



## IBA International Criminal Court and International Criminal Law Programme

# Report on the 'Experts' Roundtable on trials *in absentia* in international criminal justice'

September 2016

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

**Judge Ivana Hrdličková** – President, Special Tribunal for Lebanon

On 8 June 2016, the International Bar Association International Criminal Court and International Criminal Law Programme convened an **‘Experts’ Roundtable on trials in absentia in international criminal justice’** at The Hague Institute for Global Justice. The event brought together experts including judges, diplomats, counsel, academics and representatives of civil society, to discuss issues related to the theory and practice of trials *in absentia*. The Experts’ Roundtable consisted of a keynote address from Judge Ivana Hrdličková, President of the Special Tribunal for Lebanon (STL), followed by two panels.<sup>1</sup>

Panel One addressed **‘Trials in absentia: human rights law and the judicial process’** from theoretical, national and international perspectives. Speakers included Dr Brianne McGonigle Leyh, associate professor, Netherlands Institute of Human Rights, Utrecht University and co-director of the Utrecht Centre for International Studies; François Falletti, attorney and former chief prosecutor of the Paris Court of Appeals; Dr Guido Acquaviva, deputy registrar of the Kosovo Specialist Chambers and former *chef de cabinet* in the STL Presidency; and Geoffrey Robertson QC, barrister, founder and joint head of Doughty Street Chambers, former president of the UN’s Special Court for Sierra Leone and author of a report on the Bangladesh International Crimes Tribunal. The panel was moderated by Dr Mark Ellis, Executive Director of the IBA.

Panel Two addressed **‘Effective representation and ethics in trials in absentia’**. Speakers included Héleyn Uñac, deputy chief of the Defence Office at the STL; Thomas Hannis, defence counsel at the STL; Toby Cadman, barrister, 9 Bedford Row International, and counsel before the Bangladesh International Crimes Tribunal; and Dr Kinga Tibori-Szabó, legal officer in the team supporting Legal Representatives of Victims before the STL. The panel was moderated by Dr Jill Coster van Voorhout, senior researcher in the Rule of Law Program, The Hague Institute for Global Justice.

Drawing on the material raised at the Experts’ Roundtable, this report summarises some of the underlying goals and justifications for trials *in absentia*; background on trials *in absentia* in common and civil law legal systems; and the use of the concept in international criminal justice. It then focuses on three main themes, namely the compatibility of trials *in absentia* and fair trials; counsels’ perspectives on trials *in absentia* and the meaning of effective representation; and trials *in absentia* and stakeholders in international criminal justice. The report concludes by exploring some future considerations for trials *in absentia* in the context of international criminal justice.

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<sup>1</sup> The IBA extends its sincere thanks to the keynote speaker and all panellists for their contributions to the Experts’ Roundtable. Most panellists spoke in their personal capacity benefiting from their professional experience and expertise. Selected audio clips of the Roundtable are available online at [http://www.ibanet.org/ICC\\_ICL\\_Programme/ICL\\_Trials\\_in\\_Absentia\\_2016.aspx](http://www.ibanet.org/ICC_ICL_Programme/ICL_Trials_in_Absentia_2016.aspx).

## I. Underlying goals and justifications for trials *in absentia*

A trial *in absentia*, derived from the Latin word meaning ‘in absence’, is a trial in the absence of the accused. The underlying rationale for holding a trial *in absentia* is to ensure that the accused cannot delay the administration of justice by opting to be absent from the court. Historically, trials *in absentia* were characterised by the complete absence of the accused, without legal representation. As discussed in Section II of this report, international law regarding trials *in absentia* is now clear that legal representation is required. There are differing criteria as to what constitutes the absence of the accused. Some systems find the accused to be ‘present’ for legal purposes if they made an initial appearance before the court. For example, at the Special Tribunal for Lebanon, an accused facing charges of contempt appeared by video link and then subsequently refused to make further appearances or to acknowledge the authority of the court after the first hearing. During the initial appearance the accused heard the charges against him and pled ‘not guilty’.<sup>2</sup> The Tribunal found that the subsequent proceedings against him did not constitute a trial *in absentia*, despite the fact that the accused was not present after the initial appearance. The STL provisions defining trials *in absentia* are discussed further below.

In the absence of the accused at the time of the trial, the punitive aspect of international criminal justice cannot be fulfilled, at least not immediately. Traditionally, a trial *in absentia* is a step towards accountability but is not an end in itself. The question was posed as to whether international trials *in absentia* could be justified if any resulting sentence cannot or may not be enforced. It was noted that the punitive aspect is but one of the main aims of international criminal law. Other aims that must be considered encompass bringing justice to victims and allowing for compensation; fostering reconciliation; creating a historical record; deterring future crimes; and ending the culture of impunity for grave crimes. In principle all of these aims can be achieved, or at least considerably advanced, through *in absentia* proceedings. It was noted that a trial *in absentia* can help ensure accountability and fight impunity, which is itself a goal of the international community in the development of international criminal justice.

