court gathers both inculpatory and exculpatory evidence during the investigatory process and considers all of the evidence when reaching its verdict regardless of whether the accused is present.[19] Second, it is thought that the public's interest in adjudicating crimes is more important than the accused's right to be present at trial, particularly when the accused has notice of the trial and chooses to

[16] Italian Code of Criminal Procedure (adopted on 24 October 1989) art 420 *quater* and art 484.
[17] Bernard Victor Aloysius Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Antonio Cassese (ed and intro.), Polity Press 1993) 50-51; Hans F.M. Crombag, 'Adversarial or Inquisitorial: Do we Have a Choice?', in Peter J. van Koppen and Steven D. Penrod (eds), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic 2003) 24; Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing 2012) 27-28.
[18] J.R. Spencer, 'The English System', in Mireille Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures* (CUP 2002) 164; Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing 2005) 21.
[19] Cassese *supra* note 2 at 371-372.

voluntarily absent himself or herself.[20]

The different methods of addressing the accused's presence at trial pursued by the German and French legal systems demonstrate that trial *in absentia* is not a necessary component of the inquisitorial system. Rather than connecting a domestic criminal justice system's willingness to conduct trials *in absentia* to it being an inquisitorial system, a more likely answer can be found in the historical development of criminal procedure in Germany and France. A consideration of these two particular countries is key because of the global influence of their legal systems. The German predilection in favour of conducting trial in the presence of the accused can be traced to an early German criminal procedure code, the *Sachsenspiegel*. Believed to have first appeared in 1235, the *Sachsenspiegel* detailed a synthesis between traditional legal practices with new approaches to criminal procedure.[21] The procedure contained therein was accusatorial in nature, as opposed to Germany's modern inquisitorial system, and it did not permit trial to take place in the accused's absence.[22] Instead, an absent accused was declared an outlaw resulting in the forfeiture of his legal rights and protections.[23]

Inquisitorial procedures began to develop in Germany during the subsequent two centuries and were uniformly codified in the sixteenth century in the *Constitutio Criminalis Carolina*.[24] The provisions of the *Constitutio Criminalis Carolina* were largely concerned with regulating the use of torture as a means of inducing an accused person to confess, and operated with the clear expectation that the accused would be present to endure the torturous inquest.[25] The *Constitutio Criminalis Carolina* remained in force until the unification of Germany in 1871 and the enactment of the *Strafgesetzbuch für das Deutsche Reich* (Criminal Code for the German Reich) ("RStGB").[26] The RStGB, still in force today, albeit in a somewhat modified form, reflects the general rule in German law that trial be conducted in the presence of the

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[20] Ibid.
[21] Maria Dobozy, (trans), 'Saxon Mirror: A Sachsenspiegel of the Fourteenth Century' (The University of Pennsylvania Press 1999) 22.
[22] *Sachsenspiegel*, Book One, Clause 38, as reprinted in Dobozy *supra* note 21 at 80.
[23] *Sachsenspiegel*, Book One, Clause 67, as reprinted in Dobozy *supra* note 21 at 89.
[24] John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard UP 1974) 155.
[25] *Constitutio Criminalis Carolina*, as reprinted in Langbein *supra* note 24 at 261-308.
[26] A. Esmein, *A History of Continental Criminal Procedure with Special Reference to France* (John Simpson (tr), Brown and Little Co 1913) 316; Langbein *supra* note 24 at 140.

accused.[27] This historical perspective demonstrates that German law's preference in favour of conducting trial in the presence of the accused developed over centuries and is not necessarily a product of the inquisitorial system.

Although the French legal system has a long history of allowing trial to occur without the accused being present, trials *in absentia* have not always been permitted under French Law. The earliest French legal codes still in existence, the *Etablissements de Saint Louis* and *la Coutume de Normandie*, detail customary law as it existed in different parts of France in the 12th and 13th centuries.[28] Neither document describes any procedure for conducting trials *in absentia*; instead, an absent accused was banished from the relevant community and deprived of many of his legal rights if he failed to appear following an official summons.[29] This changed in the 16th century with the introduction of *L'Ordonnance de Villers-Cotterêts*. *L'Ordonnance de Villers-Cotterêts* was not an official legal code but an expression of the changes its author wished to see made in the existing code.[30] In particular, it did away with the long-standing banishment procedure in favour of conducting trials in the absence of the accused.[31] The use of trials *in absentia* was further developed in the 17th century when *l'Ordonnance Criminelle* became the first criminal procedure code to set out a comprehensive procedure for trying the accused *in absentia*.[32] That procedure was retained by Napoleon when he introduced the *Code d'Instruction Criminelle* in 1808.[33] The *Code d'Instruction Criminelle* was disseminated

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[27] Barbara Huber, 'Criminal Procedure in France', in John Hatchard, Barbara Huber and Richard Vogler (eds), *Comparative Criminal Procedure* (British Institute of International and Comparative Law 1996) 113; Hans-Heiner Kühne, 'Chapter 5-Germany', in Christine van den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths 1993) 159-60; Christoph J.M. Safferling, *Towards an International Criminal Procedure* (OUP 2001) 241-2.

[28] F.R.P. Akehurst, (tr and intro), *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris* (University of Pennsylvania Press 1996) xxi-xxii; François Neveux, 'Le Contexte Historique de la Rédaction des Coutumiers Normands' [2011](2) Annales de Normandie 11, 11.

[29] *les Etablissements de St. Louis*, Book One, Article 28, as reprinted in Akehurst *supra* note 32 at 23; Esmein *supra* note 26 at 74.

[30] Langbein *supra* note 24 at 223.

[31] *l'Ordinance de Villers-Cotterets* (1539) art 27-30 <http://www.axl.cefan.ulaval.ca/francophonie/Edit_Villers-Cotterets-complt.htm> 29 June 2017.

[32] *l'Ordonnance Criminelle* (1670) art 7-19, Title XVII, <http://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm> 29 June 2017.

[33] Thomas Vormbaum, *A Modern History of German Criminal Law* (Margaret Hiley (tr),

throughout the world and influenced the development of criminal procedure in those countries making up the French empire, as well as Belgium, Luxembourg, Poland, Greece, Spain, the Netherlands, Japan, Ottoman Turkey and parts of South America, Italy, Egypt, Switzerland, Canada and Germany.[34] The *Code d'Instruction Criminelle* remained in force until 1958 when the current French criminal procedure code came into force.[35] Despite the fact France has had a number of different criminal procedure codes, a clear line can be drawn through them evidencing a historical commitment to conducting trials *in absentia* without demonstrating any real correlation to its use of an inquisitorial system.

By comparison, the English and Welsh legal system, which is considered the foundational accusatorial legal system, is increasingly embracing trials *in absentia*. Historically, the notion of trial taking place in the absence of the accused was rejected as being incompatible with the British common law. In the eighteenth century, William Blackstone made clear that trial could not commence for a felony if the accused was not present and that remained the general rule into the twentieth century when the traditional legal position on the right to be present began to erode.[36]

The general prohibition against proceeding in the absence of an accused charged with a felony began to change in 1933 when, in *Lawrence v The King*, the Privy Council found that the rule requiring the presence of the accused was "inviolable" except possibly when the conduct of the accused makes holding the trial impossible and then it might take place in his or her absence.[37] The permissibility of proceeding in the accused's absence continued to expand in 1972 when the Court of Appeal extended the holding of *R. v Abrahams*, an Australian case pertaining exclusively to misdemeanour crimes, by finding that it also applied to felonies.[38] In doing so, the Court of Appeal reiterated the

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Michael Bohlander (ed), Springer 2014) 66.

[34] Christian Dadamo, and Susan Farran, *The French Legal System*, (2nd Ed, Sweet & Maxwell 1996) 10, n. 36; Richard Vogler, *A World View of Criminal Justice* (Ashgate Publishing Ltd. 2005) 59; John Jupp, 'Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation' (2014) 3(1) CJICL 387.

[35] Serge Lasvignes and Marcel Lemonde, 'The Criminal Process in France', in Mireille Delmas-Marty (ed), *The Criminal Process and Human Rights: Towards a European Consciousness* (Martinus Nijhoff Publishers 1995) 23.

[36] William Blackstone, *Blackstone's Commentaries on the Laws of England*, Book IV, Chapter 24.

[37] *Lawrence v The King* [1933] A.C. 699, 708.

[38] *R v Jones (Robert) (No. 2)*, [1972] 1 WLR 887, 891; *citing R v Abrahams* (1895) 21 Vict.L.R. 343, 353.

general position that the accused has the right to be present at trial; however, it made the right contingent on the accused not abusing it for the purpose of obstructing the proceedings.[39] It also found that by absconding, an accused waives his or her right to be present, and the Court can properly proceed in the absence of the accused.[40] The Court left open to the discretion of the trial court the possibility of continuing trial in the accused's absence in other circumstances, while cautioning that the court's discretion should be used with "great reluctance" and its exercise should be based on the "the due administration of justice".[41]

The 21st century saw further changes to British law in relation to the right to be present at trial. In 2002, the trial court decision in *R v Anthony William Jones* repeated the conclusion that the right to be present could be waived through the deliberate absence of the accused and that the judge had the discretion to proceed with an *in absentia* trial.[42] The *Jones* court also set out a list of considerations for the court to take into account when deciding whether to proceed in the accused's absence; which were then slightly modified by the later ruling in the House of Lords to uphold the decision of the Court of Appeal.[43] In *R v O'Hare*, it was found that waiver of the right to be present could be implied if it were demonstrated that "the accused knew of, or was indifferent to, the consequences of being tried" in his or her absence.[44] English and Welsh courts have also proceeded in the absence of an unrepresented accused upon a finding by the court that the accused's refusal to leave his cell for trial and to properly instruct his counsel acted as a waiver of his right to be present and his right to representation.[45] These decisions signal a clear departure from the traditional accusatorial principle that trial should take place in the presence of the accused.

As indicated by the changing practices in England, there appears to be growing support in different domestic legal systems for conducting some or all of trial in the

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[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] *R v Jones (Anthony William)* [2002] UKHL 5 [HL]; P.W. Ferguson, 'Trial in absence and waivers human rights' [2002](Jul.) Crim L Rev 554, 555; James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (Sweet & Maxwell 2015) 335.
[43] John C. Smith and Clare Barsby, 'Case Comment: *Trial: trial of defendants in their absence*' [2001](Jun.) Crim L Rev 502, 503-04; Richardson *supra* note 42 at 335-336.
[44] *R v Leigh James O'Hare* [2006] EWCA Crim 471; N.W. Taylor, 'Case Comment: *Trial: defendant voluntarily absenting himself from trial - representatives withdrawing from trial*' [2006](Oct.) Crim L Rev 950, 951; Richardson *supra* note 42 at 336.
[45] *R v Henry Lee Smith* [2006] EWCA Crim 2307; Richardson *supra* note 42 at 342.

accused's absence.[46] At the same time, more countries have also been shifting away from the inquisitorial system and towards adopting more accusatorial practices.[47] That trial is being conducted in the accused's absence in more countries, while simultaneously more national jurisdictions are adopting adversarial criminal procedures, further demonstrates that trial *in absentia* is not an idea limited to the inquisitorial system. It also highlights the blurring between traditional ideas about different legal systems and reinforces the growing conclusion that the debate about the accusatorial and inquisitorial systems is nothing more than a false dichotomy.

3.2 THE IMPACT INQUISITORIAL AND ACCUSATORIAL APPROACHES HAVE HAD ON THE RIGHT TO BE PRESENT IN INTERNATIONAL CRIMINAL LAW

Distinguishing between accusatorial and inquisitorial systems is also of diminishing relevance in the context of international criminal law. None of the international or internationalised criminal courts or tribunals is completely inquisitorial or accusatorial in style, but rather blend elements of both systems in their Statutes, Rules of Procedure and Evidence and their practice. International criminal procedure is best viewed as an attempt to develop a procedure "that is uniquely suited to the reality and the values of the tribunals' international nature".[48] While it is important to understand the distinguishing components of each system, one should not become too focused on what differentiates the two systems. Ultimately, no statutory or procedural rule is imported unchanged from a national jurisdiction into the Statute or Rules of an international criminal tribunal.[49] Each rule must be designed "to promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal."[50] Rules are likely to undergo modifications based on the "contextual and teleological requirements" of the

[46] Ekaterina Trendafilova, 'Fairness and Expeditiousness in the International Criminal Court's Pre-Trial Proceedings', in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 449.
[47] Stephen C. Thaman, 'The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy', in John Jackson, Máximo Langer and Peter Tillers, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Mirjan Damaška* (Hart Publishing 2008) 99-100; Vogler *Reform Trends supra* note 9 at 631.
[48] Mégret *supra* note 7 at 59.
[49] Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11(3) European Journal of International Law 569, 579.
[50] Ibid.

particular Tribunal, notwithstanding which system the rule was drawn from.[51] As a Trial Chamber at the International Criminal Tribunal for the former Yugoslavia made clear in *Prosecutor v Delalić et al.* "[a] Rule may have a common law or civilian law origin but the final product may be an amalgam of both common law or civilian elements, so as to render it *sui generis*."[52]

Salvatore Zappalà questions whether the accusatorial system is even relevant in international criminal law. Zappalà argues that modern international criminal law norms adequately protect the rights of the accused through the imposition of a duty on judges and prosecutors "to assist the accused in the preparation of his or her defence."[53] Zappalà's position is undermined by the fact that, in practice, defendants at the international criminal courts and tribunals do not always receive the requisite assistance from the prosecution. The *Lubanga* trial at the International Criminal Court had to be stayed on two different occasions by the Trial Chamber because of the Prosecution's refusal to disclose evidence to the defence.[54] The International Criminal Tribunal for the former Yugoslavia was forced to delay the progress of the *Mladić* trial after it was discovered that the Prosecution failed to produce millions of pages of documents in what the court described as "the prosecution's significant disclosure errors."[55] These "errors" reinforce the importance of protecting the fair trial rights of the accused at international and internationalised criminal courts and tribunals. The accused must be afforded the necessary safeguards to protect his or her fair rights regardless of the criminal law tradition with which those protections may be associated.

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[51] Ibid at 580.
[52] *Prosecutor v Delalić et al.* (Decision on the Motion on Presentation of Evidence by the Accused Esad Landzo) IT-96-21-T, T Ch (1 May 1997) para 15.
[53] Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003) 24.
[54] *Prosecutor v Lubanga* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/06, T Ch I (13 June 2008) para 94; *Prosecutor v Lubanga* (Redacted Decision on the Prosecution's Urgent Request for Variation of the Time- Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU) ICC-01/04-01/06, T Ch I (8 July 2010) para 31.
[55] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (17 May 2012) 524, line 15.

3.2.1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Despite the diminishing importance in distinguishing between the two systems, a perceived tension between inquisitorial and accusatorial procedures informed the drafting of the Statutes and Rules of Procedure and Evidence of the *ad* hoc Tribunals.[56] This tension was no more evident than in the debate concerning whether the International Criminal Tribunal for the former Yugoslavia should permit trials *in absentia*. Prior to submitting the draft statute to the Security Council for its approval, the Secretary General of the United Nations solicited suggestions from different states regarding the formation of the International Criminal Tribunal for the former Yugoslavia.[57] The right to be present at trial, and whether to hold trials *in absentia*, were amongst the most debated issues addressed in the proposals received.

The French government proposed using trials *in absentia* in a way that would be consistent with the inquisitorial system as described in the French *Code de procédure pénale*.[58] The French proposal barred the absent accused from being represented by council and from questioning witnesses.[59] The French did suggest that any judgment reached in the absence of the accused would be annulled if the accused came under the control of the Tribunal and that trials *in absentia* should be utilised only as a last resort.[60] France appears to have been motivated by a concern that the work of the Tribunal would have been paralysed in the absence of trials *in absentia*.[61] The French opinion on this issue is informed by the inquisitorial system's emphasis on the interests of society over the interests of the accused.

Other nations supported the French position, although there is little clear evidence

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[56] Fairlie *supra* note 2 at 246; Salvatore Zappalà, 'General Framework of International Criminal Procedure', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 43; Carlo Tiribelli, 'Judgment in Absentia in International Criminal Law: Its Admissibility Before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant' (2006) 18(2) Sri Lanka J Intl L 369, 371.
[57] Ruth Wedgwood, 'War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal' (1994) 34 Va J Intl L 267, 267.
[58] Anne L. Quintal, 'Rule 61: The "Voice of the Victims" Screams Out for Justice' (1998) 36 Colum J Transnatl L 723, 743-44.
[59] 'Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General' (10 February 1993) U.N. Doc. S/25266 at 30.
[60] Ibid.
[61] Quintal *supra* note 58 at 743-44.

that the support was the result of adherence to a particular system of criminal law. The Russian government proposed that the accused's right to be present at trial be respected, but it also allowed for the possibility of trying an accused in his or her absence.[62] Although that position did not find support at the time, it is actually quite similar to the policy later adopted by the Special Tribunal for Lebanon. The Italian government suggested that default judgments should be excluded "unless specifically accepted", a somewhat unusual suggestion, particularly as over the following decade, the Italian government would repeatedly find itself in trouble with the European Court of Human Rights for failing to properly notify the accused before conducting trials in their absence.[63]

In contrast, the United States was firmly against conducting trial in the absence of the accused. The United States government took the position that the Tribunal "must be fair and be seen to be fair" and that part of achieving that goal was "the participation of defendants in their own defense."[64] The United States also proposed including an Article forbidding the commencement of trial in the absence of the accused.[65] This position is clearly based on the accusatorial system as practised in the United States with its emphasis on due process and the rights of the accused. Interestingly, the government of the Netherlands also opposed permitting trials *in absentia* at the International Criminal Tribunal for the former Yugoslavia, despite the fact that the Netherlands allows *in absentia* trials in its national courts. The Netherlands based its opposition on two grounds: first, any *in absentia* conviction would be "questionable from a legal point of view" because the absent accused would also be unrepresented; and second, because of the perceived difficulty of notifying a person convicted *in absentia* of their conviction in time to allow the appeals process to be completed during the limited time period during

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[62] 'Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General' (6 April 1993) U.N. Doc. S/25537 at 7, 9.

[63] 'Letter Dated 16 April 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General' (16 April 1993) U.N. Doc. S/25300 at 14; *Somogyi v Italy* (2008) 46 EHRR 5, 10 November 2004; *Sejdovic v Italy* (2006) 42 EHRR 17, 1 March 2006, paras. 100-101; *Hu v Italy* App No 5941/04 (ECtHR, 28 December 2006); *Ay Ali v Italy* App No 24691/04 (ECtHR, 14 March 2007); *Zunic v Italy* App No 14405/05 (ECtHR, 21 March 2007).

[64] 'Letter Dated 5 February 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General' (12 April 1993) U.N. Doc. S/25575 at 2.

[65] Ibid at 7.

which the International Criminal Tribunal for the former Yugoslavia would be open.[66] By contrast, the Netherlands supported the inclusion of trial *in absentia* in the International Criminal Court's Statute in part because the Rome Statute ensured the accused's right to counsel and, as a permanent court, it avoided the danger of the court ceasing operations before any potential appeals might be heard. The Netherlands' willingness to change its position about the permissibility of trials *in absentia* suggests that it was acting in what it believed was the best interests of the court or tribunal being established, and not through some ideological notion of how to best implement the inquisitorial system at the International Criminal Tribunal for the former Yugoslavia.

The resultant Statute takes a fairly clear position about whether the accused has a right to be present at trial. Using the International Covenant on Civil and Political Rights as a model, the accused's presence at trial is described as one of the minimum guarantees of a fair trial. Although the Statute stops short of describing presence at trial as a right, the report prepared by the Secretary-General of the United Nations pursuant to the Security Council's resolution establishing the Tribunal leaves little doubt that the accused has the right to be present at trial and that trials *in absentia* should not be permitted at the ICTY.[67] In paragraph 101 of his report, the Secretary-General reiterated the position of the United States and stated, "[a] trial should not commence until the accused is physically present before the International Tribunal."[68] The Secretary-General went on to declare, "[t]here is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in his presence."[69]

Despite this seemingly unequivocal statement by the Secretary-General, the debate continued about whether the ICTY could conduct trials *in absentia*. Proponents of trials *in absentia* viewed the Tribunal's failure to adopt the procedure as a triumph of the accusatorial system over the inquisitorial system, and argued that the Tribunal would be

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[66] 'Note Verbale dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General' (4 May 1993) U.N. Doc. S/25716 at 5.
[67] Report of the Secretary-General, 'Pursuant to Paragraph 2 of Security Counsel Resolution 808' (3 May 1993) U.N. Doc. S/25704.
[68] Ibid at para 101.
[69] Ibid (original emphasis).

unable to meet its political goals without conducting *in absentia* trials.[70] Two lines of argument are used to attack the Secretary-General's position; the first is semantic and the second is legal. In line with the first argument, Paola Gaeta indicates that the phrase "[t]here is a widespread perception", contained in the original English version of the report, appears as "[d]'aucuns estiment que" in the French version which, when translated into English, means "some hold the view that".[71] In Gaeta's view, the more equivocal phrase contained in the French text may indicate that the possibility of holding trials *in absentia* was a topic about which there was disagreement, as opposed to the phrase found in the English version of the report which more definitively rules out trials *in absentia*.[72] While it is true a discrepancy exists between the meaning of the phrases "[t]here is a widespread perception" and "[d]'aucuns estiment que", that inconsistency is minimised when placed in the context of the entire paragraph. In particular, the French version of the report also states that trials *in absentia* are inconsistent with Article 14 of the International Covenant.[73] Whether some people or most people think trial *in absentia* should not be included in the Statute is of no real import when indicating that such a provision would violate the International Covenant. Additionally, there is no legal basis for the suggestion that the French version of the report should somehow negate the meaning of the English version. That is particularly true where, as here, the report was written in English and the French version is a translation.[74] It is counterintuitive to disavow the meaning of the language used in the original document in favour of a different meaning extrapolated from a translation.

A second semantic argument concerns the Secretary-General's use of the term "[a] trial should not commence until the accused is physically present" in his report, rather than the more decisive, "shall not commence until the accused is physically present". It is thought by some that the use of the former statement suggests a lack of

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[70] William A. Schabas and Veronique Caruana, 'Article 63: Trial in the Presence of the Accused', in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Hart Publishing 2016) 1564.
[71] Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) n. 20; Alain Pellet, 'Le Tribunal Criminel International Pour L'ex-Yugoslavie: Poudre aux Yeux ou Avance Decisive?' (1994) 98 RGDIP 1, 48.
[72] Gaeta *supra* note 71 at n. 20.
[73] Report of the Secretary-General supra note 67 at para 101.
[74] Ibid.

decisiveness about the issue.[75] However, if the Secretary-General's Report is placed in the appropriate context, that of a series of recommendations on the form of the draft statute and commentary thereto, then the oblique language used in the commentary is appropriate for its purpose.[76] The Secretary-General was attempting to make suggestions about how the Tribunal should proceed, not direct the Tribunal as to how it must operate.

The legal argument used to refute the Secretary-General's conclusion that trial *in absentia* should not be permitted at the International Criminal Tribunal for the former Yugoslavia relates to the Secretary-General's assertion that to do so would be inconsistent with Article 14 of the International Covenant on Civil and Political Rights. Scholars have argued that the Secretary-General was incorrect when he asserted that trials *in absentia* do not comply with Article 14 of the International Covenant.[77] Support for this position runs the spectrum. Herman Schwartz alleges that the International Criminal Tribunal for the former Yugoslavia does permit trials *in absentia* because international criminal law permits the accused to waive his or her right to be present.[78] Ruth Wedgwood suggests that the Secretary-General may have intentionally relied on a misinterpretation of Article 14(3)(d) of the International Covenant in an effort to be less controversial.[79] Alain Pellet insists that it would be absurd to interpret Article 14(3)(d) as imposing a ban on conducting trial in the accused's absence as such an interpretation would run counter to "les exigences d'une justice equitable" and threaten to paralyze the proper functioning of the Tribunal.[80] While there is some validity to the general proposition that the Secretary-General's reliance on Article 14 to prohibit trials *in absentia* was misplaced, the opinions of these commentators takes the argument too far. The Human Rights Committee interpretation of Article 14(3)(d) is more nuanced than the Secretary-General's report might suggest as it identifies exceptions to the right to be present at trial rather than supporting the seemingly inviolable rule announced by the Secretary-General.[81] However, there is little basis to support the conclusion that the Secretary-General intentionally misstated or misinterpreted the International Covenant.

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[75] Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda*, vol 1 (Transnational Publishers, Inc. 1998) 503.
[76] Ibid.
[77] Gaeta *supra* note 71 at n. 20; Wedgwood *supra* note 57 at 268; Herman Schwartz, 'Trials in Absentia' (1996) 4 Hum Rts Brief 12, 12.
[78] Schwartz *supra* note 77 at 12.
[79] Wedgwood *supra* note 57 at 268.
[80] Pellet *supra* note 71 at 48-49.
[81] *Mbenge v Zaire* Comm No 16/1977 (25 March 1983).

In an effort to reconcile the Secretary-General's statement with the jurisprudence of the Human Rights Committee, some commentators have justified the decision not to hold trials *in absentia* as a political one. Various political pros and cons of holding trials *in absentia* have been advanced. Those advocating in favour of trials in the absence of the accused claimed that it would likely be difficult for the Tribunal to gain custody over the accused, particularly due to the expected failure of the States involved to extradite identified suspects.[82] *In absentia* proceedings would provide the possibility of a public condemnation of the accused, even when he or she is not physically within the jurisdiction of the Tribunal.[83] Others were concerned that if the Tribunal had no procedure condemning an absent accused, the Tribunal would be in danger of becoming 'une bureaucratie inefficace'.[84] Opponents of *in absentia* proceedings were concerned that if the accused was not present during trial, the trials could be perceived as 'show trials' and the verdicts dismissed as little more than a biased condemnation.[85] This view connotes a concern that trials *in absentia* would open up the International Criminal Tribunal for the former Yugoslavia to criticisms similar to those directed at the Nuremberg trials.[86] The fear was that the International Criminal Tribunal for the former Yugoslavia would be nothing more than a "paper tiger" issuing "hollow judgments" and wasting limited resources on trying defendants that would never be punished.[87]

The debate over whether the International Criminal Tribunal for the former Yugoslavia should conduct trials *in absentia* did not end with the conversation surrounding the Statute.[88] When the Tribunal's Rules of Procedure and Evidence were being discussed prior to their adoption in February 1994, Antonio Cassese, the Tribunal's first president, submitted a memorandum to the judges in which he challenged the Secretary-General's assertion that trials held in the accused's absence are not consistent

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[82] Ralph Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute' (2004) 2 JICJ 361, 364; Eric David, 'Le Tribunal International Pénal Pour l'ex-Yugoslavie' (1992) 25 Rev Belge Droit Intl 565; Pellet *supra* note 71 at 49.
[83] Zacklin *supra* note 82 at 364.
[84] Pellet *supra* note 71 at 49.
[85] Zacklin *supra* note 82 at 364.
[86] Mark Thieroff and Edward A. Amley, Jr., 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 Yale J Intl L 231, 258; Morris and Scharf *supra* note 75 at 501-2.
[87] Ibid.
[88] Pellet *supra* note 71 at 49.

with the right to be present and advocated for a rule permitting trial by default.[89] The notion of adopting a rule permitting trials by default was met with resistance and ultimately was not adopted as many of the judges had reservations about conducting trial under those circumstances.[90] Cassese later confirmed that "the overriding need to ensure that justice is not only done, but is seen to be done" led to the conclusion by the judges that trial *in absentia* should not be incorporated into the International Criminal Tribunal for the former Yugoslavia's Rules of Procedure and Evidence.[91] Judge Gabrielle Kirk McDonald proposed an alternative procedure under which a hearing could be conducted to preserve and make public the evidence against an absent accused.[92] In Judge McDonald's formulation the accused would be entitled to representation by counsel during the proceeding.[93]

Instead of allowing trial by default of trial *in absentia*, the Tribunal introduced Rule 61 as a compromise between the different sides in favour or against conducting the entirety of trial outside of the accused's presence.[94] Rule 61 describes a procedure that amalgamates the proposals set forth by Professor Cassese and Judge McDonald into a single process. Rule 61 permits the Tribunal's Trial Chambers to conduct hearings in the absence of the accused during which evidence is presented and, at the conclusion of the proceeding, the Chamber reaches a determination about the culpability of the accused.[95] These proceedings have been described as resembling trials *in absentia*, "a substitute to

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[89] Gaeta *supra* note 71 at 233-34; Gabrielle Kirk McDonald, 'Chapter 14: Trial Procedures and Practices', in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol 1 (Kluwer Law International 2000) 554.

[90] Gaeta *supra* note 71 at 233-34.

[91] Statement by the President Made at a Briefing to Members of Diplomatic Missions, 11 February 1994, in Virginia Morris and Michael Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol 2, (Transnational Publishers, Inc. 1995) 655 (original emphasis); *see also* Daniel D. Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia' (1994) 5(2-3) Crim LF 507, 530.

[92] Ibid at 555.

[93] Ibid.

[94] Salvatore Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy: General Framework of International Criminal Procedure', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 48.

[95] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) rule 61.

the process *in absentia*" and most notably by former Judge Mohamed Shahabuddeen, as "a mock trial."[96] Rule 61 has also been described as a compromise "between common law countries who disfavoured the use of trial in absentia and civil law countries who felt that without it, the Tribunal would not be able to function properly."[97] Rule 61 proceedings largely proved to be an unsatisfactory solution and quickly fell out of use.[98] Louise Arbour, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia, considered Rule 61 proceedings detrimental to the work of the prosecution, and felt that its benefits did not outweigh its detriments.[99]

The Appeals Chamber largely resolved the conflict surrounding the appropriateness of proceeding outside of the presence of the accused in its decision in *Prosecutor v Blaškić*. Speaking in the context of whether the Tribunal was authorized to hold *in absentia* contempt proceedings against an individual that failed to comply with a subpoena, the Appeals Chamber addressed the appropriateness of holding *in absentia* trials generally.[100] The Appeals Chamber found that:

> [G]enerally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal (i.e., persons accused of crimes provided for in Articles 2-5 of the Statute). Indeed, even when the accused has clearly waived his right to be tried in his presence (Article 21, paragraph 4 (d), of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused.[101]

Although the *Blaškić* case did not directly involve the defendant's right to be present at trial, the Appeals Chamber's opinion that the Statute did not permit trials *in absentia* has been afforded due respect. This is particularly evident from the fact that several significant suspects avoided coming under the jurisdiction of the court and no effort was

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[96] William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (CMP Publishing, Ltd 2009) 360; Hervé Ascensio, 'The Rules of Procedure and evidence of the ICTY' (1996) 9(2) LJIL 467, 471; Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012) 130; Orie *supra* note 12 at 1446.
[97] Quintal *supra* note 58 at 747.
[98] Tiribelli *supra* note 56 at 372.
[99] Louise Arbour, 'The Crucial Years' (2004) 2 JICJ 396, 399.
[100] *Prosecutor v Blaškić* (Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108bis, A Ch (29 October 1997) para 59.
[101] Ibid.

made to try them in their absence.

Despite the rather clear preference in favour of trial in the presence of the accused, the Tribunal would eventually come to accept that some proceedings could take place in the accused's absence. Rule 80 of the Tribunal's Rules generally authorises the exclusion of any individual from the courtroom in order to maintain the dignity and decorum of the proceedings and specifically allows the Trial Chamber to order the removal of the accused if he or she has been consistently disruptive and has been warned that he or she may be removed.[102] If the accused is removed under Rule 80, the trial may continue in his or her absence.[103] The Appeals Chamber would later find that disruptions to trial consistent with Rule 80(b) were not confined to the defendant's outbursts; it also described absence due to illness as a disruption to trial, albeit a non-intentional one.[104] A later Appeals Chamber decision would find that the right to be present at trial is not absolute; that it can be waived or forfeited as evidenced by the fact that a disruptive accused could be removed from the courtroom.[105] However, the right to be present, as a fundamental right, can only be restricted in service of a sufficiently important objective, and the restriction can be no greater than that which is necessary to achieve that objective.[106]

The Secretary-General's Report and the International Criminal Tribunal for the former Yugoslavia's subsequent decision in *Blaškić* led many to conclude that the accused must be tried in his or her presence at the Tribunal.[107] However, the Tribunal's actual practise has been much more nuanced. The early debate over whether trial *in absentia* should be incorporated into the Tribunal's rules, and the resulting compromise

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[102] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) rule 80.
[103] Ibid at rule 80(B).
[104] *Milošević* v *The Prosecutor* (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel) IT-02-54-AR73.7, A Ch (1 November 2004) para 14.
[105] *Prosecutor v Stanišić et al.* (Decision on Defence Appeal of the Decision on Future Course of Proceedings) IT-03-69-AR73.2, A Ch (16 May 2008) para 6.
[106] Ibid.
[107] Sean D. Murphy, 'Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999) 93 AJIL 57, 75; Zacklin *supra* note 82 at 364; Lal Chand Vohrah, 'Chapter 13: Pre-Trial Procedures and Practices', in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol 1 (Kluwer Law International 2000) 503.

position establishing the Rule 61 proceedings that could take place outside of the accused's presence, demonstrates that the issue was far from settled. The subsequent practice to continue trials in the absence of a disruptive or unwell accused indicates that the Tribunal has been much more flexible in interpreting the Statute's dictate that the accused be tried in his or her presence. While it is certainly true that the Statute and the Tribunal's jurisprudence would not allow for the entirety of trial to take place in the absence of the accused, it is also apparent that substantial portions of trial have occurred outside of the accused's presence.

3.2.2 THE INTERNATIONAL CRIMINAL COURT

The idea of a permanent international criminal court is an old one. In 1920, Baron Descamps, the president of the Committee of Jurists, suggested the establishment of a 'High Court of International Justice' to adjudicate crimes against public order and the law of nations.[108] Baron Descamps' declaration was followed two years later by an International Law Association resolution advocating in favour of the creation of an International Criminal Court.[109] Two years later the International Law Association promulgated a draft Statute for the proposed court.[110] Interest in the Court was revived in 1948, when Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide authorised trial against individuals accused of genocide "in such international penal tribunal as may have jurisdiction."[111] This led to the International Law Commission drafting a model statute for an international criminal court before the idea was again abandoned in the 1950's.

Interest in an international criminal court was resurrected in the late 1980's by Arthur Napoleon Raymond Robinson, then the Prime Minister of Trinidad and Tobago.[112] Concerned by the financial pressure being placed on small nations to combat international narco-terrorism, Mr Robinson formed a coalition of Latin American and Caribbean countries and requested a U.N. General Assembly agenda item "addressing the

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[108] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office 1948) 437.
[109] Ibid at 438.
[110] Ibid.
[111] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948 UNGA Res 260 A III, entered into force 12 January 1951) art 6.
[112] Paul Marquardt, 'Law Without Borders, The Constitutionality of an International Criminal Court' (1995) 33 Colum J Transnatl L 73, 90.

creation of an international criminal court with jurisdiction over international drug offenses."[113] The General Assembly responded to the Trinidadian initiative by requesting that the International Law Commission renew its earlier work on a Statute for an international criminal court.[114] While the negotiating parties quickly agreed that the default position of the court should be to conduct trial in the presence of the accused, the issue of trial *in absentia* came to be considered one of the most controversial topics during the negotiation process of the Statute. [115]

Some debate exists as to whether the divergence in practice between the inquisitorial and accusatorial systems played a role in the development of the International Criminal Court's position on the presence of the accused. Salvatore Zappalà describes the issue of whether trials *in absentia* should be permitted as one of the "key divisions" between inquisitorial and accusatorial nations, and that the debate between the two sides on the issue was reopened during the negotiations of the Rome Statute.[116] Håkan Friman took a less strident stance by asserting that although the conversation over trials *in absentia* during the negotiation of the Rome Statute did not exactly split down inquisitorial versus accusatorial lines, the type of system followed domestically did often inform the position of the negotiating states.[117] William Schabas rejects Zappalà and Friman's positions as a false distinction and asserts that the issue of presence at trial is really an issue of different practices rather than one about the fundamental values underlying national criminal law practices.[118] Despite his refutation of the traditional understanding of the clash between the accusatorial and inquisitorial systems, Schabas does recognise that the debate about presence at trial during the Rome Conference invoked some of the traditional disagreements between the accusatorial and inquisitorial traditions.[119]

The drafting history of the International Criminal Court's Statute does not clearly demonstrate an inquisitorial or accusatorial bias with regard to the right to be present although there are some identifiable instances in which concerns were raised arising out

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[113] Ibid; Cristian DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 Va L Rev 1381, 1388-89.
[114] Marquardt *supra* note 112 at 91.
[115] Friman *supra* note 8 at 255; Schabas *In Absentia Proceedings supra* note 96 at 370.
[116] Zappalà *supra* note 57 at 129.
[117] Friman *supra* note 8 at 256.
[118] Schabas *Introduction to the International Criminal Court supra* note 8 at 305; *see also* Schabas and Caruana *supra* note 70 at 1564.
[119] Schabas and Caruana *supra* note 70 at 1567.

of that dichotomy. In particular, the early negotiations do not suggest a debate drawn along inquisitorial versus accusatorial lines. The introduction in 1993 of the International Law Commission's Draft Statute for an International Criminal Court ("1993 Draft Statute") immediately sparked debate over whether trial *in absentia* should be permitted, but that debate appears to have been informed by the practice in each commenting state and not whether it employed an inquisitorial or accusatorial system.[120]

Article 44 of the 1993 Draft Statute sets out the suggested rights to be afforded to the accused, including the right to be present at trial.[121] The Article's Commentary demonstrates significant disagreement amongst the Committee's members with regard to the appropriateness of trials *in absentia*. Some took the position that trials *in absentia* should be banned outright, while other members took a more nuanced view.[122] It was proposed that distinctions about the reason for the accused's absence should be drawn and three different types of absence were discussed, including: (1) where the accused has been indicted but is unaware of the proceedings; (2) the accused has been notified but refuses to appear; and (3) the accused has been arrested but escapes before the start of trial.[123] The members also debated whether trial should be allowed to commence under these different scenarios, although it was generally agreed that trial should not take place in the first situation and that retrial be allowed if a trial *in absentia* were conducted.[124]

Following the presentation of the 1993 Draft Statute, the United Nations invited the states to present their written positions as to the advisability of conducting trials *in absentia*.[125] These written statements indicate that States' positions were not strictly dictated on the basis of the inquisitorial/accusatorial divide. Some countries, including Germany, Australia, New Zealand, Malta, the United States, Switzerland (as a non-member State) and Yugoslavia (consisting of Serbia and Montenegro), made it clear that

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[120] Schabas *In Absentia Proceedings supra* note 96 at 370.
[121] International Law Commission, 'Report of the Working Group on a draft statute for an international criminal court', reprinted in *Yearbook of the International Law Commission 1993: Report of the International Law Commission on the work of its forty-fifth session*, vol 2, part 2 (United Nations 1995) 120.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] International Law Commission, 'Draft Code of Crimes Against the Peace and Security of Mankind: Observations of Governments on the Report of the Working Group on a draft statute for an international criminal court', *1994 Yearbook of the International Law Commission: Documents of the Forty-Sixth Session*, vol 2, part 1 (United Nations 2001) 23; Schabas *In Absentia Proceedings supra* note 96 at 370.

they were opposed to trial taking place in the absence of the accused.[126] This list contains a mix of inquisitorial and accusatorial countries, two of which, Yugoslavia and Switzerland, were inquisitorial countries that permitted some form of trial *in absentia* in their own domestic legal system.[127] This departure from a State's own national practice was not confined to countries opposing *in* absentia trials. In contrast, some countries, like Austria, that narrowly limit trials *in absentia* in their national courts, felt it was appropriate to hold *in absentia* trials in certain situations so long as the accused was afforded the right to a new trial if he or she were to later come under the custody of the proposed court.[128] Still other countries, particularly Cuba, Hungary, Kuwait, Sri Lanka and the United Kingdom advocated in favour of implementing a system that closely resembled its own.[129] Finally, some countries, notably Mexico, Iceland, Denmark, Norway, Sweden and Slovenia, refused to take a firm position on the issue and instead counselled further deliberation while also taking explicit notice of the importance of Article 14 of the International Covenant on Civil and Political Rights.[130] This diversity of positions indicates that opinion on the matter was wide-ranging but it does not suggest that the disagreement could be strictly reduced to a dispute between inquisitorial and accusatorial states.

The debate over trials *in absentia* continued during the meetings of the International Law Commission in May 1994. At that time, the debate about trial *in absentia* began to crystalize along inquisitorial and accusatorial lines, although there was no uniformity of agreement based on those distinctions. The French and Algerian participants, both representing inquisitorial countries, asserted that Article 14 of the International Covenant on Civil and Political Rights does not forbid conducting trial in the accused's absence and expressed their support for trials *in absentia* held under limited

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[126] International Law Commission Draft Code *supra* note 134 at 29, 42, 57, 60, 88, 94, 96.
[127] Code of Criminal Procedure, Yugoslavia (1 July 1951) art 275; European Committee on Crime Problems, Committee of Experts, on the Operation of European Conventions on Co-operation in Criminal Matters, Council of Europe 'Questionnaire concerning judgments *in absentia* and the possibility of retrial: Summary and Compilation of Replies' (21 February 2013) Doc. No. PC-OC/Docs 2013/ PC-OC(2013)1rev, 41-42 <https://rm.coe.int/168058f4ae> accessed 30 June 2017.
[128] International Law Commission Draft Code *supra* note 125 at 32; European Committee on Crime Problems *supra* note 127 at 19-20.
[129] International Law Commission Draft Code *supra* note 125 at 38, 47, 55, 58, 65, 69, 73 and 78.
[130] Ibid at 58, 65 and 68.

circumstances.[131] They were joined in their support of trials *in absentia* by Australia and Guatemala, both countries viewed as employing accusatorial criminal procedures (Guatemala had recently adopted an accusatorial system).[132] That opinion was contradicted by Uganda, Germany, and the United States, nations that generally disapprove of trial *in absentia*, each of whom believed that such trials would undermine the legitimacy of the court.[133] The latter two states also expressed opposition because in their view trials *in absentia* would lack any practical effect.[134] China and India also opposed trials *in absentia* out of a concern that such trials are "contrary to the concept of respect for the rights of the accused."[135]

In its 1994 Draft Statute ("1994 Draft Statute"), the International Law Commission introduced Article 37 entitled 'Trial in the Presence of the Accused'.[136] Article 37 started with the proposition that "[a]s a general rule, the accused should be present during trial."[137] The draft statute then went on to describe instances in which trial could be conducted in the absence of the accused. Article 37(2) permitted *in absentia* trials if the accused was in custody, or had been released pending trial, and considered it undesirable to conduct trial in the presence of the accused for reasons of security, when the accused was in ill-health; if the accused was continuing to disrupt trial; or the accused had escaped from lawful custody or broken bail.[138] Under this model, before trial could be held in the absence of the accused the court was required to take reasonable steps to inform the accused of the charge and ensure that the accused was legally represented at trial.[139] Next, the Draft Statute authorized the formation of an 'Indictment Chamber' tasked to record evidence, consider whether a *prima facie* case had been established against the accused and issue arrest warrants against those accused against whom such a

[131] International Law Commission, 'Summary Records of the Meetings of the Forty-Sixth Session: 2 May-22 July 1994', *1994 Yearbook of the International Law Commission*, vol 1, (United Nations 1996) 17, 26.
[132] Ibid at 9, 11; Richard Vogler, 'Due Process', in Michael Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative International Law* (OUP 2012) 945-6.
[133] Ibid at 11-12, 21, 27.
[134] Ibid at 21, 27.
[135] Ibid at 38, 131.
[136] International Law Commission, 'Draft Statute for an International Criminal Court 1994', *1994 Yearbook of the International Law Commission*, vol 2, part 2 (United Nations 1997) 53
[137] Ibid.
[138] Ibid.
[139] Ibid.

case had been established.[140] If the accused was subsequently tried following the decision of the 'Indictment Chamber', the evidence presented before that chamber would be admissible at trial.[141]

The International Law Commission explained the reasoning behind the provisions of Article 37 in the commentaries to the Statute. The Commission started with the proposition that "the presence of the accused is "of vital importance"" in recognition of Article 14(3)(d) of the International Covenant on Civil and Political Rights and to ensure the establishment of the facts and the ability to enforce any sentence passed by the court.[142] However, the International Law Commission also identified the appeal of a developing a procedure similar to the Rule 61 Proceedings contained in the Rules of Procedure and Evidence of the *ad hoc* Tribunals.[143] The Commission's advocacy on behalf of this sort of procedure could be interpreted as an attempt to reach a compromise on the issue of trial *in absentia*.[144]

On 9 December 1994, the United Nations General Assembly established an *ad hoc* committee to review the 1994 Draft Statute.[145] The *ad hoc* committee reviewed the Statute and developed some conclusions regarding the right to be present at trial. The rule that the accused should be present at trial was "widely endorsed" although there was disagreement as to the extent of any exceptions to the rule.[146] Some delegations questioned whether there should be any exceptions to the right to be present at all, and specific concerns where expressed over the exceptions relating to ill-health and security.[147] Other delegations viewed paragraph 2 of the 1994 Draft Statute, which sets out the situations in which a person may be tried in their absence, as overly broad while others felt it struck the right balance between the importance of the right to be present and

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[140] Ibid.
[141] Ibid.
[142] Ibid at 54.
[143] Ibid.
[144] Quintal *supra* note 58 at 747.
[145] UNGA Res. 49/53 (17 February 1995) U.N. Doc. A/RES/49/53, at 2.
[146] Ad Hoc Committee on the Establishment of an International Criminal Court, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' (1995) U.N. Doc. A/50/22, para 164, *as reported in* Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol. 2 (Transnational Publishers, Inc. 2005) 457 (hereinafter 1995 Ad Hoc Committee Report.)
[147] Ibid.

the need to allow trial to take place if the conditions of the exceptions were met.[148] Finally, the committee discussed the need for the paragraph concerning the "Indictment Chamber", the proper function of the "Indictment Chamber" and whether paragraph four should be deleted in its entirety and replaced with a separate article establishing a permanent indictment chamber.[149]

In 1995, the United Nations General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court ("1996 Preparatory Committee"), which convened in 1996 to continue the discussion about the 1994 Draft Statute and to prepare a consolidated statute as a next step towards holding a conference of plenipotentiaries.[150] The Preparatory Committee introduced significant changes to the 1994 Draft Statute including deleting the paragraphs concerning the "Indictment Chamber" (although that procedure would reappear as the Pre-Trial Chamber as described in Article 56-58 and 60-61 of the Rome Statute).[151] The 1996 Preparatory Committee also combined paragraphs two and three of the 1994 Draft Statute and listed five exceptions to the right to be present including: for reasons of security or ill-health; the continued disruption of the trial by the accused; following an escape or breaking of bail by the accused; the refusal of a detained accused to appear at trial; and the accused's failure to appear where all reasonable steps have been taken to inform him or her of the charges.[152] The 1996 Preparatory Committee also proposed an alternative whereby the accused was required to turn himself in at least one day before the start of trial.[153] and failure to do so, absent an exemption granted by the Trial Chamber, would result in the issuance of an arrest warrant for the accused, and failure to appear for the commencement of trial would result in the trial being conducted in the accused's absence.[154]

The 1996 Preparatory Committee experienced lengthy debates regarding the right

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[148] Ibid.
[149] Ibid.
[150] UNGA Res. 50/46 (18 December 1995) U.N. Doc. A/RES/50/46 at 2.
[151] Preparatory Committee on the Establishment of an International Criminal Court, '*Report of the Preparatory Committee on the Establishment of an International Criminal Court*', vols 1-2 (1996) U.N. Doc. A/51/22 *as reported in* Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol 2 (Transnational Publishers, Inc. 2005) 455-57 (hereinafter "1996 Preparatory Committee Report").
[152] Ibid at 455-57.
[153] Ibid.
[154] Ibid.

to be present at trial.[155] These debates were, in part, the result of a French concern that practitioners from common law countries were dominating the conversation and that a danger existed that in the absence of action a common law system would be implemented at the court.[156] Therefore, the French introduced its own Draft Statute in an effort to ensure that its civil law system was properly respected.[157] Some states blamed the French for delaying the negotiations but this intervention is thought to have been crucial to stimulating discussion about the adversarial and inquisitorial systems and led to the hybridized procedure now in place at the ICC.[158]

During the negotiations, France and the Netherlands both proposed expanding the possibility of conducting trials *in absentia*.[159] It is interesting to note that the Dutch supported trials *in absentia* at the International Criminal Court as they opposed the practice at the International Criminal Tribunal for the former Yugoslavia. Their apparent change of heart likely resulted from the Rome Statute's guarantees that an absent accused would receive representation and would have access to an automatic retrial if he or she ever came under the jurisdiction of the Court. France, Canada, Austria and South Africa all showed support for the Article 37(4) indictment chambers as proposed in the 1994 Draft Statute.[160] China, Austria and South Africa also expressed concerns over conducting trial in the absence of the accused due to the illness of the accused and China suggested that trial should be postponed when an accused becomes ill.[161] The Japanese submitted a Working Paper recommending limiting trials *in absentia* to only those situations in which a defendant in custody refuses to attend trial on a particular day.[162]

The Preparatory Committee ("1997 Preparatory Committee") met again in 1997 and continued the discussion about the right to be present at trial. The 1997 Preparatory Committee introduced four new options regarding the right to be present each using the 1994 ILC Draft Statute as a starting point. Option one forbade the Court from holding

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[155] Friman *supra* note 8 at 257.
[156] Kai Ambos, 'International Criminal Procedure: "adversarial", "inquisitorial" or "mixed"?' (2003) 3 Intl Crim L Rev 1, 6-7.
[157] Ibid.
[158] Ibid.
[159] Friman *supra* note 8 at 257.
[160] Ibid at 257-58; United Nations Press Release, 'Trial In Absentia Among Issues Discussed By Preparatory Committee Establishment of Criminal Court' (16 August 1996) UN. Doc. L/2798, at 1.
[161] Ibid at 2.
[162] Working Paper submitted by Japan (13 August 1996) U.N. Doc. A/AC.249/L.7.

trials in the absence of the accused.[163] Option two started with the proposition that the accused should be present at trial but set forth several exceptions whereby trial could take place in the absence of the accused including: where the accused has escaped from lawful custody or broken bail; or where the defendant continued to disrupt the trial.[164] The third option also started with the general presumption that the defendant had the right to be present at trial but expanded on the instances in which trial could take place in his or her absence to include: when the accused requests to be absent from trial for reasons of ill-health; when the accused fails to appear on the day of the hearing; when the accused disrupts trial; and when a detained defendant refuses to appear at trial.[165] This option does not include proceeding with trial if the defendant has escaped from custody.[166] The fourth option also specifically identifies the accused's right to be present at trial but would permit trial to proceed in his or her absence when the Trial Chamber determines that the accused's absence is deliberate.[167] The significant differences between these options demonstrates how little consensus there was between the States when addressing the issue of the right to be present at trial.

Although there were subsequent meetings in which the right to be present at trial were discussed, there were no real substantive changes to the draft article until the Rome Conference. What did change over the course of the two subsequent drafts was the numbering of the Article. What had been labelled as Article 37 became Article 56 in the Zutphen Draft, prepared during an inter-sessional meeting held in Zutphen, Netherlands between 19 January and 30 January 1998.[168] The final meeting of the Preparatory Committee was held in April 1998, at which time the Article had again been renumbered as Article 63, but no substantive changes were made.

The delegates arrived at the Rome Conference without any agreement as to how the presence at trial of the accused would be treated in the Statute. Presence at trial

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[163] Preparatory Committee on the Establishment of an International Criminal Court, '*Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997*' (1997) U.N. Doc. A/AC.249/1997/L.8/Rev.1 *as reported in* Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol 2 (Transnational Publishers, Inc. 2005) 453-55 (hereinafter "1997 Preparatory Committee Report").
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands (4 February 1998) UN. Doc.: A/AC.249/1998/L.13.

remained one of the most contentious issues to be resolved during the Rome Conference, as it had been throughout the preparatory stages of the drafting process.[169] Common ground remained amongst the delegates as to certain aspects of the right to be present. It was generally agreed that the default position of the court was for the accused to be present at trial, that some measure needed to be introduced to prevent the accused from disrupting trial and that a procedure to preserve evidence was needed.[170] What was lacking was an accommodation between those delegations that firmly opposed holding trials *in absentia*, and those that believed such trials should be permitted.[171] Numerous states took the floor during the conference to declare their preference for one approach or another without any consensus being reached.[172] Because of the lack of agreement the issue was referred to a working group for resolution before being included in the larger statute.[173]

Three new proposals addressing the presence of the accused at trial were introduced during the Rome Conference by nations that had previously been silent on this issue. On 25 June 1998, a group of Muslim nations made up of Egypt, Iraq, Libya, Oman, Qatar, Sudan and the Syria submitted a proposal that allowed for trial *in absentia* if the accused had been notified of the date of trial and the accused refused to attend, or was prevented from attending the proceedings; the accused escaped from custody or; if the Trial Chamber wished to proceed in the face of force majeure preventing the accused from attending.[174] Although this proposal was not adopted, it bears marked similarities to the trial *in absentia* provision adopted by the Special Tribunal for Lebanon. On the same day, Malawi also submitted a proposal under which the accused could be tried in his or her absence following a determination by the Trial Chamber that the accused's absence

[169] Friman *supra* note 8 at 262.
[170] Ibid at 259.
[171] Statement made by William A. Schabas as recorded by Leila Nadya Sadat, 'The Influence of International Law and International Tribunals on Harmonized Hybrid Systems of Criminal Procedure: Transcription: The Centennial Universal Congress of Lawyers Conference' (2005) 4 Wash U Global Stud L Rev 651, 655.
[172] Friman *supra* note 8 at 259.
[173] Ibid.
[174] 'Proposal of Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic submitted on 25 June 1998 regarding Article 63', *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, vol 3 (United Nations, 2002) U.N. Doc. A/CONF.183/C.1/WGPM/L.15, p. 303.

was deliberate.[175] Malawi's proposal also permitted the Trial Chamber to request that the Pre-Trial Chamber reconvene to record evidence against the absent accused that would be admissible in a future trial.[176] This latter proposal is similar to a procedure later adopted at the International Criminal Tribunal for Rwanda as Rule 71 *bis*. The stated purpose of both rules is to preserve the evidence against an absent accused that might be used at a future trial should the accused ever come under the control of the court.[177] Colombia also submitted a proposal designed to authorize the Court to proceed in the absence of the accused if, after all necessary steps are taken to secure the appearance of the accused, he or she still does not attend trial.[178] Both the Malawian and Colombian provisions are similar to the system each country utilizes domestically when confronted with an absent accused, although Malawi's proposal is not quite as expansive as its domestic practice.[179]

In an effort to simplify the proposals thus far introduced, the Committee on Procedural Matters introduced two different working papers during the conference. Both working papers contained the provisions found in the finished Statute, that the accused "shall be present during trial" and that the Court could order the removal of a continuously disruptive accused from the courtroom.[180] The 4 July Working Paper also contained two additional clauses under consideration for addition to the Statute. The first optional clause permitted the court to proceed in the accused's absence if the accused, having been present at the beginning of trial, fled after trial started.[181] This practice is permitted by most domestic courts, including those like the United States that are

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[175] 'Proposal of Malawi submitted on 25 June 1998 regarding Article 63', *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, vol 3 (United Nations, 2002) U.N. Doc. A/CONF.183/C.1/WGPM/L.16, p. 304.
[176] Ibid.
[177] Ibid; *see also* International Criminal Tribunal for Rwanda Newsletter (October 2009) 1 <http://www.unmict.unictr.org/sites/unictr.org/files/news/newsletter/oct09.pdf> accessed 30 June 2017.
[178] 'Proposal of Colombia submitted on 25 June 1998 regarding Article 63', *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol 3 (United Nations, 2002) UN Doc. A/CONF.183/C.1/WGPM/L.17, 304.
[179] Criminal Procedure and Evidence Code, Malawi (1 February 1968) art 203 and art 248; Code of Criminal Procedure, Republic of Colombia (31 August 2004) art 127.
[180] Working Committee on Procedural Matters, 'Working Paper on Article 63, Rome Conference' (4 July 1998) UN Doc. A/CONF.183/C.1AVGPM/L.51; Working Committee on Procedural Matters, 'Working Paper on Article 63' (9 July 1998) UN Doc. A/CONF.183/C.1/WGPM/L.67.
[181] 4 July 1998 Working Paper *supra* note 181.

particularly unreceptive to holding trials without the accused being present. By only starting trial in the presence of the accused, the trial court guarantees that the accused is aware of the proceedings against him or her, eliminating any concern that the accused did not receive notice of the trial. The second option was more audacious and proposed to allow trial to be conducted in the accused's absence if: the accused requested to be absent due to his or her ill-health; the accused failed to appear in court on the day of the hearing; or an incarcerated accused refused to appear and made it particularly difficult for the court to force his or her appearance.[182] The second option also described the procedure to be followed in any of the above instances where the accused had not been notified of the start of trial, thus countenancing the idea of true trials *in absentia*.[183]

The 9 July Working Paper demonstrated some movement on the right to be present. Gone were the provisions permitting trial to begin without the accused having notice of he proceedings.[184] Gone too were the sections allowing the accused to waive his or her appearance due to ill-health or when an incarcerated accused refused to appear for trial.[185] The only questions left to consider were whether trial could continue after a once present accused had fled or when the accused had been notified about trial but simply failed to appear.[186] In the end, these proposals were not incorporated into the Rome Statute. It became clear as negotiations continued that there was no compromise to be reached regarding trials conducted in the accused's absence.[187] In order to avoid placing this issue before the entire Conference for a resolution, it was decided that confirmation of charges hearings would be introduced at the pre-trial stage that mimicked Rule 61 proceedings and could take place in the absence of the accused, and that trial *in absentia* would be entirely removed from Article 63.[188] The Court's Appeals Chamber later explained that not only does Article 63 not permit trials *in absentia*, but that the article was included in the Statute, in part, to inhibit a finding that an accused had implicitly waived his or her right to be present by absconding or failing to appear for

[182] Ibid.
[183] Ibid.
[184] 9 July 1998 Working Paper *supra* note 181.
[185] Ibid.
[186] Ibid.
[187] Friman *supra* note 8 at 261; Orie *supra* note 12 at 1479; Schabas and Caruana *supra* note 70 at 1567.
[188] Friman *supra* note 8 at 261; Tiribelli *supra* note 56 at 382.

trial.[189]

The conclusion of the Rome Conference, and the introduction of the Court's Statute, did not entirely put to rest all discord between the accusatorial and inquisitorial factions. In *The Prosecutor v Kenyatta*, Trial Chamber V(B) attributed the "failure to reach an agreement on trials *in absentia*" at the Rome Conference to "a misapprehension of the law in significant respects on the part of the common law delegates."[190] In particular, the Chamber found that those delegates were "under the erroneous impression that such trials were not permissible in common law jurisdictions or in international law, when in fact the opposite is true."[191] This suggestion typifies much of the ill will that has developed on both sides of the trial *in absentia* debate. Not only does it presuppose that the highly qualified professionals advocating against trials *in absentia* at the Rome Conference did not understand how international law treated the issue, it also suggests that they did not even understand how the issue was dealt with in their own domestic jurisdictions. It also ignores the fact that just four years before the Rome Conference the Secretary General of the United Nations stated that trials *in absentia* were not compatible with Article 14 of the International Covenant on Civil and Political Rights.[192] A more constructive approach would be to attempt to understand why certain countries opposed the use of trials *in absentia* at the Court rather than attribute their opposition to ignorance.

