

The Absconding Accused and the ICC: An examination on the legitimacy and capacity of the International Criminal Court to hold in absentia trials

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Introduction

The term ‘trial *in absentia*’ refers to a proceeding in a court of law in which the accused is not physically present. This form of trial is at odds with a defendant’s right to be present in court; as first recognized in Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) [here], and other subsequent international human rights documents [here]. Despite this concern, it remains the only alternative to holding trial proceedings in the event an accused cannot be brought to court.

Since the Nuremberg trials, ad hoc international criminal tribunals, and the International Criminal Court (ICC), have largely rejected the possibility of a trial being held in the absence of the accused. The Special Tribunal for Lebanon (STL) is a recent exception. Article 22 of the *STL Statute* not only permits, but appears to require, trials to be held in absentia in certain circumstances. Specifically, Article 22 [here] provides that:

1. “The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
a) Has expressly and in writing waived his or her right to be present;
b) Has not been handed over to the Tribunal by the State authorities concerned;
c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.”

The STL ruled that the case of *The Prosecutor v. Salim Jamil Ayyash et al*. STL-11-01 [here] was one such circumstance. The accused had absconded, or otherwise could not be found, and all reasonable steps had been taken in accordance with Article 22(1)(c) above. The trial was held in absentia and the trial chamber unanimously found Mr. Ayyash guilty beyond reasonable doubt as a co-perpetrator of all the counts against him and unanimously sentenced him to five concurrent sentences of life imprisonment. The *Ayyash et al.* case is currently in the appeals phase, despite the continued absence of Mr. Ayyash.

Trials in absentia at the International Criminal Court (ICC)

The ICC has never conducted a trial *in absentia*. Article 63 of the Rome Statute appears to expressly reject this possibility as it provides: “the accused *shall* be present during the trial” [here].

The first question invariably becomes whether the International Criminal Court could lawfully hold trials *in absentia* [interesting commentary on recent developments].

The second question is whether the benefits of holding trials *in absentia* outweigh the drawbacks in the context of international criminal justice. For, as everyone (hopefully) learns in the course of life, just because one *could* do something, does not necessarily mean one *should*.

Legal Framework

The Right to be Present – Article 14(3)(d) of the ICCPR

Conducting a trial in the absence of an accused person is, in principle, at odds with the general requirements of due process and the right to participate in one's own defence set out in Article 14 of the ICCPR. Article 14 does not invariably render proceedings in absentia as inadmissible and the Human Rights Committee has acknowledged that exceptional circumstances may apply allowing for trial in absentia to proceed in the interest of the proper administration of justice [here at para. 14.1].

As noted by Parker and Jordash, "[n]otwithstanding the apparently mandatory language contained in Article 14(3)(d), there appears to be a consensus amongst states party to the ICCPR that the right is not absolute and may be subject to certain restrictions" [here at p. 489]. The exceptions to this rule that are most relevant for the determination of the ICC's ability to conduct trials in absentia lawfully are:

(1) **Waiver** - where there is a clear and unequivocal waiver of the right to be present [here at para. 31]

(2) **Retrial** - where there is an unfettered right to a subsequent retrial
[here at p. 490 citing B. v. France, Application No. 10291/82, reported at (1994) 16 EHRR 1.]

Legality of in absentia trials at the ICC

Exception 1: Waiver of the Right to be Present

The European Court of Human Rights (ECtHR) in *Poitrimol v. France* held that any waiver of the right to be present must be clear and unequivocal [here at para. 31].

The STL allowed for trials in absentia to be conducted where "all reasonable steps" had been taken to notify the accused [here]. Some hint as to what is meant by this is provided in Rule 76 *bis* of the STL's Rules of Procedure and Evidence, entitled Advertisement of Indictment. This rule provides that if an indictment cannot be personally served to an accused, "a form of advertisement shall be transmitted…for publication in newspapers and/or broadcast via radio, television and/or other media, including the internet…" as well as notifying and calling upon the public for information [here 105-106]. The concern is whether these "reasonable steps" can establish that the accused had actual knowledge of the proceedings in order to effectively determine that there has been an implied, or constructive, waiver of the right to be present. Even if this could be established, this is surely a far cry from the standard of a "clear and unequivocal" waiver.

There are several examples from outside of the context of the STL which demonstrate the difficulties that arise in trying to justify *in absentia* trials with constructive waiver. In *Mbenge v. Zaire* [here], the Human Rights Committee concluded that there had been a breach of Article 14 after it determined that the accused only found out about the trials held in his absence after they had occurred. He was sentenced to death in both.