A number of additional rationales were mentioned in support of trials *in absentia*, in addition to the rationale of not permitting the accused to delay or avoid justice. It was pointed out that, by not having a trial for someone who has absconded, the public can be under the impression that the accused is being rewarded for escaping. Victims’ interests may also support holding a trial *in absentia*, especially in systems where civil parties may participate and claim compensation. Trials *in absentia* may also be seen as supporting the truth-seeking functions of the trial process.

### *Trials in absentia from civil and common law perspectives*

A number of panellists addressed the different approaches to trials *in absentia* in civil and common law systems. From a common law perspective, jurisdiction means having someone within the power of the court, and is related to the state’s ability to exercise its power, as well as to enforce punishment. Therefore, the concept of jurisdiction used in common law is strictly linked to the power of the state to actually apprehend an accused. It was put forward that the concept of *in absentia* trials does

<sup>2</sup> See, STL, *Prosecutor v Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin*, 20140529\_STL-14-06\_I\_T2\_OFF\_PUB\_EN\_CT1, Transcript of Trial Hearing, 29 May 2014, p. 13, line 14. See also, <http://www.stl-tsl.org/en/the-cases/about-the-contempt-cases#stl-14-06> [Last visited on 19 August 2016].

not exist as such in common law jurisdictions, because it is assumed that the exercise of jurisdiction requires having the person in custody of the court. However, it was also argued that trials *in absentia* do take place in common law systems and that while there is emphasis on the presence of the accused, in exceptional circumstances trials *in absentia* are permitted. The operative question is whether full opportunity has been given to the accused person to appear. If the court is satisfied that the opportunity was given, then the court has the discretion to decide whether to proceed or not.

From a civil law perspective, it was noted that jurisdiction is understood as the power of the court to state the law, which can be done without the presence of the accused. The procedure for building a case in the civil law system was also noted, which entails the investigative judge gathering evidence, including written statements from witnesses. It was pointed out that the work of the investigative judge alongside the evidence provided during the investigation phase may contribute to a shorter court process. However, it was also noted that the amount of time spent in court is increasing because people want to see, understand and listen to the proceedings. For trials *in absentia* in a civil law system, even without the cross-examination phase there is plenty of material in the file to be considered by the court. Once the case file ('dossier') is compiled, which may represent several years of investigations, the question is whether to wait for years for the accused to be arrested or to put this file before the court. In the inquisitorial system, it was noted that if a person fails to appear in court, they are considered to be denying the justice system.

A trial *in absentia* can serve as a focal point for victims and function to provide victims and the general public with information about a case – when such a procedure allows information from investigations to be made public – even after the investigations have been concluded for many years. One such example given was the Arrêt 07/027 (2010) before the Paris Court of Appeals, which dealt with human rights violations that took place circa 1973 in Chile.<sup>3</sup> The case was brought by the families of four Franco-Chilean people who had disappeared. 14 people were identified as having allegedly played a role in the disappearances, and who were then tried *in absentia*. Notification was sent through diplomatic channels to inform the accused about the charges, the date of the trial and the list of trial witnesses, but none of the accused appeared. However, it was noted that the procedures held significance for the families of the victims who were grateful for the trial.

### *Trials in absentia in international criminal justice*

Many speakers addressed the place trials *in absentia* hold in international criminal justice, with reference to specific historical examples as well as to contemporary institutions. At the inception of the modern system of international criminal justice, the 1945 Nuremberg Tribunal Charter authorised trials *in absentia*.<sup>4</sup> One person, Martin Bormann, was tried and convicted *in absentia*, however it was noted that this case was tried without much evidence and that Bormann was sentenced to death, despite having died two years before he was convicted.<sup>5</sup> For the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established in 1993 and

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3 Cour d'Assises de Paris, 3ème section statuant dans le cadre de la procédure du défaut criminel, Arrêt 07/0027 du 17 Décembre 2010, available at [https://fidh.org/IMG/pdf/Arret\\_de\\_condamnation\\_17dec2010.pdf](https://fidh.org/IMG/pdf/Arret_de_condamnation_17dec2010.pdf). [Last visited on 19 August 2016].

4 Charter of the International Military Tribunal (Nuremberg) Article 12, provides that: 'The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.'

5 See, P. Manning, Martin Bormann, *Nazi in Exile* (Secaucus: Lyle Stuart Inc., 2005) p. 16. The judgment against Martin Bormann is available at <http://avalon.law.yale.edu/imt/judborma.asp>. [Last visited on 19 August 2016].