3.2.3 THE SPECIAL TRIBUNAL FOR LEBANON

The nature of the underlying system of law also became relevant following the introduction of the Statute of the Special Tribunal for Lebanon. The report released by the United Nations' Secretary-General in conjunction with the introduction of the Statute specifically indicated that proceedings before the Special Tribunal for Lebanon contain both inquisitorial and adversarial elements.[193] Although the Secretary-General identified the procedure followed by the Special Tribunal as being "essentially adversarial", he also

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[189] *Prosecutor v Ruto et al.* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 54.

[190] *Prosecutor v Kenyatta* (Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (18 October 2013) para 83.

[191] Ibid.

[192] Report of the Secretary-General supra note 67 at para 101.

[193] Report of the Secretary-General, 'On the Establishment of a Special Tribunal for Lebanon' (15 November 2006) UN Doc. S/2006/893, para 32.

makes clear that the decision to conduct trials *in absentia* is informed by the inquisitorial tradition.[194] It has also been suggested that Article 22 was the subject of great controversy and was only inserted in the Statute at the insistence of the Lebanese government.[195]

The importance of the inquisitorial system at the Special Tribunal for Lebanon is reinforced through Article 28 of the Statute, which permits the Special Tribunal's judges to consider the Lebanese Code of Criminal Procedure when adopting the Rules of Procedure and Evidence for the Special Tribunal.[196] The Lebanese legal system is part of the inquisitorial tradition and, as a result, specifically permits trials to take place in the absence of the accused. Through its Statute and Rules, the Special Tribunal for Lebanon embodies a number of different traditions and represents a true hybrid between the inquisitorial and accusatorial systems while also incorporating a strong domestic law influence.[197] The Special Tribunal for Lebanon, more than any other court or tribunal, demonstrates the blurred boundaries between the inquisitorial and accusatorial systems and constitutes the best argument in favour of ignoring these distinctions entirely. Instead, the focus should be on devising sensible and practical procedures that will work within the context of the particular legal system regardless of the legal system those procedures may be most closely identified with. How the Special Tribunal for Lebanon's unique approach to the right to be present at trial operates in practice will be explored in depth in subsequent chapters.

3.2.4 OTHER COURTS AND TRIBUNALS

The negotiating and drafting histories of the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone are not instructive about the accused's right to be present at trial when analysed in light of the inquisitorial versus accusatorial dichotomy. Both Statutes draw their provisions on the right to be present almost verbatim from the Statute of the International Criminal Tribunal for the former

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[194] Ibid.
[195] Melia Amal Bouhabib, 'Power and Perception: The Special Tribunal for Lebanon' (2010) 3 Berkeley J Mid East & Islamic L 173, 195.
[196] UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 28(2).
[197] Dov Jacobs, 'The Unique Rules of Procedure of the STL', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 111; Matthew Gillett and Matthias Schuster, 'The Special Tribunal for Lebanon Kicks Off: The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence' (2009) 7 JICJ 885, 886-87.

Yugoslavia and there does not appear to have been any substantive debate surrounding whether trial should proceed in the accused's absence. Both the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone would eventually confront the limits of the accused's right to be present, particularly as it relates to an incarcerated accused that refuses to appear for trial. However, as those decisions were not reached through reference to either the inquisitorial or accusatorial approaches to this issue they are discussed in subsequent chapters.

The Extraordinary Chambers in the Courts of Cambodia also did not try to interpret the presence of the accused at trial from either an inquisitorial or accusatorial perspective. However, the Extraordinary Chambers' strong presumption in favour of proceeding in the accused's presence is thought to result from the active role the accused is expected to play in the proceedings.[198] This active role for the accused resembles the one played by criminal defendants in the German inquisitorial system although the Extraordinary Chambers in the Courts of Cambodia do not explicitly draw this comparison. The incorporation of inquisitorial procedure into the practice of the Extraordinary Chambers is not surprising in light of Article 33 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia. Article 33 requires that the Extraordinary Chambers adhere to "existing procedures in force", i.e. Cambodian criminal procedure.[199] Cambodian law is made up of an amalgam of different practices, including inquisitorial and accusatorial principles.[200] Therefore, the lack of debate over employing procedures ascribed to one system or the other should come as no surprise as the use of that procedure is already settled in domestic law.

3.3 CONCLUSION

State support or opposition for trials *in absentia* at international and

[198] Guido Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Extraordinary Cambodian Chambers' (2008) 6 JICJ 129, 139.
[199] Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) art 33; *see also* Håkan Friman, 'Procedural Law of Internationalized Criminal Courts', in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 322.
[200] Kong Phallack, 'Overview of the Cambodian Legal and Judicial System and Recent Efforts at Legal and Judicial Reform', in Hor Peng, Kong Phallack and Jörg Menzel (eds), *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung 2012) 8.

internationalised criminal courts and tribunals is often attributed to whether the criminal procedure of the state in question is rooted in the inquisitorial or accusatorial tradition. In fact, this is too broad a distinction. Most nations are interested in implementing a system that is most similar to their own, not because of the tradition that underlies it, but out of a belief that criminal procedure as practiced in their home country in the best approach to criminal procedure in general. There is logic to that conclusion. Presumably, a country would change its domestic criminal procedure if its existing system did not meet its criminal justice needs. What that attitude fails to take into account is that while a particular country's procedure might be best for that country, it is not necessarily the best procedure for an international or internationalized court.

The importance of the accused's presence at trial differs depending on whether trial is being conducted in international or domestic courts. The statutes of international and internationalised criminal courts and tribunals entitle the accused to the minimum guarantee that trial will take place in his or her presence. That entitlement can only be derogated from with explicit statutory authorisation or through the accused's unequivocal waiver of their right to be present. This objective justification differs from the subjective reasons relied on by domestic legal systems when determining the importance of the accused's presence at trial. The domestic reasons include: so the accused can understand the case against them; to give the accused an opportunity to answer the charges and; in recognition of the role the accused plays in discovering the complete truth about the incident in question. Those motives are then considered in light of society's interest in adjudicating crime, and whether that interest outweighs the accused's interest in being present. Because of the divergence between international and domestic practice, the procedure used at international and internationalised criminal courts and tribunals must be suited to the court or tribunal's particular needs, regardless of the system from which it derived.

The negotiations about the right to be present provisions in the Rome Statute and the Statute of the International Criminal Tribunal for the former Yugoslavia involved a real struggle between those nations attempting to develop the most appropriate procedure for the court or tribunal being formed, and those nations primarily interested in installing their own national practices into international law. In the end, no compromise could be reached and, as a result, both Statutes ended up with basic clauses recognizing the importance of the right to be present without any real limitations on it. Although the Statutes of both the International Criminal Tribunal for the former Yugoslavia and the

International Criminal Court do not permit trial to continue in the accused's absence, other than in the narrow circumstance involving a disruptive accused, both have also adopted policies permitting trial to continue outside of the accused's presence in limited situations. Those situations are dependent on the accused waiving, either explicitly or tacitly, his or her right to be present. In that way, the practices of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court do not differ too greatly from the approach to presence at trial pursued by the Special Tribunal for Lebanon, despite the fact that the Statute of the latter does specifically allow for trials *in absentia*. The real difference, and the major point of contention, is not that the Special Tribunal for Lebanon permits trials *in absentia*, but rather, the procedure used by the Special Tribunal for Lebanon when reaching a finding that the accused waived his or her right to trial. It is clear that the old inquisitorial/accusatorial driven debate about trials *in absentia* has largely run its course, and the conversation has moved on to ensure that any permitted absences do not violate the accused's right to be present.

CHAPTER 4: THE INTERACTION BETWEEN THE RIGHT TO BE PRESENT AT TRIAL AND THE UNDERLYING GOALS OF INTERNATIONAL CRIMINAL TRIALS

In 2004, former United Nations Secretary-General, Kofi Annan formally set out the objectives to be met when establishing international criminal tribunals. Those stated goals are:

> Bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.[1]

The aims set out by the Secretary-General were, for the most part, not new, but reflected the ambitions already identified in the foundational documents of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the Special Court for Sierra Leone. The Special Tribunal for Lebanon would identify similar, albeit slightly different goals when its Statute was introduced three years later.

When the United Nations' Security Council established the International Criminal Tribunal for the former Yugoslavia it made clear that it wished to achieve three goals: first, to stop the violations of international humanitarian law being committed in the former Yugoslavia, including mass killings and ethnic cleansing; second, to "bring to justice" individuals perpetrating those crimes; and third, to restore and maintain peace in the region.[2] The Security Council set out similar, albeit somewhat differently worded, objectives when establishing the International Criminal Tribunal for Rwanda, highlighting the importance of ending the commission of international crimes, bringing the perpetrators to justice and contributing to national reconciliation and the restoration and maintenance of peace.[3] The major difference between the identified goals of the two *ad hoc* tribunals is that the resolution establishing the International Criminal Tribunal for Rwanda specifically identified the importance of promoting national reconciliation. Despite this textual difference between the Statutes, Antonio Cassese, the first president

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[1] Report of the Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Doc. No. S/2004/616 (24 August 2004) para 38.
[2] UNSC Res. 808 (22 February 1993) Doc. No. S/Res/808 at 2; *see also* UNSC Res. 827 (25 May 1993) Doc. No. S/RES/827 at 1.
[3] UNSC Res. 955 (8 November 1994) Doc. No. S/RES/955, at 1.

of the International Criminal Tribunal for the former Yugoslavia, later explained that the realization of national reconciliation is implicit in the goals of the Yugoslavia Tribunal.[4]

In addition to achieving similar goals to the *ad hoc* Tribunals, the International Criminal Court's Statute attempts to protect the victim-oriented interests identified by Secretary-General Annan. The Preamble to the International Criminal Court's Statute refers to the fact that millions of people have been the victims of crimes that "deeply shock the conscience of humanity" and then reinforces the important role the Court plays in punishing the perpetrators of those crimes.[5] By including reference to victims in the Preamble, the drafters of the Statute intended to emphasise the prominent place of victims' interests in the International Criminal Court's system. The Court's interest in securing justice and dignity for victims is further reinforced in Article 54(2), which compels the prosecutor to consider the interests and personal circumstances of the victims and witnesses when investigating and prosecuting crimes within the Court's jurisdiction, and Article 68(1), which obligates the Court to take measures to protect "the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."[6]

The Security Council set out somewhat different goals in its resolution authorising the formation of the Special Tribunal for Lebanon. In addition to expressing the specific desire to bring to justice those responsible for assassinating former Lebanese Prime Minister Rafik Hariri, which the Security Council classified as a threat to international peace and security, it also stressed that the Tribunal would assist Lebanon "in the search for the truth" about the incident.[7] By identifying the search for truth as part of the function of the Special Tribunal for Lebanon, the Security Council implicitly suggested that a court is an adequate forum for determining the truth about a given situation.

The Secretary-General's Report and the foundational documents of the different international criminal courts and tribunals emphasise the importance of a multitude of different purposes. They include: 1) punishing those offenders found to be accountable;

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[4] Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (29 August 1994) Un. Doc. A/49/342, S/1994/1007, at para 13.

[5] Rome Statute of the International Criminal Court (17 July 1998) preamble.

[6] Ibid at art 54(2).

[7] UNSC Res. 1757 (30 May 2007) U.N. Doc. S/RES/1757 at 2.

2) providing the victims of international crimes with dignity and justice; 3) establishing the truth about a situation and developing the historical record; 4) promoting reconciliation and lasting peace; 5) re-establishing and enhancing the commitment to the rule of law and; supplying the victims with reparations for the wrongs they have suffered. There is no hierarchy amongst these different goals and various commentators assign greater or lesser importance to them based on the point he or she is trying to prove. Mirjan Damaška warns that an over ambitious or inappropriate selection of goals will lead to "uncertainty about their relative importance" resulting in disorientation, disillusionment and unfulfilled expectations.[8] These Statutes demonstrate that there are a number of trial goals linked to holding the perpetrators of atrocity crimes accountable for their actions.

4.1 ACCOUNTABILITY

Once confined to the narrow legal focus of trying individuals for their alleged crimes, accountability has become the more expansive and is now seen as both an end result of trial as well as a means for facilitating a myriad of other trial goals.[9] Accountability efforts have been credited with furthering: reconciliation, deterrence, recognition of victimisation, reparations, truth, peace, representative democracy, lustration and the cessation of on-going conflict.[10] Additionally, these goals can be achieved outside of the traditional boundaries of the courtroom. Accountability processes in international criminal law now include: truth and reconciliation commissions, memorialisation of victims and "other guarantees of non-repetition."[11]

Despite the proliferation of functions assigned to accountability, and the

[8] Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 Chi-Kent L Rev 329, 365.
[9] Anja Matwijkiw and Bronik Matwijkiw, 'A Modern Perspective on International Criminal Law: Accountability as a Meta-Right', in Leila Nadya Sadat and Michael P. Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 42; Caroline Fournet, 'Mass Atrocity: Theories and Concepts of Accountability - On The Schizophrenia of Accountability', in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011) 27.
[10] Ibid; *see also* M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 LCP 9, 23; Oskar N. T. Thoms, James Ron and Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 IJTJ 329, 333.
[11] Fournet *supra* note 9 at 27.

increasing number of ways in which accountability can be realised, it is thought that legal accountability, that is, the aims arising out of prosecution and conviction, must remain the most prominent form of accountability.[12] Legal accountability, in the context of international criminal law, involves holding individuals responsible for violations of any crimes proscribed by the applicable statute.[13] Legal accountability is seen as the natural counterpoint to impunity and the absence of legal accountability is thought to be immoral, damaging to victims' interests, in violation of international legal norms and will lead to the recurrence of atrocity crimes.[14] In theory, prosecution for all acts of genocide, crimes against humanity, war crimes and acts of torture is essential to ensure that none of these crimes will be committed with impunity, although none of the international and internationalised criminal courts and tribunals have either the interest or the capacity to achieve that goal.[15]

An important question underlying whether international criminal courts and tribunals should conduct trials *in absentia* is whether accountability can be achieved in the absence of the accused. International trials are time consuming and expensive and should not be held simply for the sake of holding a trial. For *in absentia* trials to have any real legitimacy in the context of international criminal law they must produce some benefit, and preferably one that outweighs the diminution of the accused's fair trial rights that necessarily accompanies a trial *in absentia*. It appears that some of the commonly cited reasons for holding international criminal trials cannot be fulfilled in the absence of the accused. In particular, an absent accused often cannot be punished because he or she is not under the control of the trial court and it is debatable whether an absent accused is truly being held accountable for his or her actions. Punishment of the accused is seen as a benefit of trial as it is an actual representation of the accused's condemnation and it rights the imbalance created by the commission of the crime.

An important question is whether punishment is necessary to achieve accountability or if it can be realised only after a determination about the accused's guilt.

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[12] Ibid at 28.
[13] Steven Ratner, Jason S. Abrams and James L. Bischoff, A*ccountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (3rd Ed, OUP 2009) 3, 10.
[14] Bassiouni *supra* note 10 at 19; Fournet *supra* note 9 at 28; Neil J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59(4) L & Contemp Prob 127, 129.
[15] Bassiouni *supra* note 10 at 20.

If punishment is necessary then trials *in absentia* are unlikely to accomplish the goals of international criminal trials because an absent accused cannot be punished. Whether punishment is necessary to achieve accountability is largely dependent on how the different courts and tribunals prioritise the interests of the distinctive groups international criminal law is intended to serve. Both the victims of the crimes being prosecuted and the larger international human rights community, which includes the United Nations and its constituent parts, international, internationalised and regional courts and tribunals and academics and other commentators, have an interest in how international criminal law is applied. While these interests often intersect, the two groups diverge on the subject of the necessity of punishment.[16] Most victims, when interviewed, emphasize the important role punishment plays in the realization of their own sense that justice has been done. Conversely, the international community often wants to achieve other goals that in some cases can be realized through a declaration of guilt and do not necessarily require the punishment of the accused.

Richard Goldstone suggests that victims should be "entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment."[17] However, some scholars reject the notion that punishment is necessary to meet the needs of the victims. William Schabas writes that the victims' interest in justice "may be better satisfied by society's condemnation of anti-social behaviour than by the actual punishment of offenders" and that in international criminal law the declaration of the accused's guilt is "far more important" than the actual punishment of the perpetrators.[18] In his view, the victims of international crimes desire the identification and stigmatisation of the perpetrator and a pronouncement by society that the offender's behaviour was wrong and anti-social.[19] This is contrary to the opinion of several other commentators who believe that punishment is an essential component of delivering justice to the victims.[20] In

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[16] Sanja Kutnjak Ivković and John Hagan, 'The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived (In)Justice' (2006) 40(2) Law & Society Review 369, 373.
[17] Richard J. Goldstone, 'Foreword', in Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press 1998) ix.
[18] William A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7(2) Duke J Comp & Intl L 461, 500, 516.
[19] Ibid.
[20] Bassiouni *supra* note 10 at 26-27; Ratner et al. *supra* note 13 at 175; Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed' (2005) 38 Cornell Intl L J 753, 775; Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair:

particular, Jeremy Rabkin explains that punishment is necessary because it acts as recognition that the victims have suffered a wrong and that society is committed to righting that wrong.[21]

The international community has a complicated role vis-à-vis crime victims. Some argue that it is necessary to recognise their victimisation and treat victims as individual subjects of justice by acknowledging the equal worth of all people as human beings.[22] Jean Hampton developed this idea, using Kantian philosophy as a starting point, when finding that all human beings are of equal value and therefore, are entitled to equal respect.[23] Certain types of crimes, including crimes against humanity, war crimes, genocide and the crime of aggression, act to diminish or invalidate the value of individuals rendering them no longer equal.[24] The existence of this imbalance imposes an affirmative duty on society to repudiate the victimisation and reaffirm the victim's equal value in society.[25] Failure to comply with that duty results in society's complicity in its commission.[26] The duty can be fulfilled by expressing solidarity with the victims as evidenced through efforts to investigate and repudiate the actions of the alleged perpetrators.[27] All of these aspects of recognition can be achieved through punishment, but it is only effective when that punishment can be imposed.[28] By doing so impunity is defeated and justice is achieved.[29] Conversely, *in absentia* guilty verdicts may prevent proper recognition of the victims, as the inability to punish the absent defendant results in his or her acts being insufficiently repudiated.

The international community also has its own distinct interests in holding international criminal trials apart from the interests of the victims. This is exemplified by Kofi Annan's statement at the opening of the Rome Conference, when he urged the

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Rethinking the contribution of Justice to Reconciliation', 24 Hum Rts Q (2002) 573, 589; Mark A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan*, the Geneva Conventions, and International Criminal Law' (2007) 35 Geo Wash L Rev 1165, 1182-83.

[21] Rabkin *supra* note 20 at 775.

[22] Eric Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court' (2006) 44 Colum J Transnatl L 801, 840.

[23] Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA L Rev 1659, 1667-68.

[24] Ibid. at 1677-78; Blumenson *supra* note 22 at 837.

[25] Blumenson *supra* note 22 at 838-839.

[26] Ibid.

[27] Ibid at 862.

[28] Ibid.

[29] George Fletcher, 'Against Universal Jurisdiction' (2003) 1 JICJ 580, 581.

delegates to develop a Statute where "the overriding interest must be that of the victims, and of the international community as a whole."[30] Listing these two groups separately acts as recognition that they each have distinct interests. While victims are largely concerned with the immediate redress of the wrongs committed against them, the international community often hopes that international criminal trials will produce more long-term benefits. The deterrence of future atrocity crimes, the public vindication of human rights norms and the promotion of long-term and stable peace are all goals that have been identified as being particularly important to society as a whole.[31] The purpose of indicating that different groups stress different goals is not meant to suggest that one group wants to realise its goals at the expense of the goals important to another group. Instead, it acts as recognition that victims and society may prioritise these goals differently.

The challenge in all of this is that the victims are not the only participants in the criminal process expecting justice. Courts and tribunals must strive to find a balance between the needs of the victims and the rights of the accused. It is generally agreed that the accused should only be convicted if his or her trial meets certain basic fair trial standards. Most observers agree that a conviction obtained without meeting the standards of fair trial constitute an injustice.[32] Those standards have a significant impact on the trial process and can result in the acquittal of an individual that may be factually guilty. These procedural rules subordinate the strict truth telling function of trial in order to guarantee procedural fairness, which creates a conflict of interest between the accused and the victims.[33] That conflict of interest often makes victims dissatisfied with the outcome of international criminal trials arising out of a perception that the criminal justice system disproportionately focuses on the defendant and fails to adequately account for the needs of the victims.[34]

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[30] United Nations Press Release, 'UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be that of Victims and World Community as a Whole' (15 June 1998) U.N. Doc. SG/SM/6597 L/2871.
[31] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95(7) AJIL 7, 10.
[32] Lawrence Douglas, 'Truth and Justice in Atrocity Trials', in William A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (CUP 2016) 35.
[33] Ibid.
[34] Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90(870) Intl Rev Red Cross 441, 447.

Both retribution and deterrence are identified as important goals in the Preamble to the Rome Statute of the International Criminal Court. The Preamble recognises that millions of people have been the "victims of unimaginable atrocities that deeply shock the conscience of humanity" and that the crimes considered most serious by the international community must be punished.[35] Subsequently, the Preamble also asserts the need to end the impunity of the perpetrators of those serious crimes contributing to their prevention.[36] There is no order amongst the goals set out in the Preamble and, therefore, punishing serious crimes is of equal importance to preventing their future commission.

4.1.1 RETRIBUTION

In its most basic form, retribution as a theory of punishment advocates punishing the accused in proportion to the wrong he or she has committed.[37] Some have rejected retribution as a legitimate basis for punishment at international and internationalised criminal courts and tribunals as it is plainly impossible for a person convicted of mass atrocity crimes to serve a punishment commensurate with the harm he or she has done.[38] This problem is further exacerbated in international criminal law by the fact that the death penalty has been specifically forbidden as a permissible sentence following conviction. The unavailability of the death penalty has led to a sense of dissatisfaction amongst some victims of atrocity crimes.[39]

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[35] Rome Statute *supra* note 5 at preamble.
[36] Ibid.
[37] Mark A. Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 61; Alexander K. A. Greenawalt, 'International Criminal Law for Retributivists' (2014) 35(4) U Pa J Intl L 969,978-79; Ralph Henham, 'Towards Restorative Sentencing in International Criminal Trials', (2009) 9 Intl Crim L Rev 809, 813.
[38] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (OUP 2013) 68.
[39] Ivković and Hagan *supra* note 16 at 394; Sanja Kutnjak Ivković, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) 37 Stan J Intl L 255, 323; Patrick Vinck and Phuong N. Pham, 'Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo', Harvard Humanitarian Initiative and United Nations Development Programme, 2014, <www.peacebuilding data.org/sites/m/pdf/DRC2014_Searching_for_Lasting_Peace.pdf>, accessed 12 September 2017, at 71; Phuong N. Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda and Richard Bailey, 'When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Northern Uganda', Human Rights Center, UC Berkeley School of Law, Payson Center for International Development Tulane University, International Center for Transitional Justice, 2007, <www.ictj.org/sites/

Many international and internationalised courts and tribunals identify providing the victims of atrocity crimes with justice as their most important function, but none of them substantively address what justice for the victims means in this context. Scholars have attempted to fill that gap by asserting that victims experience justice when provided with the right to an effective remedy designed to eliminate the effect of the harm caused by the commission of the crime.[40] A crucial component of the right to a remedy is the prosecution and punishment of perpetrators.[41] As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia explained, one purpose of punishment is to 'reflect…the calls for justice from the persons who have been victims of suffered because of the crimes'.[42]

Trials *in absentia* ending in conviction can contribute to the victims' sense of dissatisfaction with the proceeding as such trials lack any real possibility of punishment and therefore result in an imperfect remedy.[43] The failure to provide victims with an adequate remedy can lead to a sense that the trial did not deliver justice to the victims. Victims of atrocity crimes consistently indicate that the perpetrators of the crimes committed against them should be tried and punished for their actions as retribution for the crimes committed.[44] A 2015 study conducted in Kenya, Uganda, Côte d'Ivoire and the Democratic Republic of Congo found that victim participants want the accused to be

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default/files/ICTJ-Uganda-Justice-Attitudes-2007-English_0.pdf>, accessed 12 September 2017, p. 35; Wendy Lambourne, 'Transformative Justice, Reconciliation and Peacebuilding', in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 25; J. E. Alvarez, 'Crimes of Hate/Crimes of State: Lessons from Rwanda' (1999) 24(2) Yale J Intl L 365, 407; Timothy Longman, *Memory and Justice in Post-Genocide Rwanda* (CUP 2017) 282.

[40] Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 30-31; *citing* Dinah Shelton, *Remedies in International Human Rights Law* (2d ed, OUP 2005) 7, 35-6.

[41] Valentina Spiga, 'No Redress Without Justice: Victims and International Criminal Law', (2010) 10 JICJ 1377, 1392-3.

[42] *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S, T Ch (10 December 2003) para 45.

[43] Metin Başoğlu, Maria Livanou, Cventana Crnobarić, Tanja Frančišković, Enra Suljić, Dijana Đurić and Melin Vranešić, 'Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions' (2005) 294(5) JAMA 580, 588.

[44] Ernesto Kiza and Holger-C. Rohne, 'Victims' Expectations Towards Justice in Post-Conflict Societies: A Bottom-Up Perspective', in Ralph Henham and Mark Findlay, *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011) 96.

convicted and punished for their alleged crimes.[45] Individuals affected by atrocity crimes in the Central African Republic overwhelmingly felt that the perpetrators of atrocity crimes should be held accountable, and advocated in favour of a variety of punishments ranging from the very general 'punishment', to imprisonment, summary execution, and the rather oblique statement that the perpetrators of atrocity crimes "should confront justice."[46] A survey conducted in 2002 of a randomly selected group of Rwandans found that 96.8% of respondents believed it was important to try those responsible for committing crimes during the genocide, and 92.3% felt that the purpose of trials was "to punish those who have done wrong", although for some punishment was a secondary consideration to reparations in the form of compensation and forgiveness.[47] In a 2004 study conducted in Iraq, the majority of those interviewed advocated in favour of summary justice in the form of execution or torture without trial.[48] This suggests that in Iraq, punishment was even more important than a finding of guilt. Taken together, these surveys present a compelling argument that the victims of atrocity crimes are particularly interested in seeing the perpetrators of those crimes punished for their actions.

In some instances punishment alone is not enough to satisfy the victims. Those victims interested in punishing the perpetrator as retribution for his or her crimes are often unhappy with the type of punishment or the length of sentences imposed following conviction.[49] This was reflected in a survey of victim participants in the *Duch* trial at the Extraordinary Chambers in the Courts of Cambodia. There, one of the overriding goals

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[45] Human Rights Center, *The Victims' Court?: A Study of 622 Victim Participants at the International Criminal Court* (UC Berkeley School of Law 2015) 3.
[46] Patrick Vinck and Phuong Pham, *Building Peace Seeking Justice: A Population-Based Survey on Attitudes About Accountability and Social Reconstruction in the Central African Republic*, (Human Rights Center, UC Berkeley School of Law 2010) 3, 29.
[47] Timothy Longman, Phuong Pham and Harvey M. Weinstein, 'Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 212-13, 219; Timothy Longman and Théonèste Rutagengwa, 'Memory, Identity, and Community in Rwanda', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 173.
[48] Human Rights Center, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction* (UC Berkeley School of Law 2004) 26.
[49] Janine Natalya Clark, 'The Limits of Retributive Justice' (2009) 7 JICJ 463, 471; Miklos Biro, Dean Ajdukovic, Dinka Corkalo, Dino Djipa, Petar Milin and Harvey M. Weinstein, 'Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina an Croatia', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 193.

of the victim participants was to see that Duch was adequately punished, a goal that likely went unmet as many of the punishments recommended by those victim participants exceeded the scope of what the Chambers could lawfully order.[50] Similar findings emerged in a study conducted of victims of the war in Yugoslavia, which also concluded that lenient sentencing, constituting any sentence other than the death penalty or life imprisonment, would disappoint victims seeking retribution through punishment.[51]

Trials *in absentia* create an additional problem when pursuing retribution as the basis for punishment because in many instances an absent accused will never come under the control of the court or serve the sentence imposed following a guilty verdict. Victims that may already feel dissatisfied with the punishment will likely only feel more aggrieved if the perpetrator is not present to serve his or her sentence. Further, failure to punish responsible criminal perpetrators is seen as having a negative effect on the reconciliation process.[52] Therefore, retributive justice, represented by the punishment of the accused, will go unfulfilled when the accused is tried *in absentia*. This is a particular concern as many victims have indicated the important role punishment of the perpetrator plays in their own ability to feel as if justice has been done.

That many victims link their own ability to feel that justice has been served to whether the perpetrator of the crimes against them has been punished does not mean that victims have the right to dictate the type or severity of punishment. The international legal community has accepted that some forms of punishment must be forbidden regardless of the sense of justice imposition of those sentences might deliver to the victims of atrocity crimes. The legal prohibition against the use of torture is the most prominent of these limitations. The prohibition against torture is considered a *jus cogens* norm that cannot be derogated from, leaving no doubt that torture is an unacceptable form of punishment in international criminal law.[53] Further, it is forbidden in a number of different international conventions, including the International Covenant on Civil and

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[50] Elisa Hoven and Saskia Scheibel, ‘‘Justice for Victims’ in Trials of Mass Crimes: Symbolism or Substance’ (2015) 21(1) IRV 161, 169.
[51] Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (OUP 2011) 151.
[52] Ivković *supra* note 39 at 263.
[53] *Questions Relating To The Obligation To Prosecute Or Extradite* (*Belgium v Senegal*) (Judgment) I.C.J. Reports 2012, 422, 458; *Prosecutor v Furundžija* (Judgement) IT-95-17/1-T, T Ch (10 December 1998) para 153.

Political Rights, the Convention Against Torture and the Geneva Conventions.[54] However, the fact that torture is considered an illegitimate form of punishment has not stopped victims of atrocity crimes from suggesting that those individuals convicted of committing crimes against them should be subjected to torture as punishment for their actions. A significant number of the people interviewed in Iraq following the end of Saddam's Hussein's regime indicated that he and other former leaders should be summarily executed or tortured as punishment for their actions.[55] A Kurdish woman living in Sulaimaniyah said of Hussein, 'bring him to us – we want to torture him'; a victim from Baghdad declared, 'I wish for him the same as what they used to do to the criminals: torture them in the public square and then hang them'; and a Shi'a woman from Baghdad stated, 'I have thought of a punishment for Saddam, which is to put him in a cage...and every person that Saddam hurt can punish him as he sees fit'.[56] These victims clearly identify torture as an appropriate, even a necessary punishment, however, the general prohibition on torture dictates that the victims advocating in favour of this form of punishment will be disappointed. By outlawing torture, the world community accepts that the barbarity of torture outweighs the sense of justice one might derive from seeing it used as well as the contribution to reconciliation and peace such a sense of justice might also produce.

Goldstone pointed out that 'full justice' for the victims means seeing the accused sentenced to an adequate punishment following a conviction, not any punishment desired by the victims. The same idea holds when trying an accused *in absentia*. The victims may be dissatisfied by a procedure during which the accused does not appear and that will likely not result in the accused being punished following a conviction, but it is

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[54] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (12 August 1949) 75 UNTS 31, art 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949) 75 UNTS 85, art 51; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135, art 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) 75 UNTS 287, art 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, art 85.

[55] Human Rights Center, *Iraqi Voices supra* note 48 at 26.

[56] Ibid at 26, 35.

certainly better than no trial at all. As Schabas asserts, there is justice in condemning the perpetrators of atrocity crimes that outweighs that experienced through imposing punishment. The victims can dispute whether they have received the justice they want, but must accept that some justice is better than none at all.

4.1.2 COMMUNICATIVE VALUE OF TRIAL

Commentators have proposed two purposes for international trials that focus on the communicative value that trial can have for the general public. These trials purposes, expressivism and deterrence, use criminal trials as a way to publicize different types of criminality, and encourage individuals not to commit those crimes. Some of the objectives of both expressivism and deterrence may be fulfilled through the prosecution and conviction of the accused absent punishment, meaning that it may be possible to achieve these goals without the participation of the accused. As a result, trials conducted *in absentia* may be sufficient to meet these goals.

Expressivism is a fairly new justification for international criminal trials although it has its roots in more traditional legal theory.[57] At its root, expressivism encourages punishing the perpetrators of atrocity crime to strengthen the general public's faith in the rule of law.[58] However, the effects of expressivism are not only realised through punishment as there can be expressive value in indictments and trials not accompanied by conviction and punishment.[59] Some expressivists even find value in the existence of an unenforced law to the extent that individuals comply with it out of fear of its enforcement.[60] Because expressivism perceives value in aspects of the criminal process that do not involve punishment, it is possible that the goals of expressivism can be achieved in the accused's absence. Expressivism is better designed to achieve the long-term goals sought by society as a whole and does little to meet the immediate needs of he victims.

The international community has also identified deterrence as a communicative reason for conducting international criminal trials. In the *Čelebići Camp Case*, the International Criminal Tribunal for the former Yugoslavia's Trial Chamber identified deterrence as "probably the most important factor in the assessment of appropriate

[57] Ambos *supra* note 38 at 71-2.
[58] Drumbl, *Atrocity, Punishment supra* note 37 at 173.
[59] Drumbl, *The Expressive Value supra* note 20 at 1199; Diane Marie Amann, 'Group Mentality, Expressivism and Genocide' (2002) 2 Intl Crim L Rev 93, 120.
[60] Amann *supra* note 59 at 122.

sentences for violations of international humanitarian law."[61] Deterrence is traditionally understood as a justification for punishment and it can be broken down into two types: specific deterrence and general deterrence. Specific deterrence acts to disincline the person charged or on trial from committing future crimes due to the anticipated severity of punishment resulting from a guilty verdict.[62] General deterrence presumes that by making certain actions illegal, and by punishing the commission of those actions, it will discourage others that might want to commit similar crimes.[63] The effectiveness of both types of deterrence in international criminal law is the subject of significant debate.

Specific deterrence has no real effect in the context of an absent accused because the accused is not present to experience the deterrent effect of the punishment. It has been suggested that specific deterrence does not necessitate punishment because the public stigmatisation and reputational injury that accompanies any suggestion of an individual's involvement in atrocity crimes would sufficiently disincline anyone from committing such crimes.[64] It is argued that individuals in national leadership positions are interested in establishing sustained political viability, which is best achieved when his or her regime is internationally accepted.[65] A fear of losing that acceptance will cause leaders to abstain from activities that could result in prosecution, or the threat of prosecution, by the international community.[66] Because the deterrent effect is produced by threatening the reputation of the accused, rather than through condemnation or punishment, it necessarily follows that it can be achieved in the absence of the accused.

The trouble with this argument is that it operates on the assumption that perpetrators of atrocity crimes engage in a rational weighing of consequences before committing criminal acts. There is little evidence to support such an assumption and, to the extent they do partake in such a consideration, it is more likely to focus on the probability of apprehension, prosecution and the possible severity of punishment, than on

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[61] *Prosecutor v Delalić, et al* (Judgement) IT-96-21-T, T Ch (16 November 1998) para 1234; *see also Prosecutor v Blaškić* (Judgment) IT-95-14-T, T Ch (3 March 2000) para 761.
[62] Geoffrey Dancy, 'Searching for Deterrence at the International Criminal Court' (2017) 17(4) Intl Crim L Rev 625, 632; *citing* Drumbl, *Atrocity, Punishment supra* note 37.
[63] Amann *supra* note 59 at 115.
[64] Robert D. Sloan, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Intl L 39, 73-4.
[65] Akhavan *supra* note 31 at 12.
[66] Ibid; Sloan *supra* note 64 at 74.

international disapprobation.[67] The circumstances under which atrocity crimes occur also have a tendency to undermine the effectiveness of specific deterrence on possible perpetrators of international crimes. The choices one might make under normal circumstances become inverted in countries riven by ethnic or military conflict as decisions are made with the intent of gratifying the divisive or violent tendencies that have become the norm in that particular society.[68] This problem can become exacerbated in countries that have fallen into a state of war, as the institutions of justice often disappear or lose effectiveness, allowing the uninterrupted commission of atrocity crimes.[69] Under such circumstances, behaviour normally considered aberrant is thought to be acceptable, and in some cases, desirable.[70] Decisions made in this sort of environment are motivated by a need to conform to the wishes of the people within the state rather than out of concern for pressures coming from outside of the state. Therefore, international suspicion and accusations will likely have little specific deterrent effect on those that might commit international crimes. Any potential deterrent will grow even smaller when the suspicion and accusations are not reinforced with trial and punishment, as there is no tangible threat the accused will suffer any sort of repercussions for their actions.

General deterrence is commonly cited as an important goal served by international criminal law. It is thought that punishing the perpetrators of atrocity crimes will "dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights."[71] This is thought to be achieved through a two step process: first, by transforming popular perceptions of acceptable behaviour; and second, through promoting the gradual internalization of those values leading to "habitual conformity" with the law."[72] However, inconsistency in the

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[67] Ibid; *see also* Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84(4) Wash U L Rev 777, 792.
[68] Michael Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights' (1996) 59(4) Law & Contemp Prob 75, 77-8; Akhavan *supra* note 31 at 11-12.
[69] Jens David Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) UCLA J Intl L & For Aff 100-1.
[70] Akhavan *supra* note 31 at 11-12.
[71] *Prosecutor v Rutaganda* (Judgement and Sentence) ICTR-96-3-T, T Ch I (6 December 1999) para 456.
[72] Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A

arrest and prosecution of those individuals accused of international crimes undermines the argument in favour of general deterrence.[73] One of the problems that plagues international and internationalised criminal courts and tribunals is the inability to exert control over all of those people subject to its jurisdiction. This is the result of two significant shortcomings. First, international and internationalised criminal justice mechanisms lack their own police forces making them dependent on domestic police to arrest indicted suspects. As a result, they are not able to gain custody over most of the people they would like to try. Second, the sort of atrocity crimes tried at international and internationalised courts and tribunals are often committed by hundreds, if not thousands, of perpetrators. International and internationalised criminal courts and tribunals lack the capacity to try all, or even most, of the people subject to their jurisdiction.[74] If there is little chance that the accused will be arrested and tried for the crimes alleged it is unlikely that such a tenuous threat will serve as any real deterrent.

Further militating against an over-reliance on general deterrence as a sufficient justification for international criminal trials is the conflicting evidence as to whether international criminal trials achieve the goal of general deterrence. On the positive side, the evidence suggests that the *Lubanga* trial at the International Criminal Court has had some deterrent effect. Interviews conducted in the Ituri Province of the Democratic Republic of Congo following Lubanga's conviction found a decrease in the use of child soldiers which was attributed to the trial creating a more widespread understanding that the recruitment and use of children in combat is illegal.[75] Lubanga's conviction also had some impact in the Central African Republic where a rebel commander demobilised his child soldiers upon learning from the trial that it is a crime to use child soldiers in

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Commentary on the United Nations War Crimes Tribunal' (1998) 20 Hum Rts Q 737, 747; *see also* Blumenson *supra* note 22 at 828.

[73] Blumenson *supra* note 22 at 825; Drumbl, *Atrocity, Punishment supra* note 37 at 170; Kirsten J. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2012) 52.

[74] Ronen Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to the Hague* (Hart Publishing 2012) 8.

[75] Sharanjeet Parmar, 'Dissuasive or Disappointing? Measuring the Deterrent Effect of the International Criminal Court in the Democratic Republic of the Congo', in Jennifer Schense and Linda Carter (eds), *Two Steps Forward One Step Back: The Deterrence Effect of International Criminal Tribunals* (International Nuremberg Principles Academy 2016) 181.

combat.[76] More generally, a study of domestic and international human rights prosecutions in over 100 countries discovered that prosecutions may have some deterrent effect, both in the country affected by human rights violations and also in neighbouring countries.[77] The study also concluded that the deterrent value of accountability mechanisms was derived from both the threat of punishment and normative pressures indicating that punishment only plays a part in producing a deterrent effect.[78] By contrast, it is often pointed out that the establishment of the International Criminal Tribunal for the former Yugoslavia did not prevent the Srebrenica genocide or numerous war crimes committed by ethnic Serbs against the Kosovars.[79] However, it has been suggested that the Srebrenica genocide and the crimes committed in Kosovo occurred before the International Criminal Tribunal for the former Yugoslavia was fully operational and therefore, it could not have been expected to have developed a functional general deterrent capacity.[80] The anecdotal nature of this evidence makes it difficult to draw any definitive conclusions about the deterrent effect of trial. Further, the accused was present at trial in those instances in which some deterrent effect was found, raising questions as to whether the same effect might be derived in the accused's absence.

The difficulty with relying on expressivism and deterrence as justifications for trials *in absentia* is that both ideas are oriented towards communicating to, and changing the behaviour of, the general public rather than addressing the needs of the trial participants. This acts as a substantial departure from the traditional model where the causes and effects of trial are mainly felt by those directly involved. Shifting the focus from the participants creates a danger that their important interests will be marginalized in an effort to maximize the educative function of trial. This is less of a concern for the accused, as providing due process is a particular focus of expressivists, but it can have the tendency of reducing the attention paid to victims' interests as the focus is on the more

[76] Human Rights Watch, *Selling Justice Short: Why Accountability Matters* (Human Rights Watch 2009) 7.
[77] Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 Intl Stud Q 939, 957.
[78] Ibid at 958.
[79] Akhavan, *Justice in The Hague supra* note 72 at 750; Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Justice Initiative 2008) 16; Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28(3) Intl Security 5, 20.
[80] Orentlicher *supra* note 79 at 16.

long-term benefits of trial.[81]

Another reason expressivism and deterrence should be used cautiously when justifying trials *in absentia* is the inherent connection both ideas draw between punishment and communicating the wrongfulness of the accused's actions.[82] Although indictment and conviction may be communicative in and of themselves, those messages are only received when accompanied by a legitimate threat of punishment.[83] Even studies that suggest societal pressures play a role in creating a deterrent effect acknowledge that those pressures are only effective when combined with a perceived higher cost of committing atrocity crimes represented by punishment.[84] Therefore, the efficacy of the communicative purposes of trial is intrinsically linked to punishment as the former cannot be achieved without the latter. The inability to punish an accused tried *in absentia* would therefore leave the purposes of both expressivism and deterrence unfulfilled making them both weak justifications for trying an absent accused. The usefulness of expressivism and deterrence becomes even more tenuous when the victims' interests are taken into account as neither theory pays much attention to their needs.

4.2 ESTABLISHING THE TRUTH

Establishing the truth about the situation under consideration is one of the most commonly identified purposes of international criminal trials. Madeleine Albright described truth as "the cornerstone of the rule of law" and different international criminal courts and tribunals have consistently identified the important role truth-finding plays in their missions.[85] The truth established by a court or tribunal is believed to serve multiple purposes including: identifying an objective record of events; undermining denials about the existence of human rights violations; supplying therapeutic benefits to the accused; and the traditional legal function of creating a factual basis upon which the fact-finder

[81] Drumbl, *The Expressive Value* supra note 20 at 1188.
[82] David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in Samantha Besson and John Tassioulas (eds), *The Philosophy of International Law* (OUP 2010) 576; Akhavan, *Justice in The Hague supra* note 72 at 796; Damaška *supra* note 8 at 339; Sloan *supra* note 64 at 72; Ivković *supra* note 39 at 264.
[83] Drumbl, *Atrocity, Punishment supra* note 37 at 174.
[84] Kim and Sikkink *supra* note 77 at 958.
[85] Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Security Council Meeting, (25 May 1993) UN Doc. S/PV.3217, at 12.

can determine the guilt or innocence of the accused.[86]

The United Nations High Commissioner for Human Rights indicated in 2006 that victims have a "right to truth" entitling them to learn: "the full and complete truth" about relevant events and the circumstances in which they occurred; the identities of the participants; and the reasons for the occurrence of the events.[87] Establishing this sort of "full and complete truth" is largely impossible when the accused is not present during the trial. There is certain information known only to the accused that cannot be introduced without his or her participation in trial. If trial is conducted without the accused's involvement, he or she cannot share that information with the court and the puzzle of truth is left incomplete and, in turn, the goal of establishing the full and complete truth remains unfulfilled.

International and internationalised criminal courts and tribunals rarely establish, or attempt to establish, the full and complete truth, irrespective of the accused's presence during trial. One of the common criticisms about the Nuremberg Tribunal is that it failed to acknowledge Allied crimes committed during World War II.[88] Similar concerns were expressed about the Tokyo Tribunal's refusal to adjudicate alleged Allied crimes and the decision not to prosecute Emperor Hirohito for his actions during the war.[89] This problem has carried over to modern international and internationalised criminal courts and tribunals. The International Criminal Tribunal for Rwanda abandoned attempts to properly investigate and prosecute crimes committed by members of the Tutsi ethnic group following tremendous pressure from the Rwandan government.[90] Survivors of Saddam Hussein's brutal regime in Iraq were disappointed that foreign actors, including the United Nations, the United States and other Arab countries, were not called to

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[86] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd ed, OUP 2014) 38; David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 Hum Rts Q 592, 593.

[87] United Nations Economic and Social Council, 'Promotion and Protection of Human Rights: Study on the Right to Truth: Report of the Office of the United Nations High Commissioner for Human Rights' (8 February 2006) E/CN.4/2006/91, para 59.

[88] Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4(2) J Hum Rts, 213, 214.

[89] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 311.

[90] Peskin *supra* note 88 at 224-25; Megan A. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY' (2003) 34(1) Cal W Intl L J 47, 57-58.

account for their perceived support of, or lack of intervention in, the human rights violations that were committed against them.[91] Many Serbians not only believe that the International Criminal Tribunal for the former Yugoslavia is biased against ethnic Serbs, but also that NATO should have been held accountable for their actions during the war in the former Yugoslavia.[92] Interviewees in Bosnia and Herzegovina believe that the Dutch government shares equal responsibility with the Serbs for the Srebrenica genocide.[93] These failures to investigate or prosecute alleged crimes committed by parties other than those being tried, indicate a tacit acceptance that no attempt would be made to establish the full and complete truth about these situations.

The willingness of international and internationalised criminal courts and tribunals to allow the accused to plead guilty also demonstrates an inclination to proceed without establishing the full and complete truth about the situation under examination. In *Prosecutor v Momir Nikolić*, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia voiced concern that a guilty plea failed to provide a full and complete record of the facts.[94] The Trial Chamber expressed further apprehension about plea agreements reached under Rule 62 *ter*, which permit the accused to enter a guilty plea only as to certain agreed upon facts.[95] The Trial Chamber felt that under these circumstances "[n]either the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement" potentially creating "an unfortunate gap in the public and historical record of the concrete case".[96] The International Criminal Court's Statute attempts to address this concern by allowing for the presentation of evidence following a guilty plea, including witness testimony, "in the interests of justice" and "in particular, the interests of the victims".[97] Whether this flexibility to allow the introduction of additional evidence following a guilty plea will contribute to a fuller factual record remains to be seen as evidence was only presented for two days in the

[91] Human Rights Center, *Iraqi Voices* supra note 48 at 29-31.
[92] Victor Peskin, *International Justice in Rwanda and the Balkans* (CUP 2008) 33-34; Steinke *supra* note 74 at 16.
[93] Clark *supra* note 49 at 472.
[94] *Prosecutor v Momir Nikolić* (Sentencing Judgement) IT-02-60/1-S, T Ch (2 December 2003) para 61.
[95] *Prosecutor v Dragan Nikolić* (Sentencing Judgement) IT-94-2-S, T Ch (18 December 2003) para 12; *see also* Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) Rule 62 *ter*.
[96] Ibid.
[97] Rome Statute *supra* note 5 at art 65(4).

single instance in which this procedure was used.[98]

There are also areas of the truth about which criminal courts are ill equipped to inquire. Incidents occur during conflicts that are part of the full and complete truth but are unlikely to be the subject of court proceedings. In some situations, atrocity crime victims have accused members of other ethnic groups of being responsible for failing to act while crimes were being committed, failing to warn people of other ethnicities of impending violence and failing to provide information about where the bodies of missing people are buried.[99] As an example, ethnic Croats living in Vukovar, Croatia felt betrayed during the war by their Serbian friends and neighbours who did not actively participate in the violence, but who also did nothing to prevent it or to help those being victimized.[100] Conversely, ethnic Serbs from Vukovar see no reason for remorse or apology because they did not personally commit acts of violence against the Croats.[101] While there is a clear need for both groups to openly discuss the situation in an effort to reach some sort of common truth, this is also not the sort of truth that can be determined by a court. First, there is no real mechanism in international criminal law to hold people accountable in these sorts of situations. Second, it is the sort of situation that demands an open communal dialogue about the issues dividing the community, not a determination of guilt or innocence.[102] In fact, a legal determination would likely further inflame the situation, as it would have the tendency to apportion blame rather than foster understanding.

Overall, the international community has been willing to accept that the furtherance of the trial purposes it considers most important, particularly accountability and deterrence, can be fulfilled by a less than complete version of the truth. Accountability and deterrence can be achieved through the establishment of a limited record that identifies alleged perpetrators and contains evidence sufficient to determine the guilt or innocence of the accused. Some commentators have argued that victims of atrocity crimes also do not require a full accounting of the truth because they only really

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[98] *Prosecutor v Ahmed al Faqi al Mahdi* (Judgment and Sentence) No. ICC-01/12-01/15, T Ch (27 September 2016) para 7.
[99] Clark *supra* note 49 at 473.
[100] Eric Stover, 'Witnesses and the Promise of Justice in the Hague', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 117.
[101] Dean Ajdukovic and Dinka Corkalo, 'Trust and Betrayal in War', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 299.
[102] Ibid at 300.

have an interest in why the incident occurred and who is responsible.[103] This argument implies that a less robust investigation into the entire truth about the situation under consideration is permissible, as the only facts needed are those necessary to apportion responsibility.

The trouble with this position is that it does not take into account the sort of information victims of atrocity crimes have specifically identified as being indispensable to aid in their own psychological healing. Individuals affected by atrocity crimes make clear that a more complete form of truth is essential if their communities are going to heal. Ninety-three per cent of Cambodians interviewed in 2011 believed "[i]t is necessary to find the truth about what happened during the Khmer Rouge regime."[104] Ninety-four per cent of Rwandans indicated that one purpose of trial "is to reveal the truth about what happened in 1994" and over eighty per cent of respondents felt that learning the truth about atrocity crimes was necessary for reconciliation and healing.[105] Eighty-nine per cent of citizens in both the Central African Republic and Northern Uganda specified that it was important to find out the truth about the atrocity crimes committed in their respective countries.[106] In the Central African Republic, survey respondents agreed that finding out the truth was important, "because the truth must be known", "to understand why the conflict and violence happened" and "to know who is responsible."[107] The citizens of Northern Uganda also valued knowing the truth and gave specific reasons for ascertaining the truth including, "so the people will not forget", "so that history will be known", and "identifying those responsible".[108] Most victims in Iraq preferred expressive reasons for establishing the truth, including "show[ing] the world the truth of

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[103] Akhavan, *Justice in The Hague supra* note 72 at 770; *quoting* Michael Ignatieff, 'Articles of Faith' (1996) 25(5) Index Censorship 110, 111.
[104] Phuong Pham, Patrick Vinck, Mychelle Balthazard and Sokhom Hean, *After the First Trial: A Population Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, UC Berkeley School of Law 2011) 31.
[105] Timothy Longman, Phuong Pham and Harvey M. Weinstein, 'Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 212-13.
[106] Vinck and Pham *supra* note 46 at 37; Phuong Pham and Patrick Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (Human Rights Center, UC Berkeley School of Law 2010) 46.
[107] Vinck and Pham *supra* note 46 at 37.
[108] Pham and Vinck *supra* note 106 at 46.

what happened in Iraq" and "ensuring that future generations know what happened and what mistakes were made."[109]

These surveys, while in no way definitive, do demonstrate that victims and others affected by atrocity crimes are interested in establishing the truth for a wide variety of reasons, many of which demand a full and complete account of the truth. Reasons like knowing the truth or the history of the situation, showing the world the truth and teaching future generations require a broad investigation into the truth and are not limited to demonstrating why the crimes were committed or who committed them. This interest in a more complete truth indicates that the victims want a broader discussion of what happened than what is required to satisfy the wider community. This problem is exemplified by the victims' strong desire to learn the location of the remains of murdered loved ones so that the living might gain a sense of closure by knowing their loved ones are dead and that they received a proper burial.[110] The sheer number of the dead in Rwanda and the former Yugoslavia, coupled with the often clandestine way in which bodies were disposed, made it impossible for the *ad hoc* Tribunals to conduct sufficient forensic investigations.[111] Therefore, the courts and tribunals made the decision not to fully investigate an aspect of the truth despite its seemingly vital importance to the victims.

The problem of locating mass graves takes on additional importance when considered in the context of trials *in absentia*. The perpetrators of atrocity crimes are often the only source of information about the burial places of the deceased. Therefore, when the accused are tried in their absence, evidence about mass graves will necessarily not be revealed. In this way, trials *in absentia* prevent the victims from learning the full truth about the situation and specific information they consider vital to restoring their sense of justice and psychological wellbeing.

This discrepancy between the needs of the victims and those of the international community has implications on whether trials *in absentia* can fulfil the goals of international criminal trials. The partial truth accepted by the international community

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[109] Human Rights Center, *Iraqi Voices supra* note 48 at 38.
[110] Mercedes Doretti and Luis Fondebrider, 'Science and Human Rights', in Victor Buchli and Gavin Lucas (eds), *Archaeologies of the Contemporary Past* (Routledge 2001) 143.
[111] Eric Stover and Rachel Shigekane, 'Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 86.

will likely also accommodate a truth to which the accused has made no contribution. That is because the international community's primary trial goals can be met without the accused's active involvement in trial. The achievement of their goals largely depend on the symbolism of trial, that someone is being called to account for their actions and condemned for their crimes. That symbolism can be realised so long as the requisite burden of proof is met, regardless of the source of the evidence needed to meet that burden. The more complete truth demanded by the victims is less likely to be satisfied in the accused's absence. Additionally, there is some evidence to suggest that the truth-telling process is only effective for victims when it is accompanied by an apology from the perpetrators of the crimes against them.[112] An absent accused is much less likely to apologize for his or her alleged crimes thus depriving the victims of an important component of the truth-telling process. Therefore, the truth telling process, as currently constituted, meets the needs of the international community as a whole but falls short of what the victims demand to enable them to experience a sense of justice.

4.3 RECONCILIATION

In declaring 2009 the "International Year of Reconciliation", the General Assembly of the United Nations recognised that reconciliation is necessary "for the establishment of firm and lasting peace" in conflict and post-conflict settings.[113] Despite its importance, reconciliation is a problematic goal in international criminal law as there is no agreement as to what must occur for reconciliation to be accomplished. As Harvey Weinstein posits:

> Is it peace, the end of violence; is it contented individuals and families; is it communities where it is safe to walk the streets, to shop, to go to the mosque or church or synagogue, where women do not fear rape and where men and women feel no pressure to take up arms; is it economic opportunity, education for the children and dignity in old age?[114]

Weinstein concedes that safety and security are critical components of reconciliation, but he also questions the meanings of those terms within the context of a

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[112] David Mendeloff, 'Truth-Seeking, Truth-Telling, and Post-Conflict Peace Building: Curb the Enthusiasm' (2004) 6 Intl Stud Rev 355, 376.
[113] UNGA Res. 61/17 (20 November 2006) U.N. Doc. A/RES/61/17, at 1.
[114] Harvey M. Weinstein, 'Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief' (2011) 5 IJTJ 1, 3-4.

post-conflict society.[115] Others have focused on the attitudes of the people on different sides of the conflict, and particularly on whether there is tolerance and acceptance of people from different communities and whether they are "getting along".[116] Still others described reconciliation as "the repair and restoration of relationships" by "discovering ways and means to build trust so that the parties might be able to live cooperatively with one another."[117] What these attempted definitions illustrate is that reconciliation can be approached from a number of different directions making it difficult to identify one single, over-arching definition.

The situation in the former Yugoslavia raises serious doubts as to whether international criminal prosecutions can produce reconciliation.[118] Qualitative research conducted by Janine Clark suggests that more than a decade of prosecutions had not resulted in reconciliation. Clark's research in Bosnia and Herzegovina found that "[e]xtremely high levels" of mistrust remained amongst members of the different factions, that there was little or no contact between divergent ethnic groups, what contact did exist was largely confined to business transactions and that different parties had markedly dissimilar understandings about how and why certain underlying acts took place during the war.[119] These findings led her to conclude that the International Criminal Tribunal for the former Yugoslavia's judicial process had not led to the reconciliation it was established to promote.[120]

Clark's conclusion undermines the optimism expressed by Antonio Cassese at the time of the International Criminal Tribunal for the former Yugoslavia's establishment. Cassese believed that fair trials conducted by an independent and impartial tribunal would promote reconciliation, and be conducive to the establishment of "healthy and cooperative relations", thus contributing to the peaceful resolution of the conflict.[121] In

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[115] Ibid.
[116] James Meernik and Jose Raul Guerrero, 'Can International Criminal Justice Advance Ethnic Reconciliation? The ICTY and Ethnic Relations in Bosnia-Herzegovina' (2014) 14(3) SE Eur & Black Sea Stud 383, 389.
[117] Clark *supra* note 49 at 482; Christopher C. Joyner, 'Reconciliation as Conflict Resolution' (2010) 8 New Zealand Journal of Public International Law 39, 40.
[118] Eric Stover and Harvey M. Weinstein, 'Conclusion: A Common Objective, a Universe of Alternatives', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (CUP 2004) 323.
[119] Clark *supra* note 49 at 482-83.
[120] Ibid at 483.
[121] Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

Cassese's view, fair trials, and the resulting convictions of those found to be responsible, would alleviate unresolved hatred and resentment diminishing the likelihood of renewed violence and the commission of new crimes.[122] Cassese failed to recognise that fair trials conducted by an objective tribunal cannot, by themselves, lead to reconciliation. Perhaps more important than the trials actually being fair is that they are seen as being fair by members of the affected communities.

Clark attributes the lack of reconciliation between the parties to the perception, particularly amongst Serbs and Croats, that the International Criminal Tribunal for the former Yugoslavia is biased against them.[123] That perception is fuelled by the belief amongst Serbs that they were disproportionately the subjects of indictments by the Tribunal and that Serbs were receiving excessively harsh sentences when compared to other ethnic groups.[124] It is true that of 161 indictments issued by the International Criminal Tribunal for the former Yugoslavia, 109 were issued against ethnic Serbs, and that Serbs received slightly longer prison sentences than those of other ethnic backgrounds.[125] While the raw numbers could be interpreted as demonstrating an anti-Serbian bias, it has been argued that they are actually indicative of greater Serbian responsibility for crimes committed in the former Yugoslavia.[126] The latter interpretation suggests that the International Criminal Tribunal for the former Yugoslavia's activities are consistent with the judicial goal of bringing to justice those responsible for committing mass killings and ethnic cleansing as set out by the Security Council, it just so happens that ethnic Serbs were disproportionately responsible for committing those crimes. Whatever the reality, as long as groups perceive a bias in how international and internationalised criminal courts and tribunals prosecute the accused, the court's judicial activities will prevent a conflicted region from achieving the political goal of reconciliation.