Similarly, in *Colozza v. Italy* [here], the accused was declared a "latitante" at trial, that is as a person willfully evading the execution of a warrant issued by a court, and committed for trial [here at para. 12]. Mr. Colozza maintained that he had been wrongly declared "latitante" and that the notifications of the summons to appear and of the extract from the judgment rendered by default were therefore null and void [here at para. 15]. The ECtHR unanimously held that this was a violation of Mr. Colozza's right to be present.

The above jurisprudence demonstrates that there is considerable difficulty in ascertaining the required knowledge of the commencement of proceedings to amount to a constructive waiver of the right to be present. Further, the Human Rights Committee in *Maleki v. Italy* [here], held that a showing of due diligence was insufficient to justify proceeding in the absence of the accused. The STL has been criticized for its approach to this exception and it is far from clear that this approach is compliant with international human rights. It is surely an understandable criticism in light of this previous jurisprudence.

In conclusion, for all of the above reasons (and for several other policy considerations discussed below), this first exception is not ideal to form the basis of the justification for in absentia trials at the ICC. The right to be present is premised on the idea that a full defence can only be made if the accused is present to instruct defence counsel. Without the presence of the accused, the defence is hamstrung in a context where one's freedom, or potentially one's life, is at stake. Regardless of the crime committed, it is surely indisputable that the situation described above in *Mbenge v. Zaire* is unethical and should be avoided at all costs.

This justification would also conflict with previous jurisprudence at the ICC. In *Ruto and Sang*, the Appeals Chamber found that Article 63(1) of the Rome Statute 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" [here at para. 54].

Exception 1B: '*Semel praesens semper praesens*'

This analysis is primarily focused on the situation of an accused who the court has been unable to locate and bring before the court or properly notify them of the commencement of legal proceedings against them. However, it is worth briefly touching on The *Banda Case* [here] and the difference in legality or advisability of continuing a proceeding where the accused has been present and subsequently disappeared.

Despite the veracity of the foregoing discussion of waiver, the ICC could potentially adopt the maxim '*semel praesens semper praesens*' (to be present once is to be present always) and allow for trials to continue where the accused was present for the pre-trial proceedings and is therefore aware that proceedings have been commenced against them.

Courts in the United States adopt the maxim of '*semel praesens semper praesens*' to view trials continued in these circumstances as not truly trials in absentia. Following this maxim, the trial is not actually being continued in the accused's absence because their presence at one stage of the trial means they are deemed to be present at the rest of the trial even if they do not attend. Adopting this maxim could allow the ICC to continue with *The Banda Case*, and similar subsequent trials where an accused has been present at pre-trial proceedings, without the need to continue to the rest of the analysis below which is primarily concerned with an accused who is never present.

The objections that make the waiver exception inappropriate to form the basis of a justification for in absentia trials at the ICC for an absconding accused fall away when speaking of an accused who has been present at some stage of a proceeding. In this circumstance, the accused has actual knowledge of the commencement of legal proceedings against them and a waiver may be more readily implied despite this waiver falling short of being clear and unequivocal.

Exception 2: Unfettered Right to a Subsequent Re-Trial

The second exception which may allow the ICC to lawfully conduct trials in the absence of the accused is where there is an unfettered right to a subsequent re-trial. As held by the European Court of Human Rights (ECtHR) in *B v. France* [B. v. France, Application No. 10291/82, reported at (1994) 16 EHRR 1.], a guarantee of a retrial renders *in absentia* proceedings permissible even where there has been no waiver of the right to be present. The question then becomes whether the ICC would be able to adequately guarantee a retrial to an accused and what this should entail.

One criticism of the STL's willingness to hold trials *in absentia* is the failure to adequately guarantee a re-trial. Article 22(3) does provide the guarantee that an accused 'shall have the right to be retried in his or her presence before the Special Tribunal' [Art. 22(3).]. However, this falls short of a guaranteed, unfettered right to a subsequent re-trial because the STL is a temporary tribunal. This flaw is exacerbated by Article 5(1) of the STL Statute, which provides that '[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' [Art 5(1).]. The result is that an accused who has been tried in *absentia*, and who seeks to exercise their right to a re-trial after the Tribunal is no longer active, will have no recourse to do so.

The ICC has the unique distinction of being the only permanent international criminal court. This fact allows for the court to provide an unfettered right to a subsequent retrial in a way the temporary ad-hoc international tribunals are not able to. With this in mind, the ICC would appear to be the most suited international criminal court for in absentia trials to occur.