1994 respectively, the drafters of the rules were more cautious about trials *in absentia*, although the Tribunals do provide for certain proceedings to take place in the accused's absence as further discussed below.<sup>6</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL) allowed for a version of trials *in absentia* to take place when an accused made an initial appearance and subsequently failed to attend.<sup>7</sup> At the International Criminal Court (ICC) there is no provision for trials *in absentia*, however the absence of the accused from trial proceedings has been permitted, for example for President Uhuru Muigai Kenyatta and Mr William Samoei Ruto in the Kenya situation before the ICC.<sup>8</sup> Furthermore, in 2013 the ICC Rules of Procedure and Evidence were amended to permit trial in the absence of the accused in specific circumstances.<sup>9</sup>

It was pointed out that the legal regime at the STL goes further than previous international criminal tribunals, since the accused is not required to make an initial appearance,<sup>10</sup> and proceedings can take place wholly in his or her absence. Under Article 22 of the Statute of the STL, proceedings can commence if the accused waives his presence expressly and in writing; has not been handed over to the Tribunal by the state authorities; or has absconded or cannot be found and all reasonable steps have been taken by the Tribunal to inform him about the proceedings and to bring him to the Tribunal. It was noted that at the STL, safeguards were put in place to protect the rights of the absent accused: (i) full legal representation in the proceedings; and (ii) the right to a retrial (*ex novo* trial if he or she appears during the process) in the accused's presence if he was convicted in his absence and was not represented by counsel of his own choosing.<sup>11</sup>

However, it was noted that international criminal justice institutions are generally less willing to embrace trials *in absentia* because of concerns regarding the incompatibility of trials *in absentia* with international human rights standards. As further discussed in Section II, the ECtHR has expressed its view on the issue of compatibility and concluded that if there are safeguards – namely the notice of the charges and the rights to effective representation and retrial – trials *in absentia* can be compatible with international human rights standards. It was noted that trials *in absentia* no longer have to mean trials 'behind closed doors'. However, speakers emphasised that there are both pros and cons to holding trials *in absentia*. It was put forward that modern day trials *in absentia* can be designed in a way that the accused's fair trial rights are protected; at the same time it was noted that a trial *in absentia* is never a goal in and of itself, but something to consider as an alternative to having no trial at all.

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6 See, for example, ICTY Rules of Procedure and Evidence, Rules 61, 80, 118; ICTR Rules of Procedure and Evidence, Rules 61, 80, 82*bis*, 119.

7 ECCC Internal Rules, Rules 81.4, 81.5; SCSL Rules of Procedures and Evidence, Rules 60, 80.

8 In the cases *The Prosecutor v Uhuru Muigai Kenyatta* and *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, the majority of the judges in Trial Chambers V(B) and V(A) respectively recognised that the presence of the accused during the trial is not only a right by virtue of Article 67(l)(d) of the Rome Statute but also a duty on the accused by virtue of Article 63(1)). The Chambers ruled that the presence of the accused is the default position, but that Trial Chambers have the discretion to make reasonable exceptions on a case-by-case basis. See, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, para 104; *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, para 124.

9 ICC Rules of Procedure and Evidence, Rule 134*ter* ('Excusal from presence at trial') and Rule 134*quarter* ('Excusal from presence at trial due to extraordinary public duties'); see also ICC-ASP/12/Res.7.

10 STL Rules of Procedure and Evidence, Rule 105*bis* permits the absence of the accused from proceedings before the Pre-Trial Judge.

11 STL Statute Article 22(2), 22(3); STL Rules of Procedure and Evidence, Rule 106 (B).

## II. Trials *in absentia* and international fair trial standards

### *Trials in absentia and international human rights standards*

Panellists pointed to the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) as having the most prolific case law on trials *in absentia*. While Article 14 of the International Covenant on Civil and Political Rights provides that an accused is entitled to be tried in his presence,<sup>12</sup> both the HRC and the ECtHR have found that trials *in absentia* can be permitted under very limited conditions. Specifically, and as further outlined below, jurisprudence holds that trials *in absentia* are not *per se* incompatible with the right to a fair trial, provided the following safeguards are in place: (i) the accused must have notice of the proceedings; (ii) the accused must be legally represented in the proceedings and have effective assistance of counsel; and (iii) the accused should have the right to retrial or an *ex novo* trial in his or her presence.<sup>13</sup> Other international legal instruments were also mentioned as having addressed trials *in absentia*, including the Council of Europe Committee of Ministers Resolution (1975) and the Framework Decision on the European Arrest Warrant (2009), which provides legal guarantees for trials *in absentia*.<sup>14</sup>

### *Safeguards for trials in absentia*

Three key safeguards, in line with those identified by the ECtHR and the HRC, were discussed, specifically: notice of the proceedings; the appointment of defence counsel and effective representation; and the right to retrial. It was noted that there are discrepancies between what the human rights bodies say and what may take place at the international level, and that areas of concern remain.