The problem of how the International Criminal Tribunal for the former Yugoslavia is perceived within the nations that once made up the former Yugoslavia is

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Territory of the Former Yugoslavia Since 1991 (29 August 1994) U.N. Doc. A/49/342, S/1994/1007, paras 15-17.

[122] Ibid at paras 15-16.

[123] Clark *supra* note 49 at 483.

[124] Mirko Klarin, 'The Impact of ICTY Trials on Public Perception in the Former Yugoslavia' (2009) 7 JICJ 89, 92.

[125] Stuart Ford, 'Fairness and Politics at the ICTY: Evidence from the Indictments' (2013) 39(1) NC J Intl L & Com Reg 45, 68.

[126] Ibid at 70-71.

exacerbated by the Tribunal's failure to create an objectively understood history about the war.[127] It is widely thought that establishing the objective truth about a conflict facilitates successful reconciliation by identifying indisputable facts that cannot be manipulated or denied.[128] Instead, the history established through testimony at the International Criminal Tribunal for the former Yugoslavia has largely been rejected in the different nations of the former Yugoslavia and domestic narratives about the war have been developed.[129] Serbia, Croatia and Bosnia and Herzegovina have all developed divergent, national historical accounts so fundamentally at odds with one another as to be irreconcilable.[130] Additionally, different ethnic groups within each nation have also developed unique understandings of the truth about what happened during the war that at times conflict with the overarching national history.[131] This problem is further complicated by the fact that each individual affected by the war believes his or her own particular truth about why and how the conflict happened.[132] This has resulted in a multitude of different histories, many of which conflict with one another on a very basic level. The Tribunal's failure to develop a single, objective narrative about the war has raised questions amongst different factions about the Tribunal's legitimacy and whether the accused are receiving a fair trial, particularly when it makes decisions that do not accord with a particular group's understanding of events.

Realistically, it may not be possible for an international criminal court or tribunal to develop a truly objective history sufficient to facilitate reconciliation. For there to be true reconciliation everyone must accept that although individual accounts may differ, each person's story is equally valid. Consensus of opinion is not required, what is necessary is for the different factions to find a way to live with the fact that there is no consensus.[133] However, it is very difficult for a person to fully accept the validity of a

[127] Erin Kathleen Lovall and June Ellen Vutrano, 'Seeking Truth in the Balkans: Analyzing Whether the International Criminal Tribunal for the former Yugoslavia has Contributed to Peace, Reconciliation, Justice or Truth in the Region and the Tribunal's Enduring Legacy' (2015) 5 L J Social Just 252, 306.
[128] Akhavan, *Justice in The Hague supra* note 72 at 741-42; Fletcher and Weinstein *supra* note 20 at 587; Meernik and Guerrero *supra* note 116 at 403.
[129] Jelena Subotic, 'Truth, Justice, and Reconciliation on the Ground: Normative Divergence in the Western Balkans' (2015) 18(3) J Intl Rel & Dev 361, 371.
[130] Ibid at 373.
[131] Ibid.
[132] Lovall and Vutrano *supra* note 127 at 307.
[133] Damaška *supra* note 8 at 346; Akhavan, *Justice in The Hague supra* note 72 at 741-42.

narrative he or she feels is incompatible with his or her own version of events. Any history developed by an international or internationalised criminal court or tribunal must be accepted as legitimate before it can help facilitate the reconciliation process. Rather than insisting on an objective truth, it may be necessary for courts and tribunals to focus on developing an acceptable truth if they truly aspire to promote reconciliation amongst belligerent groups. Unfortunately, such an approach is at odds with the accused's fair trial rights.

The accused's right to a fair trial cannot accommodate a compromised truth telling process designed to encourage reconciliation. A fair trial requires factual accuracy and if relevant facts are omitted or distorted so as to create a truth acceptable to all sides of a conflict the entire proceeding will be considered inequitable. Further, it is not clear if reconciliation is possible in the absence of punishment. Interviews conducted with Bosnian survivors of the war in the former Yugoslavia linked the possibility of reconciliation to the need for the punishment of the perpetrators of atrocity crimes.[134] Some of the interviewees tied reconciliation to forgiveness, indicating that they would be more likely to forgive someone that was being punished for his or her crimes.[135] The interviewees also generally rejected the idea of a truth commission as being sufficient to promote reconciliation because truth commissions lack the authority punish the perpetrators of atrocity crimes.[136] These findings suggest that the victims need to see the perpetrators of the crimes against them punished before they can properly begin to reconcile with other ethnic groups. That is not possible if the accused is not present during trial suggesting that trials *in absentia* fail to further the goal of reconciliation.

4.4 PEACE

Achieving peace is also a commonly cited goal of international criminal trials. Peace is a frequently used word that defies easy definition.[137] Johann Galtung posited that the modern concept of peace should be understood as being of two different types, negative peace and positive peace.[138] He defined 'negative peace' as "the absence of

[134] Goran LJIL, 'Conditions for Reconciliation: Narratives of Survivors from the War in Bosnia and Herzegovina' (2015) 17(2) J Crim Just & Sec 107, 116.
[135] Ibid.
[136] Ibid at 123.
[137] Alfred de Zayas, 'Peace', in William A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (CUP 2016) 96.
[138] Johan Galtung, *Theories of Peace: A Synthetic Approach to Peace Thinking*, Oslo,

organized collective violence", and positive peace as "all other good things in the world community, particularly cooperation and integration between human groups."[139] Charles Webel elaborated on Galtung's theory and introduced the ideas of a "Strong, or Durable, Peace" and a "Weak, or Fragile Peace."[140] Strong, or durable, peace exists when there is "relatively robust justice, equity, and liberty, and relatively little violence and misery at the social level".[141] Conversely, peace is described as weak or fragile if there is an absence of war, but also "pervasive injustice, inequity and personal discord and dissatisfaction."[142]

The United Nations' use of the modifier 'lasting' in describing the type of peace achievable through truth indicates that the United Nations hopes to achieve positive peace or strong, or durable peace, when establishing international and internationalised criminal courts and tribunals.[143] This interpretation is further supported when one considers the interaction between reconciliation and lasting peace. If one purpose of reconciliation is to build cooperative and integrated relationships between different groups, it logically follows that such reconciliation will result in a peace defined along the same terms. This relationship between reconciliation and peace suggests that the problems precluding reconciliation would also inhibit peace. Although the arrest and prosecution of individuals actively disturbing peace in a particular region will help produce the absence of violence, i.e. negative peace, it is less likely to bring about the sort of positive or lasting peace sought by the United Nations.[144] All arrest and prosecution does is remove agitators from the equation; it does not address the root causes of the conflict.

Holding trials *in absentia* of those same individuals would likely serve no purpose at all. It would not remove them from the positions that allow them to provoke violence. Therefore, *in absentia* trials would not help to promote negative peace. In fact, trials *in absentia* would probably encourage the perpetrators of atrocity crimes to be more

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International Peace Research Institute, 1967, 12, <https://www.transcend.org/files/Galtung_Book_unpub_Theories_of_Peace_-_A_Synthetic_Approach_to_Peace_Thinking_1967.pdf> 25 August 2016.

[139] Ibid.

[140] Charles Webel, 'Introduction: Toward a Philosophy and Metapsychology of Peace', in Charles Webel and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge 2007) 11.

[141] Ibid.

[142] Ibid.

[143] Werle and Jessberger *supra* note 86 at 33-34.

[144] James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) 42(3) J Peace Res 271, 276.

provocative as they would likely feel as they have nothing left to lose after being accused.[145] Trials *in absentia* would also have no discernable effect on positive peace. The potential effect trials can have on creating a positive peace is tied to the deterrent effect trials are thought to produce.[146] However, as discussed above, the deterrent effect of trial is largely reinforced by the credible threat of punishment.[147] As trials *in absentia* fail to carry with them a credible threat of punishment they are unlikely to fulfil the goal of promoting peace.

4.5 RULE OF LAW

International criminal trials are also conducted in the belief that doing so helps to strengthen the rule of law both domestically and internationally. Ban Ki-Moon emphasised the importance of the rule of law by placing it at "the heart" of the work done by the United Nations due to its intrinsic link to peace and justice.[148] The rule of law is thought to legitimate the internal sovereignty of the State and its right to make, adjudicate and enforce laws within its own territory, while also ensuring the separation of powers, limiting the use of power by the State and guaranteeing fairness in how the laws are applied.[149] Central to this concept is the requirement that all persons and entities within the State, both public and private, are "bound by and entitled to" the same benefits and detriments of the law, regardless of their position.[150] The rule of law serves three purposes: to protect people from arbitrary abuses of power; to allow people to make decisions with knowledge of the legal consequences of their actions; and to protect people from arbitrary exercised of power by public authorities.[151]

A strong rule of law is thought to lead to peace and reconciliation but can only exist if the people have trust that their legal institutions will deliver prompt and fair

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[145] Kim and Sikkink *supra* note 77 at 958.
[146] Akhavan, *Justice in The Hague supra* note 72 at 743.
[147] Ibid at 796; Damaška *supra* note 8 at 339; Sloan *supra* note 64 at 72.
[148] Provisional Verbatim Record of the Seven Thousand Thirteenth Meeting of the United Nations Security Council (19 February 2014) U.N. Doc. S/PV.7113 at 2.
[149] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2002) 52-3.
[150] Thomas Bingham, *The Rule of Law* (Allen Lane 2010) 8.
[151] Richard H. Fallon, '"The Rule of Law" as a Concept in International Discourse' (1997) 97 Colum L Rev 1, 7; *see also* Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights: Building the Rule of Law After Military Interventions* (CUP 2006), 69-70, 250.

dispute resolution.[152] Trials conducted under the rule of law by international and internationalised criminal courts and tribunals compel the governments of affected States to comply with rule of law norms and even dictators are persuaded that atrocity crimes are morally repugnant.[153] They also raise public awareness amongst the citizens of those nations that human rights laws were violated thus increasing the legitimacy of those laws.[154] Trials are seen as an expression of the moral authority for all humanity and compliance with the basic legal standards expressed therein is part of being a member of the international community.[155] If taken to the logical extreme, international criminal trials can lead to habitual lawfulness and the belief that committing atrocity crimes is not a logical alternative to peaceful, multi-ethnic co-existence.[156]

It is important to note that international criminal law, on its own, cannot establish or re-establish the rule of law following the commission of atrocity crimes. Instead, it takes multiple actors to strengthen the standing of the rule of law. International criminal law is responsible for reinforcing two different aspects of the rule of law. First, it is designed to establish or re-establish the rule of law in a state following a period of violence during which atrocity crimes were committed.[157] Second, international criminal trials are meant to be expressive, both in an effort to encourage the growth of the rule of law in regions afflicted by conflict, but also to demonstrate the legitimacy of the trial itself in an effort to facilitate acceptance of the outcome.[158] It has been posited that both of these purposes can be achieved in the accused's absence, although judgment has been reserved as to whether vindicating the rule of law can justify an infringement of the accused's right to be present at trial.[159]

The evidence does not appear to support the more optimistic projections about the effects international criminal trials have on rebuilding or enhancing the rule of law. A study done in Rwanda and the former Yugoslavia on the impact that international tribunals have on the rule of law found that the *ad hoc* Tribunals suffer from a lack of legitimacy within the affected States and, as a result, neither has had the desired effect on

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[152] 7113th Security Council Meeting *supra* note 148 at 2.
[153] Thoms and Paris *supra* note 10 at 333; Blumenson *supra* note 22 at 828.
[154] Ohlin *supra* note 69 at 88.
[155] Leslie Vinjamuri, 'Deterrence, Democracy and the Pursuit of International Justice' (2010) 24(2) Ethics & Intl Aff 191, 196-97.
[156] Akhavan, *Justice in The Hague supra* note 72 at 749.
[157] Thoms and Paris *supra* note 10 at 333.
[158] Vinjamuri *supra* note 155 at 196-97.
[159] Ohlin *supra* note 69 at 101-102.

developing the rule of law domestically.[160] A study into the impact the Special Court for Sierra Leone had on the rule of law in Sierra Leone and Liberia produced more mixed findings. A majority of the people in both countries felt that there had been an overall improvement in the Rule of Law since the establishment of the Special Court for Sierra Leone, and more than 80% of the people surveyed attributed that improvement to the work of the Special Court.[161] However, the researchers found that despite the interviewees' perception, the Special Court for Sierra Leone had instigated few changes to domestic legislation in either country and had minimal impact on law enforcement or the judiciary.[162]

It also does not appear that the International Criminal Court has had any real success in instilling victim participants with a sense that the domestic rule of law has been enhanced. Studies done in Uganda and Kenya found that despite International Criminal Court involvement in those countries there was still widespread distrust for domestic legal institutions due to perceptions about political interference and corruption.[163] In fact, interviewees in both countries believe that the more likely outcome is that the domestic governments will have a corrupting effect on the International Criminal Court resulting in an overall diminishment of the rule of law internationally.[164]

These findings lead to the conclusion that many victim participants view their nation's lack of adherence to the rule of law as being so entrenched that it is more likely that local political entities will corrupt international justice institutions than that those international institutions will positively affect domestic respect for the rule of law. Even in Sierra Leone and Liberia, where interviewees expressed some positivity about how the Special Court for Sierra Leone has enhanced the rule of law, researchers have been unable to identify any significant reforms to domestic justice institutions. There is insufficient evidence to support a finding that international criminal trials have a substantive influence on the domestic rule of law in states formerly affected by conflict. As a result, trials *in absentia* should not be justified on rule of law grounds because the potential infringement on the accused's participation in trial outweighs the uncertain

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[160] Stromseth, et al *supra* note 151 at 264.
[161] L. Alison A. Smith and Sara Meli, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia* (No Peace Without Justice 2012) Annex 10 and Annex 33.
[162] Ibid at 36.
[163] Human Rights Center, *The Victims Court supra* note 45 at 34, 56.
[164] Ibid at 34, 53.

benefit such a trial might have on strengthening the rule of law.

4.6 REPARATIONS

Reparations represent one area in which the victims' interests can be satisfied without the participation of the accused. Victims have made abundantly clear that one expected outcome of trial is that they will be provided with reparations in recognition of their victimisation. In 2005, the United Nations General Assembly recognized a right to reparations for victims of gross violations of international human rights law or international humanitarian law.[165] Reparations are meant to be proportional to the harm done and fall into five categories: Restitution, Compensation, Rehabilitation, Satisfaction and Guarantees of Non-Repetition.[166] National governments are responsible for reparations for crimes that can be attributed to the state and individuals are responsible for paying reparations when found liable by a competent court.[167]

Prior to 2005, victims of atrocity crimes being tried in international criminal courts and tribunals only had a right to reparations to the extent that the particular court or tribunal responsible for adjudicating the accused perpetrator of the crimes against them provided for reparations. The Statutes of the *ad hoc* Tribunals and the Special Court for Sierra Leone only authorise reparations in the form of restitution of property and proceeds obtained by the accused through his or her criminal conduct.[168] None of these three institutions are authorised to order any of the other four types of reparations identified by the United Nations General Assembly.[169] The law establishing the Extraordinary Chambers in the Courts of Cambodia does not provide for any form of restitution for victims. Instead, it requires the forfeiture to the State of any illegally

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[165] UNGA Res. 60/147 (16 December 2005) U.N. Doc. A/RES/60/147, at para 1 and Principle 11 of the Annex.
[166] Ibid at Principles 15, 19-23.
[167] Ibid at Principle 15.
[168] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 24(3); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 23(3); UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 19(3).
[169] Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol 2 (Transnational Publishers, Inc 1995) 282; Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda*, vol 1 (Transnational Publishers, Inc. 1998) 595.

obtained money or property.[170] The Extraordinary Chamber's Internal Rules do allow for the award of reparations, but limit them in scope to "collective and moral" reparations and explicitly exclude monetary awards.[171] The Statute of the Special Tribunal for Lebanon does not directly provide the victims with a right to reparations. Instead, it sets out the procedure it will follow to assist victims receiving reparations from courts of national jurisdictions.[172] In contrast, Article 75 of the International Criminal Court's Statute permits victims to seek reparations in the form of restitution, compensation and rehabilitation in the event of the conviction of the accused.[173]

People affected by atrocity crimes have consistently asserted that they believe that the victims of such crimes should receive reparations. A majority of victim participants in Uganda and Kenya indicated that the prospect of receiving reparations was there primary motivation for becoming victim participants in cases at the International Criminal Court.[174] Their counterparts in the Democratic Republic of Congo and Côte d'Ivoire were more likely to rank reparations amongst their motivations for participating rather than as their primary motivation, but respondents from both countries generally expected reparations following trial.[175] In 2010, 97% of interviewees in the Central African Republic, not all of whom identified themselves as victims, felt that reparations for the victims are important.[176] Most Iraqis responding to a 2004 survey indicated that reparations in the form of rehabilitation and compensation were necessary for Iraq to move on from the crimes committed during Saddam Hussein's regime.

The ability of the victims to receive reparations from international criminal courts and tribunals is not affected when trial is conducted *in absentia*. Although orders to pay reparations constitute part of the sanctions against an individual following his or her conviction, the reparations do not have to be paid by the convicted perpetrator. When the United Nations General Assembly recognized the right to reparations it also adopted the principle that States should implement national programmes to pay reparations to victims

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[170] Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) art 38.
[171] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 23 *quinquies*(1).
[172] Statute of the Special Tribunal for Lebanon (2007) art 25.
[173] Rome Statute *supra* note 5 at art 75.
[174] Human Rights Center, *The Victims Court* supra note 45 at 36, 58.
[175] Ibid at 46, 68.
[176] Vinck and Pham *supra* note 46 at 35.

or to provide them with other assistance should those liable for harming the victims prove unwilling or unable to do so.[177] The International Criminal Court also has a mechanism permitting the Trial Chambers to order that the Court's Trust Fund pay the reparations awarded to the victims.[178] These rules mean that the award of reparations is unrelated to the presence of the accused because there are other entities that will be responsible for paying the necessary reparations to the victims.

The accused's presence at trial is largely irrelevant to victims primarily motivated by receiving reparations. In fact, it could be argued that it is in the best interests of those victims driven by receiving reparations to proceed *in absentia* if the alternative would be the postponement of trial and an accompanying delay in the award of reparations. The existence of mechanisms that do not require the accused to participate in trial to ensure that the victims will receive the ordered reparations renders the accused's presence immaterial.

4.7 CONCLUSION

International human rights practitioners have gone beyond the strictly legal reasons for holding a trial and identified numerous other purposes to justify conducting international criminal trials. These additional reasons for trial are largely designed to vindicate the rights of two groups, the victims of atrocity crimes and the international community. These two groups are generally interested in achieving the same things, including reconciliation between opposition groups following an armed conflict, the development and maintenance of a sustainable peace and the punishment of perpetrators of atrocity crimes. Despite this general agreement when identifying the appropriate goals of trial, the victims and society as a whole often disagree about how best to prioritise those different goals. Victims are mostly interested in the immediate redress of the wrongs committed against them while society as a whole emphasises the long-term benefits that international criminal trials can provide. Redress for the victims most often takes three forms: being made to feel as if justice has been done, often through the punishment of the perpetrator of the crimes against them; by developing a full and complete historical record; and through financial reparations awarded in recognition of the suffering they endured. The first two of these goals generally require the accused to

[177] Annex to UNGA Res. 60/147 *supra* note 165 at Principle 16.
[178] Rome Statute *supra* note 5 at art 75(2).

be present. The international community prioritises different goals including: deterring the future commission of atrocity crimes; promoting long-term peace and the rule of law through out the world; and promoting a moral shift under which potential rights abusers will consider the commission of atrocity crimes repugnant. While many of these goals are best accomplished through the punishment of the accused, in some situations they are also thought to be effective in the absence of punishment. These distinctions are relevant because whether punishment is necessary to meet the goals of trial has a significant bearing on whether trying an accused in his or her absence is advisable. If a particular goal cannot be met without punishing the accused than it cannot properly be used to justify holding a trial *in absentia* as an absent accused cannot be punished.

Also important is how a particular court or tribunal ranks the interests of these different groups. The International Criminal Court explicitly mentions victims in the Preamble of its Statute, and its extensive provisions detailing the rights of the victims make clear that their interests are a primary focus for the court. Because the International Criminal Court emphasises the victims' interests, and most of the victims' high priority goals are generally only effective when the accused is punished, there is little point in trying an accused *in absentia* at the International Criminal Court if it intends to fulfil its responsibility to the victims. Conversely, when the *ad hoc* Tribunals were formed, the Security Council identified trial goals more closely aligned with the interests of the international community. This suggests that trials at those tribunals could accomplish their overarching goals in the absence of the accused. Therefore, it is necessary for courts and tribunals to clearly understand what goals they hope to achieve, and whether those goals can be achieved in the absence of the accused, before proceeding with a trial *in absentia*.

CHAPTER 5: THE RIGHT TO BE PRESENT AT TRIAL AND TRIAL *IN ABSENTIA*

By the mid-2000's it was generally thought that trial *in absentia* was a dead letter in the context of international criminal law. The Rome Statute's apparent requirement that the accused be present at trial was interpreted as an indication that the international legal community had rejected trials *in absentia*.[1] Trials *in absentia* had been described as 'anachronistic', 'unfair' and 'in opposition to international law standards'.[2] However, the introduction of the Special Tribunal for Lebanon's Statute in 2007, and its more permissive approach to trial taking place in the absence of the accused, signalled a radical shift in thinking about the role of trials *in absentia* in international criminal law. For the first time since the Nuremberg Trials, the statute of an international or internationalised criminal court or tribunal authorised the use of trial *in absentia*. An issue that many thought had been resolved in international criminal law was imbued with new life.

The phrase *in absentia* translates from Latin to "in the absence of" and carries the same legal meaning.[3] Despite this clear literal definition, the term trial *in absentia* has been used to describe many different factual scenarios involving an accused's absence from trial and as a result has no set meaning in international criminal law.[4] It is used broadly to describe any situation in which trial occurs outside of the accused's presence and more narrowly to describe a trial occurring in its entirety without the accused being present but where the accused is aware that trial is taking place in his or her absence. When used broadly, some commentators separate trial *in absentia* into two categories, partial *in absentia* and total *in absentia*, in an effort to describe the different legal rules that apply to each situation.[5] Total *in absentia* refers to a trial which entirely takes place

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[1] Stan Starygin and Johanna Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the *Draft Criminal Procedure Code*' [2005] Singapore J Legal Stud 170, 185.
[2] Anne L. Quintal, 'Rule 61: The "Voice of the Victims" Screams Out for Justice' (1998) 36 Colum J Transnatl L 723, 739; Christoph J.M. Safferling, *International Criminal Procedure* (OUP 2012) 396; M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Intl L 235, 280.
[3] Starygin and Selth *supra* note 1 at 171.
[4] Ibid; Chris Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham Intl L J 57, 68; Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1309.
[5] Jenks *supra* note 4 at 67-9; Mohammad Hadi Zakerhossein and Anne-Marie de

in the absence of the accused while partial *in absentia* exists when the accused is present for some parts of the trial and absent for others.[6] However, this approach is too limiting and fails to adequately account for the difference types of total and partial absences from trial.

To provide as much specificity as possible, absences from trial have been divided into four parts, each of which will be addressed in its own chapter. The four types of absences are: 1) trial *in absentia*; 2) trial by default; 3) absences that occur after the commencement of trial; and 4) situations where the accused is physically present in the courtroom but unable to understand and participate in the trial. This chapter examines trials *in absentia*, which are trials that occur in the absence of the accused where the accused has adequate notice that the trial is taking place and has waived his or her right to be present. In this context, notice exists when the accused learns of the charges against him or her and the date and location of trial sufficiently in advance of its start to ensure that he or she has an adequate amount of time to prepare his or her defence to those charges.[7] Some also take the position that adequate notice should also include an indication of the consequences that can arise if the accused does not appear for trial.[8] Waiver of the right to be present occurs when the accused has adequate notice of the charges and the date and location of trial and declines to exercise his or her right by failing to appear for trial.[9] Trial *in absentia* is thought to be permissible and compatible with the right to be present when the accused is given the opportunity to exercise his or her right to be present through adequate notice and declines to do so following an effective waiver.[10] Therefore, the existence of notice and waiver are fundamental

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Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 183; Alexander Schwarz, 'The Legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal Court and Their Compatibility with Human Rights' (2016) 16 African Human Rights Law Journal 99, 102.

[6] Zakerhossein and de Brouwer *supra* note 5 at 183; Schwarz *supra* note 5 at 102.

[7] *Mbenge v Zaire* Comm No 16/1977 (25 March 1983) para 14.2.

[8] Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5 at para 36.

[9] Ibid; *see also Mbenge supra* note 7 at para 14.2.

[10] Council Directive 2016/343 *supra* note 8 at para 36; *see also* Evert F. Stamhuis, 'In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System' (2001) 32 VUW L Rev 715, 722; Schabas, William A. and Veronique Caruana, 'Article 63: Trial in the Presence of the Accused', in Otto Triffterer and Kai Ambos, *The Rome Statute of the International*

considerations when determining whether a trial can properly held *in absentia*.

5.1 THE REASONS FOR AND AGAINST TRIALS *IN ABSENTIA* IN INTERNATIONAL CRIMINAL LAW

Trials *in absentia* conducted by international and internationalised criminal courts and tribunals are often justified on the basis of the Human Rights Committee's Views in *Mbenge v Zaire*. In its Views, the Committee stated that *in absentia* proceedings "are in some circumstances… permissible in the interest of the proper administration of justice."[11] The Human Rights Committee did not elaborate about what circumstances might allow a court or tribunal to proceed in the accused's absence, but they appear to encompass those situations in which the public interest in holding trial outweighs society's competing interest in respecting the fair trial rights of the accused.[12] The public interest in holding trials assumes this dominant position when the potential delay caused by the accused's absence could result in: the loss of evidence; the expiration of applicable statutes of limitations; a burden on other trial participants, particularly with respect to the speedy trial rights of co-defendants; or a lengthy delay to the start of trial.[13] Trials held under these circumstances are meant to promote public confidence in criminal trials and preventing the accused from subverting the course of international law and justice.[14]

The danger of conducting trials *in absentia* is that they can act to de-emphasise the importance of defence rights, which can result in those rights becoming undervalued and lead to the conviction of innocent defendants.[15] Further, convictions resulting from trials *in absentia* may create the perception that the outcome is indicative of the accused being disciplined for his or her contumacy, and not because of the evidence presented by

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Criminal Court: A Commentary (3rd ed, Hart Publishing 2016) 1564.

[11] *Mbenge supra* note 7 at para 14.1.

[12] *Prosecutor v Milošević* (Decision on Admissibility of Prosecution Investigator's Evidence, Partial Dissenting Opinion of Judge Shahabuddeen) IT-02-54-AR73.2, A Ch (30 September 2002) para 36; Artur Malaj, 'Reflection of the Due Process Standards in Judgments in Absentia' (2015) 4(1) Acad J Interdisciplinary Stud 135, 135; Christoph J.M. Safferling, *Towards an International Criminal Procedure* (OUP 2001) 242.

[13] Safferling, *Towards an International Criminal Procedure supra* note 12 at 242; Lucas Tassara, 'Trial in Absentia: Rescuing the "Public Necessity" Requirement to Proceed with a Trial in the Defendant's Absence' (2009) 12(1)(4) Barry L Rev 153, 168; *citing United States v Tortora*, 464 F.2d. 1202, 1210 (2d Cir 1972).

[14] Tassara *supra* note 13 at 153; Antonio Cassese, *International Criminal Law* (OUP 2003) 402-403.

[15] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 JICJ 611, 615.

the prosecution. This concern is exacerbated when trials *in absentia* are conducted in international and internationalised criminal courts and tribunals because of the attention paid to these trials and the seriousness and gravity of the crimes alleged.[16] Trials *in absentia* also often do not serve the penological interests of justice when the defendant remains at large following the conclusion of trial.[17] It can be viewed as a wasted effort to go through the lengthy process of convicting someone *in absentia* when there is no real likelihood that the defendant will be punished for his or her actions. Additionally, convictions *in absentia* may create the impression that the international community will be satisfied with punishing atrocities through declarations of guilt rather than prison sentences and reparations.[18] To avoid these outcomes, it is generally agreed that trial *in absentia* should be considered the exception and not the rule, even in those jurisdictions that permit the practice.[19]

5.2 ATTITUDES TOWARDS INTERNATIONAL TRIALS *IN ABSENTIA* BEFORE THE NUREMBERG TRIBUNAL

Although the Nuremberg Tribunal marked the first instance in which individuals were tried before an international criminal tribunal, it was not the first time that the international community expressed interest in conducting trials of an international character. The British government signalled its willingness to hold *in absentia* trials during the deliberations of the Commission on Responsibilities following World War I. The Commission on Responsibilities was established by the preliminary Paris Peace Conference to consider the issue of responsibility relating to the war and, as an ancillary issue, to discuss the formation and applicable procedure of the tribunal later discussed in

[16] Wayne Jordash and Tim Parker, 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 500-501.
[17] Ibid; *see also* Zakerhossein and de Brouwer *supra* note 5 at 183; Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 253.
[18] Niccolò Figa-Talamanca, 'Trials in Absentia and International Criminal Court', in Flavia Lattanzi (ed), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998) 216.
[19] Fawzia Cassim, 'The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process' (2005) 38 Comp & Intl L J S Afr 285, 286; Håkan Friman, 'Rights of Persons Suspected or Accused of a Crime', in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 255.

Article 228 of the Treaty of Versailles.[20] On 8 February 1919, the British government submitted a memorandum regarding its position on the various issues being considered by the Commission, including its suggestion that the proposed tribunal be able to try the accused in his or her absence so long as the accused received advance notice of the trial.[21] This is particularly notable as it is one of the earliest instances in the international context in which a distinction is drawn between a trial *in absentia* and a trial by default. Emphasising the importance of notice, and the information contained in that notice, will prove pivotal for the development of the right to be present at trial.

The British memorandum does not state why trials *in absentia* should be permitted at the proposed tribunal, but the memorandum does speak about the need for "prompt action" and "the urgent demand for stern justice".[22] From that one can extrapolate that the British believed that trials should take place quickly and should not be subject to the delays caused by an accused that failed to appear. The position of the British government is particularly notable because at the time the English and Welsh Common Law prided itself on the proposition that trials should not take place in the absence of the accused.[23]

The Treaty of Versailles, the official peace agreement with Germany following World War I, contains several provisions concerning criminal sanctions resulting from actions taken during the war. Article 227 of the treaty announced criminal charges against Kaiser Wilhelm II of Germany, charging him with "a supreme offence against international morality and the sanctity of treaties" and a special tribunal was to be constituted in which to try him.[24] Despite this, the special tribunal was never established, and Kaiser Wilhelm was never tried for his 'supreme offence', in large part because the Netherlands, where he fled following the war, would not extradite him for trial. The Dutch refused on the grounds that it had no duty under either the Versailles Treaty, international law or domestic law to extradite the Kaiser, and that to comply with the request would run counter to the Netherlands traditional position as a nation of refuge

[20] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office 1948) 32.
[21] Ibid.
[22] Ibid at 33.
[23] William Blackstone, *Blackstone's Commentaries on the Laws of England*, Book IV, Chapter 24 < http://avalon.law.yale.edu/18th_century/blackstone_bk4ch24.asp> 1 July 2017; *Lawrence v The King* [1933] AC 699, 708.
[24] Treaty of Versailles (adopted on 28 June 1919) art 227.

"for the vanquished in international conflicts".[25]

Although no international trials were held following World War I, Belgium, France and Turkey all conducted domestic trials against individuals accused of committing crimes during the war, and some of those were held *in absentia*.[26] It is safe to assume that the trials that took place in Belgium and France were conducted under the criminal procedure rules of those countries that specifically authorized trials *in absentia*. In Turkey, the Constantinople War Crime Trials started with great promise but significant procedural concerns, accompanied by the on-going political upheaval in Turkey, led to these trials being declared a "farce" and a "failure".[27] Despite this, the trials did succeed in returning *in absentia* convictions against a number of significant members of the Ottoman leadership during the war, including Mehmet Talaat, Ismail Enver and Ahmed Djemal.[28]

The fact that *in absentia* trials took place for crimes committed during the war should not lead to the conclusion that the international community accepted trials *in absentia*. Rather, the post-World War I trials *in absentia* are more appropriately viewed as exercises of domestic criminal procedure, or, in the case of Turkey, as an effort to shift blame away from the State and onto certain individuals, and to ingratiate the failing Ottoman government with Western Europe.[29] The decision not to try Kaiser Wilhelm II in absentia is stronger evidence that the international community at large did not accept trials *in absentia*, but it too should be viewed more as a politically motivated decision. While one could interpret the decision not to prosecute Kaiser Wilhelm II as a decision to respect his fair trial rights, it is more likely that the choice not to pursue a trial outside of his presence was based on the lack of political will to try a former head of state for his actions taken during his period of leadership for a crime that did not exist while he was in

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[25] 'The Kaiser. Extradition Refused. Holland and Right of Asylum." The Times (24 January 1920) (courtesy of Professor William A. Schabas); Paul Marquardt, 'Law Without Borders, The Constitutionality of an International Criminal Court' (1995) 33 Colum J Transnatl L 73, 79; Antonio Cassese, *International Criminal Law* (2nd Ed, OUP 2008) 318; Eric A. Posner, 'Political Trials in Domestic and International Law' (2005) 55(1) Duke L J 75, 82.

[26] APV Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice 1945-1949' (1990) 39 Intl & Comp L Q 780, 784.

[27] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton UP 2002) 106, 129-30.

[28] Guenter Lewy, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide* (The University of Utah Press 2005) 76.

[29] Bass *supra* note 27 at 118.

power.[30]

5.3 TRIAL *IN ABSENTIA* AT THE NUREMBERG TRIBUNAL

International criminal law generally, and the right to be present at trial specifically, again rose to prominence following the Second World War. Tribunals were established in Nuremberg, Germany and Tokyo, Japan to try those German and Japanese officials accused of committing crimes during the war. The decision to pursue trials following World War II has been attributed to the phenomenal brutality of the war and the need to heal the wounds of the world.[31] The trial held at Nuremberg by the International Military Tribunal resulted in the first international trial *in absentia*, and first international conviction *in absentia*.

Following the unconditional surrender of the Germans to the Allies on 7 May 1945, the Allied powers assumed supreme authority over Germany on 5 June 1945.[32] The Allied powers met in London to discuss the creation of the International Military Tribunal ("Nuremberg Tribunal") and to draft its charter.[33] On 8 August 1945, the International Military Tribunal's Charter was signed and introduced to govern the conduct of the Nuremberg Tribunal.[34] Certain fair trial rights possessed by the accused were set out in the Charter, including the right to conduct a defence, the right to counsel, the right to introduce evidence and the right to examine witnesses.[35] The right to be present at trial was not included amongst those fair trial rights. In fact, Article 12 of the Charter specifically authorized conducting proceedings against an absent accused if that accused "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."[36] No compelling reason has been offered as to why the Allied powers authorised the use of trials *in absentia* at the

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[30] M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Hum Rts J 11, 12.
[31] Theodor Meron, *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (OUP 2011) 77.
[32] Rogers *supra* note 26 at 787.
[33] Gregory S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 Colum J Transnatl L 635, 641.
[34] Ibid.
[35] United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) art 16.
[36] Ibid at art 12.

Nuremberg Tribunal.[37]

The Allies' decision to allow trials in the absence of the accused at the Nuremberg Tribunal was immediately put to the test in the form of Martin Bormann. Bormann became head of the Nazi Party Chancellery on 12 May 1941 following Rudolf Hess' escape to Britain, and in 1943 was named Secretary to the Fuhrer.[38] Bormann's authority over domestic matters was thought to rival that of Heinrich Himmler and Hermann Goring and it is believed that by the end of the war Bormann exerted "great influence" over Hitler.[39] Bormann was directly involved in the systematic slaughter of Jewish people, crimes committed against prisoners of war and operating the forced labour programme.[40] In his memoir, Telford Taylor, who served as assistant prosecutor to Robert Jackson at the Nuremberg Tribunal, described Bormann as "a bad man" and recalled the statement of Hans Fritzsche, another Nazi tried at Nuremberg (although he was acquitted), who said of Bormann:

> The vanished defendant had no friends. Neither in court nor in private talks did I ever hear a single friendly word spoken of this man whose good will had once been so avidly sought…Now as he was tried *in absentia* it was shown that this stocky dark-haired man with the face of a peasant had always been regarded as a tyrant; his subordinates, even down to the typists, had been full of resentment against him, and he had been on bad terms with his family and closest relations.[41]

Martin Bormann's whereabouts following Germany's unconditional surrender were unknown, as was whether he was alive or dead (it was later learned that he was dead).[42] The Allied powers disagreed about whether Bormann should be included in the indictment due to his absence. The United States and the United Kingdom were not particularly interested in trying an absent accused, but the French and the Soviets both

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[37] Alphons Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (OUP 2002) 1492.
[38] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 338.
[39] Ibid at 338-9.
[40] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Bloomsbury Publishing Limited 1993) 267.
[41] Ibid at 464-65.
[42] K. Anslinger, G. Weichhold, W. Keil, B. Bayer and W. Eisenmenger, 'Identification of the Skeletal Remains of Martin Bormann using mtDNA Analysis' (2001) 114 Int J L Medicine 194, 195-96; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 750.

wanted to move ahead with indicting Bormann because he was considered "extremely important" and because he might prove to be alive.[43] In the end, both the French and Soviet negotiators insisted on Bormann's inclusion in the indictment and used the procedure set out in Article 14 of the Tribunal's Charter to overcome the objections of the British and the Americans.[44]

Two significant issues arose out of the Tribunal's decision to try Bormann in his absence. The first problem was that Bormann's lawyer, Friedrich Bergold, had no client to instruct him about the evidence, the role of particular witnesses in the crimes alleged or to direct him towards any existing exculpatory evidence. Telford Taylor described Bergold's difficulties as follows, "never has a lawyer had a more thankless task. He had no client in the flesh, and no one wanted to help him."[45] With regard to documentary evidence "Bergold had fewer than a dozen documents for which the best one could say was that Bormann had written some letters that did not incriminate him."[46] Bergold highlighted the problem during his closing argument when he pointed out that his ability to defend Bormann was compromised because he did not have a client to consult about the identity of witnesses or the location of exculpatory evidence.[47] In total, it took Bergold "little more than an hour" to present Bormann's case in defence of the charges.[48]

The second issue arising out of the decision to try Bormann in his absence was that other defendants used Bormann's absence as an opportunity to shift responsibility for their own misdeeds on to Bormann. Bergold asserted that:

> The charges which many co-defendants have made against him, perhaps for very special reasons and obviously in order to further their own defense and exonerate themselves, cannot for reasons of fairness be taken as the basis of a judicial decision. The prosecution has already stated quite frequently through its representatives that the defendants would endeavour to throw the main blame upon dead or absent men for the acts which are subject to the Tribunal's jurisdiction. Some of my colleagues have followed these tactics of the defendants in their defense speeches. Perhaps it was right to do all of this. I cannot judge the matter. Besides, I have no authority to form such a judgment.[49]

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[43] Bradley F. Smith, *Reaching Judgment at Nuremberg* (Andre Deutsch Limited 1977) 229-30.
[44] Charter of the IMT *supra* note 35 at art 14; *see also* Smith *supra* note 43 at 229-30.
[45] Taylor *supra* note 40 at 465.
[46] Ibid.
[47] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 19 (1948) 116-7.
[48] Taylor *supra* note 40 at 466.
[49] *Trial of the Major War Criminals*, vol 19 supra note 47 at 117.

As Bergold suggested in his statement, the prosecution shared his concern that the defendants present for the trial were marginalising their own guilt and disproportionately blaming people that were absent. During his closing argument, Robert Jackson pointed out that all of the defendants had shifted blame to those Nazi officials, including Bormann, not present at the trial. While Jackson avoided directly accusing the defendants of lying, he did make clear his incredulity at this fact, stating "[i]t is a temptation to ponder the wondrous workings of a fate which has left only the guilty dead and only the innocent alive. It is almost too remarkable."[50]

Later commentary supports Bergold's unease that the present defendants were absolving themselves of blame while blaming others known to be absent or dead. Bradley Smith wrote of Bormann that "most of the other accused found him an ideal figure on whom to deposit all the responsibility they could brush off themselves" and that "[b]y the end of the trial, the prosecution and the various defendants had produced such a towering picture of Bormann's malevolent influence and power that his image threatened to overshadow that of Hitler himself."[51] Kim Christian Priemel asserts that Bormann's absence meant he could not give evidence against the other accused, leading to responsibility being "dumped at his doorstep" by the other defendants.[52] Michael Bazyler described the shifting of blame to those Nazi officials not present at trial, including Bormann, as "a common defense tactic".[53]

The decision to try Bormann *in absentia* is often justified on the grounds that the documentary evidence against Bormann was overwhelming. After recognising that Bergold "labored under difficulties" when trying to refute the documentary evidence, the Tribunal found in its decision that, "[i]n 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."[54] Others have reached a similar conclusion and stated, "[i]t is more than doubtful that Bormann's presence in court would have altered the judgment, for the

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[50] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 18 (1947) 428.
[51] Smith *supra* note 43 at 230.
[52] Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (OUP 2016) 128.
[53] Michael Bazyler, *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (OUP 2016) 75.
[54] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 340.

documents were unanswerable."[55] While this may be true, it is also beside the point. Even if the evidence against an accused is overwhelming, and even if the court ultimately came to the 'right' decision, it does not justify abrogating the accused's right to be present. As Bergold put it in his closing argument "nobody knows what the defendant Bormann could of said in answer to these men if he had been present."[56]

This goes to the very crux of the danger of trying an accused in his or her absence. The prosecution's case will always appear persuasive if the defence is unable to adequately test it.[57] When the defendant is not present the prosecution has free rein to characterise the evidence in any way it chooses, to question witnesses about incriminating facts while ignoring exculpatory evidence and to generally create a case that upon first glance appears unimpeachable. It is only through cross-examination and the introduction of contrary evidence that the trier of fact is able to adequately assess the guilt or innocence of the accused. Reaching an accurate verdict is made even more difficult where co-defendants use the absence of others as an opportunity to shift the blame onto those missing parties. The Tribunal's decision was, in part, based on inaccurate and inadequately tested evidence and as a consequence the court's verdict as it relates to Bormann can be called into question.

The court's decision to try Bormann in his absence constituted an injustice against the victims of the Nazis' crimes. Justice is not achieved simply by apportioning guilt; guilt must be ascribed to the proper parties in appropriate proportions for justice to be done. Here, participants and subsequent observers had the impression that Bormann's co-defendants transferred at least some of their own culpability onto him so as to relieve themselves of guilt. Therefore, acts or omissions ascribed to Bormann at trial may not have been his responsibility at all. This demonstrates a failure of justice as in some instances the actual guilty party may not have been held responsible for his crimes. None of this is to say that Bormann was not guilty; he was most certainly responsible for the commission of horrendous acts during the Second World War. However, equally guilty people used his absence as an opportunity to avoid full responsibility for their own crimes. As Robert Jackson made clear during his concluding remarks:

> nor do I deny that all these dead and missing men shared the guilt…But their guilt cannot exculpate the defendants…It was these dead men whose

[55] Taylor *supra* note 40 at 466.
[56] *Trial of the Major War Criminals*, vol 19 supra note 47 at 117.
[57] Starygin and Selth *supra* note 1 at 173.

these living chose to be their partners in this great conspiratorial brotherhood, and the crimes that they did together they must pay for one by one.[58]

5.4 TRIALS *IN ABSENTIA* IN INTERNATIONAL CRIMINAL LAW SINCE NUREMBERG

When reaching its decision to try Bormann *in absentia*, the Nuremberg Tribunal only considered whether the notice requirement contained in Article 12 of the Charter had been complied with, and did not address whether Bormann's failure to appear constituted a waiver of his right to be present at trial.[59] This is not surprising as the right to be present had not yet been recognised in international criminal law. Because no right to be present existed when the decision was made to try Bormann in his absence, there was no need to determine whether he had waived that right. This has changed since Nuremberg following the introduction of the accused's right to be present in a variety of human rights conventions and the Statutes of the different international and internationalised courts and tribunals. Presence at trial is now seen as both a right and a general principle of international procedure, however it is not absolute.[60] The legal recognition of the accused's right to be present has made the issue of waiver of that right a prominent feature of litigation involving the presence of the accused at trial. The legality of proceeding against an absent accused now turns on whether the accused effectively waived his or her right to be present. [61]

5.4.1 THE EUROPEAN COURT OF HUMAN RIGHTS

To establish the effective waiver of any fair trial right, including the right to be present, three conditions must be met.[62] These conditions were originally set out by the

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[58] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 18 (1947) 428.
[59] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 2 (1947) 25-27.
[60] Safferling, *International Criminal Procedure supra* note 2 at 400; *see also Prosecutor v Zigiranyirazo* (Decision on Interlocutory Appeal) ICTR-2001-73-AR73, A Ch (30 October 2006) para 14.
[61] Safferling, *International Criminal Procedure supra* note 2 at 400.
[62] *Colozza v Italy* (1985) 7 EHRR 516, 12 February 1985, para 28; *Sibgatullin v Russia* App No 32165/02 (ECtHR, 14 September 2009) para 46; *Sejdovic v Italy* (2006) 42 EHRR 17, 1 March 2006, para 86; *Demebukov v Bulgaria* (2010) 50 EHRR 41, 28 February 2008, para 47; *Poitrimol v France* (1994) 18 EHRR 130, 23 November 1993, para 31; *Prosecutor v Ruto and Sang* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's

European Court of Human Rights and later recognised by the International Criminal Tribunal for Rwanda and the International Criminal Court.[63] To meet those conditions one must show that the waiver is: (1) unequivocal; (2) does not run counter to any important public interest; and (3) is attended by minimum safeguards commensurate with its importance.[64] The European Court of Human Rights has also indicated that there are certain rights that can only be waived if the waiver was knowing and intelligent.[65] Thus far only the right to counsel has been specifically acknowledged as requiring that additional protection, but the Court's reference to the right to counsel as one of the "fundamental rights among those which constitute the notion of a fair trial" suggests that the waiver of other, similar rights might also need to meet this heightened criteria.[66] This may be particularly true of the right to be present as it has been described as the right that permits "an effective use of all the rights in article 6 of the Convention".[67] As such, it would appear to fit into that category of rights necessary to ensure that the accused's trial is fair.

The European Court of Human Rights has provided three examples of actions sufficiently unequivocal to meet the first criterion. They are: (1) where the accused states publicly or in writing that he or she does not intend to participate; (2) where the accused has become aware of the proceedings from unofficial sources and intentionally evades an attempted arrest; or (3) where the evidence unequivocally shows that the accused was aware of the charges and still did not appear.[68] All three of these examples demonstrate the importance of notifying the accused about the proceedings. The European Court of Human Rights has confirmed the important role notice plays in holding that "to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal

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Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 51; *Nahimana, Barayagwiza and Ngeze v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007) para 108.

[63] Ibid.

[64] Ibid.

[65] *Şaman v Turkey* App No 35292/05 (ECtHR, 5 April 2011) paras 32-33; *Pishchalnickov v Russia* App No 7025/04 (ECtHR, 24 September 2009) paras 77-78; *Dvorski v Croatia* (2016) 63 EHRR 7, 20 October 2015, paras 100-101.

[66] Ibid.

[67] Stamhuis *supra* note 10 at 722.

[68] *Shkalla v Albania* App No 26866/05 (ECtHR, 10 August 2011) para 70; *citing Iavarazzo v Italy* App No 50489/99 (ECtHR, 4 December 2001).

knowledge cannot suffice."[69] This reinforces the notion that an accused can only decide to exercise his or her rights, or waive those rights, if the accused has the specific knowledge necessary to allow him or her to make an informed decision and demonstrates the essential link between notice and waiver.

The jurisprudence as to the second and third criteria needed to show effective waiver is less developed. When considered in the context of presence at trial, the public interest component prevents the accused from waiving his or her right to be present if there is an important public interest requiring the appearance of the accused.[70] The European Court of Human Rights has not made clear what sort of important public interests could prevent the accused from waiving his or her right. The European Court of Human Rights specifically adopted the minimum safeguards element in *Pfeifer and Plankl v Austria*, following the European Commission on Human Rights' introduction of that element in its earlier decision in the same case.[71] In developing the standard, the Commission found that a waiver given when under pressure from the court, outside of the presence of the accused's counsel, and where an immediate decision is made without an opportunity to reflect or consult with counsel, fails to meet those minimum safeguards.[72] The European Court of Human Rights later found in *Zachar and Ćierny v Slovakia*, that the appropriate minimum safeguards are lacking when the accused is notified of his or her rights by the responsible authorities without any commentary or explanation particular to the individual accused and the charges are such that they could be reclassified so as to carry with them much more serious consequences than those initially indicated.[73] These decisions indicate that the minimum safeguards standard is not met if the facts suggest that the decision to waive was not made of the accused's own free will, but was instead the product of pressure, compulsion or without the accused having a full understanding of the consequences of his or her decision.

It is apparent from the case law that the effectiveness of an accused's waiver of a fundamental right is largely dependent on whether he or she had sufficient information to

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[69] Ibid *citing T v Italy* App No 14104/88 (ECtHR, 12 October 1992) para 28; *Somogyi v Italy* (2008) 46 EHRR 5, 10 November 2004, 75.
[70] *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1, 21 February 1990, para 67-68.
[71] *Pfeifer and Plankl v Austria*, Application No. 10802/84, Judgment, 25 February 1992, para 37; *Pfeifer and Plankl v Austria*, Application No. 10802/84, Report of the Commission, 11 October 1990, para 74.
[72] *Pfeifer and Plankl* Report of the Commission *supra* note 71 at para 78.
[73] *Zachar and Ćierny v Slovakia* App Nos 29376/12 and 29384 (ECtHR, 21 July 2015) para 74.

make an informed decision when making that waiver. This is in line with the general requirement that the accused have notice of the charges against him or her and the date and location of trial before his or her appearance can be effectively waived. The *Pfeifer and Plankl* and *Zachar and Ćierny* decisions, together with the notice requirements, clearly indicate that waiver can only really be deemed effective when the accused is provided with the information needed to make an informed choice. The European Court of Human Rights' decisions emphasise that generalised information is insufficient and that the accused must have information relevant to their situation to make an informed decision. Further, the Court has been more likely to find that waiver was effective if the accused had access to advice from counsel suggesting that, in its view, an informed decision most often occurs when one can discuss the matter with his or her lawyer. The European Court's decisions also underscore the importance of counsel to the extent that it was less willing to overturn a decision made with the assistance of counsel. This again signals the weight the Court gives to adequate knowledge, as counsel should be able to make the accused aware of the benefits and consequences of waiving one or more rights.

Waivers can be separated into two broad categories; express waiver and implied or tacit waiver.[74] Express waiver of the right to be present is not particularly controversial. It is generally agreed that trial may take place in the absence of the accused if the accused has expressly waived his or her right to be present at trial so long as it complies with the criteria discussed above.[75] A more contentious issue involves the limits of express waiver and particularly whether the accused can utilize it so as to avoid attending trial in its entirety. Determining whether an accused has implicitly waived his or her right to be present at trial is a much more difficult inquiry. It generally requires an analysis of whether he or she had sufficient notice of the proceedings against him or her, and whether the accused's absence from trial constituted an informed decision not to attend. The European Court of Human Rights has counselled extreme caution when courts seek to determine if an accused tacitly or implicitly waived a human right during a criminal proceeding.[76] In addition to the factors normally considered when establishing the effectiveness of a waiver, finding the existence of an implied waiver also requires a showing that the accused "could reasonably have foreseen what the consequences of his

[74] Council Directive 2016/343 *supra* note 8 at para 35.
[75] Martin Böse, 'Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia' (2011-12) 37 NC J Intl L & Com Reg 489, 500.
[76] *Kaste and Mathisen v Norway* (2009) 48 EHRR 3, 9 November 2006, para 29.

conduct would be."[77] To find an implied waiver of the right to be present necessitates a showing that the accused is aware that he or she will not have access to those rights that are given meaning through his or her presence, including the right to participate and the right to confrontation.

5.4.2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The *Barayagwiza* case at the International Criminal Tribunal for Rwanda is a good example of a trial being conducted in its entirety in the absence of the accused on the basis of a waiver. Although the *Barayagwiza* case is best known for Barayagwiza's prolonged period of pre-trial detention and the Tribunal's failure to ensure his timely initial appearance before the Tribunal, it is also notable for his refusal to appear during trial. That refusal is all the more remarkable considering the fact that Barayagwiza was in the Tribunal's custody during his trial and simply refused to appear in the courtroom.

Originally arrested in Cameroon on 15 April 1996, Barayagwiza remained incarcerated until 19 November 1997 at which time he was transferred to the custody of the International Criminal Tribunal for Rwanda.[78] On 29 September 1997, Barayagwiza filed a writ of habeus corpus, which was never addressed by the Trial Chamber.[79] Barayagwiza remained in custody without appearing before the Tribunal until 23 February 1998 at which time he pled not guilty to the charges against him.[80] Barayagwiza challenged the validity of the delay in providing him with a preliminary hearing and on 3 November 1999, the Appeals Chamber issued a decision dismissing the indictment with prejudice and ordering Barayagwiza's release on abuse of process grounds.[81] Subsequently, the government of Rwanda brought significant pressure on the International Criminal Tribunal for Rwanda by threatening non-cooperation with the Tribunal if the Appeals Chamber failed to reverse its 3 November 1999 decision.[82] On 31 March 2000 the Appeals Chamber changed its earlier decision on the grounds that

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[77] *Jones v United Kingdom* App No 30900/02 (ECtHR, 9 September 2003); *Talat Tunç v Turkey* App No 32432/96 (ECtHR, 27 March 2007) para 59; *Battisti v France* App No 28796/05 (ECtHR, 12 December 2006); *Hermi v Italy* (2008) 46 EHRR 46, 18 October 2006 at para 74.
[78] Gordon *supra* note 33 at 674-75.
[79] *Barayagwiza v The Prosecutor* (Decision) ICTR-97-19-AR72, A Ch (3 November 1999) para 8
[80] Ibid at para 9; Gordon *supra* note 33 at 674-75.
[81] *Barayagwiza supra* note 79 at para 113.
[82] *Barayagwiza v The Prosecutor* (Decision) ICTR-97-19-AR72, A Ch (31 March 2000) para 34.

new facts brought forth by the prosecution on appeal revealed that Barayagwiza's human rights had been violated during his detention however those violations were not co-extensive with the omissions committed by the Prosecutor.[83] The Court revoked its Order releasing Barayagwiza and found that any remedy for the violation of Barayagwiza's rights would be fixed following trial "at the time of judgement."[84]

When trial in this case, popularly referred to as "the Media Trial", began on 23 October 2000, Barayagwiza was not present.[85] Barayagwiza believed, along with many others, that the political pressure exerted by the Rwandan government, and not the new facts discussed by the Appeals Chamber, was the real reason the decision to release him was reversed.[86] He issued a statement indicating that he refused "to associate himself with a show trial" and that the trial against him was inherently unfair because the Tribunal had allowed itself to be "manipulated by the Rwandan government".[87] Although the trial lasted for almost three years, Barayagwiza remained absent for its entirety and was ultimately convicted *in absentia*.[88]

Near the outset of the trial, Barayagwiza's lawyers filed a Motion to Withdraw as his counsel on the basis of Barayagwiza's direction to them that they not represent him in any way at trial because of his perceived inability to receive a fair trial.[89] In its decision denying the motion, the Chamber also reflected on his decision not to attend trial. The Trial Chamber concluded that "where the accused has been duly informed of his on-going trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence."[90] The Trial Chamber did not go so far as to analyse whether

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[83] Ibid at para 74.
[84] Ibid at para 75.
[85] Mercedeh Momeni, 'Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics' (2001) 7 Intl L Stu Assoc J Intl & Comp L 315, 315-16.
[86] Megan A. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY' (2003) 34(1) Cal W Intl L J 47, 57-8.
[87] Momeni *supra* note 85 at 315-16; *Barayagwiza* (2000 Decision) *supra* note 82 at para 5.
[88] *Prosecutor v Nahimana et al.* (Judgement and Sentence) ICTR-99-52-T, T Ch I (3 December 2003) para 1093.
[89] *Prosecutor v Barayagwiza* (Decision on Defence Counsel Motion to Withdraw Case) ICTR-97-19-T, T Ch I (2 November 2000) para 2.
[90] Ibid at para 6.

Barayagwiza's failure to appear at trial constituted a waiver, although it did refer to his choice not to be present.[91]

In reaching that decision the Trial Chamber declared that Article 20 of the International Criminal Tribunal for Rwanda's Statute is modelled on Article 14(3)(d) of the International Covenant on Civil and Political Rights, and that both are the equivalent of Article 6(3)(d) of the European Convention on Human Rights.[92] Based on the relationship between Article 20 of the International Criminal Tribunal for Rwanda's Statute and Article 14(3)(d) of the International Covenant on Civil and Political Rights, the Tribunal relied on the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights in *Maleki v Italy*, which the Trial Chamber alleged stands for the proposition that trials *in absentia* are "only permissible when the accused is summoned in a timely manner and informed of the proceedings against him."[93] The Trial Chamber also asserted that a similar principle had been developed in the jurisprudence of the European Court of Human Rights.[94]

Following his conviction, Barayagwiza challenged the permissibility of his trial *in absentia* on the grounds that neither the Statute nor the Rules of Procedure and Evidence allow the International Criminal Tribunal for Rwanda to conduct *in absentia* proceedings.[95] In support of that position, Barayagwiza relied on the *travaux preparatoires* of the International Criminal Tribunal for the former Yugoslavia's Statute, and particularly the Secretary-General's statement regarding trial *in absentia*, and jurisprudence arising before both of the *ad hoc* Tribunals.[96] The Appeals Chamber rejected Barayagwiza's appeal on the grounds that the Secretary-General's statement and the cited jurisprudence pertained specifically to accused individuals that had not yet been apprehended by the Court and did not relate to defendants, like Barayagwiza, that refused

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[91] Ibid at para 5.
[92] Ibid at para 7.
[93] Ibid.
[94] Ibid; *citing FCB v Italy* (1992) 14 EHRR 909, 28 August 1991, paras 29-36.
[95] *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007) para 94.
[96] Ibid; *referring to Prosecutor v Bizimana et al.* (Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment) ICTR-98-44-I, T Ch III (8 October 2003) para 3; *Prosecutor v Karemera et al.* (Decision on Severance of André Rwamakuba and Amendments of the Indictments) ICTR-98-44-T, T Ch III (7 December 2004) para 24; *Prosecutor v Blaškić* (Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108bis, A Ch (29 October 1997) para 59.

to participate in the trial.[97]

The International Criminal Tribunal for Rwanda's Appeals Chamber justified its denial of Barayagwiza's appeal on the basis of jurisprudence from the Human Rights Committee, European Court of Human Rights and International Criminal Tribunal for the former Yugoslavia, the appellate rules of the Special Court for Sierra Leone and a statement made by the African Human Rights Commission.[98] Based on these sources, the Appeals Chamber came to the conclusion that trials *in absentia* are permissible if the accused exercises a free, unequivocal and knowledgeable waiver of that right.[99] The Appeals Chamber found that Barayagwiza's refusal to attend trial, even though he was aware that it was being held, constituted a free, explicit and unequivocal waiver of his right to be present at trial and that the Trial Chamber did not err in conducting trial in his absence.[100]

The Appeals Chamber's judgment in *Barayagwiza* disregarded its earlier decision in *Prosecutor v Blaškić* on the grounds that its treatment of presence at trial in *Blaškić* was "an incidental matter" and that it "could not be interpreted as prohibiting the conduct of trial in the absence of the accused who had clearly waived his right to attend and participate."[101] The *Blaškić* decision specifically found that "even when the accused has clearly waived his right to be tried in his presence (Article 21(4)(d) of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused."[102] This statement indicates that even where an individual has notice of the charges against him or her, and has waived the right to appear, that trial in the accused's absence should still be avoided. While it is true that the *Blaškić* decision does not forbid conducting trial in the absence of an accused that has waived his or her right to be present, the *Barayagwiza* decision would have been stronger if it had more directly addressed the concerns raised in *Blaškić*.