It is clear from the criticisms of the STL that if the ICC were to allow for trials in the accused absence, there must be a robust, unfettered right to a re-trial that is more than illusory or a disingenuous attempt to appear in compliance with international human rights.

In *Colozza v. Italy* [here], the ECtHR held that the Italian rules governing the retrial of in absentia convictions do not meet the ECtHR's standards, because they do not grant the defendant the right to

adduce new evidence and to effectively dispute the evidence gathered in his absence [see: Nicola Canestrini, “Italian in absentia trial violates the right to a fair trial” (2018)].

Provided that provisions were made for a right to a retrial which allows for the accused to participate as they would have been able to if present at the first instance, the ICC may be able to hold trials in absentia in compliance with international human rights principles. This would fall under a recognized exception to Article 14 of the ICCPR.

Implementation

As previously mentioned, Article 63 of the Rome Statute provides that the accused provides: “the accused *shall* be present during the trial”. It may appear that, because of this wording, it is simply not possible for lawful in absentia trials at the ICC, even if such trials can be consistent with international human rights principles in the framework outline above.

The final hurdle to clear thus becomes how the ICC might implement this change lawfully. Amending Article 63 of the Rome Statute may appear to be the only way in which this would come about. However, such measures may be unnecessary. If Article 63 is understood and interpreted as providing both a right and imposing a duty on an accused to be present at trial, there would be no need to amend the Rome Statute.

In *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Ambos remarks “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” [here p. 164]. This may be confusing and seemingly contradictory that there could possibly be both a right and a duty to be present at trial – the duty appearing to extinguish the free exercise of the right.

In *The Right to be Present at Trial in International Criminal Law*, Wheeler argues that Article 14 of the ICCPR provides both a right and imposes a duty [see Ch. 2.2 (p. 8-20)]. To work through the contradiction Wheeler understands the right and the duty as encompassing different interests and looks to the text of the ICCPR which grants the accused the minimum guarantee to be tried in his presence. Wheeler states that “[d]escribing 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. Wheeler then offers the statement made by the ICTY in *Prosecutor v. Delalic et al.* (“*Celebici* Camp case”). The presiding judge in that case, speaking of an absent defendant, stated “[if he wants to be here, he has a right to be here. There is no doubt about it.” [*Prosecutor v. Delalic et al.* (Trial Transcript) IT-96-21, T Ch (4 November 1997) 8973, lines 10-11] Wheeler concludes that “the right to be present is essentially the right not to be unilaterally excluded from the trial” [see Ch. 2.3 (p. 21)]

There has also been support for this view at the ICC itself. In *Ruto and Sang*, the Trial Chamber held that it had been 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 [here at para. 42].

Policy Considerations

Importance of the Right to be Present

An understandable criticism of trials in absentia is that, as stated by Parker and Jordash, “[t]he defendant is, and must always be, the central figure in a criminal trial. The prosecuting authority will have prepared its case and be convinced that it represents a reasonable prospect of establishing the guilt of the accused. The trial is the accused’s opportunity to challenge that evidence, and to present his account” [here at p. 500].

The right to be present is premised on the idea that a full defence can only be made if the accused is present to instruct defence counsel. Without the instructions of the accused, effective representation is not possible, and the defence is hamstrung. Essentially, what is occurring in this situation is the prosecution is advancing a theory of the case armed with its usual arsenal, while the defence is missing one of their key weapons used to fight back.

This is where the importance of the right to a retrial becomes apparent. However, this too comes with its own set of concerns. Some may understandably believe that this may allow for an accused to tactically avoid the first proceeding, knowing that, if convicted, they can have a retrial if they are eventually apprehended.

What then is the purpose of a trial in absentia? Would it not simply be better to wait and hope that eventually the situation changes and the accused can be brought before the court?

The Search for Truth

In international criminal law, courts are dealing with crimes of a scale measured in human suffering, not seen in other legal contexts. For this reason, it is vital that a human element be included in the analysis. The proceedings in a case such as *Ayyash et al.*, implicate far more than just the accused. There are often many victims and political implications relying on the findings of fact. To this end, international criminal proceedings should not be viewed as functioning for the sole purpose of determining the guilt of the accused – they are also a search for truth.

While the defendant may be the central figure in a criminal trial, it is important to remember they are not the only party effected by the proceedings. A trial can be an achievement of justice for victims and other parties even if the trial itself is imperfect without the presence of the accused. This includes the ability to receive reparations based on the judgement at the national level. This is not just monetary compensation, and serves other ends, including labelling historical events, locating deceased family members through the investigations, and recognition of those affected as victims. One should also not forget the inconvenience and emotional strain to witnesses, victims, and co-accused as a result of a proceeding that is delayed in perpetuity.