### *Notice to the accused*

Both the HRC and the ECtHR have ruled that the burden is on the State to show that the person concerned was aware of the proceedings. The standard requires the State to demonstrate that the accused had actual knowledge; vague and informal knowledge is insufficient, and any waiver must be express. Actual knowledge can be assessed through examining whether concrete steps to give formal and timely notice to the person concerned were taken. It was noted that the burden is high, in that regular due diligence is not enough. Both the HRC and the ECtHR have pushed States to show that they went beyond the mere formality of giving notice, for example by posting in a local newspaper. States have had to show the actual notice including some sort of formality on the part of the State. However, the HRC also recognises that there are limits to the efforts that can reasonably be expected from a State, and in this regard there can be a conflicting message.

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12 ICCPR Article 14(3) (d): 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

13 See, Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para 36; See also European Convention on Human Rights Article 6 (3) and ECtHR cases *Colozza v Italy*, (1985) 7 E.H.R.R. 516; *Goddi v Italy*, Judgment of 09.04.84, Series A. No. 76; *Van Geyselghem v Belgium*, Application no. 26103/95, Judgment, 21 January 1999; *Lala v Netherlands*, Application no. 14861/89, Judgment, 22 September 1994; *Sejdovic v Italy*, Application no. 56581/00, Judgment, 1 March 2006.

14 See, Resolution (75) 11 on the Criteria Governing Proceedings held in the Absence of the Accused; and see Council Framework Decision 2009/299/JHA of 26 February 2009.

There was reference to the steps taken by the STL to formally notify the accused, and the problems faced by both the Tribunal and the Lebanese authorities, outlined in the 20 December 2013 decision in *The Prosecutor v Mehri*.<sup>15</sup> Panellists raised the question as to whether the notification was a mere formality or whether the Trial Chamber sought to be convinced that the accused knew about the charges and proceedings against him. However, it was also stated that the decision shows a substantive approach by the Trial Chamber, detailing why the Chamber found that the accused was aware of proceedings against him, and therefore why the Chamber was convinced that the accused was wilfully not participating in his own trial.

### *Assistance of counsel*

An accused tried *in absentia* has the right to legal representation. The State must show that the accused was appointed defence counsel, and that the counsel can effectively fulfil its duties; in particular that counsel did not operate under undue influence or pressure. The representation that is assigned needs to be at a level that is compatible with the crime that is charged against the accused and proportionate to the severity of the crime that is charged. However, it was noted that the appointment of, and effective assistance of, counsel will not remedy an unfair trial, if either notice is insufficient or if there is no actual right of retrial. In this regard, while many courts focused on the fact that adequate legal representation was provided, both the HRC and ECtHR require adequate representation together with notice and the right to retrial.

Questions were also raised about effective representation and assignment of counsel for self-representing defendants, as well as for defendants who are disruptive and are removed from the court. Practical considerations for legal representation in trials *in absentia* are further discussed below in Section III.

### *Right to retrial*

Individuals who were tried *in absentia* and who later appear before a court must, in all cases, be able to obtain a fresh determination on the merits of the charges, both law and fact. It was noted that the HRC understands retrial as retrial in the form of a trial of first instance, while at the ECtHR retrial can be an appellate review, *de novo*, based on the facts.

In this regard, it was noted that the right to retrial presents questions in respect of trials taking place at courts with a temporary mandate, like the STL, that will eventually close down. It was noted that there remained questions regarding what institution would be responsible for a re-trial, if there is an absolute right to a re-trial, as well as questions about who would provide funding for a re-trial of an STL accused. It was noted that this issue concerns the ICTY and ICTR, as well as the STL, as there are provisions for review judgments that may take place ten years or 20 years after the trial. In light of the ad-hoc tribunals' Statutes having been adopted by the Security Council, it was argued that the Security Council was responsible for establishing a residual mechanism to address issues including review of judgments, and one possibility would be to assign re-trials after *in absentia* proceedings to such residual mechanisms.

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<sup>15</sup> STL, *Prosecutor v Hassan Habib Merhi*, STL-13-04/1/TC, Decision to hold trial in absentia, 20 December 2013.

## *Trials in absentia and inquiries*

The Roundtable explored the relationship between trials *in absentia* and inquiries. One perspective presented argued that a trial should be strictly construed as a proceeding that takes place in the presence of the defendant and with the opportunity to cross-examine witnesses. The defendant is the subject of observation and reacts to the charges put before him or her. This perspective sees the focus on the defendant's opportunity to participate, and sees the defendant's presence as integral to a trial's function as a procedure capable of producing the truth. Trials *in absentia*, regardless of whether they provide a right to retrial, should therefore not be seen as trials at all.