In addition to disregarding its earlier decision in *Blaškić*, the Appeals Chamber also discounted the Secretary-General's Report issued when the International Criminal Tribunal for the former Yugoslavia's Statute was introduced. The Secretary General stated ""[t]here is a widespread perception that trials in absentia should not be provided

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[97] *Nahimana et al.* (Judgment) *supra* note 95 at paras 97-99.
[98] Ibid at paras 102-109.
[99] Ibid at para 109.
[100] Ibid at para 116.
[101] Ibid at para 97.
[102] *Blaškić supra* note 96 at para 59.

for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in his presence."[103] The Appeals Chamber dismisses this statement on the dubious grounds that the wording of the paragraph and its placement in the report indicate that the term "*in absentia*" refers exclusively to an accused that has not yet been arrested.[104] In essence, the Appeals Chamber limited the Secretary-General's use of the phrase "*in absentia*" to the extent that it only refers to trials being held against defendants not in the custody of the trying court. There is little basis to support that limitation.

Rule 82 *bis* was added to the International Criminal Tribunal for Rwanda's Rules of Procedure and Evidence in May 2003, and established a procedure whereby trial could continue in the absence of the accused when the accused chooses to boycott trial.[105] Rule 82 *bis* states that the Trial Chamber may "order that the trial proceed in the absence of the accused" so long as his or her "refusal to appear persists."[106] The application of Rule 82 *bis* is limited to the extent that an accused tried in this manner must have made his or her initial appearance before the tribunal, had notice from the Registrar that he is required to be present a trial and is represented by counsel.[107] The lack of any requirement that the absence be construed as an implied waiver of the accused's right to be present suggests that Rule 82 *bis* is imposing a duty on the accused to be present at trial.[108] This is underlined by the fact that Rule 82 *bis* understands the presence of the accused as a requirement rather than the permissive exercise of his right to be present. Taken together, these elements demonstrate that the accused is obligated to be present and that the Trial Chamber may continue trial in his or her absence without due consideration for his or her right to be present at trial.

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[103] Report of the Secretary-General, 'Pursuant to Paragraph 2 of Security Counsel Resolution 808' (3 May 1993) U.N. Doc. S/25704, para 101 (original emphasis).
[104] *Nahimana et al. supra* note 88 at para 98.
[105] William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (CMP Publishing, Ltd 2009) 364; Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 235-36.
[106] Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) rule 82*bis*.
[107] Ibid.
[108] Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law International 2005) 87-8.

The provisions of Rule 82 *bis* are guided by the International Criminal Tribunal for Rwanda's interpretation of the notice requirement originally set out by the Human Rights Committee in *Maleki*. It is clear from the Trial Chamber's decision in Barayagwiza that the International Criminal Tribunal for Rwanda took from *Maleki* that trial *in absentia* is permissible in international criminal law so long as the accused has received notice of the charges. While notice is a component of what can make trial *in absentia* permissible, the accused's waiver of the right to be present is also a fundamental part of the analysis. It is generally inadequate to conduct trial in its entirety in the accused's absence without first identifying some form of waiver as doing so does not properly account for the accused's right to be present at trial.

5.4.3 THE INTERNATIONAL CRIMINAL COURT

The most modern waiver procedure in use at an international or internationalised criminal court or tribunal for excusing an accused from appearing during trial is found in Rules 134 *bis*, 134 *ter* and 134 *quater* of the International Criminal Court's Rules of Procedure and Evidence. The addition of these rules to the Court's Rules of Procedure and Evidence represent a departure from the intent of the original drafter's of the Rome Statute. Evidence for this conclusion is found in the fact that the Statute specifically authorises waiver of the right to be present during the Confirmation of Charges hearing but not during trial. Article 61(2)(a) of the Statute allows the Confirmation hearing to take place in the accused's absence when he or she "[w]aived his or her right to be present".[109] Article 61(2)(a) is made operative by Rule 124 of the Rules of Procedure and Evidence which requires the accused seeking to absent himself or herself from the hearing to submit a written request for permission to be absent and waive his or her right to be present.[110] The Pre-Trial Chamber can elect to conduct consultations with the parties and waiver will be only be granted if the pre-trial chamber is satisfied that the accused understands his or her right to be present and the consequences of waiving that right.[111] Pre-Trial Chamber I permitted Germain Katanga to waive his right to be present at the Confirmation of Charges hearing following a finding that he was fully aware of the consequences of the waiver and that he would not be prejudiced if the hearing continued

[109] Rome Statute of the International Criminal Court (1998) art 61(2)(a).
[110] Rules of Procedure and Evidence, International Criminal Court (as amended 2013) rule 124.
[111] Ibid.

in his absence.[112] Subsequently, in *The Prosecutor v Banda and Jerbo*, Pre-Trial Chamber II determined that both defendants understood their rights and the consequences of waiving those rights and allowed the Confirmation of Charges hearing to go forward in their absence.[113]

The existence of a waiver procedure during the Confirmation of Charges stage of proceedings suggests that the Statute's drafters could have adopted a similar practice during the trial stage but chose not to. This supports the conclusion that the omission of any rule authorising trial to proceed in the accused's absence was intentional. The decision to allow the accused to waive his or her appearance at the Confirmation of Charges stage of proceedings is seen by some as a concession to those delegations at the Rome Conference advocating on behalf of permitting trials *in absentia* at the Court.[114] That the drafters could have included a similar rule during trial, and did not, is indicative of the fact that they did not believe that trial should be conducted in the accused's absence.

The issue of whether an accused could waive his or her right to be present at trial largely remained dormant until 2013 when it was raised in the two Kenya cases, *Prosecutor v Ruto et al.* and *Prosecutor v Kenyatta*. On 4 March 2013, Uhuru Kenyatta was elected president of Kenya and William Ruto was elected deputy president. Thereafter, both Kenyatta and Ruto submitted requests to the relevant Trial Chamber that, if granted, would permit them not to be continuously present at trial so that they could perform the duties of their offices.[115] The Court was now presented with a situation in which two defendants were signalling their willingness to continue to engage in the on-going proceedings, but who wished to waive their right to be present so that each could attend to their official duties as president and deputy president of Kenya.

The respective Trial Chambers both decided that the accused has a right to be

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[112] *Prosecutor v Katanga* (Transcript, Confirmation of Charges Hearing) ICC-01/04-01/07, PT Ch (11 July 2008) 23, lines 23-25; 24, lines 1-10.
[113] *Prosecutor v Banda and Jerbo* (Decision on Issues Related to the Hearing on the Confirmation of Charges) ICC-02/05-03/09, PT Ch I (17 November 2010) para 4.
[114] Gordon *supra* note 33 at 683.
[115] *Prosecutor v Ruto et al.* (Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09-01/11, T Ch V(A) (13 June 2013) para 1; *Prosecutor v Kenyatta* (Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (18 October 2013) para 4.

present at trial that can be waived voluntarily, but only if certain conditions are met.[116] In the *Ruto* case, the Trial Chamber made clear that Ruto's presence during trial was the appropriate default position and established a number of different types of hearings during which his attendance was required.[117] Additionally, while he would be able to waive his right to be present during those court sessions that did not fall into those mandatory categories, he could only do so if his absence was directed towards performing his duties as deputy president.[118] The *Kenyatta* Trial Chamber placed the same limitations on Kenyatta's ability to waive his right to be present.[119] It also took pains to emphasise that the decision in each case was the product of a desire to reach a reasonable accommodation between each man's need to perform official functions and their responsibility to the Court, and neither decision should be perceived as authorising their absence in "gratification of dignity of his own occupation of that office."[120]

Following the prosecution's appeal of the *Ruto* decision, the Appeals Chamber concluded that the right to be present at trial as embodied in Article 63(1) "does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused."[121] As a result, the Trial Chamber may excuse the accused from attendance in exceptional circumstances.[122] The Appeals Chamber based its decision on a finding that Article 63(1) was not intended to prevent the accused from occasionally being absent from court, but rather, it was included in the Statute, in part, so as to prevent an interpretation of Article 67(1)(d) permitting the accused to be tried *in absentia*.[123] However, the Appeals Chamber also found that although the Trial Chamber had the discretion to permit the accused to absent himself or herself from trial, it had exceeded that discretion by interpreting it too broadly.[124] The Appeals Chamber reminded the Trial Chamber that under Article 63(1) the presence of the accused "must remain the general rule" and also found that the Trial Chamber had essentially provided Ruto with a blanket excusal from court "effectively making his absence the general rule and his

[116] *Ruto et al.* (Trial Chamber Decision) *supra* note 115 at para 2-3, 35; *Kenyatta supra* note 113 at paras 4-5, 124.
[117] *Ruto et al.* (Trial Chamber Decision) *supra* note 115 at para 104.
[118] Ibid at para 104.
[119] *Kenyatta supra* note 115 at para 5.
[120] Ibid at para 6.
[121] *Ruto et al.* (Appeals Chamber Decision) *supra* note 62 at para 55.
[122] Ibid at para 56.
[123] Ibid at para 54
[124] Ibid at para 63.

presence the exception."[125] To ensure that the presence of the accuse remained the general rule, the Appeals Chamber imposed six limitations on the Trial Chamber's discretion to excuse the accused from trial. Those restrictions are:

> (i) The absence of the accused can only take place in exceptional circumstances and must not become the rule;
> (ii) The possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;
> (iii) Any absence must be limited to that which is strictly necessary;
> (iv) The accused must have explicitly waived his or her right to be present at trial;
> (v) The rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and
> (vi) The decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal had been requested.[126]

After the Appeals Chamber made its decision in *Ruto*, Trial Chamber V(B) reconsidered its original decision pertaining to the presence of Kenyatta during trial and issued a new decision in line with the holding of the Appeals Chamber.[127]

The guiding principle underlying the decisions of both the Trial Chamber and the Appeals Chamber is that the presence of the accused during trial is the norm and any approved absences from trial must be the exception. What is at issue is the standard by which the decision to excuse the accused is made. While the Trial Chamber intended to premise any decision to excuse the accused on whether the absence was necessary to allow him to perform his official duties, the Appeals Chamber only authorised absences that involve exceptional circumstances and are strictly necessary. The language of the Appeals Chamber's decision appears intended to suggest that not all duties of office should warrant an absence, but should only be reserved for those duties arising out of exceptional circumstances.

While the Court was trying to resolve whether Kenyatta and Ruto could voluntarily absent themselves from trial, it also found itself under intense political

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[125] Ibid at paras 61, 63.
[126] Ibid at para 62.
[127] *Prosecutor v Kenyatta* (Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr. Kenyatta from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (26 November 2013) para 16.

pressure surrounding the issue of head of state immunity. Article 27(2) of the International Criminal Court's Statute specifically asserts that the Court is not barred from exercising jurisdiction over an individual claiming immunity derived from his or her official capacity.[128] Head of state immunity and trial *in absentia* are generally unrelated, however, because both Kenyatta and Ruto based their requests to absent themselves from trial on the need to fulfil the official functions of their offices, the issues became intertwined. During the Assembly of States Parties held in November 2013 various proposals were introduced to prevent the Court from proceeding against sitting heads of state including amending any or all of the following: Article 27, Article 63 or the Rules of Procedure and Evidence.[129] Ultimately, the States Parties acknowledged how difficult it would be to change the Statute and instead agreed to amend the Rules of Procedure and Evidence in such a way as to permit an accused to waive his or her right to be present at trial. The decision to amend the Rules of Procedure and Evidence resulted in the inclusion of Rules 134 *bis*, 134 *ter* and 134 *quater*.

Rule 134 *bis* authorises the defendant to request that he or she be permitted to appear remotely for "part or parts" of his or her trial through the use of video technology.[130] Rule 134 *ter* allows the accused to request that he or she be permitted to absent him or herself from trial so long as he or she is still represented by counsel.[131] Such a request can only be granted in exceptional circumstances; where amendment to the trial schedule would be inadequate; where the accused has explicitly waived his or her right to be present; and the accused's rights will be fully protected in his or her

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[128] Rome Statute *supra* note 109 at art 27(2).
[129] Statement by Nigeria delivered by Mr. Mohammed Bello Adoke during the meeting of the 12th Session of the Assembly of State Parties to the Rome Statute (21 November 2013) para 8 <https://asp.icccpi.int/en_menus/asp/sessions/general%20 debate/Pages/general%20debate%20_%20twelfth%20session.aspx> accessed 24 July 2017; Statement by Botswana delivered by Dr. Athaliah Molokomme during the General Debate of the 12th Session of the Assembly of State Parties to the Rome Statute (21 November 2013) para 21 <https://asp.icccpi.int/en_menus/asp/sessions/ general%20debate/Pages/general%20debate%20_%20twelfth%20session.aspx> accessed 24 July 2017; Statement by New Zealand delivered by Dr. Penelope Ridings at the 12th Session of the Assembly of State Parties to the Rome Statute (21 November 2013) at 2 <https://asp.icc-cpi.int/en_menus/asp/sessions/general% 20debate/Pages/general%20debate%20_%20twelfth%20session.aspx> accessed 24 July 2017.
[130] Rules of Procedure and Evidence, International Criminal Court *supra* note 110 at rule 134 *bis*(1).
[131] Ibid at rule 134 *ter*(1).

absence.[132] Both of these rules only allow portions of the trial to occur in the absence of the accused and do not permit the accused to be absent during the entire trial. Rule 134 *quater*, by comparison, could be used to permit the accused to absent himself or herself from the entirety of trial so long as the absence is due to the accused's fulfilment of "extraordinary public duties at the highest national level" and the accused is represented by counsel at trial.[133] Such a request must contain an explicit waiver of the right to be present at trial.[134] A notable feature unique to Rule 134 *ter* and Rule 134 *quater* is the requirement that any absence on the part of the accused has to be accompanied by an explicit waiver of his or her right to be present at trial. None of the new rules allow for an implicit waiver.

It is interesting to note that Rules 134 *ter* and 134 *quater* only mandate that the waiver of the right to be present be explicit. These Rules do not clearly require that a waiver be knowing, voluntary or made after receiving legal advice.[135] As a result, it could be argued that the waiver provisions of Rules 134 *ter* and 134 *quater* do not comply with existing human rights standards.[136] The European Court of Human Rights has found that any waiver of the right to be present at trial must "be attended by minimum safeguards commensurate to its importance" and must be voluntary, knowing and intelligent.[137] However, the non-inclusion of these procedural necessities are likely the result of poor drafting rather than an effort to allow the accused to waive his or her rights without adequate protections. This conclusion is borne out by the limitations found in Rule 124 of the Rules of Procedure and Evidence mandating that the Pre-Trial Chamber may only grant a waiver of the right to be present during the Confirmation of Charges hearing when it is satisfied that the accused understands the right to be present and the consequences of waiving that right.[138] It is highly unlikely that the International Criminal Court would allow the accused to waive his or her right to be present at trial based on a lesser showing than that which is required for waiving the right to be present at the confirmation of charges hearing. Although it is not specified in Rules 134 *ter* and

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[132] Ibid at rule 134 *ter*(2).
[133] Ibid at 134 *quater*(1).
[134] Ibid.
[135] Schwarz *supra* note 5 at 113.
[136] Ibid.
[137] *Sejdovic supra* note 62 at para 86; *see also Pishchalnickov v Russia* App No 7025/04 (ECtHR, 24 September 2009) para 77.
[138] Rules of Procedure and Evidence, International Criminal Court *supra* note 108 at rule 124.

134 *quater*, one should read the same knowledge standard found in Rule 124 into the later rules.

Another interesting feature of the rules is that a Trial Chamber considering a waiver request under Rules 134 *bis* and 134 *ter* always has the discretion to grant a waiver, but, so long as specific conditions are met, is obligated to grant a waiver requested under Rule 134 *quater*. Rules 134 *bis* and 134 *ter* provide that the Trial Chamber considering the issue "shall rule" on the request.[139] By comparison, Rule 134 *quater* states that the Trial Chamber "shall grant" a request to be absent so long as the prescribed conditions are met.[140] Despite the seemingly obligatory formation of Rule 134 *quater*, the Trial Chamber retains significant discretion when considering a waiver request made pursuant to the rule as such a request may only be granted if doing so is "in the interests of justice" and the rights of the accused are fully protected.[141] Allowing the reviewing court to act only if it is in the interests of justice gives it significant leeway when deciding whether to grant a Rule 134 *quater* request.

The Assembly of State Parties did not directly follow the decision of either Chamber when it amended the rules to include Rule 134 *quater*. Rule 134 *quater* allows the accused to be absent when he or she is "mandated to fulfill extraordinary public duties", a formulation that appears to be an amalgamation of the decision of both chambers.[142] Unfortunately, the term "mandated to fulfill extraordinary public duties" is ambiguous as it is susceptible to at least two different interpretations. First, it can be understood to follow the Appeals Chamber's distinction between normal official duties and duties arising out of exceptional circumstances, and only allow the accused's absence when the latter situation exists. Conversely, it can also be read to include any and all functions of a sitting president or deputy president, as those duties are necessarily extraordinary when compared to the duties of the average citizen.[143] Such a reading exceeds the scope of both Chambers' decisions and creates a scenario in which the accused may attempt to absent himself or herself from the entire trial.

Ruto wasted no time in trying to take advantage of this discrepancy between the

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[139] Ibid at rule 134 *bis* and rule 134 *ter*.
[140] Ibid at rule 134 *quater*.
[141] Ibid.
[142] Ibid at rule 134 *quater*.
[143] Abel S. Knotternus, 'Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial' (2014) 13 L & Pract Intl Crts & Tribs 261, 281.

Rule and the Appeals Chamber's decision when, less than a month after Rule 134 *quater* was introduced, he filed a request seeking to be excused from appearing at any part of his trial. In making that request, Ruto suggested that Rule 134 *quater* meant that he could be absent "for as long as the accused person is mandated to fulfill extraordinary public duties at the highest national level."[144] By requesting permission under the rule to miss the entire trial, Ruto was clearly implying that all of his duties as deputy president constituted extraordinary public duties within the meaning of Rule 134 *quater*.

The Trial Chamber accepted the validity of Rule 134 *quater*, and the conditions contained therein, as the standard by which an accused may waive his or her right to be present at trial when making its decision about Ruto's renewed request to be absent from trial. The Trial Chamber reached that conclusion despite recognising that Rule 134 *quater* does not accord with the earlier Appeals Chamber's decision in *Ruto*.[145] The Trial Chamber dismissed the discrepancy between the rule and the Appeals Chamber's decision as a clarification on the part of the Assembly of State Parties as to what limitations must be placed on the scope of the Trial Chamber to authorise trial to take place in the absence of the accused.[146] However, the Trial Chamber disagreed with Ruto's interpretation of Rule 134 *quater* whereby he could be absent from the entire trial.[147] Instead, it identified those parts of the trial during which Ruto's presence was obligatory. Generally, Ruto had to appear for the hearings identified in the Chamber's original decision, however his attendance was no longer necessary during the opening statements, but he now had to be present during all hearings conducted in the first five days after a judicial recess.[148] Practically, the introduction of Rule 134 *quater* did not substantively change how the Court viewed the presence of the accused, what it did do was create a mechanism through which the Court could properly regulate the accused's attendance at trial.

The decision to add Rules 134 *bis*, 134 *ter* and 134 *quater* was made in spite of the plain language of the Statute, which reads, "the accused shall be present during trial".[149] This is a straight-forward statement which cannot logically be interpreted as

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[144] *Prosecutor v Ruto et al.* (Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*) ICC-01/09-01/11, T Ch V(A) (18 February 2014) para 11.
[145] Ibid at para 58.
[146] Ibid.
[147] Ibid at para 79.
[148] Ibid.
[149] Rome Statute *supra* note 109 at art 63(1).

permitting most of the trial to take place in the absence of the accused. However, the Assembly of State Parties, like the Trial Chambers and Appeals Chamber before it, was presented with a difficult real world situation that required it to find a way to advance the work of the Court while also respecting the fact that some of the defendants have responsibilities that must be attended to regardless of the fact he or she is on trial. The danger in the addition of Rule 134 *quater* is that it carries the potential to create parallel trial systems whereby certain defendants, based on their official positions, are subject to different appearance rules than the rest of the defendants.[150] This threatens to upset the balance found in the first sentence of Article 27, asserting that "[t]his Statute shall apply equally to all persons without any distinction based on official capacity."[151]

Some argue that the success of international and internationalised criminal courts and tribunals depends on how they are perceived by states and other international actors.[152] That view is premised on the notion that the continued operation of international criminal entities necessarily depends on the support of their member states and that when reaching decisions courts must take actions "that enhance the court's authority in the international community."[153] Through this lens it could be argued that the decision to change the Rules of Procedure and Evidence represented a necessary adjustment to the Court's mandate so that it might better comply with the expectations of its various member states. The danger of that position is that it creates a precedent whereby anytime the Court makes a decision that runs counter to the expectations of one or more States Parties, those aggrieved States can protest the decision and expect it to be overturned so as to suit its expectations. At that point, the court ceases to be an objective arbiter of the law and becomes a political body rubberstamping the will of its member states. When making changes to its Statute or Rules of Procedure and Evidence, the Court must ensure that it is doing so for sound legal reasons and not just to appease its members.

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[150] *Ruto et al.* (Appeals Chamber Decision) *supra* note 62 at para 49.
[151] Rome Statute *supra* note 109 at art 27(1).
[152] Allen S. Weiner, 'Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence' (2013) 12(3) Wash U Global Stud L Rev 545, 550.
[153] Ibid.

5.5 CONCLUSION

Trials *in absentia* have experienced a new life in international criminal law in the past decade. The codification of trials *in absentia* in the Statute of the Special Tribunal for Lebanon reinvigorated debate about a concept that had existed in international criminal law since the Second World War. This renewed interest in trial *in absentia* evolved out of concerns that an absent accused could simply halt the course of trial by refusing to appear, an act thought to be contrary to the interests of justice. Although trial *in absentia* is often used as a blanket term covering any sort of absence from trial, it is better understood as one of four types of absences. A trial *in absentia* is a trial that is conducted in its entirety in the accused's absence and where the accused has notice that the trial is taking place and waives his or her right to be present by refusing to appear during the proceedings.

Modern trials *in absentia* require the presence of two components, adequate notice and waiver, that must be found before trial can be conducted in the absence of the accused. Adequate notice requires that the accused learn of the charges against him or her, and the date and location of trial, with sufficient time to allow him or her to prepare a defence to the charges. Waiver is an affirmative indication, either expressed or implied, that the accused does not wish to attend trial and that it can proceed in his or her absence. If one or both of those elements are missing, and trial is still conducted in the absence of the accused, it is of dubious legal value and may be better described as a trial by default.

CHAPTER 6: THE COMPATIBILITY OF TRIAL BY DEFAULT WITH THE RIGHT TO BE PRESENT AT TRIAL

Trial by default is the second type of trial conducted without the participation of the accused. Trial by default and trial *in absentia* are similar in that both involve trial happening in its entirety in the absence of the accused. What distinguishes these two types of trial is the extent to which the accused's failure to attend trial is the result of an informed decision not to participate in person. A trial by default occurs in the absence of the accused without the accused having previously appeared before the court or tribunal and without any indication that the accused is aware that the trial is taking place.[1] Without any affirmative indication that the accused possesses the information necessary to participate in trial it becomes very difficult for the applicable court or tribunal to determine whether the accused's absence is the outcome of a conscious choice not to attend or whether it is the result of the accused's ignorance about the proceedings.[2] Because the court or tribunal does not know the reason for the absence it also cannot decide whether the accused has waived his or her right to be present.[3] Conversely, in a trial *in absentia* the evidence demonstrates that the accused is aware of the allegations against him or her and the date and time of trial.[4] An accused with notice of this information that does not appear for trial is seen as making a conscious choice not to attend trial. That conscious choice is interpreted as a waiver of the right to be present.

International criminal law generally disapproves of proceeding against an accused who has not waived his or her right to be present because of the lack of clear evidence that the accused's absence is the product of his or her conscious choice not to appear.[5]

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[1] Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 238; William A. Schabas and Veronique Caruana, 'Article 63: Trial in the Presence of the Accused', in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Hart Publishing 2016) 1565.

[2] Wayne Jordash and Tim Parker, 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 491.

[3] D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick Law of the European Court of Human Rights* (3rd ed, OUP 2014) 410; Evert F. Stamhuis, 'In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System' (2001) 32 VUW L Rev 715, 722.

[4] Gaeta *supra* note 1 at 238; Schabas and Caruana *supra* note 1 at 1565; Stan Starygin and Johanna Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the *Draft Criminal Procedure Code*' [2005] Singapore J Legal Stud 170, 171.

[5] Starygin and Selth *supra* note 4 at 171.

For the most part, this is a non-issue at the majority of international or internationalised criminal courts and tribunals because of their Statutory and jurisprudential unwillingness to commence trial in the absence of the accused under any circumstances. However, the Special Tribunal for Lebanon, as the first international or internationalised criminal court or tribunal since the International Military Tribunal at Nuremberg to permit the entirety of the trial to be conducted in the absence of the accused, is statutorily permitted to conduct trials *in absentia*. Further, the wording of the Statute's trial *in absentia* provision may also allow trial by default under some circumstances. [6]

As a preliminary point, it is important to stress that the Statute of the Special Tribunal for Lebanon specifically provides the accused with the right 'to be tried in his or her presence', but makes that right subject to the provisions of Article 22.[7] Article 22(1) permits the Court to try defendants in their absence if one of three circumstances exists. Those circumstances are when the accused: (a) has expressly and in writing waived his or her right to be present; (b) has not been handed over to the Tribunal by the State authorities concerned; (c) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.[8] There is no indication in the wording of the Statute as to whether the provisions of Article 22(1) are conjunctive or disjunctive. However, Rule 106 of the Rules of Procedure and Evidence, which makes Article 22(1) operative and largely restates the article verbatim, inserts the word 'or' between the second and third clauses signifying that they should be read disjunctively.

The provisions of Article 22(1) identify four different types of absent accused: those that explicitly waive the right to be present; those that are prevented by State authorities from appearing; those that abscond; and those that otherwise cannot be found. The situation covered by subparagraph (a), where trial takes places after the accused "has expressly and in writing waived his or her right to be present", is a classic example of trial *in absentia* and should not be interpreted as authorising a trial by default. The same should be said for those accused described as absconding. A person absconds "in order to

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[6] Sarah Williams, *Fair Trials: Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing 2012) 372; Björn Elberling, *Theefendant in International Criminal Proceedings* (Hart Publishing 2012) 60-61.
[7] UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 16(4)(d).
[8] Ibid at art 22(1).

evade justice", i.e. to avoid trial.[9] An absconding accused is generally one that has been subject to the control of the court, has been released, usually on bail, and then fails to appear before the court at the appointed date and time.[10] Because the act of absconding is performed to avoid being tried it is reasonable to surmise that an accused that absconds is aware of the charges against him or her. This knowledge, and the accused's subsequent failure to appear, acts as an implicit waiver of the right to be present and an absconding accused may be tried *in absentia*.[11]

The remaining two types of absent defendants, those that are detained by State authorities and those that "otherwise cannot be found", can give rise to situations in which trial may take place without the accused's knowledge. In the scenario where State authorities prevent the accused from attending his or her trial, there is no guarantee that the interfering State authorities will notify the accused of the charges or the date and location of trial. The Statute does allow for notification by way of "communication to the State of residence or nationality", implying that an accused being stopped from attending trial can be properly notified of the charges so long as his or her state of residency or nationality is notified.[12] However, this sort of notification will only be effective if the State blocking the accused from participating is also his or her State of residence or nationality. If the accused is being prevented from attending by a State other than that described above, this form of notification is not capable of providing the accused with effective notice. It is also important to keep in mind that the purpose of showing that an absent accused received notice of the charges is to permit the court or tribunal to reach a decision as to whether the accused's absence is the result of a conscious choice not to attend and therefore act as a waiver of his or her right to be present. In a situation where the accused is aware of the charges against him or her, and the date and location of the trial, but the accused is being prevented by a State authority from attending trial, it is difficult to conclude that the absence is the result of the accused's conscious decision not to attend even though he or she has notice of the charges. Proceeding in the accused's

[9] Christoph Safferling, 'Part B Issues, Institutions, and Personalities: Trial *in absentia*', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 642; *see also* Rupert Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure' (2010) 8 JICJ 451, 460.
[10] William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (CMP Publishing, Ltd 2009) 378.
[11] Antonio Cassese, *International Criminal Law* (OUP 2003) 402.
[12] STL Statute *supra* note 7 at art 22(2)(a).

absence under these circumstances may comply with the letter of the rule regarding trial *in absentia* but not its spirit.

The remaining category of absent accused, those that "otherwise cannot be found", serves as a catch-all to describe any other accused that fail to appear for trial. This category may include the defendants in the *Prosecutor v Ayyash* and the *Prosecutor v Merhi* cases (later consolidated into one case under the name *Prosecutor v Ayyash*) at the Special Tribunal for Lebanon.[13] The procedure employed by the Special Tribunal for Lebanon when permitting the *Ayyash* trial to take place in the absence of the accused is particularly notable. On 30 June 2011, the Registrar transmitted the indictments and the arrest warrants for four of the Special Tribunal's suspects to Lebanon pursuant to Rule 76(A).[14] Rule 76(A) requires the Special Tribunal for Lebanon to formally provide the indictment "to the authorities of the State in whose territory the accused resides or was last known to be residing, or in whose territory or under whose jurisdiction he is believed likely to be found, in order to serve the indictment on the accused without delay."[15] Subsequently, on 8 July 2011, the Pre-Trial Judge issued international arrest warrants for the four accused and authorised the Prosecution to request that Interpol issue "red notices" relating to the accused, indicating that the court wanted to locate and arrest the suspects.[16] On 9 August 2011, the Public Prosecutor at the Lebanese Court of Cassation wrote a letter to the Court indicating that "the Lebanese authorities exerted its utmost efforts to execute any of the in absentee warrants" but that those efforts had not been successful.[17] The Lebanese authorities then detailed their efforts to locate the accused and give them notice. Those efforts included visiting residential and business addresses associated with the accused, checking electoral lists and civil status registers, interviewing individuals acquainted with the accused and reviewing the accused's movements in and out of Lebanon in an effort to establish whether the suspects were still in the country.[18]

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[13] *Prosecutor v Ayyash et al.* (Trial Transcript) STL-11-01/T/TC, T Ch (11 February 2014) 95, lines 2-5; *Prosecutor v Ayyash et al.* (Decision on Trial Management and Reasons for Decision on Joinder) STL-11-01/T/TC, T Ch (25 February 2014).
[14] *Prosecutor v Ayyash et al.* (Order Pursuant to Rule 76(E)) STL-11-01/I/PRES, President of the Tribunal (18 August 2011) para 3.
[15] Ibid; *see also* Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) rule 76(A).
[16] *Prosecutor v Ayyash et al.* (Order Pursuant to Rule 76(E)) *supra* note 14 at para 6.
[17] Ibid at para 8.
[18] Ibid at paras 9-12.

The failure of the Lebanese authorities to locate the four accused led the court to act under Rule 76(E). Rule 76(E) permits the President to establish that reasonable efforts have been made to serve the indictment and, following consultation with the Pre-Trial Judge, to order an alternative form of service, which can include public advertisement.[19] Antonio Cassese, then the president of the Special Tribunal for Lebanon, concluded that reasonable efforts had been made, both by the Tribunal and the Lebanese government, to serve notice on the suspects.[20] President Cassese authorised the registrar to "identify and effectuate" the alternative means of service to be employed.[21]

President Cassese confirmed on 11 August 2011 that the court had been unable to serve notice on the accused. He then took the interesting decision to make a public statement directed at the accused in which he referred to the active participation of the accused "as a major safeguard of a fair and just trial."[22] One week later, on 18 August 2011, President Cassese issued an order pursuant to Rule 76(E) authorising service of the indictments in an alternative manner. President Cassese indicated in that order that "[a] trial – even one conducted in the absence of the accused – is a requisite step toward restoring in the long run the social peace disturbed by these crimes, with their persistent adverse consequences for the whole fabric of Lebanese society."[23] These two statements, made one week apart, highlight the tension between the importance of the accused's presence at trial, and the positive impact it can have on ensuring that trial is fair, and the important societal function that trial can serve, even if it takes place in the absence of the accused.

Subsequently, the Registrar of the Special Tribunal for Lebanon sent two letters to the Lebanese Public Prosecutor pursuant to the Rule 76(E) order issued President Cassese. This was authorised by Rule 76 *bis*, which permits the Registrar to transmit the form of advertisement to the officials of the relevant state.[24] The first letter, sent on 31

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[19] Rules of Procedure and Evidence, Special Tribunal for Lebanon *supra* note 15 rule 76(A).
[20] *Prosecutor v Ayyash et al.* (Order Pursuant to Rule 76(E)) *supra* note 14 at paras 17-18.
[21] Ibid at para 22.
[22] Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon (11 August 2011) < https://www.stl-tsl.org/en/media/press-releases/670-11-08-2011-statement-of-judge-antonio-cassese-president-of-the-special-tribunal-for-lebanon> accessed 3 July 2017.
[23] *Prosecutor v Ayyash et al.* (Order Pursuant to Rule 76(E)) *supra* note 14 at para 22.
[24] Rules of Procedure and Evidence, Special Tribunal for Lebanon *supra* note 15 at rule 76 *bis*.

August 2011, contained the text of a wanted notice for the four accused so that it could be published in the Lebanese media.[25] The second letter, sent 8 September 2011, indicated which news sources the wanted notice should be published in.[26] The notices were published in five newspapers on 15 September 2011, including three Arabic language papers, one English paper and on French paper.[27]

On 17 October 2011, the Pre-Trial Chamber issued an order seizing the Trial Chamber so that it might make a determination as to whether trial could proceed in the absence of the accused, and ordering the Registrar to transmit certain documents to the Trial Chamber so that it might be able to make its decision.[28] This decision was made in fulfilment of Rule 105*bis*, which authorises the Pre-Trial Chamber to ask the Trial Chamber to initiate *in absentia* proceedings in the event that the accused is notified of the indictment via publication and at least 30 days had passed between the date of the notification and the entry of the Pre-Trial Chamber's order.[29]

The Trial Chamber issued its decision on 1 February 2012 in which it decided that the accused could be tried in their absence. In reaching that decision, the Trial Chamber determined that the evidence indicated that the four accused had absconded within the meaning of the third of the three scenarios set out in Article 22 and Rule 106, thus authorising trial to proceed in the absence of the accused.[30] In support of that holding, the Chamber found that because none of the four accused had been seen at their last known address since the indictments were transmitted to the Lebanese government, and because of the extensive media coverage in the case naming the four accused as suspects, all reasonable steps had been taken to inform them of the charges.[31]

The Trial Chamber justified its decision, in part, on its interpretation of international human rights law as it pertains to trials *in absentia*. Specifically, the Trial Chamber found the following:

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[25] *Prosecutor v Ayyash et al.* (Order to Seize the Trial Chamber Pursuant to Rule 105*bis*(a) of the Rules of Procedure and Evidence to Determine Whether to Initiate Proceedings *in Absentia*) STL-11-01/I, PT Ch (17 October 2011) para 11.
[26] Ibid.
[27] Ibid at para 12.
[28] Ibid at paras 26-27.
[29] Rules of Procedure and Evidence, Special Tribunal for Lebanon *supra* note 15 at rule 105 *bis*.
[30] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) STL-11-01/I/TC, T Ch (1 February 2012) paras 3, 111.
[31] Ibid at paras 106-111.

> International human rights instruments require that an accused person is properly notified of the charges and invited to appear before the court (at least by summons) and is notified of the consequences of non-appearance - that is of the possibility of the court holding a trial *in absentia* - before the court can proceed to try the person in his or her absence. The accused must have waived the right to attend the trial by exercising their own free will or through their conduct. The objective is to ensure that the accused can properly exercise the right to appear, or conversely, not to appear at the trial. The State authorities have a wide discretion as to the method used to properly inform the accused; what counts is the effectiveness of that communication. International human rights law, however, imposes no obligations on State authorities, beyond taking these necessary notification steps, before a court may proceed to a trial *in absentia.*[32]

Following a defence appeal of the Trial Chamber's refusal to reconsider its original decision to conduct trial *in absentia*, the Appeals Chamber confirmed the Trial Chamber's decision and found that the Trial Chamber had not committed any error in its decision to proceed against the accused *in absentia*.[33]

6.1 INTERNATIONAL CRIMINAL LAW MAY NOT REQUIRE THAT THE ACCUSED RECEIVE NOTICE BEFORE PROCEEDING WITH TRIAL IN THEIR ABSENCE

In reaching its decision, the Trial Chamber of the Special Tribunal for Lebanon stated that international human rights law requires that States take "necessary notification steps" to notify the accused.[34] However, this does not adequately portray the state of international human rights law. While it is desirable to inform the accused of the charges against him or her and the date and location of trial what is required is that the court or tribunal attempting to notify the accused about the trial must make "reasonable efforts" to

[32] Ibid at para 32; *citing* International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 14(3)(a), (b), (d) and (e); European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 at arts 6(1) and 6(3); *Somogyi v Italy* (2008) 46 EHRR 5, 10 November 2004 at para 67; *Colozza v Italy* (1985) 7 EHRR 516, 12 February 1985 at paras 27-30, *Sejdovic v Italy* (2006) 42 EHRR 17, 1 March 2006 at paras 86, 88-90; *Mbenge v Zaire* Comm No 16/1977 (25 March 1983) para 14.2.

[33] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *in Absentia* Decision) STL-11-01/PT/AC/AR126.1, A Ch (1 November 2012) para 32.

[34] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 32.

provide the accused with notice and that there are limits to those efforts.[35] Although courts and tribunals have generally declined to identify a set rule as to what constitutes "reasonable efforts", it has been suggested that the assiduousness with which the appropriate authorities attempt to notify the accused and the diligence exercised by the accused to receive the information should be part of the consideration.[36] Further, any failure to properly notify the accused can be remedied so long as the accused has a right to a new determination of the charges after learning that he or she has been prosecuted.

Authority on this issue can be found in the decisions of the Human Rights Committee and the European Court of Human Rights.[37] Although the Special Tribunal for Lebanon is not bound by the decisions of either body, it has relied on the decisions of each when determining general issues of international criminal law. With regard to the European Court of Human Rights, the Appeals Chamber found that the European Court's decisions are helpful "in assessing the highest standards of international criminal procedure" when considering the accused's right to be present at trial.[38] Additionally, Judge Cassese, in his position as president of the Tribunal, described the case law of the European Court of Human Rights as "extremely important" to the Tribunal, and indicated that because such decisions are based on provisions similar to those found in the International Covenant on Civil and Political Rights, which is binding on Lebanon, they should be seen as "a crucial set of legal standards for the STL as well."[39] By expressly identifying the importance of the International Covenant on Civil and Political Rights, President Cassese was also tacitly recognising the significance of the Human Rights Committee's Views interpreting the International Covenant.

The case law from the European Court of Human Rights and the Human Rights Committee does not support the conclusion that there is an irrefutable rule of international criminal law that trial cannot commence outside of the accused's presence

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[35] Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5 at para 39; *Mbenge supra* note 32 at para 14.2.
[36] Council Directive 2016/343 *supra* note 35 at para 38.
[37] *Maleki v Italy* Comm No 699/1996 (27 July 1999) para 9.3; *citing Mbenge supra* note 32 at para 14.1; *Poitrimol v France* (1994) 18 EHRR 130, 23 November 1993 at paras 38-9; *Sejdovic supra* note 32 at para 82; *Somogyi supra* note 32 at para 66; *Colozza supra* note 32 at para 29; *Krombach v France* App No 29731/96 (ECtHR, 13 February 2001) para 85; *Einhorn v France* App No 71555/01 (ECtHR, 16 October 2001) para 33.
[38] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 27.
[39] *In the Matter of el Sayed* (Order Assigning Matter to Pre-Trial Judge) CH/PRES/ 2010/01, Order of the President (15 April 2010) para 26.

unless necessary steps have been taken to ensure that the accused received notice of the charges. In *Maleki v Italy*, the Human Rights Committee was asked to consider whether an Italian court's decision to try Maleki *in absentia* constituted a violation of the International Covenant on Civil and Political Rights.[40] The Committee found that there had been a violation of Maleki's rights because he had not been "summoned in a timely manner and informed of the proceedings against him".[41] However, the Committee went on to find that the violation could have been remedied if Maleki had been entitled to a retrial once he was arrested and transferred to the jurisdiction of the trial court.[42] The decision in *Maleki* shows that while it is a violation to proceed against an accused that does not have proper notice, that violation can be remedied if the accused is granted a fresh determination of the charges. Therefore, there is no *per se* bar against trying an accused without notice, however the decision of a court or tribunal to proceed in such a manner lacks legitimacy if the absent accused does not have a right to a new trial.

In *Poitrimol v France*, the European Court of Human Rights reached a similar conclusion to that of the Human Rights Committee, although it formulated its finding somewhat differently. In *Poitrimol*, the European Court was presented with a case where the applicant, Poitrimol was tried and convicted *in absentia* by a French Court.[43] He challenged his conviction on the grounds that he had been deprived of his right found in Article 6(3)(c) of the European Convention on Human Rights that he be allowed "to defend himself in person or through legal assistance of his own choosing".[44] In finding a breach of his rights, the European Court of Human Rights stated, "[p]roceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact."[45] Poitrimol's rights were violated because he was denied such an opportunity.[46] It is important to note that the European Court of Human Rights did not tie the violation of Poitrimol's rights to a lack of notice, in fact he had notice of the trial and declined to appear, but instead found that his rights were violated because he was not given the opportunity to have a new

[40] *Maleki supra* note 37 at para 1.
[41] *Ibid* at para 9.3; *citing Mbenge supra* note 32 at para 14.1.
[42] *Maleki supra* note 37 at para 9.5.
[43] *Poitrimol supra* note 37 at para 15-16.
[44] European Convention on Human Rights *supra* note 32 at art 6(3)(c).
[45] *Poitrimol supra* note 36 at para 31.
[46] Ibid at para 38-9.

determination of the law and the facts.[47] This suggests that a lack of notice may not be necessary so long as an accused has the opportunity to have the charges against him or her considered again once he or she chooses to submit to the jurisdiction of the court.

The European Court of Human Rights has taken up this issue on other occasions, most notably in *Sejdovic v Italy*, and has generally found that denying an accused convicted *in absentia* a new determination about the merits of the charges against them constitutes a denial of justice.[48] The European Court went even further in *Stoichkov v Bulgaria* and found that when a court refuses to reopen proceedings conducted in the absence of the accused and there is no indication that the accused waived his or her right to be present at trial that it constitutes a "flagrant denial of justice" that is "manifestly contrary" to the provisions and principles of Article 6 of the European Convention on Human Rights.[49] Again, the violation of the accused's rights lies in the fact that he was not given a new trial rather than because the court held trial without any indication that the accused waived his right to be present.

The European Court of Human Rights has identified two situations in which an absent accused is not necessarily entitled to a new determination of the charges. First, the European Court has found that the accused does not have a right to an automatic rehearing of the facts if he or she waived his or her right to appear at trial and present a defence.[50] Second, the accused is not entitled to an automatic retrial if the accused's failure to appear at trial is the result of the accused intentionally trying to evade justice.[51] What these two exceptions have in common is that in either case the accused must necessarily have received notice of the charges against him or her and his or her resulting absence was a result of an informed decision not to appear for trial. The important point is that an accused should be able to obtain a new trial at any time after he or she first learns about the charges against him or her.[52] Therefore, any person being tried by default is entitled to a fresh determination of the charges once he or she becomes aware of the charges.

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[47] Ibid at para 35.
[48] *Sejdovic supra* note 32 at para 82; *Somogyi supra* note 32 at para 66; *Colozza supra* note 32 at para 29; *Krombach supra* note 37 at para 85; *Einhorn supra* note 37 at para 33.
[49] *Stoichkov v Bulgaria* (2007) 44 E.H.R.R. 14, 24 June 2005 at para 56.
[50] *Sejdovic supra* note 32 at para 82; *Somogyi supra* note 32 at para 66; *Colozza supra* note 32 at para 29; *Krombach supra* note 37 at para 85; *Einhorn supra* note 37 at para 33.
[51] *Medenica v Switzerland* App No 20491/92 (ECtHR, 12 December 2001) para 55.
[52] *Colozza supra* note 32 at para 29.

The European Court of Human Rights and the Human Rights Committee reached similar conclusions that an accused can be tried in his or her absence even when the trial court fails to take adequate steps to notify him or her of the charges against them. However, such a trial is only permissible if the accused has the right to a new trial, or some other fresh determination of the charges, after he or she comes under the control of the trial court. The two decisions differ to the extent that the European Court found that the lack of a fresh determination of the charges was the reason the accused's convention rights were violated whereas the Human Rights Committee found that the violation arose out of insufficient notice but that it could have been remedied had a new trial been conducted. Despite these different approaches, it is clear that international criminal law does not contain a strict prohibition against trying an accused in his or her absence without notice, so long as the accused have an automatic right to be retried after surrendering or being apprehended by the trial court.

The Statute of the Special Tribunal for Lebanon complies with international criminal law because it grants an absent accused a near automatic right to retrial. Article 22(3) of the Statute grants an accused convicted in his or her absence the right to a retrial unless he or she designates a defence counsel of his or her choosing or he or she accepts the *in absentia* judgment.[53] These limitations are substantively similar to those imposed by the European Court of Human Rights.[54] By creating the limitation that an accused may only be retried if he or she has not appointed counsel, the Special Tribunal for Lebanon is simply recognising that an accused that has appointed counsel must be aware that the trial is taking place and is actively choosing not to attend. Further, the Tribunal can be confident that the rights of an accused that has chosen his or her own counsel are being protected because the accused is represented and he or she played a role in choosing that representation. Similarly, limiting retrial in situations where the accused accepts the *in absentia* judgment is logical as there is no reason to repeat the burdensome process of trial if the accused agrees with the outcome of the original proceeding. The important point is that an accused should be able to obtain a new trial at any time after he or she first learns about the charges against him or her if he or she wishes.[55] Therefore, any

[53] STL Statute *supra* note 7 at art 22(3).
[54] *Sejdovic supra* note 32 at para 82; *Somogyi supra* note 32 at para 66; *Colozza supra* note 32 at para 29; *Krombach supra* note 37 at para 85; *Einhorn supra* note 37 at para 33; *Medenica supra* note 51 at para 55.
[55] *Colozza supra* note 32 at para 29.

person being tried by default at the Special Tribunal for Lebanon is entitled to a fresh determination of the charges once he or she becomes aware of the charges but the exercise of that right remains dependent upon whether he or she wants to be retried.

Paola Gaeta argues that the retrial provision contained in Article 22(3) actually exceeds what is required under international criminal law. She reaches this conclusion on the grounds that the right to retrial at the Special Tribunal for Lebanon is available to any absent defendant regardless of whether he or she had notice of the trial and/or waived his or her right to be present, so long as he or she did not appoint counsel.[56] By providing all defendants that meet these criteria with the right to a retrial, and not limiting retrial to only those defendants being tried by default, the Special Tribunal for Lebanon has transformed the right to retrial from a remedy for the violation of the accused's right to be present into a primary right held by an formerly absent accused.[57]

One area of concern arises when an accused is being tried under Article 22(1)(b) of the Statute. Article 22(1)(b) permits the Special Tribunal for Lebanon to proceed in the absence of an accused that "[h]as not been handed over to the Tribunal by the State authorities concerned".[58] The legality of proceeding in the accused's absence under these circumstances has been questioned mainly on the grounds that the accused's absence is not the result of a conscious choice not to attend but because he or she is being barred from appearing.[59] A situation could exist where the accused is aware that he or she is being tried *in absentia*, wishes to attend trial, but is unable to do so because a government unwilling to cooperate with the Special Tribunal for Lebanon is detaining the accused. A strict reading of the rule, particularly one taking into account its underlying purpose, could lead to the conclusion that such a defendant is not entitled to a retrial because he or she was aware the first trial was taking place. However, such a construction would lead to an unjust result. Fortunately, it is unlikely that an accused in this position would have the opportunity to appoint counsel and would therefore maintain his or her right to retrial. This approach is favourable because it does not mechanically determine if the accused

[56] Gaeta *supra* note 1 at 247.
[57] Ibid at 247-248.
[58] STL Statute *supra* note 7 at art 22(1)(b).
[59] Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1312-13; Björn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly how Tailor-Made is the Special Tribunal for Lebanon' (2008) 21(2) LJIL 529, 537.

has notice of the proceedings and based on that determination mandate whether there will be a retrial.

Another issue relating to the right to retrial involves the limited period of time during which the Special Tribunal for Lebanon will be in operation. Specifically, there is trepidation that if an accused is convicted in his or her absence, and subsequently apprehended after the court ceases operation, that those defendants convicted *in absentia* will not have access to a new trial.[60] This limitation on the right to retrial could have both short-term and long-term consequences for the Tribunal.[61] In the short term it could impact on the legitimacy of the Tribunal if the perception persists that the Tribunal is operating outside of established human rights norms.[62] In the long term it could have implications on the formation of future international or internationalised courts and tribunals and the extent to which they protect the fair trial rights of the accused.[63] The danger of what will happen when the Special Tribunal for Lebanon closes is now somewhat diminished as it seems likely that some mechanism akin to those established for the *ad hoc* Tribunals and the Special Court for Sierra Leone will be created to carry on the Special Tribunal's jurisdiction.

Gaeta dismisses concerns about how previously absent defendants might be retried after the Special Tribunal for Lebanon closes on the dual grounds that Article 22(3) of the Statute does not require that a retrial take place before the Special Tribunal for Lebanon and that a verdict rendered *in absentia* does not constitute a final verdict and therefore a new trial is permitted in a court other than the Special Tribunal.[64] With regard to the first point, Gaeta asserts that the Statute does not expressly require the retrial to take place before the Special Tribunal for Lebanon and therefore the Statute implicitly authorises retrial in another venue, including Lebanese national courts.[65] However, the plain language of the Statute may not support her interpretation. Article 22(3) states, "the accused… shall have the right to be retried in his or her presence before the Special

[60] Chris Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham Intl L J 57, 62; Jordash and Parker *supra* note 2 at 500-01.
[61] Jenks *supra* note 60 at 62.
[62] Ibid.
[63] Ibid.
[64] Paola Gaeta, 'To Be (Present) or Not To Be (Present): Trials in Absentia Before the Special Tribunal for Lebanon' (2007) 5 JICJ 1165, 1173.
[65] Ibid.

Tribunal, unless he or she accepts the judgement."[66] The Statute does not state that the retrial can take place anywhere; instead, it indicates that retrial will occur "before the Special Tribunal". While that phrase does not explicitly exclude the right to retrial in other venues, it does place a limitation on where retrial can take place under the Statute. Article 5(1) of the Statute also makes abundantly clear that any retrial cannot take place in the national courts of Lebanon as it specifically asserts, "[n]o person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal."[67] This unequivocal statement precludes retrial in Lebanese Courts.

Gaeta's second argument alleges that the very existence of the right to a retrial indicates that an *in absentia* verdict rendered by the Special Tribunal for Lebanon is not final and therefore does not constitute *res judicata* necessary to prevent retrial in an alternate venue.[68] This argument relies on the assumption that a verdict must be final before the possibility of retrial is foreclosed and is largely based on the International Covenant on Civil and Political Rights and several European legal conventions. Article 14(7) of the International Covenant forbids trying an accused on charges for which a final verdict has been reached.[69] Article 14(7) does not delineate what constitutes a final verdict and instead, leaves that up to the penal procedure of the relevant country. Article 4(1) of Protocol Seven of the European Convention on Human Rights indicates that there can be no new trial or new punishment imposed "under the jurisdiction of the same State for an offence for which he [or she] has already been finally acquitted or convicted."[70] Article 50 of the Charter of Fundamental Rights of the European Union also prohibits trial where there has been a final acquittal or conviction.[71] Article 54 of the Schengen Convention forbids one State from conducting trial against an accused where another State has entered a final judgment as to the same crimes.[72] Collectively, these Conventions suggest that a judgment must be final before a court can be foreclosed from

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[66] STL Statute *supra* note 7 at art 22(3).
[67] Ibid at art 5(1).
[68] Gaeta *To Be Present supra* note 64 at 1173; Gaeta *Trial in Absentia supra* note 1 at 249.
[69] International Covenant on Civil and Political Rights *supra* note 7 at art 14(7).
[70] Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 22 November 1984, entered into force 1 November 1998) ETS 117 at art 4(1).
[71] Charter of Fundamental Rights of the European Union (adopted on 18 December 2000, entered into force 1 December 2009) Doc. No. 2012/C 326/02 at art 50.
[72] Convention Implementing the Schengen Agreement of 1985 (adopted on 19 June 1990, entered into force 1 September 1993) art 54.

holding a new trial.

Despite being enshrined in the above-cited conventions, international criminal law does not necessarily mandate the entry of a final judgment before retrial is precluded. The International Criminal Court's Statute only requires that accused has been acquitted or convicted of the same conduct by another court and there are no questions regarding the legitimacy of the first trial.[73] The Statutes of the *ad hoc* Tribunals also do not require that a judgment be final before eliminating the prospect of a retrial.[74] The same holds true for the Special Court for Sierra Leone, the Extraordinary African Chambers and the Kosovo Specialist Chambers.[75] All of these Statutes were drafted after the introduction of the International Covenant, the Schengen Agreement and Protocol 7, suggesting that the drafters of the Statutes of the various international and internationalised courts and tribunals could have included the finality requirement but opted not to.

There is also no consensus in domestic law requiring finality before a retrial can be prohibited. The language of Article 5(1) is similar to *ne bis in idem* (also called double jeopardy) rules as applied in other jurisdictions. The principle of *ne bis in idem* generally prevents a person from being tried more than once for the same crime. The United States Supreme Court applies the most liberal interpretation of this rule by finding that trial commences for the purpose of the double jeopardy rule at the time the jury is empanelled and sworn.[76] Several other nations forbid a new trial from being held if the first trial resulted in either an acquittal or conviction, i.e., where the first trial was litigated to a conclusion.[77] England and Wales now permit retrials following an acquittal, but only when new evidence has been discovered that could have some bearing on a determination as to the guilt or innocence of the accused.[78] Germany and France permit retrial following an acquittal if the verdict is not final and even permit the reopening of a

[73] Rome Statute of the International Criminal Court (17 July 1998) art 20.
[74] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 10; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 9.
[75] UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 9; Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990 (2013) art 19; Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) art 17.
[76] *Crist v Bretz*, 437 US 28, 35 (1978); *Martinez v Illinois*, 134 S Ct 2070, 2071 (2014).
[77] Constitution of the Islamic Republic of Pakistan (1973) art 13; Constitution of the Republic of South Africa (1996) art 35(3)(m).
[78] Criminal Justice Act, 2003 (England & Wales) (2003) part 10.

final judgment where new evidence is introduced or the initial resolution of the case was based on fraud.[79] This variety of approaches to when a new trial is permitted following an acquittal or conviction indicates that there is no consensus found in domestic law supporting Gaeta's position that a new trial is permitted until a final judgment has been reached.

Finally, the Arab Charter of Human Rights, propounded by the League of Arab States, of which Lebanon is a member, prohibits a person from being tried twice for the same crime and does not make any prospective second trial contingent on the finality of the judgment in the first trial.[80] Lebanese law only provides for a retrial when three criteria are met: (1) following a conviction and not an acquittal; (2) when the new trial is being sought by the convicted person and not by the State; and (3) where new evidence has come to light suggesting that the convicted person is innocent.[81] The finality of the judgment is not a relevant consideration. The lack of agreement surrounding the requirement of finality, and its exclusion from numerous international and domestic statutes, undermines Gaeta's *res judicata* argument as finality of the judgment may be a requirement in European law, but it is not one in international criminal law or Lebanese law, and should not be imposed on the Special Tribunal for Lebanon.

International criminal law does not prevent trial from being held in the absence of the accused when he or she does not have notice of the proceedings. However, an absent accused must be provided with a new determination of the charges after learning that trial was conducted in their absence. The limitations placed on the right to retrial by the Human Rights Committee and the European Court of Human Rights are meant to distinguish between an accused that is genuinely ignorant about the existence of the proceedings and an accused that was aware trial was taking place but chose not to attend. Both human rights bodies take the position that defendants who intentionally fail to attend trial should not be rewarded with a new evaluation of the charges simply because they were not present. That right should be reserved those individuals whose non-attendance was inadvertent due to lack of notice. This approach to the right to re-trial

[79] Basic Law for the Federal Republic of Germany (1949) art 103(3); Code of Criminal Procedure, Germany (as amended 23 April 2014) sections 359 and 362; Code of Criminal Procedure, France (as amended 1 July 2017) art 6.
[80] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) *reprinted in* (2005) 12 International Human Rights Reporter 893 at art 19.
[81] New Code of Criminal Procedure, Law No. 328 (Lebanon) (7 August 2001) arts 328 and 329.

recognises the distinction between voluntary and involuntary absence and attempts to ensure that the rights of those that did not choose to absent themselves from trial are respected. It also creates a safety net whereby even if an accused is tried in his or her absence, he or she has access to a fresh determination of the charges after coming under the control of the trial court.