An example of one such achievement of justice from the STL case of The *Prosecutor v. Ayyash et al.* [here] is illustrative of this point. A young man named Ahmed Abu Adass was initially thought to be the man who perpetrated the suicide bombing in Beirut, Lebanon 14 February 2005 which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured hundreds of others in adjacent buildings, destroying many homes [here]. In a video broadcast by Al-Jazeera shortly after the attack, Mr. Ahmad Abu Adass claimed to represent a fundamentalist group called 'Victory and Jihad in Greater Syria' and to have executed a 'resounding martyrdom operation' against Mr. Hariri as an agent of the 'infidel Saudi regime'. However, through the course of the trial it was determined that the group was fictional and Mr. Abu Adass was not the suicide bomber. The false claim of responsibility was aimed at diverting attention away from the true perpetrators.

The above is merely one example of many that illustrates that, even though arresting the accused may not be possible, a legal proceeding can still achieve justice for many other people. Those who question the value of trials in absentia should consider the meaning of this trial for the family of Mr. Abu Adass. Although he remains missing, this judgment determined that he was a victim of abduction and not a suicide bomber who killed over twenty people.

Another way a legal proceeding of this kind may achieve justice is through compensation to the victims.

As noted by Dr. Joseph Rikhof [here], in *The Prosecutor v. Ayyash et al.*, the Trial Chamber noted that The Special Tribunal, unlike the ICC, had no statutory compensatory or reparations mechanism. However:

"While the Statute does not authorise the Trial Chamber to make financial orders against a convicted accused person, such as to pay compensation or reparations to a victim of crimes within its jurisdiction, it does not expressly prohibit the Special Tribunal from establishing or administering any such scheme that does not involve making orders against a convicted person. Further, in addition to imposing sentence, the Trial Chamber may make relevant recommendations on matters of concern that it has encountered in the proceedings" (paragraph 275).

Ultimately, the Trial Chamber recommended that Lebanon should establish statutory mechanism to compensate victims of crimes (paragraphs 281-284) or, in the words of the Trial Chamber:

"In addition to setting up such a mechanism, the Trial Chamber also recommended that the Special Tribunal establish a special trust fund to compensate the victims of the crimes… (see paragraphs 299-302 and 308).

The Evidence

Another point to discuss when considering international trials as serving the dual role of searching for both truth and justice is the fact that the quality of evidence depreciates over time. As held by the court in *Colozza v. Italy*, "the impossibility of holding a trial by default may paralyze the conduct of criminal

proceedings, in that it may lead, for example to dispersal of evidence, expiry of time limits for prosecution or a miscarriage of justice" [here at para. 29]. Viewed this way, a trial in absentia may be beneficial to both parties as it is, at the very least, a trial which occurs using evidence that is of a higher quality than may be expected in the future.

Trying a case while the evidence is of its highest quality and availability is undoubtedly beneficial for the proper administration of justice and the search for the truth. This fact, combined with the indirect benefits and achievements of justice that are possible through a trial in the absence of the accused make a strong case for having this as an option available to the ICC in exceptional circumstances which are deemed to warrant it.

A trial *in absentia* can never be a perfect replacement for a trial under ideal circumstances, and the expectations of what can be accomplished should reflect this. Nonetheless, in the paraphrased words of Voltaire, the ICC should not allow the perfect to become the enemy of the good.

Conclusion

The ICC can, and arguably should, allow for in absentia trials. This can be done in accordance with international human rights norms if there is a guaranteed right to a subsequent re-trial which is procedurally fair to an accused. There is also an option to adopt the maxim '*semel praesens semper praesens*' to justify continuing proceedings in the absence of a once-present accused.

There are good arguments both for and against holding trials in absentia at the ICC. Nonetheless, this is a useful option for the court to have in exceptional circumstances where the benefits outweigh the negatives. This could all be achieved through a reinterpretation of Article 63 of the Rome Statute as not providing an absolute right to not have proceedings while an accused is not present, but rather through viewing the right to be present as a right not to be unilaterally excluded from the trial.

It remains to be seen if the ICC will ever hold a trial *in absentia*. However, the ICC has an option to do so legally and this author believes it would be advisable to have such an option available when it is needed. With that said, there are valuable lessons to be learned from previous jurisprudence on the topic, particularly at the STL, which the court should keep in mind if there were ever to make such a change.

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