Panellists referred to procedures, other than trials, which can publicly rehearse the evidence against a particular perpetrator as a matter of public interest. For example, Rule 61 of the ICTY Rules of Procedure and Evidence sets out the 'Procedure in Case of Failure to Execute a Warrant' and includes procedures for the prosecutor to present the indictment and all evidence to the chamber in open court, and for the Trial Chamber to determine whether there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment. In the *Mladić* and *Karadžić* cases, the ICTY Prosecutor used this procedure in light of the long period of time during which the tribunal did not have custody over the accused, and because it was considered a matter of public interest to hear evidence on the charges.<sup>16</sup>

The question was raised as to whether the STL should have taken the form of an inquiry rather than being considered a legitimate legal procedure. From the perspective that considers trials *in absentia* objectionable and unfair by definition, it was argued that holding a trial *in absentia* can give the public the sense that justice is not being done. From this perspective, the retrial provision is not satisfactory because the conviction *in absentia* sets up a presumption of guilt, including for the second trial. Instead, it was argued that if the defendants were absent for a period of years, an inquiry or fact-finding process should be set up which could then lead to extradition. However, it was put forward that this process should be distinguished from a court, as it lacks the elements of certainty of a trial verdict. It was argued that victims are not in all situations entitled to a trial *in absentia*, but may be entitled in some cases to an inquiry which will hear the available evidence and come down with a recommendation of innocence or guilt, and then a decision may be made to extradite for trial. This view was challenged in terms of the interests of the victims, and whether it was truly in the interests of justice to tell victims that there will be an inquiry but not a final verdict.

There was also discussion about whether there was a difference between someone who seeks to frustrate the process of the court by being disruptive and someone who seeks to frustrate the process of the court by being absent from his own trial. It was argued that, in principle, these two scenarios are materially the same; however, the issue then reverts to where the line is drawn in practice. One position is that the line should be drawn from the beginning of the trial. If the defendant is present when the trial begins then it is possible for the court to have a procedure that is fair. Regardless of whether the client refuses to listen, or chooses to turn his back on the court, the trial can still be called fair because the defendant has participated in it. From this perspective, if the defendant cannot be made to come to court at all, the only alternative is an inquiry. This perspective contrasts

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16 See, for example ICTY, IT-95-5-R61 & IT-95-18-R61, *Prosecutor v Radovan Karadžić and Ratko Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.



with the more established jurisprudence permitting trial in absence of the accused, provided that the safeguards discussed above are in place.

### III. Counsels' perspectives on trials *in absentia* and the meaning of effective representation

#### *The right to counsel in the context of the STL*

The Expert Roundtable presented a detailed perspective of counsel issues at the STL. In line with the ECtHR's jurisprudence, the Statute for the STL provides that defence counsel shall be assigned by the Head of the Defence Office to an accused tried *in absentia* 'with a view to ensuring full representation of the interests and rights of the accused'.<sup>17</sup> In addition to the statutory requirements, the STL Head of Defence Office required counsel to confirm that he/she accepts representing the accused *in absentia*, both at the time when counsel were admitted on the list of counsel as well as prior to their assignment as counsel in the *Ayyash et al* case. It was put forward that these measures show that the representation provided for an accused person tried *in absentia* at the STL is in conformity with both the right to a fair trial and the ethical obligations of counsel.

It was noted that such representation in international criminal cases remains controversial, and that the STL Defence Office has taken an active approach to examining issues of legal representation in light of its duty to ensure the legal representation of accused before the STL is effective.<sup>18</sup>

#### *Ethics and codes of conduct*

In addition to the legal and logistical support provided to defence teams, the STL Defence Office advises counsel on their ethical obligations. At the STL there are two codes of conduct: 1) the 'Code of Professional Conduct for Counsel Appearing Before the Tribunal', which sets general and common ethical standards for all counsel;<sup>19</sup> and 2) the 'Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon', which establishes specific professional standards as well as a disciplinary regime.<sup>20</sup>

Article 8 of the 'Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon' defines the scope of representation for counsel representing accused tried *in absentia*. This provision was drafted by the Defence Office, in the absence of any national code or regional code providing ethical obligations for counsels representing accused tried *in absentia*.

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17 Article 22 (2) (c) of STL Statute and Rule 105bis B RPE.

18 STL Rules of Procedure and Evidence Rules 57 (G) (iii), (iv). For instance in 2010 the Defence Office organised training for members of the list of counsel and as a result of concerns raised at the training, the Defence Office took steps to pre-emptively address the ethical obligations of counsel at the STL, the scope of representation in trials *in absentia*, and how to ensure effective representation.