6.2 THE SPECIAL TRIBUNAL FOR LEBANON REQUIRES NOTICE BEFORE TRYING AN ABSENT ACCUSED

Even if international criminal law does not require that the accused receive notice of the charges against him or her before trial can be commenced in his or her absence, such a requirement is contained in the Statute of the Special Tribunal for Lebanon. The decisions of the Special Tribunal for Lebanon's Trial Chamber and Appeals Chamber both asserted that the Statute requires that the accused received notice in one of the manners set out in Article 22(2) before the Trial Chamber can proceed with a trial *in absentia*.[82] The Appeals Chamber explicitly found that before a trial *in absentia* can commence Article 22(2)(a) requires that the accused receive notice of the proceedings and that he or she also be informed about the consequences of not appearing.[83] The first subparagraph of Article 22(2) of the Statute details what sort of notice is required to properly inform the accused of the charges. It states that:

> 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…[84]

The methods of notice identified in Article 22(2) can be divided into two general categories: actual notice and implied notice. Actual notice occurs when the accused is told of the charges against him or her and therefore knows about them. For there to be actual notice, evidence must exist that the accused really knows about the charges or that he or she was "served with the indictment."[85] In either situation no doubt remains that the accused received notice of the proceedings. Implied notice exists when the Court can infer, but does not know for certain, that the accused has learned about the charges.

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[82] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 32; *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 25.
[83] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 25.
[84] STL Statute *supra* note 7 at art 22(2).
[85] Ibid at art 22(2)(a).

Under the Statute, notice can be implied when information about the indictment is spread through publication in the media or when notice is given to the accused's State of residency or nationality.[86]

The *Ayyash* and *Merhi* cases are both instances in which the Special Tribunal for Lebanon was required to find that notice on the part of the accused could be implied. There was no clear indication that four of the five suspects have actual notice of the charges against them. One of the suspects did give an anonymous interview to Time Magazine in 2011 in which he demonstrated that he was aware of the charges.[87] However, without knowing the identity of the interviewee it is impossible to ascribe knowledge to any of the accused in particular. No other evidence exists to suggest that any of the suspects are actually aware of the charges. Further, none of the accused have been personally served with a copy of the indictment. Therefore, notice has to be implied through one of the methods authorised by the Statute.

The Special Tribunal for Lebanon is not the first international criminal court or tribunal to imply notice on the part of the accused through alternative means. Martin Bormann, one of the individuals indicted by the International Military Tribunal at Nuremberg, was not in custody as the start of trial approached. As a result, the International Military Tribunal ordered that he be served through alternative means. Rule 2(a) of the International Military Tribunal's Rules of Procedure required that each individual defendant be given copies of the indictment, the Tribunal's Charter, other documents lodged with the indictment and a statement of the right to counsel not less than 30 days before the commencement of trial.[88] Rule 2(b) indicated that those individuals not in custody be given notice of the indictment and his right to receive the documents described in part (a) of the rule "by notice in such form and manner as the Tribunal may prescribe."[89] To comply with that provision, the Tribunal introduced a form of notice stating that Bormann had been indicted for crimes against peace, crimes against humanity and war crimes, indicating the date and time of trial and containing a

[86] Ibid.
[87] 'Accused Hizbollah Man Speaks', Time Magazine (18 August 2011) <http://content.time.com/time/world/article/0,8599,2089422,00.html> accessed 3 July 2017.
[88] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) rule 2(a).
[89] Ibid at Rule 2(b).

declaration that if he did not appear he could be tried in his absence.[90] The notice was to be read over the radio once a week for four weeks and also published in four separate issues of newspapers circulated in Bormann's home city.[91] Additionally, the American government printed 100,000 copies of the official notice and posted them throughout Germany and in prisoner of war camps.[92] The Tribunal considered these efforts sufficient to imply that Bormann had notice of the charges against him and the date and location of trial and allowed the prosecution to proceed with its case against him.

The Trial Chamber and the Appeals Chamber of the Special Tribunal for Lebanon relied on a similar justification when deciding that the steps taken to inform the absent accused about the charges against them were adequate to imply notice.[93] The Trial Chamber determined that the four defendants in *Ayyash* had sufficient notice of the charges against them due to the "the near saturation media coverage in Lebanon" naming the four suspects, identifying the contents of the indictment and publicising other documents and decisions produced by the Tribunal.[94] It also found that the "massive if not blanket coverage" made it "inconceivable" that the suspects were not aware of the charges.[95] Because the accused failed to appear when summoned by the Court, the Trial Chamber concluded that they did not want to participate in trial, effectively waiving their right to be present and opening the possibility of trial proceeding in their absence.

The Appeals Chamber found that for notice to be effective at the Special Tribunal for Lebanon, the Trial Chamber must be satisfied that: (1) reasonable efforts have been taken to personally notify the accused; (2) the Trial Chamber is satisfied that the evidence demonstrates that the accused actually knew about the proceedings against them; and (3) that the evidence establishing notice does so 'with such a degree of specificity' that the absence of the accused means that he or she has elected not to appear at trial and has waived his or her right to be present.[96] The Appeals Chamber concluded that these three requirements had been met in the *Ayyash* case, permitting trial to be conducted in the

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[90] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 102-3; *see also* Schabas *supra* note 10 at 336-7.
[91] *Trial of the Major War Criminals* vol 1 *supra* note 90 at 102-3.
[92] Schabas *supra* note 10 at 336-7.
[93] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 32.
[94] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 67, 70, 74.
[95] Ibid at para 106.
[96] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 31-32.

absence of the accused.[97] In reaching that conclusion, the Appeals Chamber found that the extent of Lebanon efforts to publicise the indictment made it "inconceivable that [the four accused] could be unaware that they had been indicted".[98]

The first two elements set out by the Appeals Chamber that must be met when determining whether notice is effective are necessarily fact specific and any evaluation of them will be subjective. While one may not agree with the weight accorded to the facts proving these elements, it is difficult to argue that the Trial Chamber's decision as to these parts was demonstrably wrong. However, there is some doubt that the Trial Chamber complied with international human rights law when reaching its decision that the absence of the accused could be construed as indicating a decision not to appear and a waiver of the right to be present at trial. The European Court of Human Rights has established that waiver of any right guaranteed by the European Convention on Human Rights, including the right to be present at trial, must be made in an unequivocal manner.[99] In a judgment released just a few months before the Special Tribunal for Lebanon's decision, the European Court of Human Rights reiterated that "to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice."[100] The European Court of Human Rights accepts that an accused's unequivocal indication of the waiver of a right can be either explicit or implied through conduct.[101] However, the European Court gives only three examples of actions that are sufficiently unequivocal to constitute a waiver. They are: where the accused states publicly or in writing that he or she does not intend to participate; where the accused has become aware of the proceedings from unofficial sources and intentionally

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[97] Ibid at para 46.
[98] Ibid at para 45; *quoting Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 106.
[99] *Colozza supra* note 32 at para 28; *Oberschlick v Austria* (1991) 19 EHRR 389, 23 May 1991 at para 51; *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692, 25 February 1992 at para 37; *Jones v United Kingdom* App No 30900/02 (ECtHR, 9 September 2003); *Khalfaoui v France* (2001) 31 EHRR 42, March 2000 at para 51; *Sibgatullin v Russia* App No 32165/02 (ECtHR, 14 September 2009) para 46; *Yavuz v Austria* (2007) 45 EHRR 16, 27 August 2004 at para 45.
[100] *Shkalla v Albania* App No 26866/05 (ECtHR, 10 August 2011) para 70; *citing T v Italy* App No 14104/88 (ECtHR, 12 October 1992) para 28; *Somogyi supra* note 32 at para 75.
[101] *Shkalla supra* note 100 at para 70.

evades an attempted arrest; or where the evidence unequivocally shows that the accused was aware of the charges and still did not appear.[102] Failure to appear following implied notice through the media would likely fall under the third of these three categories.

Whether the Trial Chamber and Appeals Chamber's findings with regard to notice and waiver comply with the jurisprudence of the European Court of Human Rights is largely one of semantics. The case law of the European Court emphasises that the evidence needed to imply waiver of the right to be present at trial must "unequivocally" show that the accused was aware of the charges.[103] When given its common meaning, unequivocal means "[u]nambiguous, clear, free from uncertainty."[104] This is largely an objective definition. Conversely, the Special Tribunal for Lebanon found that it was "inconceivable" that the suspects had not received notice of the indictment through the media.[105] Inconceivable means "impossible to comprehend" and "unbelievable."[106] This is a subjective definition. Whether something is believable depends largely on the person or persons perceiving the information. Therefore, the Trial Chamber's finding may not accord with European Court of Human Rights jurisprudence as it determined awareness on the part of the accused to a subjective standard and not an objective one.

Paola Gaeta argues that there is no discrepancy between the two terms and that the decision of the Special Tribunal for Lebanon accords with the European Court of Human Rights' case law. Gaeta asserts that:

> [t]he reasoning of the Appeals Chamber tended to demonstrate, although it did not expressly say so, that the four accused unequivocally knew about the charges and the consequences of their absconding, and therefore clearly waived their right to participate in the criminal proceedings.[107]

Gaeta's point is weakened by the indefinite nature of her statement. First, Gaeta concedes that the Appeals Chamber did not expressly find that the four accused unequivocally knew about the charges. Second, Gaeta indicates that the reasoning of the

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[102] Ibid; *citing Iavarazzo v Italy* App No 50489/99 (ECtHR, 4 December 2001).
[103] *Colozza supra* note 32 at para 28; *Oberschlick supra* note 99 at para 51; *Pfeifer and Plankl supra* note 99 at para 37; *Jones supra* note 97; *Khalfaoui supra* note 99 at para 51; *Sibgatullin supra* note 98 at para 46; *Yavuz supra* note 99 at para 45.
[104] Bryan Garner (ed), *Black's Law Dictionary* (10th ed, Thomson Reuters 2014) 1760.
[105] *Prosecutor v Ayyash et al.* (Decision on Defence Appeals) *supra* note 33 at para 45; *quoting Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 106.
[106] "Inconceivable" Merriam-Webster.com <www.merriam-webster.com/dictionary/inconceivable> accessed 28 December 2017.
[107] Gaeta *Trial in Absentia supra* note 1 at 246.

Appeals Chamber "tended to demonstrate" the unequivocal knowledge of the accused. However, this is not an entirely accurate statement of the European Court of Human Rights' jurisprudence. The European Court does not require the knowledge of the accused to be unequivocal. Rather, "what is decisive is whether the facts of the case show unequivocally that the applicant was sufficiently aware" of the opportunity to exercise his or her rights.[108] If the reasoning of the Appeals Chamber merely "tended to demonstrate" the knowledge of the accused, that is insufficient to meet the European Court's standard that "the facts of the case show unequivocally" that the accused had the requisite knowledge. The phrase "tended to demonstrate" does not suggest reasoning that is free from doubt. Rather, it implies that it is more likely than not that the accused had the requisite knowledge, which falls short of the unequivocal standard applied by the European Court of Human Rights.

However, the prodigious scope of the publicity surrounding the identities of the suspects and the crimes alleged against them should not be discounted. Following the Pre-Trial Judge's decision on 16 August 2011 to make the full indictment public, including identifying the four original *Ayyash* accused, virtually every Arabic, English and French language news source in Lebanon, including print, television, radio and electronic media, published the indictment in full or provided commentary on it.[109] The Trial Chamber described the media coverage given to the charges and the indicted individuals as "near saturation" and found that "[t]he evidence of the widespread publication of the indictment and the identifying information is overwhelming."[110] The Trial Chamber came to a similar conclusion in the *Merhi* case, finding that all of the main print and media outlets in Lebanon publicised the indictment against Merhi, that the Special Tribunal for Lebanon's spokesman conducted interviews with national and international news organisations identifying Merhi as a suspect and that the Special Tribunal disseminated a radio broadcast discussing Merhi's involvement in the case that was also widely publicised in Lebanon.[111] The Special Tribunal also used Facebook and Twitter to bring further attention to the charges against Merhi.[112] These efforts to notify

[108] *Stoyanov v Bulgaria* App No 39206/07 (ECtHR, 30 April 2012) para 32.
[109] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at paras 71-72.
[110] Ibid at para 67.
[111] *Prosecutor v Merhi* (Decision to Hold Trial *in Absentia*) STL-13-04/I/TC, T Ch (20 December 2013) paras 36-40.
[112] Ibid at paras 35, 41.

Merhi of the charges against him led the Trial Chamber to conclude that it was satisfied that "Merhi must have been aware that he had been indicted as a co-accused in the *Ayyash* case" due to "the enormous publicity in Lebanon".[113] Based on the extent of the publicity given to the indictments it is reasonable to conclude that the evidence unequivocally shows that the accused were sufficiently aware of the charges against them, even if the Trial Chamber failed to explicitly make such a finding. The holding that the efforts made to inform the accused were sufficient to imply notice also implicitly acknowledges the diligence exercised by the appropriate authorities when seeking to notify the accused about the trial.

Article 22(2)(a) of the Special Tribunal for Lebanon's Statute mandates that an absence accused must have actual or implied notice of the proceedings against him or her before being tried *in absentia*. It is clear that, with the exception of the one anonymous accused that positively demonstrated his knowledge of the charges during a interview with Time magazine, there is no evidence that the five individuals accused by the Special Tribunal have actual knowledge of the charges against them. The terms of the Statute made it necessary for the Trial Chamber to determine if it could imply notice on the part of the accused and try them *in absentia*. It found that it could, and the Appeals Chamber supported that decision. While there is some question about the appropriateness of implying a waiver of the right to be present under these circumstances, the Trial Chamber's decision to do so appears to comply with the existing jurisprudence of the European Court of Human Rights. Therefore, although there is no evidence supporting the conclusion that the accused had actual knowledge of the charges against them, the Special Tribunal for Lebanon took suitable steps to determine that notice could be implied and that the trial was being conducted in compliance with international criminal law standards.

6.3 THE FORM OF THE NOTICE USED MAY NOT HAVE COMPLIED WITH INTERNATIONAL CRIMINAL LAW OR THE SPECIAL TRIBUNAL FOR LEBANON'S STATUTE

Although the steps taken to notify the accused were legally sufficient to justify trying them *in absentia*, there is some question as to whether the form of the notice provided by the Special Tribunal for Lebanon complied with international criminal law. The advertisement prepared by the Special Tribunal's Registrar, and provided to the

[113] Ibid at para 100.

Lebanese officials for publication, identified the accused by name and photograph, set out their dates and places of birth, named their parents and summarised the charges contained in the indictment.[114] The advertisement did not specify the location and date of the trial.

Omitting the location and date of trial from the advertisement may have caused it not to conform to the existing jurisprudence on notice. Multiple human rights bodies impose a duty on the trial court to inform the accused of the date and location of trial. The Human Rights Committee determined in *Osiyuk v Belarus* that the trial court's failure to inform the accused of the date of trial constituted insufficient efforts to notify the accused about the impending court proceedings in violation of his right to be present at trial.[115] The European Court of Human Rights found in *Sibgatullin v Russia* that before a court can find that the defendant has effectively waived his or her right to be present, the court has an obligation "to check whether the defendant has had the opportunity to know of the date of the hearing and the steps to be taken in order to take part."[116] In the *Nahimana* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda found that in order for notice to be sufficient to imply waiver "the accused must have had prior notification as to the place and date of trial."[117] The purpose of requiring the trial court to notify the accused of the date and location of trial is to give him or her sufficient time in which to prepare his or her defence and to otherwise participate in trial.[118]

The case law demonstrates that before an international or internationalised court or tribunal proceeds against an absent accused it must determine whether the accused had an opportunity to know the date and location of trial. However, it does not suggest that the accused must be informed of the date and location of trial simultaneously with the

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[114] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 55.
[115] *Osiyuk v Belarus*, Comm No 1311/2004 (30 July 2009) para 8.3; *see also* United Nations Human Rights Committee, 'General Comment No. 32: Right of Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) Doc. No. CCPR/C/GC/32 (2007) para 36.
[116] *Sibgatullin supra* note 99 at para 46.
[117] *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007) para 109.
[118] *Sibgatullin supra* note 98; *Yakovlev v Russia* App No 72701/01 (ECtHR, 15 March 2005); *Ziliberberg v Moldova* App No 61821/01 (ECtHR, 1 February 2005); *Osiyuk supra* note 115 at para 8.3; Ralph Riachy, 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon' (2010) 8 JICJ 1295, 1297-98; Lilian Chenwi, 'Fair Trials and Their Relation to the Death Penalty in Africa' (2006) 55(3) Intl & Comp L Q 609, 622.

charges. In fact, the law is unclear as to whether the trial court has the responsibility itself to notify the accused of the date and location of trial or whether the accused can learn of it through more informal means. The Human Rights Committee's Views in *Osiyuk* seem to impose that duty on the trial court, but the European Court of Human Rights and the International Criminal Tribunal for Rwanda only require that the accused have prior notice and does not specify the source of that notice. As a result, the omission of the date and location of trial from the advertisement notifying the accused of the charges may not be defective so long as the accused learned those details sufficiently in advance of trial to permit them to prepare their defence.

The failure to include the date and location of trial in the Special Tribunal for Lebanon's notices may be attributed to two causes. First, the Special Tribunal for Lebanon's Statute does not contain a provision requiring the inclusion in the notice of the date and location of trial even if that information is necessary under international criminal law. Article 22(2)(a) states that the accused must be made aware of the contents of the indictment either through service, publication in the media or notification to the accused's State of residency or nationality.[119] It does not require notice of the date and location of trial. Therefore, the information contained in the advertisement met the requirements set out by the Statute even if it did not comply with international criminal law.

Second, the rules requiring notice of the date and location of trial were established to protect the rights of an accused being tried soon after the events that make up the substance of the trial and where the trial is not the focus of significant notoriety. By comparison, the trial at the Special Tribunal for Lebanon has been the subject of intense international publicity and more than eight years passed between the day Rafik Hariri was assassinated and the start of trial. Further, two and a half years elapsed from when the Special Tribunal for Lebanon first tried to notify the accused of the charges against them and the start of trial. This indicates that there was ample time and opportunity for the accused to learn that they were accused of the crimes being addressed by the Special Tribunal for Lebanon and to then separately ascertain the date and location of trial so that they could prepare for, and participate in, trial. While the failure of the Special Tribunal for Lebanon to inform the accused about the date and location of trial may not technically comply with some interpretations of international criminal law, the accused still had

[119] STL Statute *supra* note 7 at art 22(2)(a).

sufficient time to find out the information necessary to enable them to adequately participate in trial. The trial date was established nearly six months before the start of trial.[120] The Trial Chamber confirmed the starting date for trial more than two months in advance.[121] This suggests that the trial date was set far enough in advance to give the accused the opportunity to learn the date and location of the trial and choose to participate if they desired.

There is also some doubt that the form of the notice conforms to the Special Tribunal for Lebanon's Rules of Procedure and Evidence. That uncertainty arises out of an incongruity about the manner in which the Special Tribunal for Lebanon's Trial Chamber characterised the nature of the absence of the four accused in *Ayyash* in its decision to conduct trial *in absentia.* In that decision, the Trial Chamber concluded that the original four accused in *Ayyash* could not be found and had absconded. However, the Statute draws a distinction between an absconding accused and one that cannot be found.[122] The former designation implies that the accused were aware of the charges against them and were intentionally evading justice.[123] The latter can include those accused that do not know they have been charged. However, it becomes clear from the context of the decision that the Trial Chamber regards the accused as having absconded rather than being unable to be found. The Trial Chamber's decision identifies several reasons indicating why the accused likely knew of the charges including: the number of times Lebanese authorities visited personal and business addresses associated with each accused and the widespread publicity throughout Lebanon given to the names and images of each accused.[124] The Trial Chamber also pointed out that there was evidence indicating that three of the four accused disappeared after being connected in the Lebanese media to the Special Tribunal for Lebanon's indictment.[125]

The Trial Chamber also did not draw a distinction between an absconding accused and one that "otherwise cannot be found" when it separately determined that Merhi could be tried in his absence. The Chamber concluded that the large amount of media coverage,

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[120] *Prosecutor v Ayyash et al.* (Order Setting a New Tentative Date for the Start of Trial Proceedings) STL-11-01/Pt/PTJ, Pre-Trial Judge (2 August 2013) para 53.
[121] *Prosecutor v Ayyash et al.* (Trial Transcript) STL-11-01, Trial Chamber (29 October 2013) p 3, lines 12-15.
[122] STL Statute *supra* note 7 at art 22(1).
[123] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 111.
[124] Ibid at paras 107-111.
[125] Ibid.

Merhi's absence from his recorded place of residence and the distribution of wanted posters identifying Merhi as a suspect, demonstrated that a trial *in absentia* was appropriate under the circumstances.[126] Despite the fact that the Statute appears to divide these two types of absent accused, the Trial Chamber approaches them as being the same. However, the context in which the terms are used, together with the Chamber's ultimate decisions to proceed with a trial *in absentia*, indicates that the Trial Chamber believed that the accused should be described as absconding because they had notice of the charges and their failure to appear represented an attempt to evade justice.

Whether it is appropriate to describe the accused as absconding, and subject to a trial *in absentia*, or as accused that otherwise cannot be found, which may result in a trial by default, turns largely on the adequacy of the notice they may or may not have received about the charges against them. Within the context of the Statute, the publication of the charges was considered sufficient to constitute notice. The Statute authorises trial *in absentia* when "notice has otherwise been given of the indictment through publication in the media."[127] Rule 76 *bis* of the Rules of Procedure and Evidence elaborate on the procedure that must be followed when advertising the indictment. The advertisement must provide notification "of the existence of an indictment" and should also call "upon the accused to surrender to the Tribunal" or otherwise submit to its jurisdiction.[128]

The advertisement publicising the indictment against the four accused in the *Ayyash* case was titled "Warrants of Arrest Issued By The Special Tribunal For Lebanon" and it identified each accused by name and photograph, their date and place of birth, their parents' names, and contained a summary of the charges contained in the indictment against each accused.[129] The advertisement issued in the *Merhi* case was almost identical.[130] Neither advertisement called upon the accused to surrender or otherwise submit to the jurisdiction of the Special Tribunal in contravention of Rule 76 *bis*.

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[126] *Prosecutor v Merhi* (Decision to Hold Trial *in Absentia*) *supra* note 111 at paras 108-111.
[127] STL Statute *supra* note 7 at art 22(2)(a).
[128] Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) rule 76 *bis*.
[129] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 55.
[130] Media advisory - STL requests that the Lebanese authorities take further steps to advertise new accused (11 October 2013) <www.stl-tsl.org/en/media/press-releases/2549-11-10-2013-stl-requests-that-the-lebanese-authorities-take-further-steps-to-advertise-new-accused> visited on 30 October 2017.

However, the advertisement does comply with the Statute, which only requires that notice be given of the indictment when notice is effectuated through publication. Here, the advertisement did just that by summarising the contents of the indictment.

It can be argued that although the advertisement does not explicitly call upon the accused to surrender to the jurisdiction of the Court, it contains the implication that the accused should surrender. The advertisements indicated that a warrant of arrest had been issued for each accused, which can clearly be interpreted as calling upon the accused to submit to the jurisdiction of the Special Tribunal for Lebanon. The statement made by President Cassese in conjunction with the issuance of the advertisement also supports the notion that the advertisement impliedly called upon the accused to participate in the proceedings. On 11 August 2011, one month before the advertisement was published, Cassese issued a public statement, directed at the accused and their families, discussing the Special Tribunal for Lebanon's mission and goals.[131] In that statement, he specifically addressed the procedure employed by the Special Tribunal when trying an accused in his or her absence while also acknowledging that "a major safeguard of a fair and just trial is the active participation of the accused."[132] To that end, he urged "all the indictees to come before the Tribunal. If you do not wish to come to the Tribunal in person, the option might be available…of appearing by video-link, thus participating in the proceedings without physically coming to The Hague."[133] The Trial Chamber found that the dissemination of President Cassese's 11 August 2011 open letter to the suspects "was so widely published and broadcast in Lebanon that each of the four Accused would have had to have been aware at the time of its publication that they were entitled to participate in a trial."[134]

Similar efforts were made to encourage Merhi to submit to the jurisdiction of the Special Tribunal for Lebanon. On 14 October 2013, the Special Tribunal issued an audio recording in Arabic, English and French to be broadcast on the radio, in which it "invited Mr. Merhi to participate in the proceedings, because, 'by participating, the accused can

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[131] Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon (11 August 2011) < https://www.stl-tsl.org/en/media/press-releases/670-11-08-2011-statement-of-judge-antonio-cassese-president-of-the-special-tribunal-for-lebanon> accessed 3 July 2017.
[132] Ibid.
[133] Ibid.
[134] *Prosecutor v Ayyash et al.* (Decision to Hold Trial *in Absentia*) *supra* note 30 at para 70.

fully defend themselves against the charges and evidence presented against them.'"[135] A second statement, released on 21 October 2013, indicated that following service through alternative measures the president of the Special Tribunal for Lebanon would seek an order from the Trial Chamber authorising trial to be conducted in Merhi's absence and inviting him "to consider whether you are prepared to face the Special Tribunal."[136] A third statement released on 13 December 2013 again asked if Merhi was "prepared to face the Special Tribunal for Lebanon", urging him to get legal advice, to appoint counsel on his behalf and advising him that he may have the right to participate in trial via video conference.[137]

The advertisements, when taken together with the information contained in other communications from the Special Tribunal for Lebanon, lead to the conclusion that the Special Tribunal wished to communicate to the accused that it wanted them to submit to its jurisdiction so that they could participate in the trial. Further, although that information was not explicitly found in the advertisements, it was publicised to an extent that makes it reasonable to find that the accused knew the Special Tribunal wished for them to participate. Any finding that the accused lacked sufficient notice because the necessary information was not contained in the actual advertisements could only result from a very mechanical reading of the Statute and the Rules that failed to give proper regard to the purpose of the rule. What is important is that each accused had the information and could exercise his free will when deciding whether or not to attend and participate in the trial. Because the accused had notice of the charges and did not appear for trial the Trial Chamber properly described them as absconding accused rather than ones that could not be found. Therefore, the trial conducted against them is best described as a trial *in absentia* rather than a trial by default.

6.4 CONCLUSION

Trial by default is distinct from trial *in absentia* in that it involves trial taking place in its entirety in the absence of the accused without an affirmative indication that the accused is aware of the charges against him or her or that the trial is being conducted. International criminal law generally disfavours trial by default but there is no prohibition against them. It is accepted that trials by default may take place; however, an accused

[135] *Prosecutor v Merhi* (Decision to Hold Trial *in Absentia*) *supra* note 111 at para 39.
[136] Ibid at para 41.
[137] Ibid at para 43.

that is tried without his or her knowledge must be entitled to an automatic retrial for the trial by default to be considered legitimate.

The Special Tribunal for Lebanon is the first international or internationalised criminal court or tribunal since the International Military Tribunal at Nuremberg that is authorised to conduct trials *in absentia*. The Special Tribunal for Lebanon's Statute specifically allows it to conduct trials *in absentia*, but it may also permit trials by default under certain circumstances. Whether the Special Tribunal is trying an accused *in absentia* or by default is dependent on the nature of the notice he or she received prior to the commencement of trial and whether his or her appearance at trial is sufficient to imply waiver of the right to be present.

The decisions in *Ayyash* and *Merhi* to try the accused in their absence put this issue to the test. Ultimately, the Trial Chamber determined, and the Appeals Chamber confirmed, that although the accused did not receive actual notice of the charges against them, notice could be implied for a number of reasons including the widespread publicity of the charges in Lebanon. Because the Special Tribunal for Lebanon found that the accused had implied notice of the charges against them the trial currently being conducted is a trial *in absentia* and not a trial by default. Further, whether the trial is *in absentia* or by default is largely a distinction without a difference, as international criminal law would not prevent the trial from taking place in either situation. International criminal law does not preclude courts and tribunals from holding trials by default so long as the accused has an automatic right to a retrial after he or she comes under the jurisdiction of the Court. The Special Tribunal for Lebanon does provide for an automatic retrial for those being tried by default and therefore its approach to this issue complies with international criminal law.

The decisions in *Ayyash* and *Merhi* also accentuate that what is really important about notice is that the accused possess the necessary information to make an informed choice to attend trial or not. The form in which that notice is conveyed is of lesser importance. While actual notice carries with it the indicia of reliability, it does not negate the potential efficacy of implied notice. A trial will be considered *in absentia* or by default based on what information the accused actually possessed and not the form in which he or she learned it.

CHAPTER 7: ABSENCES THAT ARISE AFTER THE BEGINNING OF TRIAL

The least controversial form of trial *in absentia* occurs when trial is allowed to continue in the absence of the accused after he or she has previously appeared before the court. Absence that starts after trial has begun is a form of trial *in absentia* because the accused has notice of the charges against him or her and has voluntarily decided to absent himself or herself from trial.[1] Some commentators describe this form of absence as a "partial *in absentia* trial" because the accused is only absent from some court sessions but not the entire trial.[2] Trial is often allowed to continue during this sort of absence because any concern about whether the accused had proper notice of the proceedings is eliminated by the fact that the accused previously appeared before the court.[3] Such absences are generally viewed as a waiver of the accused's right to be present.[4]

If the accused's right to be present at trial is understood as the right to choose whether or not to appear, absence that occurs after the trial has commenced is often interpreted as an affirmative decision on the part of the accused not to appear and a tacit agreement that trial can continue. There are numerous types of absences that can broadly be described as absences that begin after trial has commenced. They can generally be divided into one of two categories: voluntary or involuntary absences. The former category includes: when the accused disrupts trial to the extent that he or she must be removed from the court room; when the accused is in custody and refuses to leave his or her cell and appear in the courtroom; when the accused absconds after trial has already started; and absences authorised by the court or tribunal. The latter category consists of: when the accused is too physically ill to attend court sessions; when the accused disappears without explanation; when the accused is incarcerated by an authority other than the one conducting trial; and the death of the accused. Each of these categories is

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[1] Ralph Riachy, 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon' (2010) 8 JICJ 1295, 1301-2.
[2] Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 183; Chris Jenks, 'Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham Intl L J 57, 68.
[3] Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1310.
[4] Francis A. Gilligan and Edward J. Imwinkelreid, 'Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia' (2005) 56 S Car L Rev 509, 510.

distinct, although some types of absence will fall into more than one category.

7.1 VOLUNTARY ABSENCES

7.1.1 DEFENDANTS REMOVED FOR BEING DISRUPTIVE

All of the major international criminal courts and tribunals allow trial to continue in the absence of the accused where the accused has to be removed from the courtroom for being disruptive. Article 63(2) of the International Criminal Court's Statute states that if the accused "continues to disrupt the trial, the Trial Chamber may remove the accused…for such duration as is strictly required."[5] The Rules of Procedure and Evidence of both *ad hoc* Tribunals include Rule 80, which generally authorises the exclusion of any individual from the courtroom in order to maintain the dignity and decorum of the proceedings and specifically allows the Trial Chamber to order the removal of the accused if he or she has been consistently disruptive and has been warned that he or she may be removed.[6] Trial may continue in the absence of an accused removed under Rule 80.[7] The Rules of Procedure and Evidence at the Special Tribunal for Lebanon, Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia all also permit the Trial Chamber to continue trial in the absence of a disruptive accused.[8]

In many instances involving removal the accused is understood to have impliedly waived his or her right to be present through his or her disruptive behaviour. In *The Prosecutor v Mladić*, the International Criminal Tribunal for the former Yugoslavia's Trial Chamber ordered Mladić out of the courtroom for being disruptive and made an oral ruling that his behaviour constituted a waiver of his right to be present during the testimony of the witness then on the stand.[9] The International Criminal Court followed a

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[5] Rome Statute of the International Criminal Court (1998) art 63(2).
[6] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) rule 80; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) rule 80.
[7] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) rule 80(B); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) rule 80(B).
[8] Rules of Procedure and Evidence, Special Tribunal for Lebanon (as corrected 3 April 2014) rule 138(B); Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 31 May 2012) rule 80(B); Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 37(2).
[9] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (8 October 2012) 3730, lines

similar course in the *Ruto et al.* case where the Appeals Chamber found that when the Trial Chamber is faced with a continuously disruptive defendant "the requirement that the accused be present during trial is superseded by the duty of the Court to ensure that proceedings are carried out in an orderly manner in the interests of the fair and proper administration of justice."[10] Therefore, "the continuously disruptive behaviour of the accused may be construed as an implicit waiver of his or her right to be present."[11]

In reaching a similar conclusion, the European Court of Human Rights explained that the proper administration of justice requires that judicial proceedings be conducted with dignity and order.[12] In *Ananyev v Russia*, the European Court of Human Rights determined that "the flagrant disregard by a defendant of elementary standards of proper conduct" need not be tolerated by the Court and can justify the removal of the defendant from court and the continuation of trial in his or her absence on the grounds that his or her behaviour threatened the proper administration of justice.[13] In such a situation, the defendant's behaviour can be construed as an implicit waiver of his or her right to be present but only if the defendant could have reasonably foreseen that trial would continue in his or her absence.[14]

Although the international and internationalised criminal courts and tribunals that have considered the issue are in agreement, it is a questionable conclusion that a disruptive defendant necessarily implicitly waives his or her right to be present at trial. These rulings seem to be a way for the deciding court to justify its decision to remove the accused from the courtroom on the grounds that the accused waived his or her right to be present, when in fact the Court is really acting of its own volition. However, implying waiver in this situation may lack the necessary indicia required to find that an accused has properly waived a fundamental right. For the waiver of a fundamental right to be implied, it must be unequivocal.[15] An implicit waiver of the right to be present is

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[10] *Prosecutor v Ruto et al.* (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(A) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 51.

[11] Ibid.

[12] *Ananyev v Russia* (2012) 55 EHRR 18, 30 July 2009 at para 44.

[13] Ibid at paras 44-45.

[14] Ibid at para 45.

[15] *Colozza v Italy* (1985) 7 EHRR 516, 12 February 1985 at para 28; *Oberschlick v Austria* (1991) 19 EHRR 389, 23 May 1991 at para 51; *Pfeifer and Plankl v Austria*

unequivocal when it is determined that the accused unambiguously wants trial to continue in his or her absence and that he or she was aware that sufficiently disruptive behaviour could result in removal.[16] Although it demands a case specific inquiry, it is unlikely that every disruptive accused wishes to be removed from the courtroom and for trial to continue in his or absence. In fact, in many instances it is probably the opposite; that the accused would like to remain in the courtroom so that he or she might continue to interrupt the smooth running of the proceedings.

The existence of the accused's right to be present means it cannot be unilaterally taken away absent some action on the part of the accused. Normally that action is a waiver of the right to be present. However, some courts and tribunals have concluded that the accused can also forfeit his or her right to be present in recognition of the fact that the accused also has a duty to be present.[17] This concept of forfeiture is interesting because legal commentators have found that forfeiture is distinct from waiver.[18] Both involve the holder of a right relinquishing that right, however, what the court must find when determining the difference between waiver and forfeiture is quite different. Before a right can be considered waived a court must find that the holder of the right made a conscious decision to waive his or her rights, that he or she understood the parameters of that right, and the consequences of waiving it.[19] Forfeiture occurs by operation of law without accounting for the accused's state of mind.[20] A classic example of forfeiture drawn from United States' jurisprudence occurs when the accused pleads guilty before

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(1992) 14 EHRR 692, 25 February 1992 at para 37; *Jones v United Kingdom* App No 30900/02 (ECtHR, 9 September 2003); *Khalfaoui v France* (2001) 31 EHRR 42, March 2000 at para 51; *Sibgatullin v Russia* App No 32165/02 (ECtHR, 14 September 2009) para 46; *Yavuz v Austria* (2007) 45 EHRR 16, 27 August 2004 at para 45; *Battisti v France* App No 28796/05 (ECtHR, 12 December 2006); *Hermi v Italy* (2008) 46 EHRR 46, 18 October 2006 at para 74; *Ananyev supra* note 12 at para 44; *see also Prosecutor v Ruto et al. supra* note 10 at para 56.

[16] Ibid.

[17] Martin Böse, 'Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia' (2011) 37 NC J Intl L & Com Reg 489, 501; *citing Poitrimol v France* (1994) 18 EHRR 130, 23 November 1993 at para 35; *van Geyseghem v Belgium* (2001) 32 EHRR 24, 21 January 1999 (Bonello, J. concurring).

[18] Ibid at 500; Christoph J.M. Safferling, *International Criminal Procedure* (OUP 2012) 400.

[19] Peter Westen, 'Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure' (1977) 75 Mich L Rev 1214, 1214, 1235-37.

[20] Ibid.

trial and forfeits his or her right to a number of different fundamental rights.[21]

The underlying logic of finding that a disruptive accused had forfeited his or her right to be present is valid even if it eliminates the need for the traditional waiver of the right to be present. In many ways it is a more elegant justification for removing an accused from court than the more convoluted procedure of finding that the accused's behaviour constitutes an implied waiver of the right to be present. The failing of forfeiture, and the reason it should not be relied on when excluding an accused from court, is that it does not account for the requirement that the accused's decision not to attend trial must be unequivocal.

Forfeiture of the right to be present is also tied to the idea that proceeding in the absence of the accused is a punishment for the accused's disruptive behaviour. Disrupting the trial can be viewed as an attempt to interrupt the administration of justice.[22] Interruptions to the administration of justice can result in forfeiture of the right to be present, which in turn can be punished by proceeding in the accused's absence.[23] This has been borne out by the practice of international and internationalised criminal courts and tribunals. When Judge Alphons Orie of the International Criminal Tribunal for the former Yugoslavia ordered Ratko Mladić out of the courtroom on 10 April 2013, he stated "Mr. Mladić is removed from the courtroom for the duration of the testimony of the witness, the testimony of the witness during whose testimony he misbehaved."[24] The Trial Chamber's use of the term 'misbehaved' when ordering Mladić's removal suggests that he was excluded from trial as punishment for his actions. Additionally, Judge Orie ordered Mladić's removal from the courtroom without any advance warning of the consequences of his actions. This implies that Mladić forfeited his rights rather than waived them, as he had no opportunity to make an informed decision to waive his right to

[21] Ibid; Gilligan and Imwinkelreid *supra* note 4 at 523.
[22] *Prosecutor v Sesay et al.* (Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days) SCSL-04-15-T, T Ch (12 July 2004) para 8.
[23] *Mbenge v Zaire* Comm No 16/1977 (25 March 1983) para 14.2; *Maleki v Italy* Comm No 699/1996 (27 July 1999) para 9.1; Pons *supra* note 3 at 1309; Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 237.
[24] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (10 April 2013) 9575, lines 5-7.

be present. [25]

While some may see differentiating implied waivers from forfeiture as a distinction without a difference, it is necessary to be cautious about the long-term impact of such a conclusion. Interpreting trial disruptions leading to exclusion from trial as forfeiture fundamentally alters the character of presence at trial. It becomes less of a right controlled by the accused and more of a duty imposed on the accused. This difference in interpretation causes the accused to lose some control over his or her right to be present if more instances of removing a disruptive accused from court are interpreted as forfeitures rather than waivers. This change could lead to the greater exclusion of defendants from court and, in turn, threaten the accused's ability to effectively exercise other fair trial rights.

Exacerbating this problem is the fact that the Statutes of the international and internationalised criminal courts and tribunals are silent as to what constitutes a disruption sufficient to require the removal of the accused, leaving that determination up to the individual Trial Chambers.[26] Chambers confronted with this issue must be careful not to stifle legitimate dissent when permitting trial to continue in the absence of a disruptive accused.[27] To avoid this danger, Trial Chambers must be able to discern what constitutes a disruption from what is a legitimate legal argument. So as to prevent this provision from being abused, the International Criminal Court's Statute does specify that such measures can only be taken "in exceptional circumstances" and "after reasonable alternatives have proved inadequate."[28] However, Trial Chambers are still left with relatively little guidance as how to best adjudicate this issue.

The lack of clarity as to when to remove a disruptive accused is not exclusive to the International Criminal Court. A Trial Chamber of the Special Court for Sierra Leone tied its decision to continue trial in Samuel Hinga Norman's absence, in part, to the fact that he exhibited disruptive behaviour in the courtroom "on a number of occasions."[29]

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[25] Ibid at 9564, lines 15-25; 9565, lines 1-12.
[26] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP 2016) 967.
[27] William A. Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 307.
[28] Schabas *A Commentary on the Rome Statute supra* note 26 at 967.
[29] *Prosecutor v Norman et al.* (Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, The Second Accused, Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings) SCSL-04-14-PT, T Ch (1 October 2004) para 18.

However, the disruptions cited by the Court were in the form of two letters, submitted on 7 September 2004 and 20 September 2004, in which he threatened his absence from court if certain procedural issues remained unresolved, and not disruptive outbursts during trial hearings.[30] While threatening the smooth progress of court proceedings is certainly not the best way to have procedural issues addressed, this type of 'disruption', to use the Trial Chamber's characterisation, is not the sort that should lead to the exclusion of the accused from trial. There is a clear difference between threatening to disrupt the trial by not appearing and actually interrupting proceedings through in-court actions. The Special Court for Sierra Leone compounded its error by failing to consider the impact its decision would have on Norman's right to be present, rendering its decision suspect as it lacked adequate grounds to justify his exclusion from trial.

The *ad hoc* tribunals recognised the danger of unfairly excluding a disruptive accused and both tribunals chose to employ the proportionality principle to protect against it. The proportionality principle in this context stands for the proposition that any infringement on the accused's right to be present "must be in service of a sufficiently important objective" and that it must not impair the right to be present any more than necessary to accomplish that objective.[31] It remains to be seen whether the actions of either tribunal comply with that principle when ordering the exclusion of a disruptive accused.[32]

Michael Scharf attempts to clarify this issue by categorising the different types of disruptions that the accused may cause during trial and proposing responses to each type of disruption. The six categories suggested by Scharf are: (1) passive disrespect which should be generally ignored unless it substantially disrupts the proceedings; (2) a refusal to comply with the basic rules governing the proceedings should be met with an inquiry into why the defendant is refusing to comply and the reassurance that the defendant's

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[30] Ibid.

[31] *Zigiranyirazo v Prosecutor* (Decision on Interlocutory Appeal) ICTR-2001-73-AR73, A Ch (30 October 2006) para 14; *Milošević* v *The Prosecutor* (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel) IT-02-54-AR73.7, A Ch (1 November 2004) para 17; *see also* Yvonne McDermott, 'Trial Process: General Duty to Ensure the Integrity of the Proceedings', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 753.

[32] M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2014) 854; *citing Zigiranyirazo* (Decision on Interlocutory Appeal) *supra* note 31 at para 14.

rights will be protected as well as a warning that he or she may be excluded from trial if he or she fails to comply with court rules; (3) a single outburst or obscenity should be addressed with a warning that future similar behaviour will be met with sanctions including exclusion from court; (4) repeated interruptions may be addressed with exclusion from court following the appropriate warnings, and if the accused is excluded he or she should be kept apprised of the proceedings and be able to communicate with his or her counsel; (5) the use of a televised trial to incite mass violence must be guarded against as the court must not permit such actions; and (6) physical violence, which cannot be tolerated under any circumstances and should result in the immediate expulsion of the accused or the use of physical restraints.[33]

Scharf's recommendations indicate that a Trial Chamber interested in excluding the accused from trial should be cautious about doing so, and that in situations that do not involve physical violence, exclusion should be preceded by warnings that signal to the accused the consequences of their disruptions. Professor Scharf's view is generally comprehensive; however, he fails to address whether there should be any limitation as to the length of the exclusion and what sort of procedure should be followed when determining when the accused can return to trial. It is necessary to clarify these two issues because exclusions of unlimited duration have the potential to undermine the perceived fairness of trial and allow the court to conduct a trial *in absentia* even in instances where such trials are specifically forbidden.

A consideration of how long a disruptive accused may be excluded from trial before he or she can return to the courtroom is necessary to understand whether the exclusion complies with the right to be present. Article 63(2) of the International Criminal Court's Statute addresses this issue by obliquely stating that the removal should continue "only for such duration as is strictly required."[34] The term "duration as is strictly required" would appear to refer to the minimum amount of time it will take to achieve a particular goal although the Statute does not identify the goal that must be achieved during that period of time. It is assumed from the context that the Statute is referring to the minimum amount of time it will take to allow the accused to return to the courtroom without further disrupting the trial. This interpretation is supported by a 2016

[33] Michael P. Scharf, 'Lessons from the Saddam Trial: Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials' (2007) 39 Case W Res J Intl L 155, 167-68.
[34] Rome Statute of the International Criminal Court *supra* note 5 at art 63(2).

Directive issued by the Council of the European Union, which indicates that an disruptive accused should only be temporarily removed from the courtroom for the purpose of "securing the proper conduct of the criminal proceedings."[35] However, it could also refer to the period of time it will take to accomplish other court objectives including maintaining the proper administration of justice and ensuring the expeditiousness of trial. This lack of precision has the tendency to confuse the question of when a disruptive accused should be allowed to return to the courtroom.

None of the Statutes, Rules of Procedure and Evidence or Internal Rules of the other international or internationalised criminal courts and tribunals make any attempt to identify how long a disruptive accused should be excluded from court. The *ad hoc* Tribunals, Special Court for Sierra Leone and Special Tribunal for Lebanon all have almost identical rules pertaining to this issue and all are silent as to the appropriate length of the exclusion.[36] Internal Rule 37 at the Extraordinary Chamber in the Courts of Cambodia is worded differently from the rules of the other courts and tribunals but it largely has the same effect.[37] Rule 37(a), which is applicable to any person causing a disruption during trial, permits the Trial Chamber to exclude a persistently disruptive individual from attending the proceedings while Rule 37(b) specifically authorises the removal of a disruptive accused from the courtroom without identifying any limit on the length of the exclusion.[38] Although no specific time period is identified, the implication to be drawn from Rule 37 is that the Trial Chamber has the discretion to permanently bar any disruptive individual, including the accused, from attending the entirety of the remainder of the trial.

The omission from the Statutes and Rules of Procedure and Evidence of the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone of the procedure to be followed when determining

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[35] Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5 at para 40.

[36] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) rule 80; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) rule 80; Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 31 May 2012) rule 80; Rules of Procedure and Evidence, Special Tribunal for Lebanon (as corrected 3 April 2014) rule 138.

[37] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 37.

[38] Ibid.

how long to exclude a disruptive accused is somewhat mitigated through the inclusion of a provision in each court's rules permitting an excluded accused to continue to attend trial via videoconferencing.[39] These provisions act as a guarantee that the accused can continue to participate in trial even after being excluded from the courtroom. That right is only limited to the extent that the Special Court for Sierra Leone has no provision mandating that the accused be able communicate with his or her counsel while remotely participating in trial. However, in practice it is unlikely the Special Court for Sierra Leone would forbid an excluded accused from communicating with his or her counsel due to the fair trial concerns that would be raised by such a prohibition.

In light of the *ad hoc* Tribunals' emphasis on the importance of the accused's presence at trial, it is surprising that they have not followed suit and found that a disruptive accused be permitted to participate in trial by way of video technology. Implementing a system that allows an excluded accused to continue to participate in trial complies with the proportionality principle by producing the dual effect of protecting the order and decorum of trial while also letting the accused continue to participate in trial. The failure of the *ad hoc* Tribunals to pursue this practice represents a missed opportunity.

Instead, it was left to the Trial Chambers of the *ad hoc* Tribunals to determine the duration of a disruptive accused's forced absence from court. In the *Mladić* case, Trial Chamber I at the International Criminal Tribunal for the former Yugoslavia had many opportunities to consider this issue due to Mladić's repeated disruptions. Each time Mladić was removed from the courtroom he was not allowed to return until after the completion of the testimony of the witness then on the stand.[40] The Court's decision to identify a specific period of time for the exclusion, rather than specifying what Mladić must do to be allowed to return to court, supports the idea that a disruptive accused has forfeited his or her right to be present for which he or she must be punished. The limitation on the duration of the exclusion found in Article 63(2) of the International

[39] Rome Statute of the International Criminal Court *supra* note 5 at art 63(2); Rules of Procedure and Evidence, Special Court for Sierra Leone *supra* note 36 at rule 80; Internal Rules, Extraordinary Chambers in the Courts of Cambodia *supra* note 37 at rule 38(b).
[40] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (8 October 2012) 3738, lines 1-4; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (11 October 2012) 4041, lines 1-2; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (30 January 2013) 7738, lines 1-5; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (10 April 2013) 9575, lines 5-7.

Criminal Court's Statute stands in contrast to the procedure followed by the International Criminal Tribunal for the former Yugoslavia. It reinforces the notion that the accused's exclusion is not a punishment by making the accused's return to the courtroom contingent on the accused's ability to observe the proper decorum of the court.[41]

All of the international criminal courts and tribunals permit trial to continue in the absence of the accused when his or her disruptive behaviour necessitates his or her removal from the courtroom and exclusion from trial. This form of absence is considered acceptable, even by those courts or tribunals that make a point of highlighting the importance of the accused's presence at trial, because it satisfies another significant objective, the proper administration of justice. In an effort to accommodate the exclusion of the accused from trial with his or her right to be present, most courts and tribunals interpret the disruption as an implied waiver of the right although it is debatable whether such a waiver is sufficiently unequivocal to be effective. However, some courts and tribunals are also willing to construe the accused's disruption as a forfeiture of the right to be present and exclusion from trial as punishment for their actions. It is not always clear what aim is being achieved by excluding the accused, but the practice of international and internationalised courts and tribunals suggests that the exclusion serves to discipline disruptive defendants and give them an opportunity to change their behaviour so as to be able to continue to participate in the trial.

7.1.2 AN INCARCERATED ACCUSED REFUSES TO APPEAR FOR TRIAL

Significant questions exist about how a court should proceed when an incarcerated accused refuses to appear for trial. When faced with an accused that refuses to appear, courts generally try to ascertain the reason for the accused's refusal and determine whether or not it is appropriate to proceed under the circumstances. Courts that do decide to continue trial without the accused typically do so by finding that the accused's decision not to attend trial constitutes a waiver of his or he right to be present.

The Special Court for Sierra Leone is the Court with perhaps the most experience prosecuting defendants that were in custody but refused to appear in court. Despite the fact that Article 17(4)(d) of the Statute for the Special Court for Sierra Leone extends the right to be present at trial to the accused, Rule 60 of the Rules of Procedure and Evidence identifies situations in which trials may be conducted in the absence of the accused. Rule

[41] Rome Statute of the International Criminal Court *supra* note 5 at art 63(2).

60 authorises the Court to conduct trials *in absentia* when the accused has appeared for his or her initial appearance and either refuses to exercise his or her right to appear at trial or absconds.[42] In either case the accused "may be represented by counsel of his choice" and the matter can proceed if the Judge or Trial Chamber "is satisfied that the accused has, expressly or impliedly, waived his right to be present."[43] The requirement that the accused must make his or her initial court appearance before the Special Court for Sierra Leone can commence with an *in absentia* trial exists so as to ensure that the accused had notice of the charges against him or her before being tried in his or her absence. It also satisfies the principle *semel praesens semper praesens*, meaning that to be present once at trial entails being present forever.[44]

Charles Taylor tested the parameters of Rule 60 as he repeatedly voluntarily absented himself during his trial. He refused to appear at the start of his trial because of concerns about the adequacy of his defence team, his ability to receive a fair trial and his inability to communicate those concerns to the Principal Defender employed by the court.[45] The Trial Chamber ruled that pursuant to Rule 60(A)(i) and 60(B), Taylor's non-attendance acted as a waiver of his right to be present and the Chamber allowed the prosecution to make its opening statement in Taylor's absence.[46] Taylor was again absent when the Trial Chamber reconvened on 25 June 2007 and the Chamber again found a voluntary waiver and continued in his absence.[47]

Taylor eventually agreed to attend trial, although he was voluntarily absent from trial on several other occasions. The reasons for his subsequent absences varied widely and included illness, religious observances, a refusal to attend trial because of complaints about how he was transported to the courtroom and concerns that his personal effects had been tampered with at the detention centre.[48] In each instance, Taylor either explicitly

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[42] Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) rule 60(A).
[43] Ibid at rule 60(B).
[44] Gaeta *supra* note 23 at 232-33.
[45] *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (4 June 2007) 250, lines 15-24.
[46] Ibid at 258, lines 28-29; 259, line 1; 267, lines 4-16.
[47] *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (25 June 2007) 342, lines 13-19.
[48] *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (18 August 2008) 14051, lines 16-29; 14052, lines 1-19; *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (19 August 2008) 14059, lines 23-29; 14060, lines 1-14; *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (27 January 2010) 34187, lines 17-26; *Prosecutor v*

waived his right to be present and trial continued in his absence or, if he did not waive the right to be present, the court agreed to adjourn trial until he was able to return.[49] The Trial Chamber typically permitted an adjournment upon a finding that continuing in Taylor's absence could result in a violation of his right to a fair trial, however, before ordering the adjournment the Trial Chamber demanded that the threat to his fair trial rights must be based on more than a supposition.[50]

The most significant absence occurred when Taylor and his defence team walked out of trial immediately before the prosecution's closing arguments due to the Court's refusal to consider his Final Trial Brief after finding that it had not been submitted in a timely fashion. The Court ruled that Taylor was voluntarily absenting himself from trial in accordance with Rule 60 and ordered that the trial continue in his absence.[51] Both Taylor and his counsel refused to appear the following day and Taylor sent a note to the court indicating that he waived his right to be present.[52] Taylor and his counsel did not return to court until the Appeals Chamber reversed the decision of the Trial Chamber not to accept the defence's Final Trial Brief.[53] Trial was then able to resume and continue until its conclusion.

The Trial Chamber took a fairly permissive approach to Taylor's presence throughout much of the trial. The Chamber generally allowed Taylor to exert significant control over when he would or would not be present by agreeing to adjourn trial at his

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Taylor (Trial Transcript) SCSL-03-01-T, T Ch (30 March 2010) 38198, lines 21-29; 38199, lines 1-9; *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (31 March 2010) 38229, lines 17-26; *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (28 April 2010) 40149, lines 18-23; *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (10 May 2010) 40721, lines 3-10.

[49] *Taylor* 18 August 2008 Transcript *supra* note 48 at 14057, lines 19-22; *Taylor* 19 August 2008 Transcript *supra* note 48 at 14068, lines 5-20; *Taylor* 27 January 2010 Transcript *supra* note 48 at 34196, lines 3-10; *Taylor* 31 March 2010 Transcript *supra* note 47 at 38339, lines 17-26; *Taylor* 28 April 2010 Transcript *supra* note 48 at 40152, lines 14-18.

[50] *Taylor* 18 August 2008 Transcript *supra* note 48 at 14057, lines 19-22; *Taylor* 19 August 2008 Transcript *supra* note 48 at 14068, lines 5-20; *Taylor* 27 January 2010 Transcript *supra* note 48 at 34196, lines 3-10.

[51] *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (8 February 2011) 49187, lines 20-29; 49188, lines 1-16.

[52] *Prosecutor v Taylor* (Trial Transcript) SCSL-03-01-T, T Ch (9 February 2011) 49295, lines 1-8.

[53] *Prosecutor v Taylor* (Decision on Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief) SCSL-03-01-T, T Ch (3 March 2011) para 67.

request or continue pursuant to Taylor's explicit waiver. However, it departed from that practise both at the beginning and the end of trial. Although Taylor raised significant procedural concerns that may have had a bearing on his ability to receive a fair trial, the Chamber saw fit to find that Taylor's refusal to appear warranted continuing trial in his absence. The Chamber's decision to continue proceedings under these circumstances stands in stark contrast to its decision on 18 August 2008 to adjourn trial out of a concern that to proceed could threaten Taylor's right to a fair trial.[54] This sort of inconsistency in application tends to suggest that the decision to proceed or adjourn trial in these situations were not informed by a desire to protect Taylor's fair trial rights but rather, were the result of some other consideration. It is likely that the Court drew a distinction between instances in which it believed Taylor's non-attendance was a result of his intentionally interrupting trial versus situations where his absence was not of his own choosing. Despite the fact that the Special Court for Sierra Leone has specific objective rules to follow when the accused does not appear for trial, it is apparent that decisions to adjourn or continue trial are most likely based on the court's own assumption about the reasons for the accused's absence.

The Taylor trial was not the Special Court for Sierra Leone's only opportunity to apply and interpret Rule 60. On 7 July 2004, Defendant Augustine Gbao refused to appear in court and indicated that he would not be attending the remainder of the proceedings because he did not recognize the authority of the Special Court for Sierra Leone.[55] In dealing with this issue, The Trial Chamber reiterated an earlier oral ruling in which it found that Gbao had expressly waived his right to be present at trial by refusing to appear.[56] The Chamber acknowledged that trial in the absence of the accused is "an extraordinary mode of trial" but it also determined that the existing jurisprudence demonstrates "the legal sustainability of trial *in absentia* in certain circumstances."[57] The Chamber found that this was one of those circumstances and that trial could continue in the absence of Gbao pursuant to Rule 60(A)(1) of the Special Court for Sierra Leone's

[54] *Taylor* 18 August 2008 Transcript *supra* note 48 at 14051, lines 16-29; 14052, lines 1-19.
[55] *Prosecutor v Sesay et al.* (Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days) SCSL-04-15-T, T Ch (12 July 2004) para 2.
[56] Ibid at para 3.
[57] Ibid at paras 8, 11.

Rules of Procedure and Evidence.[58] The Trial Chamber also observed in its decision that criminal law does not allow an absent or disruptive accused "to impede the administration of justice or frustrate the ends of justice."[59]

A Trial Chamber of the Special Court for Sierra Leone had to deal with this issue again the same year when all three of the Defendants in *Prosecutor v Norman, et al.* refused to appear for trial. On 20 September 2004, trial was briefly halted when none of the Defendants appeared for the afternoon hearing.[60] When court resumed later that day, Allieu Kondewa appeared in the absence of the other two defendants and explained that he was ill and was granted permission to be excused so that he might rest and recuperate.[61] Through counsel, Moinina Fofana linked his non-appearance to concerns regarding witness anonymity, although the following day he reconsidered his position and agreed to return to court.[62] Samuel Norman indicated via letter that he would not attend court sessions again until certain perceived procedural deficiencies were addressed.[63] In determining that trial could continue in Norman's absence, the Chamber relied heavily on the earlier decision in the *Gbao* case and found "that it is settled law, nationally and internationally, that while an accused person has the right to be tried in his presence, there are circumstances under which a trial in the absence of the accused can be permitted."[64] In the judgment of the Trial Chamber, it is not "in the interests of justice to allow the Accused's deliberate absence from the courtroom to interrupt the trial" and that any deliberate absence "will certainly undermine the integrity of the trial and will not be in the interests of justice."[65]

In both the *Gbao* case and the *Norman* case, the respective Trial Chambers expressed a concern that the interests of justice are undermined when the accused's deliberate absence is allowed to disrupt the course of trial. As the decision regarding Zdravko Mucić in the *Čelebići Camp* case at the International Criminal Tribunal for the former Yugoslavia demonstrates, threats to the proper administration of justice have been used to justify the continuation of trial against the accused even in the absence of

[58] Ibid at para 12.
[59] Ibid at para 8.
[60] *Norman et al.* (Ruling on the Issue of Non-Appearance) *supra* note 29 at para 2.
[61] Ibid at para 3.
[62] Ibid at paras 6-7.
[63] Ibid at para 5.
[64] Ibid at para 17.
[65] Ibid at para 22.

waiver.[66] During the *Čelebići Camp* case, one of the accused, Zdravko Mucić, refused to appear in court and also explicitly refused to waive his right to be present.[67] The Trial Chamber chose to proceed in Mucić's absence despite the fact that he had refused to waive his right to be present. The Trial Chamber reasoned that Mucić's absence was a tactic to delay trial and that a "a moral and legal obligation" was owed to Mucić, "the country and to the universe at large and to all involving the administration of justice" to continue trial in his absence.[68] The Trial Chamber indicated that Mucić could not unilaterally decide not to attend trial and refuse to waive his right to be present as permitting him to do so would be tantamount to a finding that Mucić had the right to control the progress of the proceedings.[69]

The Trial Chamber also made clear that Mucić was required to appear at trial, or nominate counsel to appear on his behalf, unless able to provide a valid excuse for his non-appearance.[70] The Trial Chamber asserted that "[i]f he wants to stay away, he has to forgo his rights -- he has to waive his right to be present".[71] Although expressed somewhat artlessly, the Trial Chamber essentially reached the conclusion that refusal to appear at trial without an excuse acts as an implied waiver of the right to be present at trial. This interpretation is borne out by the fact that the Registrar informed Mucić that his refusal to come to court was interpreted by the Trial Chamber as a waiver of his right to be present.[72]

The requirement that a waiver of the right to be present be unequivocal would seem to preclude a finding that Mucić impliedly waived the right to be present at trial. Here, Mucić specifically declared that he did not wish to waive his right to be present. Therefore, any implied waiver of the right would necessarily be equivocal as it stands in direct contradiction to his explicit statement. That the Trial Chamber decided to proceed in has absence despite this conflict suggests that while it may be procedurally preferable to find that the accused has either explicitly or implicitly waived his or her right to be

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[66] *Prosecutor v Delalić et al.* (Trial Transcript) IT-96-21, T Ch (17 April 1998) 11376, lines 17-24; 11377, lines 1-10.
[67] Ibid at 11332, lines 17-22.
[68] Ibid at 11376, lines 17-24; 11377, lines 1-10.
[69] *Prosecutor v Delalić et al.* (Trial Transcript) IT-96-21, T Ch (16 April 1998) 11262, lines 8-14.
[70] *Delalić et al.* 17 April 1998 Trial Transcript *supra* note 66 at 11377, lines 22-25; 11378, lines 1-3.
[71] *Delalić et al.* 16 April 1998 Trial Transcript *supra* note 69 at 11262, lines 2-3.
[72] *Delalić et al.* 17 April 1998 Trial Transcript *supra* note 66 at 11334, lines 9-11.

present, such a waiver is not strictly necessary if the court can justify continuing trial on the grounds that to do so would facilitate the proper administration of justice.

The issue of how to proceed when an accused refuses to attend trial was also taken up by the International Criminal Tribunal for Rwanda. Rule 82*bis* was added to the Tribunal's Rules of Procedure and Evidence in May 2003 following the *Barayagwiza* trial to establish a procedure whereby trial could proceed when the accused refuses to attend trial.[73] In that case, the Court interpreted Barayagwiza's refusal to appear as a boycott of the trial. However, the decision to conduct the entirety of trial in his absence means it should be considered a trial *in absentia* rather than an absence occurring after the start of trial.

The International Criminal Court has never faced the issue of an incarcerated accused refusing to appear in court absent some other justification. Whether trial will continue at the Court in this situation remains an open question although its answer may lie in Rules 134 *bis*, 134 *ter* and 134 *quater* of the Court's Rules of Procedure and Evidence. It is thought that the new rules prevent an accused from simply refusing to appear for trial at the International Criminal Court, however it is unclear in practice what the consequence might be if an accused refuses to appear. [74]

As with other absences from trial, international and internationalised criminal courts and tribunals confronted with an incarcerated accused that simply refuses to appear in court typically try to find that the accused has waived his or her right to be present during trial and to proceed with trial. However, in at least one instance a defendant explicitly refused to waive his right to be present and the relevant Trial Chamber chose to proceed in the accused's absence. Electing to proceed when waiver has been explicitly refused indicates that waiver may not be strictly necessary to continue trial in the accused's absence and that trial may continue so as to maintain the proper administration of justice. The practice followed by the Special Court for Sierra Leone in the *Taylor* case also demonstrates that there is room for discretion based on the perceived voluntariness of the absence when deciding whether to proceed in the absence of an accused that refuses to appear for trial.

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[73] Gaeta *supra* note 23 at 235-36; William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (CMP Publishing, Ltd 2009) 364.
[74] William A. Schabas and Veronique Caruana, 'Article 63: Trial in the Presence of the Accused', in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Hart Publishing 2016) 1584.

7.1.3 THE ACCUSED ABSCONDS AFTER THE START OF TRIAL

There are few, if any, examples in international criminal law of the accused absconding during the course of proceedings. It is an issue that more commonly arises in courts of national jurisdiction. Most national courts choose to continue trial in the absence of an absconding accused regardless of whether that court permits trials *in absentia* under other circumstances. An example of this can be found in the federal courts in the United States. Typically, United States' federal courts allow trials *in absentia* in very limited circumstances; the primary exception being when the accused absconds during trial. Rule 43(a) of the United States' Federal Rules of Criminal Procedure specifically indicates that the accused must be present for "every trial stage, including jury empanelment and the return of the verdict".[75] However, when an accused absconds after trial begins, Rule 43(c) permits courts to depart from that general presence requirement and assume that the accused impliedly waived his or her right to be present and allow trial may continue to completion in the absence of the defendant.[76] The United States Supreme Court confirmed in *Crosby v The United States* that the absence of the accused from court following the commencement of trial constitutes "a knowing and voluntary waiver of the right to be present."[77] The Supreme Court justified its decision on the grounds that the continuation of the trial after the accused has become absent "deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him."[78]

Continuing trial against an absconding accused is not a practice limited to accusatorial criminal justice systems. Some civil law countries that generally do not allow trials *in absentia*, like Germany and Turkey, also allow trial to continue if the accused absconds after the beginning of proceedings. Rule 231(2) of the *Strafprozeßordnung* (the German Code of Criminal Procedure) only permits trial to continue in the absence of the accused when: 1) the trial court has already examined the accused; and 2) the court does not think the outcome of the trial is dependent on the continuing presence of the accused.[79] This system recognises the important role the accused plays in the process of determining the truth, which is a central feature of a

[75] Federal Rules of Criminal Procedure, United States of America (2017) rule 43(a).
[76] Ibid at rule 43(c).
[77] *Crosby v The United States*, 506 U.S. 255, 261 (1993).
[78] Ibid.
[79] Code of Criminal Procedure, Germany (as amended 23 April 2014) section 231(2).

German criminal trial, but is also willing to dispense with the presence of the accused once that role has been fulfilled. It imagines that the accused's most important function during trial is as a source of information, and that he or she does not play as important part in confronting the witnesses or otherwise testing the evidence against him or her. Turkey follows a somewhat similar procedure to that of the Germans. The *Ceza Muhakemesi Kanunu* (the Turkish Penal Procedure Code) allows trial to continue if the accused escapes from the courtroom during trial, but only if he or she has already been questioned during the proceedings and the court determines that his or her presence is no longer necessary.[80] In Turkey, trial can also be conducted in the absence of an accused that has not testified so long as sufficient evidence exists to sustain a judgment other than conviction.[81]

The willingness of national courts that otherwise do not allow trials *in absentia* to continue without the participation of an absconding accused suggests a similar rule should apply at international and internationalised criminal courts and tribunals. However, there is some belief that national court practices as to absconding defendants do not have relevance in international criminal law. One particular cause for unease relates to the public perception of international trials held under these circumstances. The need to ensure a fair trial and to "avoid any miscarriage of justice" is of paramount concern in the international context.[82] These are also sources of anxiety in national courts, but those issues are balanced by the need to prevent individuals from avoiding punishment for crimes they are alleged to have committed by remaining absent until the expiration of the applicable statutory limitation periods expire for the crime he or she is alleged to have committed.[83] This is not a concern in international courts because international crimes do not have statutory limitations and courts will not become time-barred from prosecuting an accused coming under their control.[84]

Instead, many international and internationalised criminal courts and tribunals are temporary, and the contumacious accused may be able to avoid adjudication by remaining absent until the temporary court closes.[85] This concern has diminished since the founding of the International Criminal Court and the establishment of the United

[80] Code of Criminal Procedure, Turkey (2009) art 194.
[81] Code of Criminal Procedure, Turkey (2009) art 193.
[82] Antonio Cassese, *International Criminal Law* (OUP 2003) 404.
[83] Ibid.
[84] Rome Statute of the International Criminal Court supra note 5 at art 29.
[85] Antonio Cassese, *International Criminal Law* (2nd Ed, OUP 2008) 393-394.

Nations Mechanism for International Criminal Tribunals and the Residual Special Court for Sierra Leone. The former, as a permanent court, is not temporally limited with regard to its period of operation and will remain open indefinitely to try any accused that come under its control. The latter two bodies were established specifically to continue the jurisdiction of the *ad hoc* Tribunals and the Special Court for Sierra Leone respectively, and their existence guarantees that a venue will exist to try an absconding accused if he or she is located after the court or tribunal that would otherwise have had jurisdiction has closed.[86]

The Statutes and Rules of Procedure and Evidence of the various international criminal courts and tribunals are largely silent as to whether trial can continue if the accused has absconded from trial after its start. The International Law Commission and the Preparatory Committee charged with creating a draft statute for the International Criminal Court both considered including a rule in the International Criminal Court's Statute allowing trial to continue when the accused absconded or refused to appear at trial but that rule never made it into the final Rome Statute.[87] The absence of authority specifically addressing the issue of an accused who absconds has led to disagreement over whether trial *in absentia* against an absconding accused may occur at the International Criminal Court. Judge Chile Eboe-Osuji questioned the assumption that the Rome Statute forbids trial *in absentia* against an absconding accused in his dissenting opinion to the Trial Chamber's Decision on the Prosecution's Motion for Reconsideration of the Decision excusing Uhuru Kenyatta from Continuous Presence at Trial.[88] However, a number of other International Criminal Court judges disagree with Judge Eboe-Osuji's interpretation of the Statute and largely feel that the Statute prevents the court from trying

[86] Statute of the United Nations Mechanism for International Criminal Tribunals (22 December 2010) art 1; Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (11 August 2010) art 1.

[87] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', vols 1-2, *as reported in* Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol 2 (Transnational Publishers, Inc 2005) 455-57.

[88] *Prosecutor v Kenyatta* (Dissenting Opinion of Judge Eboe-Osuji to Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr. Kenyatta from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (26 November 2013) paras 71-3.

an absconding accused *in absentia*.[89] In the end, the Court has never been called upon to definitively decide this issue and the debate surrounding it is entirely limited to the *dicta* of a several different opinions and dissents.

How international criminal law should treat an absconding accused remains speculative as there has yet to be a situation in which an international or internationalised criminal court or tribunal has been called upon to decide the issue. This lack of authority leads to the conclusion that there is no rule addressing whether trial can continue in the absence of an absconding accused. While some guidance might be derived from the debate contained in *dicta* at the International Criminal Court, it is important to note that those arguments were mainly based on interpretations of the Statute and not grander international criminal law principles. Therefore, it appears that whether trial can continue without an absconding accused will largely depend on how the controlling Statute is interpreted rather than a pre-existing rule of international criminal law.

7.1.4 COURT AUTHORISED ABSENCES

There have been instances in which international and internationalised courts and tribunals have agreed to excuse the accused from attending some parts of the trial proceedings after the beginning of trial. This practice was common during trials held at Nuremberg following World War II where defendants received permission to be absent from trial to facilitate defence preparation, attend to family matters and for other "compassionate reasons".[90] The International Criminal Tribunal for the former Yugoslavia also dealt with a similar issue when it granted Vinko Pandurević's request for provisional release to attend a memorial service for his father during the winter trial

[89] *Prosecutor v Ruto et al.* (Joint Separate Opinion of Erkki Kourula and Anita Ušaka to the Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial") ICC-01/09-01/11, A Ch (25 October 2013) para 5; *Prosecutor v Ruto et al.* (Judgment on the Appeal) *supra* note 10 at para 54; *Prosecutor v Ruto et al.* (Dissenting Opinion of Judge Herrera Carbuccia to the Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09-01/11, T Ch V(A) (13 June 2013) para 5; *Prosecutor v Kenyatta* (Partial Dissenting Opinion of Judge Ozaki to the Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11,T Ch V(B) (18 October 2013) paras 9-10.

[90] Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol 15 (U.S. Government Printing Office, 1949-53) 339.

recess in December 2007.[91] Due to circumstances beyond Pandurević's control, he was unable to return to The Hague prior to the recommencement of trial in January.[92] The Court continued trial in his absence and considered him to have waived his right to be present a trial.[93] Viewing a request to be absent as a waiver of the right to be present is a logical conclusion. When making a request to be excused from trial the accused must have considered that one effect of his or her absence is that trial will continue without them. Further, the accused must have also decided that the reason underlying their request to be absent, be it to prepare their case, attend a funeral, or some other compassionate reason, outweighs the benefit they will receive from being present during trial. Therefore, although the accused may not have expressly waived the right to be present, the request for excusal is a tacit waiver of the right to be present.

The International Criminal Court also addressed how to deal with a defendant's request to be excused from trial in both the *Kenyatta* and *Ruto and Sang* cases. There, the requests were based on the need of Kenyatta and Ruto to fulfil their official duties as president and deputy president of Kenya. The litigation history of this issue, and its ultimate outcome, is addressed more fully in other chapters, but for the purposes of this section it should be noted that each Trial Chamber decided that Kenyatta and Ruto could be absent from some parts of their trials but had to be present for other parts.[94] However, consistent with Rule 134 *quater* of the Court's Rules of Procedure and Evidence, any request for excusal from those sessions at which attendance is not required has to be accompanied by a written waiver of the right to be present.[95] By requiring a written waiver of the right to be present the Court emphasized the fact that a waiver must accompany an excusal from trial.

Vojislav Šešelj raised a related issue during his trial at the International Criminal

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[91] *Prosecutor v Popović et al*. (Decision on Pandurević's Request for Provisional Release on Compassionate Grounds) IT-05-88-T, T Ch (11 December 2007).
[92] *Prosecutor v Popović et al.* (Trial Transcript) IT-05-88-T, T Ch (10 January 2008) 19330, lines 10-18.
[93] Ibid.
[94] *Prosecutor v Kenyatta* (Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) ICC-01/09-02/11, T Ch V(B) (18 October 2013) para 124; *Prosecutor v Ruto et al.* (Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09-01/11, T Ch V(A) (13 June 2013) para 104.
[95] Rules of Procedure and Evidence, International Criminal Court (as amended 2013) rule 134 *quater*; *see also Prosecutor v Ruto et al.* (Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*) ICC-01/09-01/11, T Ch V(A) (18 February 2014) para 67.

Tribunal for the former Yugoslavia he demanded that the Trial Chamber remove him from court asserting that he had the right to request his own removal.[96] The Trial Chamber rejected that request on the grounds that no such right exists and opined that Šešelj had misunderstood the law on presence.[97] However, it could be argued that the accused does have the right to request his or her removal from the courtroom. If the accused has the right to refuse to appear in court at all, as demonstrated at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, he or she should also be able to excuse himself or herself from a hearing if he or she sees fit. This is essentially what Charles Taylor did during the closing arguments in his case as discussed at greater length in the next section. There is no substantive difference between Taylor's refusal to appear in court and Šešelj's request to be removed from court. In actual fact, moments after he made his request to be removed, the Trial Chamber ordered Šešelj's removal for being disruptive.[98] This allowed the court to give the appearance that it was in control of the situation because it ordered Šešelj's absence rather than acceding to his request that he be allowed to absent himself. In so doing, the court could claim a small, if hollow, victory.

It appears that international and internationalised criminal courts and tribunals prefer to understand an absence precipitated by the accused as a waiver of the right to be present as opposed to an exercise of a right to be absent. To the extent a right to be absent exists, it has been suggested that the accused can only effectively exercise it by disrupting proceedings to such an extent that the court orders his or her removal.[99] However, as the *Šešelj* case demonstrates, the court will maintain its authority over the situation by not allowing the accused to unilaterally absent himself or herself from the courtroom during a trial session at which he or she as already appeared. It is likely that courts wish to approach the issue in this way to avoid a position granting the accused the ability to take over the trial schedule by insisting on being brought to, and removed from, the courtroom at his or her discretion.

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[96] *Prosecutor v Šešelj* (Trial Transcript) IT-03-67-PT, T Ch I (1 November 2006) 635, lines 5-9.
[97] Ibid at 635, lines 10-14.
[98] Ibid at 635, lines 21-25; 636, lines 1-4.
[99] Schabas *A Commentary on the Rome Statute supra* note 26 at 1036.

7.2 INVOLUNTARY ABSENCES FROM TRIAL

7.2.1 THE ACCUSED IS ABSENT FROM COURT DUE TO ILLNESS

Absences resulting from the accused being too ill to appear constitute a disruption to trial, albeit a non-intentional one.[100] International and internationalised criminal courts and tribunals have proven to be flexible and have responded with greater care when the accused's absence results from illness because the accused has no control over this sort of absence. [101] During the Nuremberg Trial the Tribunal was informed at the beginning of each day whether illness would prevent one or more defendants from attending that day's hearings. [102] The Tribunal took no particular action with regard to those absent defendants, and counsel for the absent defendants rarely objected to trial proceeding outside of their clients' presence.[103] By the close of trial, a defendant's absence was noted in the record but the Court had stopped tracking the reasons that individual defendants were not present in court.[104]

The International Criminal Tribunal for the former Yugoslavia was repeatedly confronted with the question of how to properly proceed in the absence of an unwell accused. When Slobodan Milošević arrived at the Tribunal in 2001, Milošević already suffered from severe essential hypertension and hypertrophic heart disease and his health continued to deteriorate during the course of his incarceration and trial.[105] The Court had to twice reduce the number of days the it could sit during any two-week period due to Milošević's ill health.[106] Despite this reduced trial schedule, Milošević's poor health caused the adjournment of 66 trial days during the presentation of the prosecution's case and the opening of the defence case had to be delayed on five occasions.[107]The situation was exacerbated by the fact that Milošević was representing himself and his absences meant that any attempt to continue trial in his absence would also result in his being

[100] *Milošević* (Decision on Interlocutory Appeal) *supra* note 31 at para 14.
[101] Bassiouni *supra* note 32 at 854.
[102] Schabas *In Absentia Proceedings supra* note 73 at 350-51.
[103] Ibid.
[104] Ibid.
[105] Timothy William Waters, *The Milošević Trial: An Autopsy* (OUP 2013) 70; *Milošević* (Decision on Interlocutory Appeal) *supra* note 31 at para 4.
[106] Waters *supra* note 105 at 70.
[107] Report to the President Death of Slobodan Milošević (30 May 2006) paras 14-15 <www.icty.org/x/cases/slobodan_milosevic/custom2/en/parkerreport.pdf> accessed 3 July 2017.

unrepresented.

On 31 August 2004, the Trial Chamber issued an oral ruling in which it imposed counsel on Milošević out of a concern that failure to do so might cause the trial to last for an unreasonably long time or that it might not be concluded at all.[108] The Trial Chamber determined that the risk to Milošević's health, and the prospect that the trial would be disrupted, were so great so as to be "likely to undermine the integrity of the trial process."[109] The Trial Chamber based this conclusion on a finding that it had a duty to ensure the accused a fair and expeditious trial and a responsibility to preserve the integrity of the proceedings.[110]

The Trial Chamber's insistence that it had to impose counsel on Milošević in order to ensure his right to a fair and expeditious trial is questionable. The purpose underlying the right to an expeditious trial does not justify abrogating the accused's other fair trial rights in an effort to ensure that he or she is tried expeditiously. The accused is the primary beneficiary of expeditious trial provisions.[111] Expeditious trial rights exist: (1) to prevent "oppressive pre-trial incarceration"; (2) to minimize the anxiety of the accused; (3) to limit the extent to which the defence will be impaired by a delay in trial; and (4) to prevent arbitrary incarceration.[112] The right to a speedy trial "is intended to limit infringements on personal freedom" and to "minimize the emotional strain on the accused caused by pending criminal proceedings."[113] None of these factors are applicable if the trial delays are the result of the accused's ill health. Therefore, if the accused is responsible for delaying trial, the need for a speedy trial largely does not exist. Justifying the imposition of counsel on the accused on the grounds that it protects his or her right to an expeditious trial fails to achieve any of the goals the right is designed to protect.

The regular interruptions in the *Milošević* trial had an impact on how the accused's right to be present was perceived by other international criminal courts and

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[108] *Prosecutor v Milošević* (Reasons for Decision on Assignment of Defence Counsel) IT-54-02-T, T Ch (22 September 2004) para 1.
[109] Ibid at para 65.
[110] Ibid.
[111] Joanne Williams, 'Slobodan Milosevic and the Guarantee of Self-Representation' (2007) 32(2) Brooklyn J Intl L 553, 572.
[112] Ibid; *see also* Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012) 163.
[113] M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Intl L 235, 285.

tribunals. Commentators believe that the Special Court for Sierra Leone's decision in *Prosecutor v Norman, et al.* and the International Criminal Tribunal for Rwanda's decision in *Prosecutor v Barayagwiza* to allow trial to proceed in the accused's absence were a direct result of the harsh criticism directed at the International Criminal Tribunal for the former Yugoslavia 's efforts to accommodate Milošević.[114] To avoid similar condemnation, the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda erred on the side of finding that trial could continue without the accused being present.

The *Milošević* case did not represent the only instance in which the International Criminal Tribunal for the former Yugoslavia had to deal with an accused absent through illness. In addition to his persistent disruptions during trial, Ratko Mladić was also regularly absent from trial due to his health. The Trial Chamber typically chose to adjourn trial on the days Mladić did not attend for health reasons, although on at least one occasion Mladić provided a formal waiver of his right to be present.[115] The practise of adjourning trial due to Mladić's poor health continued throughout the trial despite the Chamber's reminder to defence counsel that "[i]t is the Chamber who finally determines whether the accused is fit to appear" and not the accused or his counsel.[116]

The Trial Chamber's attitude when determining whether to adjourn trial based on the accused's health is illuminating. It demonstrates that the Trial Chamber considered absence due to ill health to be different from an accused's refusal to appear for trial. With respect to the former, the Trial Chamber would only conduct trial in the accused's absence if the accused first waived his right to appear. In the latter, the Trial Chamber viewed the failure of the accused to appear as an implicit waiver of the accused's right to appear at trial. It is likely that the apparent difference between the two types of absence

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[114] Charles Chernor Jalloh, 'Self-Representation and the Use of Assigned, Standby and Amicus Counsel', in Linda Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013) 156.

[115] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (13 July 2012) 824, 10-16; 827, lines 23-25; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (8 April 2013) 9537, lines 10-14; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (9 April 2013) 9541, lines 4-8; *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (9 September 2013) 16475, lines 2-6; 16477, lines 3-6; 16488, lines 20-25; *see also Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (1 November 2012) 4314, lines 8-16; 4315, lines 1-2.

[116] *Prosecutor v Mladić* (Trial Transcript) IT-09-92-T, T Ch I (10 September 2013) 16488, lines 4-8.

relates to the perceived voluntariness of each. Absence resulting from illness is usually out of the control of the accused. Absence resulting from the accused's refusal to appear is the product of a conscious decision. The decisions made by the Trial Chamber in *Mladić* demonstrate a willingness to accommodate one type of absence and to more strictly apply the rules when confronted with the other.

The International Criminal Tribunal for the former Yugoslavia's willingness to accommodate an unwell accused was severely tested in *The Prosecutor v Stanišić et al*. Although Stanišić was found physically fit to stand trial prior to its commencement, his health prevented him from attending numerous court hearings.[117] The trial started on 28 April 2008 in Stanišić's absence and continued until 16 May 2008 when the Appeals Chamber issued a ruling adjourning the trial so that Stanišić's health could be reassessed.[118] More than a year elapsed before the Trial Chamber found that trial could re-commence.[119] The court instituted a limited hearing schedule and a protocol to determine on a daily and weekly basis whether Stanišić continued to be well enough to attend trial.[120] That protocol included a direction that trial would be adjourned if Stanišić was deemed too unwell to attend, but if he could attend, and refused to do so, his refusal would be considered a waiver of his right to be present and trial would continue in his absence.[121] This decision is inline with Trial Chamber I's decision in *Mladić* to distinguish between a defendant's refusal to appear for trial and his or her inability to appear due to illness. Having found that Stanišić was able to appear, his non-attendance became the result of a refusal to attend. On that basis, the Court felt justified in continuing in his absence.

This protocol was almost immediately put to the test when Stanišić informed the Trial Chamber that he was too unwell to attend court, that he did not consent to trial continuing in his absence and that he did not wish to follow the progress of trial by video-

[117] *Prosecutor v Stanišić et al.* (Judgment, Vol. 2) IT-03-69-T, T Ch I (30 May 2013) para 2434.
[118] *Prosecutor v Stanišić et al.* (Decision on Defence Appeal of the Decision on Future Course of Proceedings) IT-03-69-AR73.2, A Ch (16 May 2008) para 22.
[119] *Prosecutor v Stanišić et al.* (Decision on Start of Trial and Modalities of Trial) IT-03-69-PT, T Ch I (29 May 2009) para 25.
[120] Ibid at the Annex to the decision.
[121] Ibid at Annex, para 8.

link.[122] In consultation with Stanišić's doctor, the court found that no objective medical reasons existed to prevent Stanišić from attending trial, either in person or by video-link, and that the trial would proceed in his absence.[123] Stanišić's absence persisted, and trial continued without him, with the Trial Chamber explaining that Stanišić bore the burden of showing that he was too unwell to attend trial and that he had failed to make such a showing.[124] The Chamber's decision to continue trial in the accused's absence was based on the judgment entered by the Appeals Chamber in *The Prosecutor v Pavle Strugar* where the Appeals Chamber found that placing the burden of proof of illness on the party alleging the illness was consistent with the approach used in common law jurisdictions.[125] Stanišić eventually overcame his illness to an extent sufficient to permit him to attend trial.

Stanišić's return to the courtroom was short-lived and he again fell ill. On one occasion he had to absent himself from court to be urgently rushed to hospital for treatment.[126] Rather than continue in his absence, as the Trial Chamber had done in response to previous absences, the court only addressed procedural matters in his absence on the grounds that Stanišić had not waived his right to appear. This decision demonstrates the Trial Chamber's willingness to suspend proceedings when it was confronted with what it considered to be an involuntary absence resulting from a legitimate illness. It also highlights the fact that the Trial Chamber was concerned with protecting the accused's right to be present, and was willing to adjourn trial when necessary to protect that right, but that it would only do so when it believed that the circumstances warranted postponement.

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[122] *Prosecutor v Stanišić et al.* (Reasons for Denying the Stanišić Defence Request to Postpone the Court Proceedings and Decision Proceeding with the Court Session of 29 June 2009 in the Absence of the Accused) IT-03-69-T, T Ch I (22 July 2009) para 3.
[123] *Prosecutor v Stanišić et al.* (Trial Transcript) IT-03-69-T, T Ch I (9 June 2009) 1440, lines 7-15; 1442, lines 10-11.
[124] *Prosecutor v Stanišić et al.* (Reasons for Denying the Stanišić Defence) *supra* note 122 at paras 13-14, 17.
[125] *Prosecutor v Stanišić et al.* (Reasons for Denying the Stanišić Defence Request to Adjourn the Hearings of 9 and 10 June 2009 and have Jovica Stanišić Examined by a Psychiatrist Before the Start of Trial and for Decision to Proceed with the Court Session of 9 June 2009 in the Absence of the Accused) IT-03-69-T, T Ch I (2 July 2009) para 11. (In this decision the Trial Chamber incorrectly identified the source of this rule as *Prosecutor v Stanislav Galić*, but a cursory inspection of the Appeals Chamber's decisions in *Galić* and *Strugar* reveals that this was erroneous); *see also Prosecutor v Strugar* (Judgement) IT-01-42-A, A Ch (17 July 2008) para 56.
[126] *Prosecutor v Stanišić et al.* (Judgment, Vol. 2) *supra* note 117 at para 2437.

The United Nations Mechanism for International Criminal Tribunals, the successor to the *ad hoc* tribunals, was also confronted with how to conduct trial in light of Stanišić's illness. After being found not guilty by the International Criminal Tribunal for the former Yugoslavia's Trial Chamber in May 2013, the Appeals Chamber quashed his acquittal in December 2015 and ordered that Stanišić stand for retrial.[127] Pursuant to Security Council Resolution 1966 establishing the Mechanism, and Annex 2 to that resolution, the *Stanišić* matter was transferred to the Mechanism for re-trial.[128] Stanišić sought leave from the Court to remain on provisional release during the new trial and to waive his right to appear for the entirety of the Prosecution's case on the grounds that his absence would "greatly increase the expeditiousness of the trial", reducing the costs incurred by the Mechanism and the risk of further deteriorations to his health.[129] The Chamber denied his request and found that it would not be appropriate or in the interests of justice to permit Stanišić to be absent from the opening of trial but agreed to revisit the issue prior to the first judicial recess in the case.[130] True to its word, the Chamber revisited the issue before the summer recess and found that Stanišić could be provisionally released not only for the duration of the recess, but until 27 September 2017.[131] His provisional release was later extended until 30 January 2018.[132]

The Mechanism's Statute contains the same provision regarding the accused's right to be present found in the Statutes of the *ad hoc* tribunals, but its Rules of Procedure and Evidence outline a much more permissive procedure to be followed when the accused refuses to appear for trial.[133] Rule 98 permits trial to proceed in the accused's absence if the accused refuses to appear for trial so long as the following conditions are met: (i) the accused has made an initial appearance under Rule 64; (ii) the Registrar has

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[127] *Prosecutor v Stanišić et al.* (Judgement) IT-03-69-A, A Ch (9 December 2015) para 131.
[128] UNSC Res 1966 (22 December 2010) Doc. No. S/Res/1966 at Annex 2.
[129] *Prosecutor v Stanišić et al.* (Decision on Modalities of Trial) MICT-15-96-PT, T Ch (13 April 2017) para 5.
[130] *Prosecutor v Stanišić et al.* (Decision on Stanišić's Motion for Extension of Provisional Release) MICT-15-96-PT, T Ch (19 May 2017) paras 25, 27.
[131] *Prosecutor v Stanišić et al*. (Decision on Stanišić's Motion for Provisional Release) MICT-15-96-T, T Ch (19 July 2017) para 23.
[132] *The Prosecutor v Stanišić et al.* (Decision on Stanišić Defence Motion for Extension of Provisional Release) MICT-15-96-T, T Ch (25 September 2017) para 14.
[133] UN Security Council, Statute of the United Nations Mechanism for International Criminal Tribunals (22 December 2010) art 19(4)(d); Rules of Procedure and Evidence, Mechanism for International Tribunals (as amended 26 September 2016) rule 98.

duly notified the accused that the accused is required to be present for trial; (iii) the accused is physically and mentally fit to be present for trial; (iv) the accused has voluntarily and unequivocally waived, or has forfeited, his right to be tried in his presence; (v) the interests of the accused are represented by Counsel.[134] The Trial Chamber took these factors into account when authorising Stanišić's provisional release and found that each criterion had been met.

In truth, the decision to grant Stanišić's request was grounded more in whether releasing him would comply with the provisional release rules than its impact on the right to be present. While recognising that its decision to allow Stanišić's provisional release during the presentation of evidence was unprecedented at the *ad hoc* tribunals, the Mechanism felt justified in permitting Stanišić's provisional release on the basis that it would "have an appreciable impact on the expeditious conduct" of the proceedings.[135] Stanišić's right to be present was a secondary concern of the court because it was clear that the requirements of Rule 98 had been complied with. By having explicit guidelines about what must happen for the accused to waive his or her right to be present, the court was able to deal with this issue as a matter of routine.

The International Criminal Tribunal for Rwanda took a somewhat different approach to absences resulting from illness. There the Trial Chamber often erred on the side of continuing trial in the absence of an unwell accused. The International Criminal Tribunal for Rwanda's Trial Chamber chose to continue trial in *Prosecutor v Bagosora et al.* despite the medically related absence from trial of defendant, Anatole Nsengiyumva. The Trial Chamber applied the proportionality principle and concluded that there had been no violation of the accused's right to be present on the grounds that the potential loss of testimony that might result of trial was postponed outweighed the remote possibility that the accused would be prejudiced if those witnesses were examined in his absence.[136] The Appeals Chamber sided with the Trial Chamber and found that Nsengiyumva's unauthorised absence constituted a forfeiture of his right to be tried in his presence pursuant to Article 20(4)(d) of the Statute.[137]

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[134] Rules of Procedure and Evidence, Mechanism for International Tribunals *supra* note 133 at rule 98.
[135] *Stanišić et al.* (Decision on Stanišić's Motion for Provisional Release) *supra* note 131 at para 19.
[136] *Prosecutor v Bagosora et al.* (Judgement and Sentence) ICTR-98-41, T Ch I (18 December 2008) para 131.
[137] *Bagosora et al. v Prosecutor* (Judgement) ICTR-98-41-A, A Ch (14 December 2011)

Even if one accepts forfeiture as a valid basis for continuing trial in the accused's absence, it is difficult to endorse the Trial Chamber's decision to do so in *Bagosora*. Although the Court did not authorise Nsengiyumva's absence during the relevant time period, two medical reports supported his reasonable belief that he was too ill to appear in court.[138] It is an extreme sanction to view Nsengiyumva's absence as a forfeiture, and thus akin to the behaviour of a persistently disruptive defendant, under these circumstances. Nsengiyumva's failure to appear is more appropriately regarded as an implied waiver of his right to be present and not a forfeiture of that right.

The International Criminal Court has taken a much more relaxed approach to permitting the accused's absence from trial for medical reasons. The first such instance occurred during the *Lubanga* Trial when on 12 May 2009, Lubanga was absent from court due to illness. Before continuing the trial, the Trial Chamber specifically acknowledged Lubanga's right to be present and left the commencement of that day's proceedings up to his discretion in recognition of his right to be present during trial.[139] Lubanga agreed to waive his right to be present and the trial went on in his absence.[140]

In the *Bemba* case, Trial Chamber III of the International Criminal Court proceeded in the accused's absence on several occasions. On 7 November 2011, the defence team informed the court and the prosecution both before and during the hearing that Bemba had a medical appointment that would prevent him from attending trial and that Bemba had indicated that trial could continue in his absence.[141] Neither the Chamber nor the prosecution objected to Bemba's absence and the hearing went ahead.[142] Bemba was absent again on 12 April 2013. He asked to be excused in advance and his request was granted.[143] Bemba was also given permission to be absent from a status conference on 3 May 2013 and again from a trial hearing on 24 June 2013.[144] The Appeals Chamber

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para 48.

[138] *Prosecutor v Bagosora et al.* (Decision on Nsengiyumva Motions to Call Doctors and Recall Eight Witnesses) ICTR-98-41, T Ch I (19 April 2007) paras 5, 7.

[139] *Prosecutor v Lubanga* (Trial Transcript) ICC-01/04-01/06, T Ch I (12 May 2009) 1, lines 15-25; 2, lines 1-2.

[140] Ibid.

[141] *Prosecutor v Bemba* (Trial Transcript) ICC-01/05-01/08, T Ch III (7 November 2011) 1, lines 22-25; 2, lines 1-4.

[142] Ibid at 2, lines 5-10.

[143] *Prosecutor v Bemba* (Trial Transcript) ICC-01/05-01/08, T Ch III (12 April 2013) 62, lines 23-24.

[144] *Prosecutor v Bemba* (Trial Transcript) ICC-01/05-01/08, T Ch III (3 May 2013) 2, lines 24-25; 3, line 1; *Prosecutor v Bemba* (Trial Transcript) ICC-01/05-01/08, T Ch III

later indicated its approval of these sorts of absences finding that part of the duty of the Trial Chamber is to be flexible when managing trial proceedings and that neither the interests of justice nor the psychological well-being of the witnesses would be well served if an automatic adjournment occurred every time an accused needed to be temporarily absent from trial.[145]

The practice employed by the Trial Chamber in the *Bemba* case when permitting Bemba to be absent is remarkable for two reasons. First, Bemba's absences were granted without any argument or really any discussion amongst the parties. Bemba would request to be excused in advance of the session and the Trial Chamber would grant the request and note it on the record during the hearing. Second, unlike the International Criminal Tribunal for the former Yugoslavia, Trial Chamber III did not make any distinction between the reasons why Bemba wished to be absent. It treated his absence to attend a medical appointment in the same way as it treated other absences.

Generally, an accused wishing to be absent from trial because of illness will explicitly waive his or her right to be present. In those instances where the accused has not waived the right to be present, the Trial Chamber tends to consider whether or not the absence was truly warranted. Court is usually adjourned in situations where the Chamber believes that the accused is genuinely unable to attend because of illness. However, if the Chamber feels as if the accused can attend, and is using illness as an excuse to avoid trial, it is much more likely to continue trial in the accused's absence. The practice at the International Criminal Tribunal for Rwanda is an exception to this general practice. It tended to ignore the voluntariness of the absence and continue trial based on a belief that the absent accused had forfeited his or her right to be present. Much as with other absences, basing the decision on whether the accused's illness was sufficiently severe to actually inhibit the accused's ability to appear in court reflects the Chamber's desire to ensure that it, and not the accused, controls when trial is adjourned.

7.2.2 Absence Due to Disappearance, Incarceration or Death

Other than non-appearance arising out of illness, there are at least three additional types of absences that can happen after trial has begun that might be classified as involuntary. The first occurs when an accused fails to appear for a hearing without explanation. This is not strictly an involuntary absence as the reason for the absence is

(24 June 2013) 1, lines 12-14.

[145] *Prosecutor v Ruto et al.* (Judgment on the Appeal) *supra* note 10 at para 50.

unknown and could be the result of the accused's decision not to attend. However, it appears that a court or tribunal confronted with this situation will likely halt trial until it is satisfied that the accused's absence is the result of a conscious choice not to attend. The International Criminal Tribunal for the former Yugoslavia followed that approach during the *Čelibići Camp* case when defendant Esad Landžo did not appear in Court on 4 November 1997 and no explanation was provided for his absence. The Court chose to adjourn proceedings for the day in recognition of Landžo's right to be present and to give the defence counsel an opportunity to find out the reason for his absence.[146] He returned to court the following day and trial continued without ever determining the reason for Landžo's absence or whether it was voluntary. The Court's approach to this situation suggests that when an accused's absence from trial is unexplained the court will treat it as involuntary and adjourn trial to conduct an inquiry into the reason underlying the absence.

Another form of involuntary absence that may arise after the start of trial occurs when an authority other than the one conducting the accused's trial detains the accused. An example of this might be when an accused being tried before an international or internationalised court or tribunal is arrested by a national authority while on conditional release and that national authority refuses to surrender the accused to the trial court. Article 22 of the Special Tribunal for Lebanon's Statute accounts for this eventuality and permits trial to continue in the accused's absence when the accused "[h]as not been handed over to the Tribunal by the State authorities concerned".[147] While this clause was likely introduced to keep national authorities from preventing trial from beginning, there is nothing in the Statute to suggest that it would not also apply after trial has already begun. Additionally, although the Statute does not directly refer to individuals being detained by State authorities, such a situation would surely fall under its ambit. In recognition of the involuntary nature of the absence the Tribunal adopted Rule 107, which attempts to enable an accused who is being prevented from appearing to participate in trial "in the most appropriate way", and to ensure that the requirements of Article 22(2), including that he or she receive proper notice of trial and are being

[146] *Prosecutor v Delalić, et al.* (Trial Transcript) IT-96-21, T Ch (4 November 1997) 8973, lines 2-5; 8975, lines 8-16.
[147] UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 22(1)(b).

represented by counsel, are being enforced.[148] Following this approach, an accused detained in another place can be tried in his or her absence, but steps must be taken to ensure that sufficient procedural steps regarding notification and representation are still observed.

Some commentators have challenged the legality of proceeding under these circumstances. Niccolò Pons finds it "extremely difficult to find a convincing lawful basis" for holding trial under these circumstances.[149] He views foreign detention of the accused as a "legitimate impediment or lawful excuse" justifying the accused's absence.[150] Björn Elberling calls it "highly doubtful" that Article 22(1)(b) is in conformity with the right to be present at trial.[151] In part, this opinion is based on a concern that the absence is due to circumstances beyond the accused's control and not the result of the accused's own free choice as demonstrated through a waiver of the right to be present.[152] The accused's absence also cannot be framed as a forfeiture of his or right to be present as the reason for the absence is out of the control of the accused. It may be possible to establish a proper administration of justice justification for continuing in the accused's absence under these circumstances, particularly in a multiple defendant trial where some of the accused are present. However, a court proceeding under such circumstances should follow the lead of the Special Tribunal for Lebanon and make sure that the absent accused's fair trial rights are protected during trial and that he or she has a right to retrial should they subsequently come under the control of the court.

A third type of involuntary absence exists when the accused dies during trial. The death of Slobodan Milošević on 11 March 2006 is the most famous example of this phenomena; however, there are at least six other instances in which an accused at an international or internationalised criminal court or tribunal has died after the beginning of trial but before a verdict was rendered. In all seven of these instances the proceedings were terminated as a result of the accused's death.[153] Additionally, there was one

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[148] Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) rule 107; *see also* STL Statute *supra* note 147 at art 22(2).
[149] Pons *supra* note 3 at 1312.
[150] Ibid at 1313.
[151] Björn Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly how Tailor-Made is the Special Tribunal for Lebanon' (2008) 21(2) LJIL 529, 537.
[152] Ibid.
[153] *Prosecutor v Milošević* (Order Terminating the Proceedings) IT-02-54-T, T Ch (14 March 2006); *Prosecutor v Mrkšić et al* (Order Terminating Proceedings Against Slavko Dokmanović) IT-95-13a-T, T Ch (15 July 1998); *Prosecutor v Hadžić* (Order

occurrence of a defendant dying during the pendency of his appeal, which also resulted in the termination of proceedings.[154] There is also one instance in which the European Court of Human Rights was asked to consider the conviction of an individual following his death.[155] Despite expressing "serious reservations" about a court system that permits the conviction of a dead person, the Court declined to rule on whether convicting the deceased constituted a violation of the European Convention on Human Rights and instead found a violation of the Convention on other grounds.[156]

It is clear that international criminal law dictates that proceedings be terminated when the accused dies before a final judgment is reached. The basis for ending trial under these circumstances is best explained by the International Criminal Tribunal for the former Yugoslavia's Appeals Chamber. As it points out, jurisdiction *ratione personae* is limited to living persons and therefore proceedings cannot continue after a defendant's death.[157] The Appeals Chamber also cited with approval the decision reached by Pre-Trial Chamber II of the International Criminal Court in *Prosecutor v Kony et al*., to terminate proceedings against the accused, Raska Lukwiya, following his death. The Pre-Trial Chamber based its decision, in part, on the grounds that "the purpose of criminal proceedings is to determine individual criminal responsibility and that the Chamber cannot exercise jurisdiction over a person who has deceased".[158] This loss of jurisdiction over the accused triggers the termination of the proceedings against an accused that is involuntarily absent from trial as a result of his or her death.

Terminating the Proceedings) IT-04-75-T, T Ch (22 July 2016); *Prosecutor v Chea et al.* (Termination of the Proceedings Against the Accused Ieng Sary) 002/19-9-2007/ECCC/TC, T Ch (14 March 2013); *Prosecutor v Thirith* (Termination of the Proceedings Against the Accused Ieng Thirith) 002/19-9-2007/ECCC/TC, T Ch (27 August 2015); *Prosecutor v Norman, et al* (Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues) SCSL-04-14-T, T Ch 1 (21 May 2007); *Prosecutor v Ayyash et al.* (Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mustafa Amine Badreddine and Possible Termination of Proceedings") STL-11/01/T/AC/AR126.11, A Ch (11 July 2016) para 53.

[154] *Prosecutor v Delić* (Decision on the Outcome of the Proceedings) IT-04-83-A, A Ch (29 June 2010).

[155] *Grădinar v Moldova*, 7170/02, ECtHR, Judgment, 8 July 2008.

[156] Ibid at paras 109, 117.

[157] Ibid at para 6.

[158] *Prosecutor v Kony et al.* (Decision to Terminate the Proceedings Against Raska Lukwiya) ICC-02/04-01/05, PT Ch (11 July 2007) 4.

7.3 CONCLUSION

Several important conclusions can be drawn from the ways international and internationalised criminal courts and tribunals have dealt with absences of the accused occurring after the start of trial. First, courts and tribunals have drawn a clear distinction between absences resulting from the accused's conscious choice not to participate in trial and absences that are not of their own making. Absences falling into the former category include: removal from the courtroom following a disruption; refusing to attend trial, absconding and requesting excusal from trial. In these situations the Courts have generally displayed a tendency to imply a waiver of the accused's right to be present, even in situations where the accused has specifically refused to waive his or her right, and proceed in his or her absence. The latter category is made up of involuntary absences which can include those caused by: illness, death, detention in another place and unexplained disappearance. In these situations the court or tribunal will typically suspend trial until the accused is again able to attend. The divergent approaches to these two sorts of absences demonstrate that courts and tribunals believe there is a qualitative difference between them determined by the motivation underlying the reason for the absence.

Another interesting issue arises out of the willingness of the International Criminal Tribunal for the former Yugoslavia to imply waiver on the part of the accused even if the accused has specifically refused to waive his or her right to be present. Related to this is the International Criminal Tribunal for Rwanda's practise of ruling that under certain circumstances the accused is thought to have forfeited his or her right to be present. These processes indicate that although presence at trial is traditionally viewed as a right held by the accused that can be waived, courts and tribunals are also willing to find that there are situations in which the right to be present must give way absent the explicit or implicit consent of the accused. This supports the conclusion that in addition to the right to be present, there is also a duty to be present arising out of the need to maintain the orderly administration of justice. Failure to comply with that duty can result in trial continuing in the accused's absence without either an expressed or implied waiver of the right to be present.

Continuing trial when the accused absents himself or herself after the start of trial is a relatively common practice. This is true, in part, because unlike other types of absence, the court already has confirmation that the accused is aware of the charges

against him or her, as well as the date and time of trial. Therefore, the trial court need only determine whether the accused waived his or her right to be present before concluding that trial can take place in the accused's absence. Normally, there is a clear indication that the accused has waived that right, although courts and tribunals have liberally construed whether the accused has provided an implicit waiver. The real danger in this area lies in whether courts and tribunals are being too liberal when finding an implicit waiver and basing their decisions on a desire to continue trial rather than in recognition of the accused's effective waiver of the right to be present. When reaching decisions as to this issue, courts need to ensure that they are upholding the accused's right to be present and not allowing it to be overwhelmed by other interests.

CHAPTER 8: WHEN IS PRESENT NOT PRESENT: THE RIGHT TO BE PRESENT AND THE ABILITY TO UNDERSTAND AND PARTICIPATE IN PROCEEDINGS

The right to be present at trial involves more than just the physical presence of the accused. It also extends to the ability of the accused to understand and participate in the proceedings. As the Privy Council of the United Kingdom stated in *Kunnath v The State*:

> It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. The basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and if so, upon what matters relevant to the case against him.[1]

This principle is further supported by the notion that one of the main purposes underlying the accused's right to be present is to afford him or her the ability to effectively participate in trial.[2] Participation is only thought to be effective when the accused understands the proceedings.[3] This includes the ability to hear and follow what is happening in the courtroom.[4] Effective participation has also been more generally interpreted to include the requirement that the accused in a criminal trial "has a broad understanding of the nature of the trial process" and that he or she also understands what is at stake and the potential penalties that can be imposed if the accused is found guilty.[5] Participation in this context refers to the direct participation of the accused and does not relate to whether or not the accused is represented by counsel during trial. An accused that cannot personally understand the proceedings is unable to participate even if he or she has a lawyer that is able to comprehend what is taking place in the courtroom.

The participation of the accused during trial can take many forms. A present

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[1] *Kunnath v the State* [1993] 1 WLR 1315.
[2] Sarah J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* (Hart Publishing 2007) 113; Catherine S. Namakula, 'Language Rights in the Minimum Guarantees of Fair Criminal Trial' (2012) 19(1) J Speech Lang & L 73, 84.
[3] William A. Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 306; Fawzia Cassim, 'The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process' (2005) 38 Comp & Intl L J S Afr 285, 287.
[4] *SC v United Kingdom* (2005) 40 EHRR 10, 10 November 2004 at para 28; *Stanford v United Kingdom* App No 16757/90 (ECtHR, 23 February 1994) para 26; *Grigoryevskikh v Russia* App No 22/03 (ECtHR, 9 July 2009) para 78.
[5] *Grigoryevskikh supra* note 4 at para 78; *Güveç v Turkey* App No 70337/01 (ECtHR, 20 April 2009) para 124.

accused can instruct and consult his or her defence counsel; suggest questions to be posed to witnesses during cross-examination; and contribute to the truth seeking function by testifying before the relevant Court or Tribunal.[6] An accused that can understand and participate in trial benefits from being able to take an active role in his or her defence, however the accused is not the only beneficiary of his or her active participation in trial. The accused's ability to contribute to the trial process also assists the finder of fact by ensuring that the fullest picture of the alleged crimes is presented for its consideration.[7]

The importance of the accused being able to instruct his or her counsel was demonstrated during the prosecution of Martin Bormann during the Nuremberg Trials. Bormann's counsel, Bergold, had virtually no access to exculpatory evidence and lacked the ability to discover any evidence that might have aided in his defence of Bormann. As Bergold stated in his closing statement during the Nuremberg trials:

> The defendant Bormann is absent. He has not even been able to defend himself against the charges made against him. He has not been able to give me any information and I have not been able to find any witnesses who would have sufficient knowledge of the matter and who would be able to disclose to me any exonerating evidence concerning the accusations made.[8]

Telford Taylor, a member of the American prosecution team at the Nuremberg trials, reinforced this point in his memoir about the trial, stating that Bormann's presence could have assisted in identifying witnesses and relevant documentary evidence to be presented in his defence.[9] Instead, Bergold was left with "fewer than a dozen documents for which the best one could say was that Bormann had written some letters that did not incriminate him."[10] As a result, Bergold's defence of Bormann took about an hour to

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[6] Antonio Cassese, *International Criminal Law* (OUP 2003) 403; Francis A. Gilligan and Edward J. Imwinkelreid, 'Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused being Tried in Absentia' (2005) 56 S Car L Rev 509, 524; Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) 8 JICJ 1307, 1310 n. 16.

[7] Abel S. Knotternus, 'The International Criminal Court on Presence at Trial: The (In)validity of Rule 134*quater*' (2014) 5 Intl Crim Database 1, 10.

[8] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 19 (1948) 116-7.

[9] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Bloomsbury Publishing Limited 1993) 465.

[10] Ibid.

present and Bormann was convicted *in absentia* and sentenced to death.[11] It is likely Bormann would have been found guilty even if he had been present, the evidence against him was thought to be overwhelming, but it highlights the difficult position counsel is placed in when they are not able to receive assistance from their client.

Contemporary commentators also recognise the significant role that a present defendant plays in the trial process. It is difficult for defence counsel to answer the case presented by the prosecution without the participation of the accused, and cases decided without the accused's involvement can lead to unsafe verdicts.[12] The prosecution's case will always appear persuasive if the defence does not adequately test it.[13]An effective defence in a criminal trial requires more than identifying inconsistencies in the evidence presented by the prosecution; it also necessitates specific answers to factual questions and the rebuttal of the prosecution's allegations.[14] The evidence needed to mount this sort of defence is often known only to the defendant and without his or her active participation it will difficult or impossible for the defence to mount an effective case. Further, in the context of the *ad hoc* Tribunals, defence counsel is required to 'take full instruction on the facts' in fulfilment of the accused's right to representation.[15] An accused unable to participate in trial cannot give full instruction on the facts, as he or she is not aware of the immediate goings on in the trial. This demonstrates a link between the right to effective counsel and the right to be present at trial and shows that if either is missing trial may be unfair.[16]

There can be a limit to the utility of the accused's participation in trial. An overly involved accused may hinder his or her counsel by creating distractions during the presentation of evidence or insisting that irrelevant lines of questioning be pursued.[17] Conversely, the accused may be present but refuse to participate at all, sitting silently at

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[11] Ibid at 466.
[12] Wayne Jordash and Tim Parker, 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 500-01.
[13] Stan Starygin and Johanna Selth, 'Cambodia and the Right to be Present: Trials *In Absentia* in the *Draft Criminal Procedure Code*' [2005] Singapore J Legal Stud 170, 173.
[14] Jordash and Parker *supra* note 12 at 502.
[15] Ibid; *see also Prosecutor v Strugar* (Decision Re: The Defence Motion to Terminate Proceedings, Trial Chamber) IT-01-42-T, T Ch I (26 May 2004) para 22.
[16] Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals' (2015) 26 Crim LF 181, 204.
[17] Neil Cohen, 'Trial in Absentia Re-Examined' (1973) 40(2) Tenn L Rev 155, 182.

the counsel table.[18] This latter situation is similar in effect to absence, as the presence of the accused and his or her refusal to participate implies an informed decision not to participate in trial. This suggests that the accused's *de facto* absence is voluntary and his or her unwillingness to participate could be interpreted as a waiver of the right to be present and participate in trial.

Of greater interest are those instances in which the accused is physically present in the courtroom but unable to understand and participate due to either: not being able to comprehend the language of the court or when the accused's mental condition is such that he or she is unable to understand and participate in the proceedings. These both qualify as involuntary absences from trial as the accused's absence, as represented by his or her inability to understand or participate in proceedings, is not the result of a conscious choice not to participate, but is the consequence of forces outside of his or her control. They are distinct from the involuntary absences discussed in the previous chapter because these involve an accused physically present in the courtroom as opposed to one who is physically absent. Because these types of absence are involuntary, international and internationalised criminal courts and tribunals confronted with them will generally try to mitigate or eradicate their effects on the accused's right to be present instead of choosing to proceed against an accused who is effectively absent from trial.

8.1 THE RIGHT TO AN INTERPRETER

A criminal trial, by its very nature, is an act of communication.[19] The defendant's inability to understand the language used by the court can be a major obstacle in international criminal trials and there will always be a need for interpretation and translation to ensure that all of the parties understand the proceedings.[20] Simply put, an accused unable to understand his or her trial is not present.[21]

Both the Charter of the International Military Tribunal, governing the Nuremberg Trial, and the Charter of the International Military Tribunal for the Far East, governing

[18] Ibid.
[19] Richard Vogler, 'Lost in Translation: Language Rights for Defendants in European Criminal Proceedings', in Stefano Ruggeri (ed), *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty* (Springer 2015) 97.
[20] Håkan Friman, 'Procedural Law of Internationalized Criminal Courts', in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 341-42.
[21] Schabas *supra* note 3 at 307.

the Tokyo Trial, contained provisions ensuring that trial would be conducted in a language understood by the accused.[22] The Nuremberg Tribunal was conducted in four languages, English, German, French and Russian, and it was the first Tribunal to employ simultaneous translation during trial.[23] This process presented significant challenges, causing prosecutor and United States Supreme Court Justice Robert Jackson to comment "I think that there is no problem that has given me as much trouble and as much discouragement as this problem of trying to conduct a trial in four languages."[24] Arthur Comyns Carr, one of the prosecutors at the Tokyo Trial, described the trial as a "modern Tower of Babel."[25]

Providing a criminal defendant with an interpreter is not a particularly controversial proposition. The right to an interpreter is generally recognised by the Statutes establishing international and internationalised criminal courts and tribunals and is seen by some as complementing the right to counsel.[26] Both counsel and an interpreter assist the accused in understanding specialised information relevant to the trial process.[27] Most modern international and internationalised courts and tribunals have recognised the need to provide a defendant with an interpreter if he or she does not speak one of the languages of the Tribunal.

The right to an interpreter is directly connected to the right to be present at trial as it gives effect to the defendant's ability to understand the proceedings and to make informed decisions relating to the case.[28] The link between the right to an interpreter and the right to be present was first recognised by the English Court of Criminal Appeal in *R v Lee Kun*. In *Lee Kun*, the Court was confronted with a situation in which a non-English

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[22] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) art 16(c); Charter of the International Military Tribunal for the Far East (19 January 1946) art 9(b).
[23] Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (University of Ottawa Press 1998) 25.
[24] Catherine S. Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer International Publishing 2014) 8; *citing* Joshua Karton, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony' (2008) 41 Vand J Transnatl L 1, 20.
[25] Arthur S. Comyns Carr, 'The Judgment of the International Military Tribunal for the Far East' (1949) 34 Prob Pub & Priv Intl L 141, 151.
[26] Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 332.
[27] Ibid.
[28] Celia Brown-Blake, 'Fair Trial, Language and the Right to Interpretation' (2006) 13 Intl J Minority & Group Rts 391, 394.

speaking defendant was convicted following a trial during which none of the testimony was translated into a language spoken by the defendant.[29] The Court found that "[t]he presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings."[30] However, the Court also found that there had to be a 'substantial miscarriage of justice' to support a finding that the accused's fair trial rights had been violated.[31] The Court held that there was no substantial miscarriage of justice because the pre-trial evidence had been interpreted and provided to the defendant, that the evidence presented during trial conformed with the pre-trial evidence and that even if the trial testimony had been translated it would not have changed the verdict.[32]

In the international human rights context, the Human Rights Committee has examined when the accused's right to an interpreter arises pursuant to Article 14(3)(f) of the International Covenant on Civil and Political Rights. Article 14(3)(f) permits the accused "[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court."[33] The Human Rights Committee elaborated on the provisions of Article 14(3)(f) in General Comment No. 13 and General Comment No. 32. In General Comment No. 13, the Committee asserted that the right to free interpretation is "of basic importance in cases in which ignorance of the language used or difficulty in understanding may constitute a major obstacle to the right of defence."[34] The Human Rights Committee also clarified that the right to interpretation applies equally regardless of the citizenship of the accused and that its application cannot be made dependent on the outcome of trial.[35] General Comment No. 32 reiterated some of these principles and also indicated that the accused has the right to interpretation at all oral stages of proceedings.[36]

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[29] *R v Lee Kun* [1916] 1 KB 337, 339.
[30] Ibid at 341.
[31] Ibid.
[32] Ibid at 339-340.
[33] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(3)(f).
[34] United Nations Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984) U.N. Doc. HRI/GEN/1/Rev.1 (1984) para 13.
[35] Ibid.
[36] United Nations Human Rights Committee, 'General Comment No. 32: Right of Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) Doc. No. CCPR/C/GC/32 (2007) para 40.