19 STL, Code of Professional Conduct for Counsel Appearing Before the Tribunal, adopted in February 2011, available at <http://www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/code-of-conduct-for-counsel/266-code-of-professional-conduct-for-counsel-appearing-before-the-tribunal>. [Last visited on 19 August 2016].

20 STL, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, adopted 14 December 2012, available at <http://www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/code-of-conduct-for-counsel/2053-code-of-professional-conduct-for-defence-counsel-and-legal-representatives-of-victims-appearing-before-the-special-tribunal-for-lebanon>. [Last visited on 19 August 2016].

Among other things, Article 8 provides for the principle that it is the defence counsel themselves who set the scope of representation, instead of the chamber. This is intended to preserve counsels' independence and to ensure that they would have a better knowledge of what they should be able to do (Article 8(C)). It also directs counsel to consider the effect of any action he or she takes on the position of the accused in current or future proceedings, and to undertake any other action in the perceived best interests of the accused (Article 8 (D)). This was included in the Code of Professional Conduct in light of the right to re-trial. The Code of Conduct also specifies actions that counsel are obliged to undertake and which are considered basic requirements for a fair trial *in absentia*.

Another issue raised was whether counsel should seek to establish contact with the accused, and in the event that the accused sought contact, whether counsel should refuse contact, and whether they should inform the Tribunal. The Code clarifies this issue in Article 8(E), which provides that defence counsel are absolutely prohibited to have contact with the accused, and if they are contacted, counsel are to refuse to discuss any element of the case and are to refer the accused to the Head of the Defence Office for independent legal advice. The Defence Office will explain to the accused that if he/she establishes further contact with the counsel, it will be seen as accepting their representation and the accused might lose his right to re-trial.

The Defence Office also worked on the issue of effective representation not only for trials *in absentia*, but also for any trial before the Tribunal. Article 9 of the Code of Conduct provides that counsel shall provide effective representation (and Articles 32-34 set out a detailed 'Effective Representation Regime'). This derives from the obligation of the Defence Office to ensure representation, as well as the importance of what effective representation means and what the Defence Office can do to assess it.

### *Lack of communication with the client*

From a counsel's perspective, representing an accused *in absentia* presents both pros and cons. On the one hand the counsel is free to choose his or her strategy, which they do not have to discuss with a client who may not have a comparable understanding of the consequences of certain choices. At the same time, this absent person is the best source of information to help the counsel make informed decisions on certain aspects of the case. It was also noted that the possibility of re-trial can alleviate some pressure regarding strategies taken during the trial *in absentia*, should the client later be taken into custody. However, it can complicate some of the strategic decisions, as it may be in the client's best interests not to raise some arguments during the *in absentia* trial. If the case is lost then the client may have something in reserve for a new trial.

It was also pointed out that the *Ayyash et al* case has multiple defendants. In this context, for counsel representing the accused *in absentia*, there is more freedom with respect to strategic choices in representing a particular client, but those choices may not be in perfect synchronicity with the strategies of other counsel. A counsel has to balance not wanting to impact the cases of the co-accused with his or her arguments and not wanting them to impact his or her own case, with making the arguments that are in the best interests of the client. This presents an ethical challenge: not having a client to consult means that the counsel has to make educated guesses and reasonable choices.

## *Contrasting the STL and Bangladesh experiences from a counsel's perspective*

The Bangladesh International Crimes Tribunal (ICT) was presented as an example with many important differences to the STL. The ICT is a domestic institution that was established in 2009 as a result of 1973 legislation that was modelled on the Nuremberg Principles, which, it was argued, are themselves not up to modern day standards. It was also noted that the process was not supported by the UN – which had offered technical assistance to the government – primarily because Bangladesh insisted on having the death penalty. It was noted that many human rights organisations have critiqued the process.<sup>21</sup> At the time of the Roundtable, ten cases had been tried *in absentia*, eight of which had resulted in sentencing accused to the death penalty in their absence. It was noted that ICT judgments have resulted in a number of executions to date.

Based on experience representing individuals before the ICT, a strong critique of the process was presented; pointing out that it lacked effective notice, effective assistance of counsel, and the right to re-trial. The notice requirement was deemed fulfilled by placing a notice in both English and Bengali in the local papers. In at least one instance, an international counsel was thrown out of the country because of the criticisms he made on the process. While the ICT Rules allow for international representation, in practice the international counsel had to act through assisting domestic counsel. It was noted that under the ICT legal framework, an individual's right to appeal ran from the date of his conviction, not from the date of his appearance.<sup>22</sup> It was also pointed out that there was tension between the desire on the part of the current government of Bangladesh to close cases as quickly as possible for political reasons, and the fact that an extradition request to the UK or the US, for instance, could take a number of years.