Much of the jurisprudence of the Human Rights Committee on this issue has focused on whether an accused has the right to testify in his or her mother tongue even if he or she understands the language of the Court.[37] The Human Rights Committee has generally found that interpretation is only required when the accused does not understand the language of the Court or cannot express him or herself in that language, and that it does not require the court to accommodate the linguistic preference of the accused.[38] The Human Rights Committee expanded on this conclusion in General Comment No. 32 when it declared that an accused is not entitled to free interpretation into his or her own mother tongue when he or she knows the language of the court sufficiently to defend himself or herself effectively.[39] The Human Rights Committee has also found that a statutory provision obligating the court to provide the accused with an interpreter "if the court is satisfied that the interests of justice so require" is compatible with, and even exceeds the protection mandated by Article 14(3)(f).[40]

The European Court of Human Rights also took up the subject of interpretation as a component of the right to be present at trial. Article 6(3)(e) of the European Convention on Human Rights is identical to Article 14(3)(f) of the International Covenant on Civil and Political Rights and permits the accused "to have the free assistance of an interpreter if he cannot understand or speak the language used in court."[41] Obviously, the plain meaning of the article indicates that an accused without any ability to speak the language of the court is entitled to interpretation. However, the Convention fails to address whether an accused with some proficiency in the court's language is entitled to translation and, more importantly, at what point translation is no longer required. The European Court has found that there is no single, objective standard whereby an interpreter needs to be appointed. Rather, the trial court must determine whether providing an interpreter will allow the accused to have knowledge of the case against him or her, to mount a defence against the charges and to enable him or her to

[37] Brown-Blake *supra* note 28 at 409.
[38] *Zeynalov v Estonia*, Comm No 2040/2011 (4 November 2015) para 9.3; *Guesdon v France*, Comm No 219/1986 (25 July 1990) para 10.2; *Cadoret and Le Bihan v France*, Comm No 323/1988 (11 April 1991) para 5.6; *Barzhig v France*, Comm No 327/1988 (6 May 1991) para 5.5.
[39] Human Rights Committee, General Comment No. 32 *supra* note 36 at para 40.
[40] *Juma v Australia*, Comm No 984/2001 (28 July 2003) para 5.17.
[41] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 at art 6(3)(e).

present his or her version of events.[42]

The burden is on the court to ensure that the absence of an interpreter will not affect the fair trial rights of the accused once the court is on notice that the accused has problems comprehending the court proceedings.[43] The European Court of Human Rights also extended the right to an interpreter to pre-trial proceedings and has even found that the defendant' fair trial rights are violated where the trial court fails to exclude a pre-trial statement made by the defendant without the assistance of an interpreter.[44] Therefore, the accused's right to a fair trial can still be violated even if the accused had the benefit of an interpreter during trial if the trial court relies on evidence developed without the assistance of an interpreter during the pre-trial phase of the case.

Pursuant to the European Convention of Human Rights, the right to an interpreter arises once an individual is charged with a crime and applies to the pre-trial, trial and appeals proceedings.[45] The defendant is entitled to interpretation sufficient to enable the defendant to have knowledge of the case, to defend him or herself against the charges and to present to the court the accused's version of events.[46] Whether the accused can understand the language of the Court is an issue of fact and it is the judge's responsibility to determine whether the accused needs an interpreter.[47]

The right to an interpreter is also contained in Article 8(2)(a) in the American Convention on Human Rights. It specifically states that "the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court".[48] The Inter-American Court of Human Rights has never found a violation of Article 8(2)(a) but it has stressed the importance of the principles it is meant to protect.[49] In *Vélez Loor v Panama*, the Court emphasised the "particular vulnerability" a person is subject to when confronted with a judicial process in

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[42] *Gungor v Germany* App No 31540/96 (ECtHR, 17 May 2001); *Hermi v Italy* (2008) 46 EHRR 46, 18 October 2006 at para 70.
[43] *Cuscani v United Kingdom* (2003) 36 EHRR 2, 24 December 2002 at para 38.
[44] *Baytar v Turkey*, App No 45440/04 (ECtHR, 14 January 2015) paras 54-55, 58.
[45] *Kamasinski v Austria* (1991) 13 EHRR 36, 19 December 1989 at para 74; *Gungor supra* note 42; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, vol 1 (2nd Ed, OUP 2009) 889.
[46] *Kamasinski supra* note 45 at 74.
[47] *Cuscani supra* note 43 at paras 39-40; Clayton and Tomlinson *supra* note 45 at 889-90.
[48] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 8(2)(a).
[49] Thomas M. Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 197.

a language that he or she does not understand, and calls on courts to "recognize and resolve any real disadvantages faced by those brought to justice."[50] Despite this seemingly unambiguous position on the issue, the evidence suggests that domestic court systems subject to the American Convention on Human Rights are failing to consistently provide members of indigenous communities with interpretation.[51] The Inter-American Court appears to be aware of this problem and has expressed the opinion that indigenous people involved in the legal process should be offered interpreters to ensure that they "understand and are understood".[52]

The international and internationalised criminal courts and tribunals also recognise the accused's right to an interpreter. The Statutes of the *ad hoc* Tribunals allow the accused to be assisted by an interpreter. Article 21(4)(f) of the International Criminal Tribunal for the former Yugoslavia's Statute and Article 20(4)(f) of the International Criminal Tribunal for Rwanda's Statute are identical as to this issue and provide the accused with the right "[t]o have the free assistance of an interpreter if he [or she] cannot understand or speak the language" of the Tribunal.[53] However, the right to be assisted by an interpreter is not unlimited. In particular, the accused is not entitled to interpretation in his or her mother tongue or in a language of his or her choosing but only to interpretation in a language he or she understands.[54] In *The Prosecutor v Delalić et al.*, the Trial Chamber denied the request of one of the defendants, Zdravko Mucić, to translate the proceedings into 'Croatian' as there was already translation into 'Serbo-Croatian', a language sufficiently similar to permit the accused to understand the proceedings.[55]

The Statute of the International Criminal Court also contains a provision setting

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[50] *Vélez Loor v Panama* (Preliminary Objections, Merits, Reparations and Costs Judgment) Inter-American Court of Human Rights, Series C No. 218 (23 November 2010) para 152.
[51] Antkowiak and Gonza *supra* note 49 at 197.
[52] *Tiu-Tojín v Guatemala* (Judgment) Inter-American Court of Human Rights, Series C No. 190 (26 November 2008) para 100.
[53] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 21; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 20.
[54] *Prosecutor v Delalić, et al.* (Order on Zdravko Mucic's Oral Request for Serbo-Croatian Translation) IT-96-21-T, T Ch (23 June 1997); *Prosecutor v Tolimir* (Decision on the Interlocutory Appeal Against the Oral Decision of the Pre-Trial Judge of 11 December 2007) IT-05-88/2-AR73.1, A Ch (28 March 2008) para 15; Schabas *supra* note 3 at 305.
[55] *Delalić et al*. *supra* note 54.

out the accused's right to free translation. Article 67(1)(f) describes the accused's right to have "the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks."[56] This provision contains two clauses not found in the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The first is the requirement that translations are necessary "to meet the requirements of fairness."[57] The second is the assertion that the translation is in a language that the accused "fully understands and speaks."[58]

In *The Prosecutor v Germain Katanga*, the Appeals Chamber of the International Criminal Court elaborated on the level of language proficiency a defendant must display to fully understand and speak a particular language.[59] In its 27 May 2008 decision, the Appeals Chamber found that a defendant fully understands and speaks a language if the defendant "is completely fluent in the language in ordinary, non-technical conversation."[60] The defendant need not understand the language "as if he or she were trained as a lawyer or judicial officer" and any doubt as to whether the defendant fully understands the language of the Court should be resolved in favour of translation into the language requested by the accused.[61] The Appeals Chamber concluded that credence must be given to an accused's claim that he or she cannot fully speak one of the languages of the Court.[62] The Chamber may determine that the accused's claim is made in bad faith but should err on the side of providing translation in the requested language where there is any doubt as to whether the accused can fully understand proceedings.[63]

The Appeals Chamber's decision in the *Katanga* case represents a departure from the jurisprudence of other international tribunals. That difference can largely be attributed to the inclusion of the word 'fully' in Article 67(1)(f). The *Katanga* court makes clear that the use of the word fully reflects an intention to create a higher standard

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[56] Rome Statute of the International Criminal Court (1998) art 67(1)(f).
[57] Ibid.
[58] Ibid.
[59] *Prosecutor v Katanga* (Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages") ICC-01/04-01/07-522, A Ch (27 May 2008).
[60] Ibid at para 3.
[61] Ibid.
[62] Ibid at para 59.
[63] Ibid at paras 60-61.

than the standard then existing in other courts.[64] The International Criminal Court's approach to interpretation appears to be an anomaly because international and internationalised criminal courts and tribunals established subsequently declined to adopt the International Criminal Court's higher standard.

The Special Tribunal for Lebanon and the Special Court for Sierra Leone adopted provisions in their Statutes identical to that found in Article 21(4)(f) of the International Criminal Tribunal for the former Yugoslavia's Statute and Article 20(4)(f) of the International Criminal Tribunal for Rwanda's Statute.[65] The decision of the drafters of those subsequent Statutes to return to the provisions used in the Statutes of the *ad hoc* tribunals, and not to follow the lead of the International Criminal Court, suggests that the heightened standard is unique to the International Criminal Court and not universally applicable throughout international criminal law.

The type of interpretation that must be provided for hearing impaired defendants is a companion issue to the larger topic of language interpretation. In France, courts are required to provide a deaf accused with a sign language interpreter or other person qualified to communicate with deaf people.[66] This issue has not come up in any of the international and internationalised criminal courts and tribunals but has been addressed by the European Court of Human Rights. In *Stanford v United Kingdom*, the European Court clarified that Article 6(3)(e) of the European Convention on Human Rights extended to deaf defendants.[67] In the view of the court the right to follow and participate in proceedings, including being able to hear the proceedings, is implicit in the very notion of an adversarial trial.[68] The European Court of Human Rights also indicated that Article 6(3)(e) is not violated if the accused fails to make the court aware of his or her hearing difficulties.[69] Although none of the statutes pertaining to international and internationalised criminal courts and tribunals directly discuss the issue of sign language translation, the provisions affording defendants the right to translation are expansive

[64] Ibid at para 49.
[65] UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 16(4)(g); UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 17(4)(f).
[66] Code of Criminal Procedure, France (as amended 1 July 2017) arts 345 and 408.
[67] *Stanford supra* note 4 at para 26.
[68] Ibid; *see also* David J. Harris, Michael O'Boyle, Edward P. Bates & Carla M. Buckley, *Harris, O'Boyle & Warbrick Law of the European Court of Human Rights* (3rd ed, OUP 2014) 412.
[69] *Stanford supra* note 4 at para 28.

enough to encompass sign language translation if needed.

Ancillary to the interpretation of live court proceedings is the requirement that certain documents must also be interpreted into a language understood by the accused. In the same way that conducting trial against an accused in a language that he or she cannot understand violates his or her right to participate in trial, relying on written evidence the accused cannot understand is also a violation. The Human Rights Committee has found that the accused does not necessarily have the right to have all relevant case documents translated into a language that he or she understands, particularly when the accused is represented by a lawyer that can read the document in question and speak the language of the court.[70] The Human Rights Committee reasoned that counsel could then familiarise the accused with the relevant documents alleviating the need for translation.[71]

The European Court of Human Rights does not require that all documents be translated but does require that translations are made of "all statements which it is necessary for [the accused] to understand in order to have a fair trial."[72] The European Court also does not specify who is responsible for determining which documents should be translated, although it is likely the judge as he or she also bears the responsibility for determining whether the accused requires oral translation of the court proceedings. Further, the European Court of Human Rights has also found that because Article 6(3)(e) refers to the right to an interpreter, and not the right to a translator, that "oral linguistic assistance", i.e. having relevant documents read to the accused rather than providing him or her with a translated copy, may be sufficient to comply with the Convention.[73]

The European Court of Human Rights does not provide any further explanation as to what documents must be translated. The European Directive on the Right to Interpretation and Translation in Criminal Proceedings ("European Directive") addresses this issue by asserting that translation is limited to those documents "which are essential to ensure that (defendants) are able to exercise their right of defense and to safeguard the

[70] *Harward v Norway*, Comm No 451/1991 (15 July 1994) para 9.5.
[71] Ibid.
[72] *Kamasinski supra* note 45 at para 74; *Luedicke, Belkacem & Koç v Germany* (1979-80) 2 EHRR 149, 28 November 1978 at para 48; *see also* Clayton and Tomlinson *supra* note 45 at 889-90.
[73] *Husain v Italy* App No 18913/03 (ECtHR, 24 February 2005); *Protopapa v Turkey* App No 16084/90 (ECtHR, 24 February 2009) para 80.

fairness of proceedings."[74] Essential documents include any decision depriving a person of his or her liberty, any charge or indictment, any judgment and all other documents found to be essential by the competent authority.[75] This lack of specificity regarding which documents must be translated would likely lead a prudent court to order the translation of most documents. No court would want to be responsible for failing to have some documents translated only for a court of second or third instance to determine that the failure to translate those documents compromised the accused's right to a fair trial. Therefore, it is logical to assume that most courts would have all those documents translated that could have any substantive bearing on the case.

A dispute at the International Criminal Tribunal for Rwanda over what written evidence should be translated led one of the defendants in the Media Trial to boycott some court hearings. Hassan Ngeze initially refused to appear at trial in protest of the Trial Chamber's decision not to translate all seventy-one copies of the newspaper, *Kangura*, which Ngeze edited, and in which it was alleged that he had incited racial violence amongst the Hutus and the Tutsis.[76] Ngeze alleged that this decision deprived him of his right to have the necessary time and facilities to prepare his defence because his counsel could not read Kinyarwanda, the language *Kangura* was written in, and therefore could not properly evaluate the evidence against Ngeze.[77] The Appeals Chamber rejected this argument on the grounds that Ngeze could have assisted in the preparation of his own defence and brought the relevant parts of *Kangura* to the attention of his counsel.[78]

The International Criminal Tribunal for the former Yugoslavia requires that certain documents be translated into a language understood by the accused. Initially, the accused was entitled to receive, in a language he or she understood, the material supporting the indictment and all evidence admitted at trial.[79] The accused was also

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[74] European Directive on the Right to Interpretation and Translation in Criminal Proceedings (20 October 2010) Directive 2010/64/EU (2010) art 3.
[75] Ibid.
[76] *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007) para 259.
[77] Ibid.
[78] Ibid at para 263.
[79] *Prosecutor v Delalić et al.* (Decision on Defence Application for Forwarding the Documents in the Language of the Accused) IT-96-21-T, T Ch (25 September 1996); *Prosecutor v Naletilić et al.* (Decision on Defence's Motion Concerning Translation of all Documents) IT-98-34, T Ch I(a) (18 October 2001); John R.W.D. Jones and Steven

entitled to translated copies of all orders and decisions made by the Tribunal in his or her case.[80] The Court subsequently expanded the scope of the documents that had to be translated to include: (a) a copy of the indictment; (b) a copy of the supporting material which accompanied the indictment against the accused and all prior statements obtained by the prosecutor from the accused, irrespective of whether these items will be offered at trial; (c) the statements of all witnesses that the prosecutor intends to call to testify at trial along with all written statements taken in accordance with Rule 92*bis*; (d) discovery material which appeared in a language understood by the accused at the time it came under the prosecution's custody or control; and (e) written decisions and orders rendered by the Trial Chamber or Appeals Chamber.[81]

The International Criminal Court's Statute imposes the condition that documents be translated to "meet the requirements of fairness". Unfortunately, this is a somewhat nebulous standard as there is no explanation in the Statute as to what constitutes "the requirements of fairness" in this context. The Pre-Trial Chamber in the *Bemba* case addressed this issue and found that the requirements of fairness entail the translation of all documents, without which, the defendant "would not be able to understand the nature, cause and content of the charge and thus to adequately defend himself or herself, thereby prejudicing the fairness of the proceedings."[82] The Court's failure to identify specific types of documents that must be translated makes it difficult to predict what precise actions have to comply with the Court's Statute. It is likely that the drafters of the Statute made this clause intentionally vague to avoid limiting what evidence had to be translated, but this only leads to uncertainty as to what information must be translated for the requirements of fairness to have been met.

The rule regarding what evidence needs to be translated to allow the accused to understand the proceedings followed by the International Criminal Tribunal for the former Yugoslavia is preferable to the approach of the European Court of Human Rights or the International Criminal Court. The International Criminal Tribunal for the former Yugoslavia's rule is more objective by setting forth specific types of documents that must be produced to meet the minimum standard for a fair trial. Conversely, the European

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Powles, *International Criminal Practice* (3rd ed, OUP 2003) 584.

[80] *Prosecutor v Delalić et al*. (Decision on Defence Application) *supra* note 79 at para 14.

[81] *Prosecutor v Šešelj* (Order on Translation of Documents) IT-03-67-PT, T Ch II (6 March 2003).

[82] *Prosecutor v Bemba* (Public Decision on the "Defence Request for an Order Requiring the Translation of Evidence") ICC-01/05-01/13, PT Ch II (11 February 2014) para 6.

Court of Human Rights' application of Article 6 simply requires the translation of those documents necessary for the accused to understand the case being presented against him or her so that the trial can be considered fair. This standard necessarily requires one of the participants, likely the court, to make a subjective value judgment as to what documents must be translated for the trial to be fair. A subjective standard is dangerous for three reasons. First, it is incredibly time consuming to require the court to review a massive number of documents and determine the relevance of each document to the fair trial rights of the accused. Second, it significantly increases the likelihood of an erroneous decision being made about the relevance of some documents and increases the danger that important documents might go un-translated. Third, the rule as it stands fails to indicate at what point in the trial proceeding the relevance of the document will be assessed. A document may not seem relevant at the time it is introduced at trial but may become so when it is considered in the context of other subsequently presented evidence.

International and internationalised criminal courts and tribunals should err on the side of adopting objective rules pertaining to the interpretation and translation of oral and written evidence. Objective rules identify a clear and transparent process to be followed from the beginning of trial about what evidence will be interpreted or translated, thus permitting the defence to adequately prepare its case. Subjective rules are more open to interpretation and in this context increase the danger of important evidence going uninterpreted or untranslated. While flexible rules are often preferable as they give courts manoeuvrability, in this instance a rule that requires the interpretation or translation of all oral and written evidence to be offered against the accused at trial ensures that the accused will understand all of the evidence that will be considered when determining his guilt or innocence. That the accused has such an understanding will be important when ensuring that his or her fair trial rights have been met.

8.2 MENTAL FITNESS TO STAND TRIAL

An accused who is mentally unfit to stand trial is not present within the meaning of the term as it pertains to trial before an international or internationalised criminal court or tribunal.[83] As a preliminary matter, whether a defendant is mentally unfit to stand trial

[83] William A. Schabas, 'Article 63: Trial in the Presence of the Accused', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) 1195.

should not be confused with whether a defendant can plead the defence of insanity.[84] The former pertains to the defendant's mental state at the time of trial while the latter relates to the defendant's mental state at the time the alleged crimes were committed. Overlap can exist between these two concepts but it is important that they not be understood as synonyms.

Two of the accused at the Nuremberg Tribunal, Gustav Krupp Von Bohlen und Halbach ("Krupp") and Rudolf Hess challenged whether they were mentally fit to stand trial. Krupp maintained that he suffered from "severe physical mental infirmities" and requested that the proceedings against him be suspended until he was fit to stand trial or, in the alternative, that he not be tried *in absentia*.[85] Krupp's attorney argued that it was not in the interests of justice to try an individual that was not capable of understanding the charges against him, who could not instruct council or participate in his own defence.[86] The Tribunal ordered a medical examination of Krupp, which found that he suffered from significant degenerative physical and mental deficiencies that prevented him from understanding the trial proceedings.[87] As a result of these findings, Krupp's counsel argued that he should not be tried *in absentia* because his impairments prevented him from exercising certain defence rights.[88] The Court found that trying Krupp *in absentia* did not serve the interests of justice and suspended the proceedings against him.[89] Although the charges were not dismissed, Krupp's infirmities prevented him from ever being tried and he died in 1950 while still under indictment.[90]

Unlike Krupp, Rudolf Hess was unable to convince the Nuremberg Tribunal that he was not mentally fit to stand trial. On 7 November 1945, Hess's counsel filed a motion expressing "grave doubts" about Hess's mental capability.[91] In response to the motion, the Court appointed a commission of ten doctors, drawn from each of the Allied powers, to examine Hess and determine his fitness to stand trial.[92] Hess was examined multiple

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[84] Schabas *An Introduction supra* note 3 at 306.
[85] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 124.
[86] Ibid at 124-5.
[87] Ibid at 127.
[88] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 2 (1948) 1.
[89] Ibid at 20.
[90] Ibid at 21.
[91] *Trial of the Major War Criminals*, vol 1 *supra* note 85 at 155.
[92] Ibid at 157.

times between 16 November 1945 and 20 November 1945 and a variety of reports were prepared discussing his mental stability. Although the reports prepared about Hess did not all agree about the severity of his condition, they did share one key finding: he suffered from hysterical amnesia that would interfere with his ability to conduct his defence.[93] On November 30, 1945, Hess asked the Tribunal to temporarily suspend trial against him and refuse to try him *in absentia* if he was found mentally unfit to enter a plea.[94] After significant argument by the parties as to these issues, Hess himself addressed the Court and stated the following:

> Henceforth my memory will again respond to the outside world. The reasons for simulating loss of memory were of a tactical nature. Only my ability to concentrate is, in fact, somewhat reduced. But my capacity to follow the trial, to defend myself, to put questions to witnesses, or to answer questions myself is not affected thereby. I emphasize that I bear full responsibility for everything that I did, signed or co-signed. My fundamental attitude that the Tribunal is not competent, is not affected by the statement I have just made. I also simulated loss of memory in consultations with my officially appointed defense counsel. He has, therefore, represented it in good faith.[95]

In light of Hess's statement the Tribunal found that Hess was capable of standing trial and his Motion was denied.[96]

In the end, this was a rather curious decision. It certainly reflects the Tribunal's desire to try all of the suspects, an inclination that reached its apex with the decision to try Martin Bormann despite the fact that much of the existing evidence indicated that he was dead. Despite Hess' claim that he was fit to stand trial, his assertion seems to run counter to the medical experts who examined him. Many of the doctors that examined Hess reported that although he might not have been insane, his mental condition would affect his ability to properly defend himself against the charges. The Tribunal claimed it considered the medical reports when making its ruling, but there is nothing in the written decision supporting the veracity of that assertion. The decision to proceed with trial against Hess runs counter to the Tribunal's finding with regard to Krupp, particularly to the extent that it is not in the interests of justice to try a mentally unfit defendant *in absentia*. The decision may reveal a desire to hold Hess responsible for his actions

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[93] Ibid at160, 162-4, 167.
[94] *Trial of the Major War Criminals*, vol 2 *supra* note 88 at 479.
[95] Ibid at 496.
[96] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 3 (1948) 1.

regardless of his questionable mental condition.

A third defendant, Julius Streicher, also had questions raised about his mental fitness to stand trial. Streicher's lawyer, Hans Marx, suggested during a hearing held on 15 November 1945 that the Tribunal order a psychiatric evaluation of his client.[97] Streicher apparently opposed the request and as a result Marx refused to make a formal motion in support of his request.[98] Instead, the Soviet Deputy Chief Prosecutor, Y. V. Pokrovsky filed a formal motion to have Streicher evaluated.[99] Streicher was examined the next day and it was unanimously determined that he was sane, fit to stand trial and present his defence to the charges against him.[100]

The mental fitness issue re-emerged during the Tokyo Trial. Ōkawa Shūmei, a Japanese author and propagandist, had the charges against him suspended after being deemed mentally unable to stand trial.[101] During the ceremonial opening of the Tribunal on the first day of trial, Ōkawa behaved bizarrely when he struck Hideki Tojo on the head and then began praying.[102] Ōkawa was removed from the courtroom and subsequent medical examinations resulted in a diagnosis of syphilis leading to meningo-encephalitis manifested by "overactivity, emotional lability, euphoria, grandiose delusions, visual hallucinations, defective judgment and impairment of retention, recent memory, abstract thinking and insight" and a conclusion that he was incapable of standing trial.[103] The Tribunal determined that Ōkawa lacked the intellectual capacity to stand trial, plead to the charges against him, instruct his counsel and conduct his defence.[104]

The charges against Ōkawa were suspended although the order did not preclude the possibility of trying Ōkawa at a later date should he become competent to stand trial.[105] No such trial ever took place and after the Tokyo Tribunal closed in 1948, it was

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[97] *Trial of the Major War Criminals*, vol 2 *supra* note 88 at 22.
[98] Ibid at 23.
[99] *Trial of the Major War Criminals*, vol 1 *supra* note 85 at 152.
[100] Ibid at 154.
[101] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard UP 2008) 64.
[102] Bernard Victor Aloysius Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Antonio Cassese (ed and intro) (Polity Press 1993) 33.
[103] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 240.
[104] Order with Reference to Ōkawa, Shumei, International Military Tribunal for the Far East (28 April 1947) <imtfe.law.virginia.edu/collections/tavenner/4/4/order-reference-okawa-shumei> accessed 3 July 2017.
[105] Majority Judgment of the International Military Tribunal for the Far East, reprinted in

announced that all charges against Ōkawa were dropped and that no further charges would be pursued.[106] By the end of 1948, Ōkawa was declared mentally fit again and released from hospital.[107] Judge Röling, the Dutch member of the Tribunal, later reflected that Ōkawa "was a very clever man. So clever that he was declared insane. He came out of the asylum at the end of the trial. He was just cleverer than anyone else, so clever that he could play the fool."[108]

The mental fitness of the accused to stand trial was also an issue at the modern international and internationalised criminal courts and tribunals with the International Criminal Tribunal for the former Yugoslavia particularly addressing the issue on multiple occasions. The most significant opinion with regard to the fitness to stand trial and its relationship to the right to be present at trial was made by the Trial Chamber in *The Prosecutor v Strugar*. During the final pre-trial conference, the Defence requested that the defendant, Pavle Strugar be evaluated to establish whether he was fit to stand trial.[109] That request was denied and trial began the next day.[110] Approximately two months after the start of trial the Defence requested the termination of the proceedings against Strugar on the grounds that he was not fit to stand trial.[111] The Trial Chamber order further medical testing and allowed limited testimony from three doctors regarding Strugar's condition before reserving judgment as to the issue of Strugar's fitness to stand trial.[112]

In reaching its decision, the Trial Chamber observed that the ability to exercise certain rights as a defendant, including the right to understand the indictment, the right to defend oneself in person, the right to examine witnesses and the right to be able to instruct counsel are all affected or precluded "if an accused's mental and bodily capacities, especially the ability to understand, i.e. to comprehend, is affected by mental or somatic disorder."[113] Based on the evidence before it, the Trial Chamber concluded

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Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal*: *Charter, Indictment and Judgments* (OUP 2008) 75; Order with Reference to Ōkawa, Shumei *supra* note 104.

[106] Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (William Collins Sons & Co Ltd 1989) 116.

[107] Ibid at 116-17.

[108] Röling *supra* note 102 at 33.

[109] *Prosecutor v Strugar* (Decision Re: The Defence Motion to Terminate Proceedings, Trial Chamber) IT-01-42-T, T Ch I (26 May 2004) para 3.

[110] Ibid at paras 3-4.

[111] Ibid at paras 5-6.

[112] Ibid at paras 8-11.

[113] Ibid at paras 22-23.

that Strugar was fit to stand trial.[114] In explaining its decision the Trial Chamber directly equated fitness to stand trial to the right to be present at trial. The Trial Chamber noted that:

> In principle, trials in absentia are not permitted before the Tribunal. This rule would appear to be devoid of any substance if it related to the mere physical presence of the accused in court. As the presence of the accused has been held to be indispensable for the determination of guilt or innocence, the requirement of presence appears to be to ensure the presence of an accused person who is capable of assisting the Tribunal by the presentation of his or her defence. [115]

The Trial Chamber also found that the burden of proof, when considering whether an accused is fit to stand trial, falls upon the Defence.[116] The Appeals Chamber later confirmed the Trial Chamber's decision finding that the Trial Chamber applied the correct legal standard when determining whether Strugar was fit to stand trial and it also agreed that accused bears the burden of proving whether the accused is fit to stand trial. [117] The Appeals Chamber also reiterated that the applicable standard when determining fitness to stand trial is that the accused must be capable of "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings."[118] The test established in *Strugar* would become the standard other international and internationalised criminal courts and tribunals would apply when considering whether an accused is mentally fit to stand trial.

The Trial Chamber's decision on Strugar's Motion was followed on 12 April 2006 by the decision in *The Prosecutor v Vladimir Kovačević,* which also considered the mental fitness of the accused to stand trial. After an initial examination in which it was determined that although Kovačević was suffering from an undisclosed illness he was still fit to appear before the Court, a defence request was made raising the issue of Kovačević's mental health.[119] At that time the Trial Chamber ordered before the matter could proceed a psychiatrist and a psychologist examine Kovačević.[120] Both experts

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[114] Ibid at para 53.
[115] Ibid at para 32.
[116] Ibid at para 38.
[117] *Prosecutor v Strugar* (Judgement) IT-01-42-A, A Ch (17 July 2008) paras 55-56.
[118] Ibid at para 55.
[119] *Prosecutor v Kovačević* (Public Version of the Decision on Accused's Fitness to Stand Trial or Enter a Plea) IT-01-42/2-I, T Ch (12 April 2006) paras 4-5.
[120] Ibid at para 5.

concluded that Kovačević was in "urgent need of treatment" and that he should be sent to a mental health facility "for an initial period of six months."[121]

Kovačević was provisionally released for six months to receive treatment after which additional examinations were conducted.[122] The Court also conducted two hearings as to whether Kovačević was fit to stand trial.[123] Relying on the decision in *Strugar*, the Trial Chamber determined that the accused had certain defence rights whose "effective exercise may be hindered, or even precluded, if an accused's mental and bodily capacity, especially the ability to understand, is affected by a mental or somatic disorder."[124] The Court found that based on the conclusions of the experts, which are redacted from the public version of the opinion, Kovačević lacked the ability to: (a) plead; (b) understand the nature of the charges; (c) understand the course of the proceedings; (d) understand the significance of the evidence; (e) instruct counsel; (f) understand the consequences of the proceedings; and (g) testify.[125] As a result the Trial Chamber concluded that Kovačević was unfit to stand trial.[126] Subsequently, the matter was transferred to the Courts of Serbia where Kovačević was indicted in July 2007 although that indictment was ultimately dismissed due to Kovačević's lack of fitness to stand trial.[127]

In November 2014, the International Criminal Tribunal for the former Yugoslavia halted trial against Goran Hadžić when he was diagnosed with glioblastoma multiforme, a type of aggressive, malignant brain tumour.[128] The initial court ordered medical examination indicated that Hadžić would not be able to participate in proceedings for four months either during or after treatment for his condition.[129] It also suggested that due to his illness Hadžić's ability to be present at trial would diminish over time.[130]

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[121] Ibid at para 10.
[122] Ibid at paras 12, 14-16, 18-19.
[123] Ibid at paras 17-20.
[124] Ibid at para 24.
[125] Ibid at para 45.
[126] Ibid at para 50.
[127] War Crimes Prosecutor v Vladimir Kovačević aka "Rambo (Indictment), District Court in Belgrade, War Crimes Chamber (26 July 2007) <www.internationalcrimesdatabase.org/Case/1039/Kovačević/> accessed 3 July 2017.
[128] *Prosecutor v Hadžić* (Order for Further Medical Examination) IT-04-75-T, T Ch (1 April 2015) 1.
[129] *Prosecutor v Hadžić* (Trial Transcript) IT-04-75-T, T Ch (26 February 2015) 12604, lines 1-25; 12605, lines 1-4.
[130] Ibid at 12609, lines 1-14.

Following a further examination, the Trial Chamber applied the *Strugar* test and found that Hadžić was fit to stand trial but stayed the proceedings to allow him to remain in consultation with his physician.[131] In so holding, the Chamber conceded that although Hadžić may suffer from some cognitive impairments, an accused can be found to be operating at less than their peak level and still be fit to stand trial.[132] In the view of the Chamber, Hadžić's limitations still permitted him to understand and meaningfully participate in the proceedings.[133] The Chamber chose to stay the proceedings, rather than terminate them out of a concern about the finality of ending the proceedings in the event that Hadžić recovered from his illness.[134] On 5 April 2016, the Chamber granted an indefinite stay of proceedings based on a finding that Hadžić's deficiencies were such that he could no longer effectively communicate with, and instruct his counsel, and therefore, no longer meaningfully participate in trial.[135] Trial proceedings were permanently terminated on 22 July 2016 following Hadžić's death.[136]

Other international and internationalised criminal courts and tribunals have followed the standard set by the International Criminal Tribunal for the former Yugoslavia in *Strugar*, *Kovačević* and *Hadžić*. The International Criminal Court's Statute is silent as to how to handle the situation of an accused who is mentally unfit to stand trial and the Court has yet to find an accused to be unfit. Laurent Gbagbo raised the issue and the Court relied on some of the criteria set out by the *Strugar* court when determining that Gbagbo was fit to stand trial.[137] In particular, the International Criminal Court found that to be considered fit to stand trial an accused must: (i) understand the purpose, including the consequences, of the proceedings; (ii) understand the course of the proceedings, including the nature and significance of pleading to the charges; (iii) understand the evidence; (iv) be able to testify or give an unsworn statement (should the accused so

[131] *Prosecutor v Hadžić* (Consolidated Decision on the Continuation of Proceedings) IT-04-75-T, T Ch (26 October 2015) para 66.
[132] Ibid at para 54.
[133] Ibid.
[134] Ibid at para 67.
[135] *Prosecutor v Hadžić* (Public Redacted Version of 24 March 2016 Decision on Remand on the Continuation of Proceedings) IT-04-75-T, T Ch (5 April 2016) para 29.
[136] *Prosecutor v Hadžić* (Order Terminating the Proceedings) IT-04-75-T, T Ch (22 July 2016).
[137] *Prosecutor v Gbagbo et al.* (Decision on the Fitness of Laurent Gbagbo to Stand Trial) ICC-02/11-01/15, Chamber I (27 November 2015) paras 35, 37.

choose); and (v) instruct counsel in the preparation and conduct of his defence.[138] It also reiterated the point that participation alone is not sufficient to meet the requirements of the accused's right to be present at trial.[139] Instead, what matters is that the accused can meaningfully participate in proceedings.[140] The Trial Chamber held that Gbagbo was able to stand trial as he met the requisite criteria for physical and mental fitness.[141] All three experts that examined Gbagbo concluded that he had the cognitive ability to understand the nature, cause and consequences of the charges and the details of the evidence; to communicate with and instruct his counsel; and to testify or make an unsworn statement on his own behalf.[142] It is thought that if an accused is found to be mentally unfit to stand trial at the International Criminal Court, his or her right to be present will likely result in the suspension of the trial pending an improvement in the accused's mental condition.[143]

Rule 135 of the International Criminal Court's Rules of Procedure and Evidence regulates the circumstances under which a medical examination of the accused may take place. The Trial Chamber is permitted to order the psychological evaluation of a defendant at the request of any party or by its own volition, for any reason but particularly to ensure that the accused understands the charges.[144] Based on the findings of the evaluation, the Trial Chamber is permitted to adjourn trial due to the accused mental unfitness to stand trial.[145] The Trial Chamber is required to review that decision every 120 days and is permitted to order a re-examination of the accused and, if appropriate, declare the accused fit to stand trial.[146] Rule 135 emphasises the importance the Court places on the mental presence of the accused, and demonstrates that the ability of the accused to understand the proceedings is directly tied to the accused's right to a

[138] Ibid at para 35.
[139] Ibid at para 37.
[140] Ibid at para 37.
[141] Ibid at para 38.
[142] Ibid.
[143] Frank Terrier, *Procedure Before the Trial Chamber*, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (Iain L. Frasier (tr)), OUP 2002) 1283-84.
[144] Rules of Procedure and Evidence, International Criminal Court (as amended 2013) rule 135(1); *see also* Rome Statute of the International Criminal Court *supra* note 56 at art 64(8)(a).
[145] Rules of Procedure and Evidence, International Criminal Court *supra* note 144 at rule 135(4).
[146] Ibid.

fair trial.

The International Criminal Court's opinion that physical presence is less important than mental presence finds support in the Special Tribunal for Lebanon's Rules of Procedure and Evidence. Rule 104 indicates that a trial will not be considered *in absentia* where the accused appears by videoconference.[147] This rule implicitly recognises that the accused is present to the extent that he or she can follow the proceedings, and presumably participate if he or she so desires, without actually being present in the courtroom. By indicating that an accused is considered not absent when attending via videoconference suggests that the mental involvement of the accused takes precedence over his or her physical presence.

It must also be noted that earlier drafts of the International Criminal Court's Statute included exceptions to the right to be present at trial in instances where the accused could not attend due to "ill-health."[148] Although mental fitness to stand trial was not specifically discussed in that context, it is reasonable to surmise that ill-health would encompass mental as well as physical health. If the accused is mentally unfit to stand trial, there is really no way of curing his or her inability to be present at trial. Even a physically ill defendant could be kept apprised of the proceedings using modern technology in the same way a disruptive defendant is kept informed. The fact that the Drafting Committee had specific provisions before it that would permit trial to continue despite the illness of the accused, and chose not to adopt those provisions, demonstrates that the drafters of the Statute did not intend for trials to continue where the defendant was mentally unfit to participate.

The Extraordinary Chambers in the Courts of Cambodia also saw fit to apply the *Strugar* test when ruling on whether an accused is mentally fit to stand trial. The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia found that although Ieng Thirith's dementia might permit her to enter a plea, understand the charges and the evidence and to testify on her own behalf, her impaired long-term and short-term memory would prevent her from adequately instructing counsel and participating in her own

[147] Rules of Procedure and Evidence, Special Tribunal for Lebanon (as corrected 3 April 2014) rule 104.
[148] M. Cherif Bassiouni (ed), *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol. 2 (Transnational Publishers, Inc 2005) 453-57; *see also* Schabas *An Introduction supra* note 3 at 306.

defence.[149] The Chamber therefore concluded that Ieng Thirith was mentally unfit to stand trial and ordered that the proceedings against her be severed from the other defendants and stayed.[150] The Supreme Court Chamber later partially overturned the decision due to the Trial Court's failure to explore all possible measures to improve Ieng Thirith's mental health.[151] The Trial Chamber later reaffirmed that Ieng Thirith's long-term and short-term memory impairment rendered her unfit to stand trial and added that all steps to improve her condition had been tried unsuccessfully.[152]

Despite the procedural challenges to the Trial Chamber's original decision, it is notable for its application and interpretation of the *Strugar* test. The decision represents the first time that an international or internationalised criminal court or tribunal has found that some, but not all, of the *Strugar* criteria are met and still determined that the accused was not mentally fit to stand trial. This reading of the *Strugar* test means that a person can only be considered mentally fit to stand trial if all of the conditions set out in *Strugar* are present. This is significant as it limits the possibility that the *Strugar* elements will be balanced against one another and possibly result in a finding that so long as the accused has some mental capacity he or she can still be tried. The Trial Chamber's decision strongly emphasises the notion that partial or limited understanding and participation on the part of the accused does not constitute a fair trial. That standard can only be reached if the accused can fully understand and participate in the proceedings.

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon demonstrates the important relationship between the accused's ability to participate and his or her right to be present. The *Strugar* case sets out the standard whereby an individual can be found mentally fit to stand trial. By explicitly describing what components of the trial the accused must be able to understand, the International Criminal Tribunal for the former Yugoslavia created an objective test designed to ensure that a mentally unfit accused would not be forced to

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[149] *Prosecutor v Chea et al.* (Decision on Ieng Thirith's Fitness to Stand Trial) 002/19-09-2007-ECCC-TC, T Ch (17 November 2011) paras 56-59.
[150] Ibid at paras 59-61.
[151] *Prosecutor v Chea et al.* (Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith) 002/19-09-2007-ECCC-TC/SC(09), SC Ch (13 December 2011) para 37.
[152] *Prosecutor v Chea et al.* (Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber's Decision of 13 December 2011) 002/19-09-2007-ECCC-TC, T Ch (13 September 2012) para 24.

stand trial. The criteria making up this test, as applied at the Extraordinary Chambers in the Courts of Cambodia, must be read inclusively, and demonstrate that the accused must be able to fully understand and participate in the proceedings. The International Criminal Court and the Special Tribunal for Lebanon have also instituted rules indicating a clear understanding that the accused's presence at trial is made effective through his or her ability to understand the proceedings and freely participate in them. Clearly, the international and internationalised criminal courts and tribunals recognise that the right to be present at trial is made effective through the accused's ability to understand and participate in trial and they have taken the steps necessary to make sure that trial will only proceed when the necessary understanding and participation is demonstrated.

8.3 PRESENT WHEN PHYSICALLY ABSENT

While it is clear that the accused can be physically present at trial without being mentally present, it remains to be seen whether the opposite is also true. Traditionally, the accused's right to be present at trial required the accused to be physically present in the courtroom during trial as there was no other way to guarantee that he or she was able to participate in trial.[153] The physical presence of the accused also allowed him or her to exercise other rights including the right to confront the witnesses against them.[154] Recent technological innovations like Videoconferencing (also referred to as Video-Link or Video-Link Conferencing) have reduced the importance of the accused's physical presence, as it is now possible for the accused to understand and participate in the proceedings without actually being in the courtroom.

Videoconferencing is the process of establishing a direct video and sound connection between the courtroom and a separate location enabling the people in each place see and hear one another as if they were in the same room.[155] Videoconferencing differs from pre-recorded audio or video statements as it permits direct interaction between the physically separate participants.[156] This technology allows the person in the remote location to understand and participate in the proceedings as if he or she was in the

[153] *Zigiranyirazo v Prosecutor* (Decision on Interlocutory Appeal) ICTR-2001-73-AR73, A Ch (30 October 2006) paras 11, 13; *see also* Cassim *supra* note 3 at 285-6.
[154] Cassim *supra* note 3 at 285-6.
[155] Evert-Jan van der Vlis, 'Videoconferencing in Criminal Proceedings', in Sabina Braun & Judith L. Taylor (eds), *Videoconference and Remote Interpreting in Criminal Proceedings* (Intersentia 2012) 12.
[156] Ibid.

courtroom.[157] Videoconferencing could play an important role in international criminal trials by allowing some or all of the participants to attend trial from their home country rather than forcing them to travel long distances to participate. Videoconferencing could also expedite trials by eliminating delays caused by absent witnesses or additional hearings and filings to authorise remote testimony. Greater use of videoconferencing would also reduce the costs associated with transporting and housing witnesses and defendants at the seat of the court. The prospect of shorter, less costly trials would improve the standing of international and internationalised criminal courts and tribunals in the esteem of the international community.[158] It would also allow international and internationalised criminal courts and tribunals to hold more trials strengthening rule of law enforcement.[159]

International and internationalised criminal courts and tribunals are incorporating the use of videoconferencing to allow the remote appearance of the accused. The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the International Criminal Court and the Kosovo Specialist Chambers, all have rules permitting the accused to appear at some or all of the trial through videoconferencing.[160] Additionally, the International Criminal Tribunal for the former Yugoslavia has permitted the accused to appear at trial through videoconferencing in at least two different cases although it does not have a specific rule permitting electronic appearance.

The International Criminal Tribunal for the former Yugoslavia took up the issue in the *Simić* case. Simić's illness prevented him from attending trial so the Tribunal installed a video-link and a two-way telephone line in the Detention Centre enabling

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[157] Ibid; Deborah D. Kuchler and Leslie C. O'Toole, 'How Technological Advances in the Courtroom are Changing the Way we Litigate', [2008] Fed Def & Corp Counsel Q 205, 209.

[158] van der Vlis *supra* note 155 at 25; Riley A. Williams, 'Videoconferencing: Not a Foreign Language to International Courts', (2011) 7(1)(3) Okla J L & Tech 1, 14, 16; Yvonne Dutton, 'Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Cases' (2012) 45 Vand J Transnatl L 1283, 1285.

[159] Ibid.

[160] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 81(5); Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) art 41; Rules of Procedure and Evidence, Special Tribunal for Lebanon *supra* note 147 at rule 104; Rules of Procedure and Evidence, International Criminal Court *supra* note 144 at rule 134 *bis*.

Simić to observe proceedings and consult with his counsel in the courtroom.[161] This shortened the trial by allowing the Trial Chamber to sit for an additional hour everyday.[162] In recognition of his absence, the Trial Chamber required Simić to habitually execute waivers of his right to be present.[163] By obligating Simić to regularly waive his right to be present the Trial Chamber demonstrated that it regarded his appearance by video-link as an absence from trial necessitating a waiver for trial to continue rather than an alternative form of presence.

Several years later, the International Criminal Tribunal for the former Yugoslavia approached appearance via videoconferencing differently during the *Stanišić and Simatović* case. A medical condition stopped Jovica Stanišić from attending trial either in person or through videoconferencing.[164] Stanišić ultimately agreed to appear via video-link and was also eventually able to make some in-court appearances.[165] The Trial Chamber left his manner of appearance to his discretion, while emphasising that both methods enabled him to participate in trial.[166] Stanišić was only required to waive his right to be present on those days when he did not attend trial at all and not when he appeared by video-link.[167] This suggests that the Trial Chamber felt that Stanišić's appearances by videoconferencing were more similar to his being present in the courtroom rather than absence. It also demonstrates an evolving attitude towards presence at trial with an increased focus on the accused's ability to properly participate in trial rather than the very literal requirement that he or she be physically present in the courtroom.

The Extraordinary Chambers in the Courts of Cambodia incorporated the International Criminal Tribunal for the former Yugoslavia's practice of allowing a physically unwell accused to appear via videoconferencing into its Internal Rules. The Internal Rules specifically permit the accused to participate in trial through

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[161] *Prosecutor v Milan Simić* (Sentencing Judgement) IT-95-9/2-S, T Ch II (17 October 2002) para 8.
[162] Ibid.
[163] Ibid. at 4, footnote 18.
[164] *Prosecutor v Stanišić et al.* (Judgment, vol 2) IT-03-69-T, T Ch I (30 May 2013) para 2437.
[165] Ibid.
[166] *Prosecutor v Stanišić et al.* (Decision on Start of Trial and Modalities of Trial) IT-03-69-PT, T Ch I (29 May 2009) para 5.
[167] *Stanišić et al.* (Judgment, vol 2) *supra* note 164 at para 2437.

videoconferencing when the accused is prevented from being present in the courtroom.[168] Participation by video-link is permitted if the accused is unable to attend trial for "health reasons or other serious concerns", where the accused's absence from trial would cause substantial delay, and when it is in the interests of justice to permit attendance by videoconferencing.[169] The Extraordinary Chambers in the Courts of Cambodia had holding cells constructed below the courtroom containing a video monitor and a phone line to better facilitate the accused's remote participation in trial.[170]

The physical health of the accused and how it affects his or her ability to participate in proceedings has been a particular concern at the Extraordinary Chambers in the Courts of Cambodia because of the advanced age of the defendants. The Trial Chamber concluded in the *Nuon Chea and Others* case that it could exclude defendant, Ieng Sary from the courtroom and ordered his participation via electronic means. After having initially agreed to waive his right to be present during trial, on 3 December 2012 defendant Ieng Sary withdrew his waiver and insisted on being physically present in the courtroom during proceedings.[171] On 4 December 2012, the Trial Chamber ignored Sary's assertion of the right to be present in the courtroom and decided to proceed with Sary appearing via videoconferencing.[172] As a result, the Trial Chamber allowed trial to continue outside the physical presence of the accused even after the accused specifically demanded that he be allowed to participate from within the courtroom. For such an order to comply with the accused's right to be present it is necessary to view participation through videoconferencing as an adequate means by which the accused can exercise his or her participatory trial rights.

In reaching its decision, the Trial Chamber appears to have conflated the terms 'following the proceedings' and 'participating in proceedings'. In fact, the two concepts

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[168] Internal Rules, Extraordinary Chambers in the Courts of Cambodia *supra* note 160 at rule 81(5).
[169] Ibid.
[170] *Prosecutor v Chea et al.* (Decision on Accused Ieng Sary's Fitness to Stand Trial) 002/19-09-2007/ECCC-E238-9, T Ch (26 November 2012) para 21; *see also* Roger L. Phillips, 'Frail Accused and Fitness to Stand Trial', in Simon M. Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press 2016) 466.
[171] *Prosecutor v Chea et al.* (Ieng Sary's Withdrawal of Waivers of Right to be Present) 002/19-09-2007/ECCC-E237-2, T Ch (3 December 2012).
[172] *Prosecutor v Chea et al.* (Trial Transcript) 002/19-09-2007/ECCC/TC, T Ch (4 December 2012) 18, lines 12-21.

are quite different.[173] To follow proceedings is passive; it suggests that one is paying attention, but not contributing, to the trial. This passive act of following proceedings does not comply with the accused's right to be present at trial. The Extraordinary Chambers in the Courts of Cambodia explained that the right to be present demands that the accused be able to 'meaningfully participate' in proceedings.[174] Meaningful participation has an active and a passive component, both of which must exist for trial to continue in the accused's absence. The active component necessitates that the accused be able to exercise his or her fair trial rights to such an extent that he or she is effectively participating in trial.[175] The passive component mandates that the accused be able to understand the essential aspects of the trial.[176]

The available evidence does not appear to support a finding that Sary could participate in his trial. Sary's doctor reported on the day the Trial Chamber entered its order that the slightest movement caused Sary to become easily fatigued, he was experiencing chest pains, he could not eat very much, he was vomiting and having difficulty concentrating.[177] His counsel added that Sary lacked the strength to reach the telephone in the holding cell.[178] Based on these observations it is reasonable to conclude that Sary probably could not effectively observe trial, let alone participate in it. The Trial Chamber's decision to allow trial to continue against an accused in such a weakened physical condition disregards the active component of meaningful participation and calls into question whether trial should have been allowed to continue under these circumstances regardless of whether the accused was physically present in the courtroom or appearing via videoconferencing.

The Special Tribunal for Lebanon's Rules of Procedure and Evidence permit the accused to choose whether he or she wishes to appear at trial through videoconferencing. Rule 105 makes that choice subject to two limitations: 1) participation by videoconferencing must be authorised by the court; and 2) the accused's counsel must be

[173] Ibid at 18, lines 4-10, 15-21.
[174] *Chea et al.* (Decision on Accused Ieng Sary's Fitness to Stand Trial) *supra* note 170 at para 18.
[175] Ibid.
[176] Ibid.
[177] *Chea et al.* (Trial Transcript) *supra* note 172 at 2, lines 3-8; 21, line 2.
[178] Ibid.

present in the courtroom.[179] Rule 105 specifically states that the accused "may participate in hearings via video-conference", indicating that the purpose of the rule is to allow the accused to do more than just observe or follow the proceedings.

The Rules of the Special Tribunal for Lebanon also specify that the accused's appearance by videoconferencing is an alternative form of presence and not a type of absence. Rule 104 unequivocally states that "[p]roceedings shall not be *in absentia* if an accused appears before the Tribunal in person, by video-conference, or by counsel appointed or accepted by him."[180] Placing in-person appearance on an equal footing with appearance by videoconferencing, without imposing any form of hierarchy, indicates that both are equivalent and acceptable forms of appearance at trial. The Special Tribunal has effectively dispensed with the requirement that the accused needs to be physically present a trial by making these equivalent methods of appearing at trial.

The Rules of the Kosovo Specialist Chambers also do not necessarily require the accused to appear for trial in person. Article 41 of the Law governing the Specialist Chambers addresses all issues arising as a result of the detention of the accused. Subsection 12 of the Article permits the accused to attend trial via videoconferencing from Kosovo in four different situations.[181] They are: (1) when the accused is released on bail in Kosovo; (2) when the accused is under house arrest in Kosovo; (3) when the accused promises not to leave his place of residence; and (4) when the accused attends trial at a police station or other venue in Kosovo.[182] In each instance the Specialist Chambers will only allow the accused to attend trial via videoconferencing if he or she first consents.[183]

There are two direct benefits of the Kosovo Specialist Chambers videoconferencing procedure. First, it keeps costs down; and second, it can act as an incentive to ensure the accused's participation in trial. Costs are reduced because the Kosovo Specialist Chambers will not always be required to transport the accused to The Hague and incarcerate him or her during trial. It incentivizes participation because it creates a more hospitable environment in which the accused can participate. The Kosovo

[179] Rules of Procedure and Evidence, Special Tribunal for Lebanon *supra* note 146 at rule 105.
[180] Ibid at rule 104.
[181] Law on Specialist Chambers and Specialist Prosecutor's Office *supra* note 160 at art 41(12).
[182] Ibid.
[183] Ibid.

Specialist Chambers' system allows the accused to remain in familiar surroundings without displacing him or her for the duration of proceedings rather than mandating that he or she be jailed in a distant country during trial. This sort of minimal disruption to the accused's life is likely to make him or her more cooperative during trial proceedings. Article 41(12) also reinforces the modern trend of allowing the accused to agree to participate remotely permitting rather than as a waiver of the right to be present. This practice demonstrates that the Kosovo Specialist Chambers does not equate electronic participation to absence. Instead, it treats attendance via videoconferencing as an alternative form of participation and indicates that the accused's right to be present is being respected so long as he or she can participate in trial.

Unlike the Special Tribunal for Lebanon and the Kosovo Specialist Chambers, the International Criminal Court has not entirely done away with the need for the accused to be physical present during trial although it has begun to move in that direction. Initially, an accused at the International Criminal Court could only participate in trial remotely if he or she had been removed from the courtroom for being persistently disruptive during trial.[184] However, in November 2013 the International Criminal Court amended its rules and added Rule 134 *bis* permitting the accused to "be present" for "part or parts" of his or her trial via videoconferencing.[185] The rule states that appearance through the use of video technology allows the accused to be present at trial although the accused still needs to request permission to appear in this manner suggests that the Court does not equate videoconferencing with physical presence in the courtroom.[186] However, Rule 134 *bis* also demonstrates that the International Criminal Court does not consider appearance by video technology to be the equivalent of absence from court by permitting the accused to appear via videoconferencing without having to explicitly waive his right to be present. This deviates from Rules 134 *ter* and 134 *quater*, both of which require the accused to waive his or her right to be present before allowing them to be absent from trial.[187] Therefore, appearance by video-link as articulated in Rule 134 *bis* constitutes a middle ground between presence and absence.

[184] Rome Statute of the International Criminal Court *supra* note 56 at art 63(2).
[185] Rules of Procedure and Evidence, International Criminal Court *supra* note 144 at rule 134 *bis*.
[186] Ibid.
[187] Ibid at rules 134 *ter* and 134 *quater*.

The International Criminal Court's Statute may provide an explanation as to why a different procedure exists for an accused appearing via videoconferencing under Rule 134 *bis* from an accused absenting himself or herself under Rules 134 *ter* and 134 *quater*. Article 63(2) was the only provision under which trial could take place outside of the physical presence of the accused prior to the introduction of Rules 134 *bis*, 134 *ter* and 134 *quater*. Article 63(2) allows the court to have continuously disruptive defendants removed from the courtroom and observe the proceedings via video technology.[188] Because Article 63(2) allows trial to continue outside of the physical presence of the accused it has been interpreted as permitting a limited form of trial *in absentia*. However, this may be a misreading of the Statute. Perhaps Article 63(2) is not meant to delineate an instance in which trial is taking place in the absence of the accused. Rather, Article 63(2) may be meant to describe an alternative method through which the accused continues to be present for trial without being physically present in the courtroom. When read this way, Article 63(2) can be more easily seen to comply with Article 63(1)'s mandate that "[t]he accused shall be present during the trial."[189] An accused participating in trial electronically is still present during the trial although he or she is not physically present in the courtroom.

The accused is not entitled to attend the entirety of trial electronically due to the internal limitation contained Rule 134 *bis* indicating that the accused may only request to attend "part or parts" of trial by videoconferencing.[190] Limiting video participation to only "part or parts" of trial gives rise to the implication that any request to attend the entirety of trial by videoconferencing would be denied. The decision not to authorise the accused to attend the whole trial electronically suggests that the Court believes that there are parts of the trial better served by the in-person appearance of the accused. This interpretation is borne out by the Trial Chamber decision in September 2014 to deny Uhuru Kenyatta's request to be excused from a Status Conference or alternatively, to be allowed to appear via videoconferencing. In reaching its decision, Trial Chamber V(B) found that the status conference constituted a "critical juncture" in the proceedings during which matters directly impacting the accused, the victims and the witnesses would be

[188] Ibid.
[189] Rome Statute of the International Criminal Court *supra* note 56 at art 63(1).
[190] Rules of Procedure and Evidence, International Criminal Court *supra* note 144 at rule 134 *bis*.

discussed.[191] The Trial Chamber further concluded that "the requirements of justice in this case necessitate the physical presence of the accused at the Court" because of the important nature of the conference.[192] This decision clearly demonstrates that the International Criminal Court, unlike the Special Tribunal for Lebanon, still draws some distinction between physical presence and presence by videoconferencing, and considers some issues to be of such importance that they can only be properly addressed when the accused is physically present in the courtroom.

The International Criminal Tribunal for Rwanda is unique amongst other international and internationalised criminal courts and tribunals in finding that the right to be present at trial requires the accused to be physically present in the courtroom unless he or she waives that right. That principle was established in the *Zigiranyirazo* case, where a Trial Chamber inadvertently found itself considering the relationship between the accused's right to be present and appearance via videoconferencing. The Trial Chamber initially determined that although the trial was being held in Arusha, a witness located in the Netherlands and seeking to testify via videoconferencing must appear in person, in the presence of all of the participants.[193] The witness was unwilling to travel to Arusha out of a fear for his safety, so the Trial Chamber ordered that arrangements be made for him to testify in The Hague with all of the parties present.[194] However, Zigiranyirazo was denied entry to the Netherlands and the Trial Chamber chose to allow the witness to testify outside of Zigiranyirazo's physical presence although he did appear via videoconferencing.[195]

Zigiranyirazo challenged that decision on the grounds that conducting any part of the proceedings outside of his physical presence was a violation of his right to be present during trial. The Appeals Chamber agreed with him in finding that the accused's right to be present at trial refers to the accused's physical presence at trial and described it as "one of the most basic and common precepts of a fair criminal trial."[196] The Appeals

[191] *Prosecutor v Kenyatta* (Decision on Defence Request for Excusal from Attendance at, or for adjournment of, the Status Conference Scheduled for 8 October 2014) ICC-01/09-02/11, T Ch V(B) (30 September 2014) para 20.
[192] Ibid.
[193] *Prosecutor v Zigiranyirazo* (Decision on Defence and Prosecution Motions Related to Witness ADE) ICTR-2001-73-T, T Ch III (31 January 2006) para 32.
[194] Ibid at para 34.
[195] *Zigiranyirazo v Prosecutor* (Decision on Interlocutory Appeal) ICTR-2001-73-AR73, A Ch (30 October 2006) para 5.
[196] Ibid at paras 11, 13.

Chamber went on to hold that although the right to be present is not absolute it can only be limited when doing so is proportional to the other interest being protected.[197] In this case the Trial Chamber's decision was found to be disproportional and constituted an unwarranted and unnecessary restriction on Zigiranyirazo's fair trial rights.[198] The Appeals Chamber reached that conclusion by focusing, in part, on the perceived inability of videoconferencing to replicate the experience of being physically present at trial. Trial Chambers at the International Criminal Tribunal for Rwanda relied on a similar rational in several future decisions and one went so far as to claim that "[v]ideo-link transmission cannot be equated with presence".[199] Admittedly, these latter cases were addressing whether witnesses could testify via videoconferencing, however, they tend to demonstrate that both the Trial and Appeals Chambers at the International Criminal Tribunal for Rwanda viewed the appearance of any trial participant by video as being qualitatively different from he or she being physically present in the courtroom. This view does not accord with the practices adopted at the other international and internationalised courts and tribunals and represents a very narrow understanding of what it means to be present at trial.

8.4 CONCLUSION

International and internationalised criminal courts and tribunals have largely found that the accused's right to be present at trial extends beyond his or her being physical present in the courtroom. It also requires that the accused be able to understand and participate in the proceedings. An accused that is physically present but not able to understand or participate in the trial is effectively absent from the courtroom. This most often arises under one of two circumstances: when the accused does not speak the language of the court and when the accused is mentally unfit to stand trial. These are both involuntary forms of absence as they do not result from the accused's choice not to attend, and therefore courts and tribunals attempt to mitigate or eliminate their negative effects rather than continue trial in the accused's absence.

International criminal law generally grants the free assistance of an interpreter to

[197] Ibid at paras 17-21.
[198] Ibid at para 22.
[199] *Prosecutor v Kanyarukiga* (Decision on the Prosecutor's Request for Referral to the Republic of Rwanda) ICTYR-2002-78-R11bis, T Ch (6 June 2008) para 79; *see also Prosecutor v Munyakazi* (Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda) ICTR-97-36-R11bis, T Ch (28 May 2008) para 65.

an accused that does not understand the language of the court so that he or she is able to comprehend the proceedings. However, the extent to which he or she must be able to understand the language in which trial is being conducted so as to be entitled to an interpreter is open to debate. All of the international and internationalised criminal courts and tribunals except the International Criminal Court simply require that the accused understand the proceedings.[200] That right is limited to the extent that the accused does not have a right to interpretation into his or her mother tongue but only into a language that he or she understands.[201] By contrast, the International Criminal Court mandates that the accused fully understand the proceedings, which means the accused must be fluent either in the language in which the proceedings are being conducted or a language into which the proceedings are being interpreted.[202] The higher standard adopted by the International Criminal Court has largely been ignored by subsequently created courts and tribunals meaning that the accused need only understand the proceedings against them. Understanding the proceedings also extends to ensuring that certain documents are translated into a language understood by the accused. While most courts recognise the importance of translating some documents, there is no settled rule as to what documents must be translated leaving it to the discretion of each court and tribunal. Courts and tribunals should use that discretion to guarantee that it is clear from the outset what documents will be translated so that the defence has access to the information necessary to prepare its case.

An accused who is mentally unable to understand and participate in proceedings is effectively not present at trial even if he or she is in the courtroom. Most international and internationalised courts and tribunals follow the test set out by the International Criminal Tribunal for the former Yugoslavia in the *Strugar* case when determining whether an accused is mentally fit to stand trial. The criteria making up this test demonstrate that the accused must be able to fully understand and participate in the proceedings. The International Criminal Court and the Special Tribunal for Lebanon also have rules demonstrating that the accused's presence at trial is made effective through his or her ability to understand the proceedings and freely participate in them. International

[200] ICTY Statute *supra* note 53 at art 21; ICTR Statute *supra* note 53 at 20; STL Statute *supra* note 65 at art 16(4)(g).
[201] *Delalić et al*. (Order on Zdravko Mucic's Oral Request) *supra* note 54; *Tolimir supra* note 54 at para 15; Schabas *An Introduction supra* note 3 at 305.
[202] *Katanga supra* note 59 at para 3.

criminal law accepts that the right to be present at trial requires more than just physical presence of the accused but that it also extends to the accused being able to understand and participate in trial.

The growing use of video technology allowing the accused to participate in trial without being physically present in the courtroom further demonstrates the importance of understanding and participation over mere presence. Generally, international and internationalised criminal courts and tribunals are willing to incorporate new technological approaches to trial into their legal procedure including innovative ways of allowing the accused to participate in trial via videoconferencing. This development lends meaning to the conclusion that the accused's right to be present at trial is meant to protect his or her right to participate in trial, and is not limited to just requiring the physical presence of the accused. Some courts and tribunals still draw some distinction between an accused that is physically present in the courtroom and one appearing remotely, however, it has become increasingly clear that appearance via videoconferencing is most accurately described as an alternative form of presence rather than a type of absence. This is likely because a remotely appearing accused can still understand and participate in the proceedings against him or her thus meeting the underlying purpose of the right to be present at trial.

Chapter 9: The Right to be Present since the Introduction of the Special Tribunal for Lebanon's Statute

It is too soon to fully appreciate the significance of the inclusion of trials *in absentia* in the Special Tribunal for Lebanon's Statute. However, one result of the decision to allow the Special Tribunal for Lebanon to hold trials *in absentia* is that it has freed other international and internationalised criminal courts and tribunals to take a more nuanced approach to the accused's right to be present at trial. Since the introduction of the Special Tribunal's Statute, two Tribunals possessing some international character, the International Crimes Tribunals in Bangladesh and the Extraordinary African Chambers, have begun operation, and a third Tribunal, the Kosovo Specialist Chambers, has opened although at the time of writing no indictments or arrest warrants have been issued. Draft Statutes for two other proposed Tribunals, the Syrian Extraordinary Tribunal and the International Criminal Tribunal for Malaysia Airlines Flight MH17, have been drafted although it is unlikely either Tribunal will ever be brought into existence. Of those five Statutes, three specifically authorise the use of trials *in absentia*, a fourth, the Extraordinary African Chambers, has generally required the accused to be present during trial, going so far as to force Hissène Habré into the courtroom; and the fifth, the Specialist Kosovo Chambers, has largely ruled out trial *in absentia*. This suggests that the decision to hold trials *in absentia* at the Special Tribunal for Lebanon has made the practice more acceptable at other tribunals but that it has not become universal. What remains in question is whether the use of trials *in absentia* at these new tribunals complies with international law.

9.1 INTERNATIONAL CRIMES TRIBUNALS (BANGLADESH)

The International Crimes Tribunals have the most extensive practices related to trials *in absentia* of all of the tribunals established or proposed after the creation of the Special Tribunal for Lebanon. Although the International Crimes Tribunals are not strictly speaking international or internationalised tribunals, they do rely heavily on international criminal law when interpreting their statutory provisions relating to the right to be present. The first International Crimes Tribunal was established for the purpose of trying the alleged perpetrators of the genocide that took place in Bangladesh during its

war for liberation in 1971.[1] Considered by some to be the most significant breach of human rights during a period of armed conflict since World War II, 8-10 million people were displaced during a nine-month period, anywhere from 269,000 to 3 million people were killed, and countless people were raped and otherwise injured.[2] The International Crimes (Tribunals) Act was passed in 1973 in an effort to establish a tribunal that could try alleged perpetrators for a wide variety of crimes committed during the Bangladeshi liberation war; including crimes against humanity, crimes against peace, war crimes and genocide.[3] This initial effort to encourage transitional justice in Bangladesh was abandoned, although the idea was resurrected in 2009 with the amendment of the International Crimes (Tribunals).[4] The first Tribunal was established in 2010 pursuant to the Act, and a second one was introduced in 2012 to handle the high volume of cases.[5]

In 2012 the Act was amended again and Article 10(A) was added. Article 10(A) specifically authorises the Tribunals to proceed *in absentia* against any accused believed to have absconded or hidden preventing him or her from being present during trial.[6] The Tribunals' Rules of Procedure and Evidence require that after the Tribunals take cognizance of an offence, they can fix a date and issue a warrant for appearance if deemed necessary.[7] If the warrant for appearance cannot be served, the Tribunal will make an order that notice requesting the appearance of the accused be published in two

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[1] Elizabeth Herath, 'Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Criminal Tribunal' (2014) 55 Harvard Intl L J Online 1, 2-3 <http://www.harvardilj.org/wp-content/uploads/2014/06/HILJ-Online_volume-55_Herath.pdf> accessed 28 June 2017.

[2] Ridwanul Hoque, 'War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates' (2016) 17(1) Austl J Asian L (Article 5) 1, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802373> accessed 27 June 2017; Bina D'Costa, 'Of Impunity, Scandals and Contempt: Chronicles of the Justice Conundrum' (2015) 9 IJTJ 357, 357-58; Surabhi Chopra, 'The International Crimes Tribunal in Bangladesh: Silencing Fair Comment' (2015) 17(2) Journal Genocide Res 211, 211-12.

[3] International Crimes (Tribunals) Act (1973) art 3.

[4] Morten Bergsmo and Elisa Novic, 'Justice After Decades in Bangladesh: National Trials for International Crimes' (2011) 13(4) Journal of Genocide Res 503, 504.

[5] Hoque *supra* note 2 at 1; Abdur Razzaq, 'The Tribunals in Bangladesh: Falling Short of International Standards', in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (CUP 2015) 341.

[6] International Crimes (Tribunals) Act *supra* note 3 at art 10(a).

[7] Rules of Procedure, International Crimes Tribunal (Bangladesh) (as amended 28 June 2011) rule 22.

local newspapers, one in English and the other in Bangla.[8] If the accused does not appear following the publication of the two notices, and the Tribunal has reason to believe that the accused has absconded or hidden so as to evade arrest, and there is no immediate prospect of arrest, then trial can take place in his or her absence.[9]

In *Chief Prosecutor v Abul Kalam Azad*, the second International Crimes Tribunal justified its decision to conduct trial in the defendant's absence on the grounds that trials *in absentia* were now permissible under international criminal law. It interpreted the inclusion of the trial *in absentia* provision in the Special Tribunal for Lebanon's Statute as a reversal of United Nations' policy on the issue.[10] It is significant that the second International Crimes Tribunal interpreted the decision to allow trials *in absentia* at the Special Tribunal for Lebanon as a policy of the United Nations, because the subsequent practice of the International Crimes Tribunal appears designed to comply with that perceived policy. However, in so doing, the Second International Crimes Tribunal failed to recognise the interconnectedness of the different provisions in the Special Tribunal for Lebanon's Statute. This led the Second International Crimes Tribunal to develop of a system where the accused can be tried in his or her absence, with little evidence required to show that he or she was aware of the proceedings, and that does not grant the accused a right to a retrial if he or she later comes under the control of the tribunal. Therefore, even to the extent that the International Crimes Tribunals regards Article 22 of the Special Tribunal for Lebanon's Statute as representative of United Nations' policy, its approach to the right to be present does not meet the requirements of Article 22.

In particular, the International Crimes Tribunals failed to take the necessary steps to ensure that the accused had notice of the date and location of trial. While this mirrors a similar issue faced by the Special Tribunal for Lebanon when it omitted the date and location of trial from the advertisements aimed at encouraging the *Ayyash* and *Merhi* defendants to participate in trial, the two situations are factually distinct. The Special Tribunal for Lebanon decided to try the accused *in absentia* more than two years before the trial commenced and the date and location of trial were heavily publicized in the Lebanese press once they were determined. This gave the defendants the opportunity to learn the date and location of trial well in advance of its start and allowed them to make

[8] Ibid at rule 30.
[9] Ibid at rule 31.
[10] *Chief Prosecutor v Azad* (Judgment) Case No 05 of 2012, ICT-2 (21 January 2013) para 50.

an informed decision about whether they wished to attend. By contrast, the notice informing Abul Kalam Azad that the International Crimes Tribunals intended to proceed in his absence was published on 25 October 2012 with trial beginning just ten days later on 4 November 2012.[11] This was not a sufficient amount of time to properly notify Azad of the date and location of trial, particularly in light of the fact that the notices were only published in two Bangladeshi newspapers and he was thought to be living in either India or Pakistan.[12]

That the notices were not a genuine attempt to inform Azad of the proceedings is further supported by the fact that they were only published on one day and in only two different newspapers, both of which are directed at an audience within Bangladesh. The jurisprudence of the Human Rights Committee requires a court to make 'all due efforts' to notify the accused of the charges he or she faces before commencing with trial *in absentia*.[13] The approach taken by the International Crimes Tribunals to notification by publication does not appear to constitute all due efforts, particularly when compared to the efforts made by International Military Tribunal and the Special Tribunal for Lebanon when each body used publication to provide the accused with notice. When attempting to give Martin Bormann notice about the charges against him and its intention to proceed in his absence, the International Military required that a notice be read over the radio once a week for four weeks and also had a written notice published in the newspaper in his hometown every week for four weeks.[14] The Special Tribunal for Lebanon confronted this issue by publishing written notices directed at the four defendants in the *Ayyash* case in five different newspapers and three different languages.[15] With regard to the fifth defendant, Merhi, the Special Tribunal for Lebanon again published print notices and also issued an audio recording inviting Merhi to participate in the proceedings.[16]

The relative reach of the publications used by the International Crimes Tribunals

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[11] Ibid at paras 20-1.
[12] Ibid at para 20.
[13] *Mbenge v Zaire* Comm No 16/1977 (25 March 1983) para 14.2; *Osiyuk v Belarus*, Comm No 1311/2004 (30 July 2009) para 8.2.
[14] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 1 (1947) 102-3.
[15] *Prosecutor v Ayyash et al.* (Order to Seize the Trial Chamber Pursuant to Rule 105*bis*(a) of the Rules of Procedure and Evidence to Determine Whether to Initiate Proceedings *in Absentia*) STL-11-01/I, PT Ch (17 October 2011) para 12.
[16] *Prosecutor v Merhi* (Decision to Hold Trial *in Absentia*) STL-13-04/I/TC, T Ch (20 December 2013) para 39.

lends credence to the notion that the Tribunal was making nothing more than a cursory effort to inform the accused. In both the *Azad* case, and the *Khan and Uddin* case, Tribunal Two was aware that the accused were not in Bangladesh when the notices were published, and therefore also knew that the notices would be largely ineffectual. In fact, in the latter case, not only were Khan and Uddin not in Bangladesh, the Tribunal was aware that both had left the country in 1971 immediately after the war ended.[17] This leads to the conclusion that the purpose of the notices was not to inform the accused of the date and place of trial and the charges against them, but instead, were published in order to comply with the rules of procedure and to give the illusion that the right to be present was being observed. This conclusion is supported by the Human Rights Committee's disapproval of the court's failure in *Mbenge* to serve the accused with notice of the trial when the court knew he was residing in Belgium and had notice of his address.[18] There is no real purpose to publishing a notification directed at the accused and informing him or her of the date and time of trial and the charges if it is done without any reasonable expectation that it might actually notify the accused. Notice provided in this way is done to create the impression that a subsequent trial *in absentia* is conducted with the accused's tacit assent that trial can proceed without him or her. This type of notice is insufficient and does not adequately protect the accused's right to be present at trial.

One difficulty when evaluating whether the Bangladeshi authorities made all due efforts to inform the accused of the charges is that the judgments of the International Crimes Tribunals fail to detail what efforts were actually made. In the *Azad* case, the judgment of the Second International Crimes Tribunal does not discuss the efforts taken by the police to locate Azad before returning to the Tribunal with the unexecuted warrant. The Second Tribunal allowed the police's unsupported statement that Azad had absconded and left the country to suffice as proof that the warrant could not be served.[19] It also found that Azad had fled Bangladesh in an effort to avoid being arrested without offering any explanation as to how it reached that conclusion.[20] No evidence was cited to indicate whether any attempt was made to actually look for Azad so that the warrant could actually be served. Based on these facts, it is difficult to determine whether all due

[17] *Chief Prosecutor v Khan et al.* (Judgment) Case No. 1 of 2013, ICT-2 (3 November 2013) para 48.
[18] *Mbenge supra* note 13 at para 14.2.
[19] *Azad supra* note 10 at para 20.
[20] Ibid at para 18.

efforts were made to notify Azad that he was the subject of prosecution as the Second Tribunal failed to record what efforts, if any, were made.

In fact, decisions issued by both Tribunals do not sufficiently identify those efforts made to notify the accused before deciding to proceed *in absentia*. In the cases of *Chief Prosecutor v Hossain et al.*, *Chief Prosecutor v Hoque et al.* and *Chief Prosecutor v Ahmed et al.*, the First International Crimes Tribunal brought charges against 22 individuals, 16 of whom were ultimately tried *in absentia*.[21] In each case, the First Tribunal simply stated that the absent accused could not be arrested and that they did not voluntarily surrender.[22] No indication is given in any of the decisions of the International Crimes Tribunals as to whether any attempts were made to actually arrest any of the absent accused, despite the fact that at least some of the accused were known to be in Bangladesh. Once again, the International Crimes Tribunals appears to have taken the obligatory step of issuing the warrants without making any real effort to execute them. This lends credibility to the notion that the International Crimes Tribunals were trying to demonstrate their compliance with the procedural rules pertaining to the accused's presence at trial without making any substantive effort to actually comply with those rules.

The International Crimes Tribunals' failure to properly notify the accused before agreeing to conduct a trial *in absentia* is further compounded by a lack of evidence to support a finding that the accused, through their behaviour, adequately waived their right to be present. In both *Azad* and *Khan and Uddin*, the International Crimes Tribunals found that the accused's decisions to leave Bangladesh indicates that they have absconded or concealed themselves so as to avoid standing trial. The *Azad* Court defined an absconding defendant as one who "refuses to appear after an initial appearance."[23] The defendants in both cases cannot be described as absconding as none of them ever appeared before the International Crimes Tribunals. Therefore, the Second Tribunal must have been proceeding on the basis that the accused had concealed themselves to avoid being tried. In Azad's case, there is evidence to suggest that he fled Bangladesh several

[21] *Chief Prosecutor v Hossain et al.* (Judgment) Case No. 04 of 2015, ICT-1 (10 August 2016) para 29, *Chief Prosecutor v Hoque et al.* (Judgment) Case No. 02 of 2015, ICT-1 (18 July 2016) para 29; *Chief Prosecutor v Ahmed et al.* (Judgment) Case No. 01 of 2015, ICT-1 (3 May 2016) para 29.
[22] *Hossain supra* note 21 at para 27; *Hoque supra* note 21 at para 27; *Ahmed supra* note 21 at para 27.
[23] *Azad supra* note 10 at para 51.

hours before the arrest warrant was issued, permitting a supposition that his decision to leave the country was tied to his imminent arrest.[24] If such a supposition is correct, the Second Tribunal could properly imply an unequivocal waiver of Azad's right to be present on the basis of the European Court of Human Rights' finding that an accused's efforts to allude arrest after learning about the proceedings against him or her through unofficial channels constitutes a sufficiently unequivocal action to permit the finding of a waiver.[25]

The same cannot be said of Khan and Uddin's decision to leave Bangladesh. Both men left Bangladesh in 1971, decades before the arrest warrants were issued against them, making it impossible to find that their decision to leave was predicated on avoiding prosecution for these particular charges. In fact, as there was no legal liability for the crimes alleged against Khan and Uddin until the introduction of the International Crimes (Tribunals) Act in 1973, there is no support for the argument that their decision to leave Bangladesh bore any relationship to possible future criminal prosecution. The same is true of the absent defendants in several other cases.

It is also difficult to suggest that Khan and Uddin were hidden; the International Crimes Tribunals knew their addresses and included them in the Decision on Charge Framing.[26] Further, even if one were to conclude that Khan and Uddin were hidden, the act of hiding is not, in and of itself, sufficient to find that the accused may be tried in his or her absence. The Statute also requires that the hiding be done with the intention of preventing the arrest and prosecution of the accused. Because there was no possibility of prosecution at the time Khan and Uddin their alleged hiding cannot be described as being done for the purpose of avoiding arrest and prosecution. The Second Tribunal failed to consider any of this, instead relying on the general assertion that there were reasons to believe that the accused had absconded or concealed themselves so that they could not be arrested or produced for trial.[27] This sort of generalised finding is not adequate as it fails to demonstrate that the International Crimes Tribunals gave anything more than cursory

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[24] Tuhin Shubhra Adhikary, 'Azad Escapes Arrest: War Crimes Tribunal – 2 Issues Warrant', The Daily Star (Bangladesh) (4 April 2012) < http://www.thedailystar.net/news-detail-228975> accessed 3 July 2017.
[25] *Shkalla v Albania* App No 26866/05 (ECtHR, 10 August 2011) para 70; *citing Iavarazzo v Italy* App No 50489/99 (ECtHR, 4 December 2001).
[26] *Chief Prosecutor v Khan et al.* (Decision on Charge Framing) Case No. 1 of 2013, ICT-2 (24 June 2013) paras 9-10.
[27] Ibid at para 14.

consideration to the issue. Ensuring that the procedural and substantive requirements have been fulfilled before deciding to proceed in the accused's absence is necessary to guarantee that the accused has been able to effectively exercise his or her rights. Procedures that derogate from those requirements raise significant doubts about the overall fairness of the trial.

The International Crimes Tribunals' approach to notice and waiver might be remedied if it were to allow an accused convicted *in absentia* to be retried after coming under the control of the Tribunal. The jurisprudence of the Human Rights Committee, the European Court of Human Rights and the Special Tribunal for Lebanon and numerous commentators all agree that a person tried in his or her absence should generally be granted a retrial in his or her presence before enforcing the sentence resulting from the original *in absentia* trial.[28] The European Court of Human Rights has found some exceptions to this rule and does not require a mandatory retrial when the accused's absence was the result of an unequivocal waiver of the right to be present or if it was the result of an intentional effort to avoid justice.[29] The practice of the International Crimes Tribunals to enforce punishment without providing the possibility for a retrial might accord with international criminal law if either of these exceptions is shown to be applicable. However, the evidence available does not support a finding that those accused tried *in absentia* had either unequivocally waived his or her right to be present or that their absences were the result of an intentional attempt to evade trial. Therefore, the International Crimes Tribunals' failure to provide a retrial to those defendants convicted

[28] *Maleki v Italy* Comm No 699/1996 (27 July 1999) para 9.5; *Sejdovic v Italy* (2006) 42 EHRR 17, 1 March 2006 at para 82; *Somogyi v Italy* (2008) 46 EHRR 5, 10 November 2004 at para 66; *Colozza v Italy* (1985) 7 EHRR 516, 12 February 1985 at para 29; *Krombach v France* App No 29731/96 (ECtHR, 13 February 2001) para 85; *Einhorn v France* App No 71555/01 (ECtHR, 16 October 2001) para 33; William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (CMP Publishing, Ltd 2009) 380; Paola Gaeta, 'Trial in Absentia Before the Special Tribunal for Lebanon', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 243-44; John R.W.D. Jones, 'Rights of Suspects and Accused', in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014)196-97; Wayne Jordash and Tim Parker, 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 JICJ 487, 498.

[29] *Sejdovic supra* note 28 at para 82; *Somogyi supra* note 28 at para 66; *Colozza supra* note 28 at para 29; *Krombach supra* note 28 at para 85; *Einhorn supra* note 28 at para 33; *Medenica v Switzerland* App No 20491/92 (ECtHR, 12 December 2001) para 55.

in absentia does not comply, with international criminal law. The Tribunals' refusal to grant a right to retrial is particularly troubling because the Tribunals have regularly sentenced people convicted in their absence to death. Of the 19 people tried *in absentia* by the International Crimes Tribunals, nine have been sentenced to death, and in each case the sentence is to be carried out upon their arrest or surrender to the International Crimes Tribunals. The International Crimes Tribunals' unwillingness to permit the accused to appeal a death sentence imposed in his or her absence, or to allow the accused to seek a pardon or commutation of the sentence, not only violates the right to be present at trial but also the right to life.[30]

The International Crimes Tribunals has chosen to rely on those portions of international criminal law that justify its decisions to conduct trials *in absentia* without taking notice of the limitations on those provisions. They permit trial *in absentia* without proper notice and dispenses with the need to establish an unequivocal waiver of the right to be present. They allow punishment to be carried out on the basis of an *in absentia* conviction without any corresponding requirement that an accused convicted *in absentia* have access to a retrial. They have fashioned a system, allegedly based on accepted rules of international criminal law, that can result in an inadequately informed accused, who never unequivocally waived his or her right to be present, being executed without ever having a chance to be heard. These practices are antithetical to the underlying purpose of the right to be present as it denies the accused the opportunity to make an informed decision about whether he or she wishes to appear at trial and they fail to give the accused an opportunity to have a new determination of the charges against them.

9.2 EXTRAORDINARY AFRICAN CHAMBERS

The Extraordinary African Chambers have taken a completely different approach to the accused's right to be present at trial. The Extraordinary African Chambers were created as the result of an agreement between the African Union and Senegal to try Hissène Habré, the former president of Chad, for human rights abuses committed during

[30] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) at art 6; *see also* United Nations Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life) (30 April 1982) U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1982); United Nations Economic and Social Council, Resolution 1984/50 (25 May 1984).

his leadership between 1982 and 1990.[31] The Extraordinary African Chambers were formed after years of negotiations and legal bickering that was only resolved following a decision of the International Court of Justice.[32] Although the Extraordinary African Chambers are characterised as an international legal body, it is felt by many that they are only international to the extent necessary to comply with an earlier ruling of the Court of the Economic Community of Western African States mandating that Habré be tried by a special *ad hoc* tribunal with an international character.[33] The Extraordinary African Chambers is described as being more akin to a national court seeking international assistance, financing and training, but not possessing the character of other internationalized courts and tribunals.[34]

Despite the scepticism about the degree to which the Extraordinary African Chambers are actually international, their Statute reflects an international criminal law approach to the fair trial rights of the accused. Article 21(3)(d) of the Statute emulates the fair trial provisions found in the International Covenant on Civil and Political Rights and the Statutes of the *ad hoc* Tribunals and it contains the familiar provision that the accused is entitled to the minimum guarantee "[t]o be present at his or her trial."[35] The procedural rules at the Extraordinary African Chambers not limited to those found in the Statute but can also be decided through the application of the Senegalese Code of Criminal Procedure.[36] This is significant because the Senegalese Code of Criminal Procedure approaches the accused's presence at trial differently from international criminal law.

Habré's trial began on 20 July 2015, with Habré present in the courtroom. His appearance was achieved through the use of force and would be short lived, as he was removed from the courtroom for being disruptive before the trial could actually

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[31] Konstantinos D. Magliveras, 'Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union's Handling of the Hissène Habré Affair (2014) 22 Afr J Intl & Comp L 420, 422; Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) 13 JICJ 209, 209.

[32] *Questions Relating To The Obligation To Prosecute Or Extradite* (*Belgium v Senegal*) (Judgment) I.C.J. Reports 2012 at para 122; *see also* Sarah Williams, 'The Extraordinary African Chambers in the Senegalese Courts: Cases Before International Tribunals: An African Solution to an African Problem?' (2013) 11(5) JICJ 1139, 1143-44.

[33] Emanuele Cimiotta, 'The First Steps of the Extraordinary African Chambers' (2015) 13 JICJ 177, 183; Brody *supra* note 31 at 212-13; Williams *supra* note 32 at 1150.

[34] Williams *supra* note 32 at 1147.

[35] Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990 (2013) art 21(3)(d).

[36] Ibid at art 17(1).

commence.[37] Habré was forced into the courtroom again the following day.[38] Trial was then suspended for 45 days and when it resumed Habré had to be carried into the courtroom by masked security guards and he was forcibly restrained following his attempts to disrupt the proceedings.[39] The trial continued in Habré's forced presence until its conclusion on February 2016.

The approach of the Extraordinary African Chambers to the accused's right to be present stands in stark contrast to the practices of most other international and internationalised criminal courts and tribunals. The Extraordinary African Chambers' decision to force Habré to attend trial suggests that it understands presence at trial as a duty to be imposed on the accused and not as a right that can be exercised by the accused. Compelling the accused's attendance by force can also be explained through the application of Senegalese law. Article 356 of the *Code de Procédure Pénale Sénégalais* authorises the use of trial *in absentia*, but only against those absent defendants that are not in detention.[40] Senegalese law does not contain any procedure that permits an accused in custody to be tried in his or her absence, and therefore an accused in custody is not afforded the ability to waive his or her right to be present. In fact, Senegalese law authorises the court to issue an order whereby an absent accused can be brought to trial by force.[41] The natural outcome of this is to require the attendance at trial of an incarcerated accused, and to use force to compel that attendance if he or she refuses to appear of his or her own free will.

Although the Statute specifically permits the Extraordinary African Chambers to follow Senegalese Criminal Procedure, it may only do so if the issue being decided is not

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[37] Diadie Ba and Daniel Flynn, 'Chad's Habré Forced to Appear for Start of Trial in Senegal', Reuters (20 July 2015) < http://news.trust.org//item/20150720085841-7ft7g/?source=jtOtherNews2> accessed 3 July 2017; 'Chad's Hissene Habre removed from Senegal court', BBC News (20 July 2015) < http://www.bbc.co.uk/news/world-africa-33592142> accessed 3 July 2017.

[38] Thierry Cruvellier, 'For Hissène Hibré, a Trial by Refusal', The New York Times (27 July 2015) < https://www.nytimes.com/2015/07/28/opinion/for-hissene-habre-a-trial-by-refusal.html> accessed 3 July 2017.

[39] Daniel Flynn and Emma Farge, 'Former Chadian Leader Carried into Senegal Court for Trial', Reuters (7 September 2015) < http://uk.reuters.com/article/uk-senegal-justice-habre-idUKKCN0R71DP20150907> accessed 3 July 2017.

[40] Code of Criminal Procedure, Senegal (21 July 1965) art 356 (translated from the French by the author).

[41] Law No 2014-28 of 3 November 2014 Modifying Law No 065-61 of 21 July 1965 about the Code of Criminal Procedure, National Assembly of the Republic of Senegal (3 November 2014) art 275.

addressed in the Statute. Therefore, before there can be any recourse to Senegalese Criminal Procedure, a determination has to be made that the issue under consideration is not addressed in the Statute. There is no guidance as to what degree of specificity is necessary when deciding whether an issue is, or is not, covered by the Statute. In the case of presence at trial, it could be argued that the minimum guarantee contained in Article 21(3)(d) is sufficient to support a finding that presence at trial is discussed in the Statute and that issues relating to presence cannot be addressed through the application of Senegalese Law. Such a finding raises the question of whether the Statute satisfactorily addresses presence at trial or whether its provisions are too vague, necessitating recourse to Senegalese procedure to give meaning to either the right or the duty to be present. By contrast, one could argue that the Statute only discusses the right to be present at trial and fails to address whether there is a duty to be present. If that is the case, the Senegalese Code of Criminal Procedure should control any decisions regarding the duty to be present as it is an issue about which the Statute is silent. The Extraordinary African Chambers' actions suggest that it did not feel that the issue was adequately addressed in the Statute thus compelling recourse to Senegalese criminal procedure.

The Extraordinary African Chambers also had an interesting approach to Habré's repeated disruptions during the trial. On the first day of trial he was removed from the courtroom and trial was continued in his absence. This was in keeping with the common practice in international criminal law when dealing with a disruptive accused. However, the Extraordinary African Chambers abandoned that practice after the first day and instead chose to restrain Habré in the courtroom following any subsequent disruptions. While this approach heeds Michael Scharf's warning that courts and tribunals should be cautious before excluding a disruptive accused, using force to minimise Habré's disruptions is most likely outside of the scope of permissible behaviour.[42] International and internationalised criminal courts and tribunals are typically authorised to remove a disruptive accused from the courtroom and continue trial in his or her absence and there are no instances of force being employed to restrain a disruptive accused so that he or she can continue to be physically present in the courtroom.[43] The Statute of the Extraordinary

[42] Michael P. Scharf, 'Lessons from the Saddam Trial: Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials' (2007) 39 Case W Res J Intl L 155, 167-68.
[43] Rome Statute of the International Criminal Court (1998) art 63(2); Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8

African Chambers and the *Code de Procédure Pénale Sénégalais* as originally written, also do not contain explicit provisions addressing how the Extraordinary African Chambers should deal with a disruptive accused. However, the *Code de Procédure Pénale Sénégalais* was modified in November 2014 and new provisions were added directly addressing how the court should treat a disruptive accused. Article 278 of the Amendment specifically states that any person disrupting the trial should be removed from the courtroom, and Article 279 extends the application of that rule to the accused.[44] Therefore, the appropriate procedure under Senegalese law was to remove Habré from the courtroom rather than to physically restrain him and force him to remain present. This is further confirmed through reference to Article 274, which restricts the function of the guards in the courtroom to preventing the accused from escaping and does not authorise them to physically restraining a disruptive accused.[45] There was no legal basis for the Extraordinary African Chambers to allow the forcible restraint of Habré during his disruptions.

Of all the international and internationalised criminal courts and tribunals, the Extraordinary African Chambers has been the most aggressive in requiring the accused to conform to a duty to appear at trial. This was best demonstrated through the decision to use physical force to bring Habré to the courtroom and to restrain him while in the courtroom to prevent him from disrupting trial. While there may be some justification for bringing Habré to the courtroom by force under Senegalese law, there is no identifiable domestic or international criminal law basis for restraining him while in the courtroom. The absence of an explicit authorisation supporting its approach to forcing Habré's to remain in the courtroom should have led the Extraordinary African Chambers to pursue less aggressive measures more in keeping with international and domestic law.

9.3 KOSOVO SPECIALIST CHAMBERS

The Kosovo Specialist Chambers has its own approach to the accused's right to

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July 2015) rule 80; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) rule 80; Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) rule 138(B); Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 31 May 2012) rule 80(B); Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 37(2).

[44] Law No 2014-28 of 3 November 2014 *supra* note 41 at arts 278 and 279.

[45] Ibid at art 274.

be present at trial. The Specialist Chambers were established to "ensure secure, independent, impartial, fair and efficient criminal proceedings" committed during and after the conflict in Kosovo between 1998 and 2000.[46] They resulted out of an investigation conducted by the Special Investigative Task Force, an entity formed with the specific purpose to study alleged crimes committed in Kosovo between 1998 and 2000. The Special Investigative Task Force concluded that sufficient evidence existed to indict former senior members of the Kosovo Liberation Army for crimes of persecution, sexual violence and ethnic cleansing because these alleged crimes were not the acts of rogue individuals but were organised and sanctioned by senior members of the military.[47]

The Law on Specialist Chambers and Specialist Prosecutor's Office, adopted by the Kosovar Parliament on 3 August 2015, governs the Kosovo Specialist Chambers. Article 21 of the law is largely modelled on Article 14 of the International Covenant on Civil and Political Rights and sets out the same minimum guarantee that the accused "shall be tried in his or her presence".[48] It does not contain any mention of trial *in absentia*, suggesting that trial will generally take place in the accused's presence. The Rules of Procedure and Evidence provide some nuance to this position, and clarify that trial *in absentia* will only be permitted if the accused is in custody and refuses to appear or where he or she is too ill to attend trial.[49] In the latter situation the Trial Chamber is under a duty to make provisions for the accused to follow the proceedings, and instruct counsel, from outside the courtroom.[50] The Specialist Chambers' approach to the right to be present is more similar to the Statutes of the *ad hoc* Tribunals than it is to more contemporary Statutes. This similarity to the International Criminal Tribunal for the former Yugoslavia's Statute may be a politically motivated decision to provide the accused at the Kosovo Specialist Chambers with similar rights to those provided to the defendants at the International Criminal Tribunal for the former Yugoslavia so as to avoid any suggestion that the accused at the former are being treated differently than

[46] Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) arts 1 and 7.
[47] Clint Williamson, Statement of the Chief Prosecutor of the Special Investigative Task Force (29 July 2014) 2 < http://sitf.eu/index.php/en/news-other/42-statement-by-the-chief-prosecutor-clint-williamson> accessed 3 July 2017.
[48] Law on Specialist Chambers and Specialist Prosecutor's Office *supra* note 45 at art 21(3)(e).
[49] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (28 March 2017) rule 65.
[50] Ibid at Rule 65(6).

those at the latter.

Despite this somewhat dated approach to the accused's right to be present, the Law on Specialist Chambers takes a very modern approach to permitting the accused to appear at trial through the use of video technology. Article 41(12) of the Law sets out the measures the Specialist Chambers is permitted to take to ensure the presence of the accused at trial. Article 41(12) permits the accused to attend trial via videoconferencing from Kosovo in four different situations.[51] They are: (1) when the accused is released on bail in Kosovo; (2) when the accused is under house arrest in Kosovo; (3) when the accused promises not to leave his or her place of residence; and (4) when the accused attends trial at a police station or other venue in Kosovo.[52] In each instance the accused must consent to attending trial via videoconferencing before the Specialist Chambers will allow it.[53]

The way the Law on the Specialist Chambers is written indicates that remote appearance is viewed as an alternative form of appearance rather than a type of absence. The conditions under which an accused can appear via videoconferencing are not listed amongst the situations giving rise to a trial *in absentia*. Therefore, a trial is not *in absentia* if the accused is appearing by video-link. This is very much in keeping with the Special Tribunal for Lebanon's approach to videoconferencing as its Rules of Procedure and Evidence also distinguish a remotely appearing accused from one being tried *in absentia*. Approaching video participation in this way supports the position that an accused is present for trial so long as he or she can understand and participate in the proceedings and does not depend on the physical location of the accused.

9.4 PROPOSED TRIBUNALS

Two additional tribunals, the Syrian Extraordinary Tribunal and the International Criminal Tribunal for Malaysia Airlines Flight MH17, have been proposed, but not established, since the introduction of the Special Tribunal for Lebanon's Statute. The Statutes drafted for each Tribunal both contain provisions authorising trial *in absentia*. Both of these provisions borrow heavily from Article 22 of the Special Tribunal for Lebanon, and in the case of the Syrian Extraordinary Tribunal, copied the Special

[51] Law on Specialist Chambers and Specialist Prosecutor's Office *supra* note 46 at art 41(12).
[52] Ibid.
[53] Ibid.

Tribunal for Lebanon's Statute verbatim.

It is unlikely that either The Syrian Extraordinary Tribunal or the Flight MH17 Tribunal will ever come into being, particularly as both will probably necessitate bringing charges against high ranking Russian officials, and the Syrian Extraordinary Tribunal could also very well result in American and British officials being charged. The probable indictment of citizens of permanent Security Council member states suggests that any effort to create either Tribunal will be vetoed by one or all of these permanent members. This was borne out when Russia vetoed a draft resolution to establish an *ad hoc* criminal tribunal addressing the downing of flight MH17 and another to refer human rights violations allegedly committed during the Syrian War to the International Criminal Court.[54] Although the latter draft resolution did not involve the establishment of an *ad hoc* tribunal, Russia's veto of the measure can be interpreted as opposition to any solution involving an international or internationalised criminal court or tribunal.

9.4.1 THE SYRIAN EXTRAORDINARY TRIBUNAL

While these are only draft statutes, and unlikely to be enacted, they remain significant as a reflection of how the world legal community currently regards the permissibility of trials *in absentia*. The draft statute for the Syrian Extraordinary Tribunal, developed out of an on-going discussion of a group of international criminal law experts, is an effort to propose "the structure, mandate and functioning" of a possible future tribunal designed to prosecute those most responsible for atrocity crimes committed during the war in Syria.[55] Article 26 of the Syrian Draft Statute follows Article 22 of the Special Tribunal for Lebanon's Statute almost exactly, and as such, specifically authorises the use of trial *in absentia*.[56]

Interestingly, when addressing trial *in absentia* in the Annex appended to the Statute, the drafters express a much broader right to retrial than that found in the text of

[54] Provisional Transcript, 7198th Meeting, United Nations Security Council, Doc. No. S/PV.7198 (29 July 2015), p. 4; Provisional Transcript, 7180th Meeting, United Nations Security Council, Doc. No. S/PV.7180 (22 May 2014) 4.
[55] The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (27 August 2013) 1 < http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf> accessed 3 July 2017.
[56] Draft Statute For A Syrian [Extraordinary][Special] Tribunal To Prosecute Atrocity Crimes (27 August 2014) art 26 and footnote 36.

the draft Statute.[57] The Annex suggests that retrial should be consistent with Syrian law, which permits the retrial of any accused that finds him or herself in custody in Syria.[58] However, that rule does not apply to all crimes in Syria. Bashar al Assad partially abrogated the right to retrial in a decree establishing a Counter-Terrorism Court with jurisdiction over alleged acts involving terrorism. In his decree, Assad announced that any person convicted *in absentia* by the Counter-Terrorism Court would only receive a retrial if he or she voluntarily surrendered to the authorities.[59] In the Annex appended to the Syrian Draft Statute, the drafters indicate that the proposed Tribunal should be able to conduct trials *in absentia* to address fears that some of the worst alleged perpetrators would avoid prosecution by fleeing Syria following the war.[60] The annex does not address what purpose is served by conducting trial *in absentia* other than to prosecute those alleged perpetrators who flee Syria following the war.

9.4.2 THE MH17 TRIBUNAL

By contrast, the draft Statute for the proposed tribunal to prosecute those involved in the downing of Flight MH17 approaches trial *in absentia* somewhat differently than the proposed Syrian Tribunal. The MH17 Tribunal also uses Article 22 of the Special Tribunal for Lebanon's Statute as a starting point, but omits some portions of that Statute from its own Statute. Unlike Article 22 of the Special Tribunal for Lebanon's Statute, Article 38(1) of the proposed MH17 statute contains two, and not three, grounds upon which a trial *in absentia* may be conducted. Gone is the provision that a trial *in absentia* can be conducted if the accused has expressly and in writing waived his or her right to be present.[61] This leaves two situations in which a trial *in absentia* can occur; where the accused has not been turned over to the Tribunal by the state in which he or she is located and where the accused has absconded and all reasonable steps have been taken to secure

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[57] 'Annex: Discussion Of Questions Related To An Extraordinary Tribunal For Syrian Atrocity Crimes', Draft Statute For A Syrian [Extraordinary] [Special] Tribunal To Prosecute Atrocity Crimes (27 August 2014) para 14. <http://www.publicinternationallawandpolicygroup.org/wpcontent/uploads/2014/01/Chautauqua-Blueprint-2014.pdf> accessed 3 July 2017.

[58] Ibid; *see also* Code of Criminal Procedure, Syria (1950) art 251.

[59] Decree 22 issued by Bashar al Assad, Syria (26 July 2012) art 6 <https://www.global-regulation.com/translation/syria/3371574/law-22-of-2012-juvenile-court-to-look-into-cases-of-terrorism-based-in-damascus.html> accessed 3 July 2017.

[60] Annex *supra* note 56 at para 14.

[61] Draft Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (19 June 2015) art 38.

his or her appearance and inform him or her of the charges.

The decision to allow trials *in absentia* at the proposed Flight MH17 Tribunal has been interpreted as an attempt to create a system able to overcome the expected challenges of gaining custody over the anticipated accused.[62] This is a plausible theory, particularly in light of Russia's predicted lack of cooperation with the Tribunal. Concerns over the Tribunal's inability to gain custody over the accused is also likely behind the decision not to include explicit waiver of the right to be present as an instance in which a trial *in absentia* can be conducted. This decision may appear anomalous when compared to the regular practice in international criminal law however, the decision must be understood in the appropriate context.

First, it should be considered in light of a decision made by Trial Chamber V(A) of the International Criminal Court in *Ruto et al*. There, the court found that it may not be in the interests of justice for the accused to waive his or her right to be present for the entirety of trial.[63] The Trial Chamber grounded its decision in the notion that the victims have an interest in trial taking place in the accused's presence.[64] This decision suggests that international criminal law disapproves of waivers of the right to be present that act to allow the accused to be absent from the entire trial. Second, by refusing to try individuals that explicitly waived his or her right to be present, the MH17 Tribunal may be trying to avoid a situation in which the accused will simply waive their right to be present and allow the trial *in absentia* to take place without any concern for the consequences. In this scenario, the accused declines to participate in trial because he or she anticipates that national governments refusing to support the work of the Tribunal will protect the accused from any consequences that might result from the trial. This is somewhat akin to the concerns expressed by the Inter-American Court of Human Rights in the *Case of Valle Jaramillo et al. v Colombia* and can be seen as another form of impunity making a mockery of international criminal justice.

Article 38(1) also states that a trial *in absentia* may not be conducted against an accused that waives his or her right to retrial. It also does not allow for the automatic retrial of an accused whose absence is the result of a waiver of the right to be present. At

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[62] Sarah Williams, 'MH17 and the International Criminal Court: A Suitable Venue?' (2016) 17 Melbourne J Intl L 210, 225-26.
[63] *Prosecutor v Ruto et al.* (Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*) ICC-01/09-01/11, T Ch V(A) (18 February 2014) para 74.
[64] Ibid at paras 73-4.

the proposed Tribunal an accused tried *in absentia* is entitled to a retrial unless he or she accepts the tribunal's judgment or if her or she expressly and unequivocally waived his or right to be present at trial.[65] This accords with the rules set out by the European Court of Human Rights when determining the necessity of a retrial. However, the proposed tribunal and the European Court of Human Rights diverge to the extent that the European Court considers a trial conducted following the accused's waiver of the right to be present to be a valid form of trial *in absentia* while the proposed tribunal does not. The inclusion of trials conducted in the absence of the accused following a waiver of the right to be present in Article 38(3), and its omission from subsection 1, suggests the accused's decision to waive his or her right to be present may not give rise to a trial *in absentia*. It is clearly not a basis for a trial *in absentia* under Article 38(1), and it does not create a right to retrial under Article 38(3), like other sorts of trials *in absentia*. From that it can be extrapolated that the proposed Tribunal assigns some other status to trials that take place as the result of a waiver. It is possible that the Statute's drafters feel that the accused's waiver of his or her right to be present means trial may proceed as normal and not be considered an *in absentia* proceeding.

The MH17 Tribunal's Draft Statute also indicates that those accused receiving notification about the trial via publication are entitled to an automatic retrial. Under the Statute, whether an accused waiving his or her right to be present is entitled to a retrial turns on the accused's waiver being expressed and unequivocal. The requirement that the waiver be expressed eliminates any form of implicit waiver, including waiver assumed following notification by publication, from preventing the accused from accessing a retrial. This suggests that the Tribunal is not emphasising the act of waiver when determining whether the accused is entitled to a retrial, but instead is trying to assess the degree of the accused's knowledge about the practicalities of trial and the charges against him or her before allowing a retrial. Instead of creating a new category of absence, it is more likely that the proposed MH17 Tribunal wants to avoid denying the right to retrial to any accused that may not have known about the trial. Conversely, those that positively did know about the trial, and refused to participate, are forced to bear the burden of that decision and are not accorded the possibility of a reassessment of the evidence against them.

[65] Draft Statute MH17 Tribunal *supra* note 69 at art 38(3).

9.5 CONCLUSION

Prior to the introduction of the Special Tribunal for Lebanon Statute, all of the Statutes of international or internationalised criminal courts and tribunals identified the accused's presence at trial as one of the minimum guarantees of a fair trial. In fact, other than the International Criminal Court's Statute, the statutes of all of the other courts and tribunals contained essentially the same clause, borrowed from the International Covenant on Civil and Political Rights, concerning the accused's right to be present at trial. That all changed after the Special Tribunal for Lebanon's Statute was introduced. The five international or internationalised courts or tribunals that have been established or proposed since the Special Tribunal for Lebanon have taken a more nuanced approach to the accused's presence at trial and have sought to draft provisions designed to work in their own particular contexts. This demonstrates that the strict adherence to the International Covenant on Civil and Political Rights approach to presence at trial is diminishing in favour of adopting practices that respect the interests of the accused while also fulfilling the needs of other trial participants.

It is encouraging that new international and internationalised criminal courts and tribunals are taking creative approaches to the accused's right to be present, but it is essential that they do not use the inclusion of trials *in absentia* in the Special Tribunal for Lebanon's Statute as a blanket justification for holding trials *in absentia* of their own. As the International Crimes Tribunals in Bangladesh have demonstrated, trials *in absentia* conducted without the appropriate safeguards lead to suspect trials that do not comply with international law. That being said, courts and tribunals should not err too far on the side of requiring presence at trial. By using force to ensure Haber's presence in the courtroom during trial, the Extraordinary African Chambers guaranteed that there were no questions about whether his right to be present was being respected. However, the Extraordinary African Chambers' use of force violated other rights held by Habré, particularly as the type of force used to keep him in the courtroom may not be authorised by international or domestic laws.

The right to be present at trial dictates that there must be adequate notice and unequivocal waiver before a trial *in absentia* can be conducted. The necessity of these two components is reinforced in the statutes and practices of the Special Tribunal for Lebanon and the others that have emerged in its wake. It is only when courts fail to pay adequate attention to notice and waiver that the validity of trials *in absentia* is called into

question. This problem is exacerbated when courts and tribunals do not permit the unconditional retrial of the accused after he or she comes under the control of the court. It is through retrial that any taint associated with lack of notice or insufficient waiver can be removed. The Statutes of the proposed Syrian and MH17 Tribunals seem to understand the importance of notice and waiver and the essential part both play in ensuring that trials are seen as being fair. Hopefully, those courts and tribunals yet to be established will also understand this and ensure that their statutes will include safeguards sufficient to protect against the infringement of the accused's right to be present at trial.

Chapter 10: Conclusion

The accused's right to be present at trial is an ancient right dating back at least to the first millennium BCE in what is now modern day Israel.[1] Its incorporation into international human rights law occurred more recently with the International Covenant on Civil and Political Rights containing the first explicit reference to the right found in an international convention or statute.[2] Thereafter, the right to be present was included in a number of regional human rights conventions and is explicitly set out in the Statute of every international or internationalised criminal court or tribunal introduced since 1993.

The right to be present at trial can generally by defined as follows: any person accused of a crime falling under the jurisdiction of an international or internationalised criminal court or tribunal has the right to understand and participate in the proceedings against them. That right entitles the accused to participate in the trial and imposes a corresponding duty on the court with jurisdiction over the matter from preventing the accused from participating in the trial if he or she wishes. The right to be present at trial is not absolute and it does not preclude trial from continuing without the accused if he or she does not want to be present. There is also a growing recognition that the accused has a duty to be present at trial that exists alongside the right to be present. The duty exists because the accused is expected to play an active role in proceedings, a role that goes unfulfilled if he or she is not present during trial. Those courts and tribunals that allow trial to take place entirely in the accused's absence often do so as a punishment imposed on the accused for failing to comply with his or her duty to participate. The right and the duty to be present must not be viewed as being co-extensive as the mandatory aspect of the duty would subsume the voluntary nature of the right. The accused should be given the opportunity to exercise his or her right to be present before a decision is made to punish the accused by proceeding with a trial *in absentia*.

The near universal recognition of the accused's right to be present in international criminal law should not be mistaken as suggesting that the right is uncontroversial. Contentious debates arose during the process of negotiating the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal

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[1] Gullie B. Goldin, 'Presence of the Defendant at Rendition of the Verdict in Felony Cases' (1916) 16 Colum L Rev 18, 18; *citing* S. Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews* (M. Curlander 1891) 128.

[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

Court about the parameters of the right and how it should apply. While it was generally felt that the accused has the right to be present at trial, significant disagreement existed about the circumstances under which trials can be conducted in the absence of the accused. This disagreement is thought by many to be based on the difference between inquisitorial and accusatorial approaches to criminal law. However, the argument is better understood as one between different countries, with different attitudes towards criminal procedure, wanting to see their own national system adopted as part of international law out of a conviction that their approach is better than that of other countries. The right to be present as it is appears in statutory law does not reflect a negotiated position between nations, but rather, signals the failure of those nations to compromise and develop a system best able to address the challenges arising during international criminal trials.

Whether it is appropriate to hold trial in the accused's absence is largely dependent on which aims a particular court or tribunal is attempting to satisfy. International criminal trials are meant to serve a variety of purposes including: retribution, deterrence, reconciliation, peace building, truth telling, reparations and enhancing the rule of law. Some, but not all, of these goals can be accomplished in the absence of the accused. Therefore, it is necessary for a court or tribunal deciding to proceed in the accused's absence to not only consider whether doing so is legally permitted but also what goals it hopes to achieve by conducting a trial against the accused. Such a determination requires an analysis of the interests the trial is intended to serve. Two distinct groups, the victims of atrocity crimes and the international community as a whole, receive the greatest benefit from international criminal trials. Both of these groups have an interest in seeing all of the identified trial objectives accomplished, but each group prioritises them differently. Those courts and tribunals that emphasise more victim-oriented goals are less likely to conduct trials outside of the accused's presence because the needs of the victims are often best served when the accused participates in trial. By contrast, courts and tribunals that focus on the demands of the international community as a whole are more likely to accommodate trial *in absentia*. Therefore, whether the presence of the accused at trial is necessary to realise the goals of international trials is dependent on which groups the particular court or tribunal is most interested in serving and which goals that particular group is most keen to have fulfilled. Only if those goals can be achieved in the accused's absence should a court proceed with a trial *in absentia*.

Trial *in absentia* should not be understood as a blanket term referring to any type of trial conducted outside of the accused's presence. Such an approach lacks nuance and fails to account for the different procedural effects created by different types of absences. Instead, there are four different types of absences from trial: 1) trial *in absentia*; 2) trial by default; 3) absence occurring after trial has commenced; and 4) absence resulting from an inability to understand or participate in trial. The first two types of absences, trial *in absentia* and trial by default, both involve the entire trial taking place in the absence of the accused. The latter two types of absences, those occurring after trial has begun and those resulting from an inability to understand or participate in proceedings, generally involve a defendant that is physically present in the courtroom for at least some part of the proceedings. Many international and internationalised courts and tribunals do not allow trials *in absentia* or trials by default although all international and internationalised criminal courts and tribunals permit portions of the trial to occur outside of the accused's presence.

A common thread runs through all of these types of absences. Before trial can continue under any of these circumstances a determination must be made about whether the accused had adequate notice of the charges against him or her and the date and location of trial and whether his or her failure to appear constitutes a waiver of the right to be present. An accused has adequate notice when he or she learns about the trial with enough time to enable him or her to prepare his or her defence to the charges. The right to be present is waived when an accused has adequate notice and does not appear for trial. Such waiver can be either explicit or implicit but the effect is the same, trial can continue outside of the presence of the accused and without his or her participation.

Those international and internationalised courts and tribunals that do not permit trial *in absentia* and trial by default largely avoid having to decide whether the accused received sufficient notice about the proceedings. Because trial can only continue in the accused's absence at those courts and tribunals if he or she has appeared before the court or tribunal at some point during the process, the need to provide them with notice is discharged as their appearance demonstrates an awareness of the proceedings. Courts and tribunals that do permit the entirety of trial to take place in the accused's absence have a more difficult task because they must determine whether the accused have actually received notice of the charges and whether their failure to appear is the result of a conscious decision not to participate. Making such a determination can be difficult as demonstrated by the experience of the Special Tribunal for Lebanon. There, in the

absence of affirmative evidence demonstrating that all of the accused were aware of the proceedings, notice had to be assumed from the overwhelming notoriety surrounding the case. Ultimately this was found to be sufficient notice, however an accused learning of the charges against him or her in such an indirect manner can lead to questions about whether the accused had been properly notified about the substance of the proceedings.

A safeguard has been developed to prevent those questions from threatening the legitimacy of trials held without the accused's participation. Trials conducted when the accused has not received proper notice are not *per se* violations of the right to be present. However, a requirement has been adopted to combat the impact such a trial may have on the accused's right to be present. An accused who does not receive notice of the charges against him or her must have the opportunity to have a new trial or other fresh determination of the charges after he or she comes under the control of the trial court. Although this right to a new trial is subject to some limitations, its existence highlights that the right to be present at trial means that trial should only continue outside of the accused's presence when he or she makes a conscious choice not to attend as evidenced by a waiver of the right to be present.

Once the notice requirement is met, a court or tribunal seeking to proceed with trial in the absence of the accused must find that his or her absence is the result of a waiver of the right to be present. To that end, courts and tribunals distinguish between voluntary absences that are the result of an accused opting not to participate in trial and involuntary absences over which the accused has no control. The voluntary absences include: removal from the courtroom following a disruption; refusing to attend trial, absconding and requesting excusal from trial. When presented with these situations courts and tribunals have generally found a waiver of the accused's right to be present and continue trial in the accused's absence. Involuntary absences falling into the latter category can include those caused by: illness, death, detention in another place and unexplained disappearance. When these types of absences occur the court or tribunal will often suspend trial until the accused is again able to attend. The conflicting approaches to these two sorts of absences demonstrate that courts and tribunals believe there is a qualitative difference between them produced by the motivation underlying the reason for the absence. It also provides affirmative evidence that the accused's absence was meant as a waiver of his or her right to be present. Treating voluntary and involuntary absences differently also helps to bring meaning to the underlying notion that the accused's right to

be present at trial means that he or she must have the opportunity to participate in trial if he or she so desires.

The fourth category of absence is distinct from the other types as it involves an accused that is physically present in the courtroom but functionally absent because of an inability to understand or participate in the proceedings. Absences caused by an inability to understand and participate are involuntary and therefore international and internationalised courts and tribunals confronted with this sort of absence will attempt to eliminate or mitigate the harm caused by it. When courts and tribunals are confronted with an accused that cannot understand the language in which the trial is being conducted it takes steps to have oral statements interpreted and written evidence translated so that the accused can know what is happening during the proceedings and participate in his or her defence. In circumstances where an accused's mental state prevents him or her from understanding and participating in the proceedings trial is usually halted in its entirety because there is often no way to allow the accused to effectively participate in trial. By attempting to overcome the impediments created by these involuntary absences, courts and tribunals have signalled that the accused's physical presence alone, without the ability to understand and participate, does not satisfy the accused's right to be present at trial. It demonstrates that being present means more than just appearing for trial, it also requires that the accused can actively understand and participate in trial. This conclusion is reinforced by the growing practice of a number of different international and internationalised criminal courts and tribunals that have increasingly permitted the accused to appear at trial remotely through the use of videoconferencing technology. This practise is significant because it prioritises the accused's ability to understand and participate in the proceedings over his or her presence in the courtroom.

The evolution demonstrated through the increased use of videoconferencing technology is significant as it is indicative of the changing understanding of the right to be present since the introduction of the Special Tribunal for Lebanon's Statute in 2007. All of the Statutes of those international and internationalised criminal courts and tribunals that preceded the Special Tribunal for Lebanon drew their understanding of the right to be present from the International Covenant on Civil and Political Rights, with some copying the International Covenant's provision verbatim. However, the inclusion of trial *in absentia* in the procedure of the Special Tribunal for Lebanon has apparently signalled to future international and internationalised criminal courts and tribunals that they are free to try and find an approach to the right to be present at trial that is most

suitable to its own particular needs. Of the five international or internationalised criminal courts and tribunals established or proposed since 2007, only the Kosovo Specialist Chambers' provisions on the right to be present are closely based on the International Covenant of Civil and Political Rights. The other four use a variety of different starting points and three of the four contain trial *in absentia* provisions. It is encouraging that these new courts and tribunals are attempting to take a more nuanced approach to the right to be present at trial rather than mechanically applying the provisions of the past.

What is clear is that the right to be present at trial can accommodate a variety of approaches so long as certain basic precepts are followed. The accused must be given the choice to attend trial, which includes the ability to understand and participate in the proceedings, if he or she wishes, and any absence from trial should be the result of a conscious choice not to participate. The best way to test whether the accused's absence is the result of his or her own decision not to attend is to consider whether the accused had adequate notice of the charges against him or her and the location and date of trial. Once proper notice has been established the court or tribunal deciding the issue should then examine the voluntariness of the accused's absence to determine whether he or she has waived the right to be present and it should only proceed in the accused's absence when it is found that he or she voluntarily waived that right. When a question exists as to whether there was adequate notice or waiver the accused should be given the right to a new trial or some other fresh determination of the charges to ensure that he or she had the opportunity to participate that is guaranteed by the right. Following this procedure will help to guarantee that international and internationalised criminal courts and tribunals properly protect the accused's right to be present and eliminate the threat a violation of that right might pose to the fair trial rights of the accused while also ensuring that the interests of other trial participants are fulfilled.

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