## *Issues with representation and professional associations*

Counsel present at the Roundtable discussed the situation of a conflict between the applicable codes of conduct for an international court and in domestic jurisdictions, if, for example, a code of conduct specifies that it may not be superseded by another code. With respect to a case before the STL, the Defence Office's position was that the STL Code governs, and that otherwise it was recommended to seek advice from the national bar and to consult the Head of the Defence Office of the STL. Another perspective suggested that in the event of a conflict with the state bar (US) and the STL Code, he would follow his state bar, which provides his professional license to practice law, unless he can find some other way to resolve the conflict. This approach was supported by the experience of a counsel (UK) practicing before the ICTY, who was told by his UK bar council that he should follow national regulations, noting that a breach of national regulations might lead to disbarment and the inability to practice before any other tribunal. Other interventions addressed the general approach of national bars towards counsel accepting representation of clients *in absentia*, and the ethics of representing clients without instructions, as well as the need to balance a number of considerations for a fair trial. It was pointed out that at the STL one of the first motions filed by Defence Counsel requested

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21 See, for example, Geoffrey Robertson QC, Report on the Bangladesh International Crimes Tribunal, (International Forum for Democracy and Human Rights, 2015), available at [http://www.barhumanrights.org.uk/sites/default/files/documents/news/grqc\\_bangladesh\\_final.pdf](http://www.barhumanrights.org.uk/sites/default/files/documents/news/grqc_bangladesh_final.pdf); Letter to the Bangladesh Prime Minister regarding the International Crimes (Tribunals) Act, Human Rights Watch, 18 May 2011, available at <https://www.hrw.org/news/2011/05/18/letter-bangladesh-prime-minister-regarding-international-crimes-tribunals-act>; Kristine A. Huskey, The International Crimes Tribunal in Bangladesh: Will Justice Prevail?, Crimes of War, available at <http://www.crimesofwar.org/commentary/the-international-crimes-tribunal-in-bangladesh-will-justice-prevail/>. [Last visited on 19 August 2016].

22 See, International Crimes Tribunal Act of 1973 Article 3 (ACT NO. XIX OF 1973), Article 21(3).

reconsideration of the decision on conducting a trial *in absentia*.<sup>23</sup>

## IV. Trials *in absentia* and stakeholders in international criminal justice

### *Victim participation at the STL*

The Roundtable included an overview of issues pertaining to victim participation at the STL. There are currently 72 participating victims in the *Ayyash et al* trial who are jointly represented by three legal representatives. It was noted that, at the outset of their participation, most participating victims attached great symbolism to the fact that the STL existed and that the trial had started. Most of them saw it as an opportunity to have their need for truth and justice met, however important questions must be asked as to what effect, if any, the absence of the accused has had in the evolution of the victims' views.

### *Practical aspects of victim participation in an in absentia trial*

It was pointed out that the practical aspects of victim participation in a trial *in absentia* should be viewed in the context of the challenges that victims' lawyers face in international criminal proceedings. For example, one challenge at the STL is the distance of the victims from the seat of the Tribunal. Another is the fact that many victims are indirect victims, including, for example, family members of people killed in an explosion, and survivors of an explosion. Such victims may not have any evidence regarding the guilt or innocence of the accused, and will play a different role than the victims who may end up testifying for the Prosecution or for the Defence. Other challenges are raised by the length and complexity of an international criminal case. Finally, from the victims' perspective, the absence of the accused presents a challenge, calling into question the proposition that trials *in absentia* serve to provide justice for victims.

### *The role of victims' counsel*

The primary role of any victims' counsel is to represent the harm his or her client suffered and to safeguard and enforce the rights of the participating victims. In this regard, victims' counsel in trials *in absentia* may have more leeway in presenting this harm, as it may not be a strategic priority for the defence counsel to object. In a situation where the accused is present in the courtroom, the accused may give different instructions to their defence counsel regarding the extent to which the victims' participation is challenged.

It was suggested that the role of a victims' counsel is to go beyond strict representation, and to highlight the 'human element' of the crimes charged, both through legal representation as well as through the possibility for victims to be present and observe proceedings in the courtroom. The presence of victims in the courtroom can allow legal representatives of victims to keep their clients better informed, and to allow the victims to directly instruct their counsel. Legal representatives can also raise issues related to the security of witnesses and victims in general, as well as legal issues to

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<sup>23</sup> STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/TC, Request by the Oneissi Defence for Reconsideration of the Decision to Hold Trial in Absentia of 1 February 2012, 24 May 2012; STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.1, Appeal of the Oneissi Defence against the Trial Chamber Decision on Reconsideration of the Trial in Absentia Decision, 5 September 2012.

advance the expeditiousness and procedural regularity of the trial.

### *Outcomes of trials in absentia from victims' perspectives*

It was noted that STL Article 25 gives victims the right to a certified copy of the judgment which they can then use to pursue domestic claims.<sup>24</sup> In this regard, legal representatives may also seek to ensure that the best evidence is presented at the trial and preserved in the judgment. It was also noted that the peculiarities of the *Ayyash et al* case – which involves complex, highly technical evidence, while the accused are still at large – have shaped the legal representation scheme of the STL in a particular way. However, it was argued that victim participation at the STL still presents a precedent which may be applicable to future trials *in absentia*.

In respect of outcomes of trials *in absentia*, it was noted that the right to reparation is part of what makes justice meaningful for victims. It was also noted that victims' priorities may shift over time. For example, at the outset of proceedings at the STL, victims emphasised seeking justice and truth as the most important goals. However, over time the question of capturing the accused has become more compelling. While at the outset victims may see the trial as a symbolic phenomenon, over the course of the trial they become more knowledgeable about the proceedings and about their rights. It was also noted that having the accused at large complicates searching for their assets. In this context it was argued that it is 'easier said than done' to declare that the victims will get their verdict from the trial *in absentia* and then may move on to claim compensation through a domestic process. As such, the difficulty of getting a decision on civil liability in Lebanon was noted as an example of how, even with the certified copy of the judgment, victims may not be able to get much compensation. It was pointed out, however, that this might be the case even if the accused were in prison and their assets were known.

It was emphasised that, should there be future trials *in absentia*, it was crucial to consider how to manage the expectations of victims. While a trial *in absentia* may be a success in respect of creating jurisprudence, dilemmas remain when it comes to actually implementing an order for reparations. In this regard, it was argued that trials *in absentia* may make more sense in domestic jurisdictions that have public funds for compensation. If indeed the outcome for victims is restricted to the certified copy of the judgment, then further reflection is needed as to whether trials *in absentia* are a success for victims.

## **V. Future considerations for trials *in absentia* in international criminal law**

The contributions presented during the Roundtable provided an excellent overview of the state of the law relating to trials *in absentia*, and raised many important questions for further examination in considering whether, and how, future trials *in absentia* could take place.

- Especially in the context of international criminal justice, trials *in absentia* should be seen as part of a process, and not as an end in and of itself. This notably means that efforts to bring an accused into the custody of the court should be ongoing. For an international or hybrid

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<sup>24</sup> STL Statute Article 25 (2) provides 'The Registrar shall transmit to the competent authorities of the State concerned the judgment finding the accused guilty of a crime that has caused harm to a victim.'

tribunal, cooperation and long-range planning with the state(s) involved will be of paramount importance for the eventual arrest of the accused as well as for implementation of key procedural components, including witness protection and reparations for victims.

- Continued attention should be paid to the possibility of inquiries or fact-finding processes such as the Rule 61 procedures of the ICTY, as intermediate procedures that may allow examination of evidence and fact-finding in the absence of the accused, stopping short of a full criminal trial and verdict.
- The range of contexts in which a trial may begin or continue in the absence of the accused continues to develop. This raises questions about what constitutes a ‘true’ trial *in absentia*, requiring the safeguards established in international criminal and human rights law, and what safeguards are, and should be, required for trials that continue in the accused’s absence under other circumstances, such as after an initial appearance; by permission of the court; or due to the accused’s disruption of legal proceedings. Permission from a court for an accused to be absent from proceedings on the basis of ‘extraordinary public duties’, as under ICC RPE 134<sup>quater</sup>, should be approached with particular caution.
- While the safeguards of notice, effective representation and the right to re-trial have become well-established precedents in international criminal and human rights law, implementing any of these safeguards entails practical considerations that should be taken into account in the design of any process or institution that may be undertaking trials *in absentia*. For example, the establishment of a Defence Office as an organ of a court allows the Office to provide structural and institutional support for counsel’s effective representation of the accused *in absentia*. Similarly, considerations for the implementation of the right to a re-trial, including questions of funding and forum, should also be taken into account in designing and negotiating the institution.
- Trials *in absentia* present particular challenges for counsel, and efforts should continue to harmonise the ethical considerations for counsel in international and national contexts.
- Additional consideration should be given to the role of victims, and to ensuring that they are fully informed about their rights and provided with legal representation to allow them to participate in proceedings. Tribunals should also plan for keeping victims fully informed about developments in the trial; for working with victims to support their understanding of the intricacies and limitations of the legal process; as well as seeking to ensure that victims have realistic expectations about the possible outcomes of the legal process. At the same time, an institution that plans for a trial *in absentia* should incorporate planning for reparations to victims, including setting up a trust fund that may provide reparations in lieu of, or in addition to, any assets of the convicted person. Provision of a copy of a judgment, in particular as the sole reparative measure following a trial *in absentia*, may not be a meaningful and adequate form of reparation. Institutions should seek to combine forms of reparations in a way that fully reflects the harm suffered.



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