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## 1 Introduction

A recent decision in the *Gbagbo and Blé Goudé* case (*'Gbagbo et al. case'*) at the International Criminal Court ('ICC') raised the possibility of a shift away from the Court's long-standing practice of only holding trial in the presence of the accused. The final paragraphs of the 28 May 2020 Appeals Chamber decision asserts that any future trial proceedings in the *Gbagbo et al.* case may be held in the absence of Mr. Gbagbo and Mr. Blé Goudé should they be released from custody and then later fail to appear for trial. This assertion runs counter to the past practice of the Court and, if followed, could pave the way for the ICC to conduct trials *in absentia*. While the decision offers little support for its position, it does assert that such a practice is compatible with the Rome Statute, existing international practice and general principles of law.

The accused's right to be present during trial is an important component of the human right to a fair trial. The International Covenant on Civil and Political Rights was the first international treaty to recognise the right to be present; it has since been included in the foundational documents of every modern international criminal justice institution as well as a number of regional human rights conventions.<sup>1</sup> The accused's presence during trial ensures that he or she has the opportunity to participate and understand the proceedings against them, particularly during the presentation and examination of the evidence.<sup>2</sup> It is also thought that an accused who is present during their trial can better exercise a number of other fair trial rights, including: assisting in the preparation and presentation of their defence; consulting with and selecting their own counsel; confronting the witnesses or the evidence presented against them; and testifying on their own behalf.<sup>3</sup> It can be much more difficult for the accused to exercise these rights when trial is held *in absentia*, potentially threatening the overall fairness of the proceedings.

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<sup>1</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>2</sup> Sarah J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* (Hart Publishing, Oxford, 2007), p. 117; Fawzia Cassim, 'The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process' 38 *Comparative and International Law Journal of South Africa* (2005) 285, 285-286.

<sup>3</sup> Daryl A. Mundis, 'Current Developments: Improving the Operation and Functioning of the International Criminal Tribunals' 94 *American Journal of International Law* (2000) 759, 761.

This article examines the Appeals Chamber’s decision in an effort to determine whether it is correct in finding that trials *in absentia* can be held at the ICC. It does this in three parts. First, it examines the Appeals Chamber’s interpretation of Article 63(1) of the Rome Statute and compares that understanding of the Statute to the existing jurisprudence on this issue. Second, it considers the past practice of international criminal justice institutions when determining whether it is appropriate to try an accused in their absence and whether the procedure suggested in this decision comports with that past practice. Finally, it conducts an analysis of national law on the issue of whether it is appropriate to try an absconding accused and whether it is possible to identify a general principle of law with regard to the issue. The article concludes that the Appeals Chamber’s decision is incorrect to the extent that it suggests that trial *in absentia* is currently permissible at the ICC. The article finds that the Appeals Chamber’s interpretation of the Statute is dubious and that the procedure currently employed at the ICC does not fully accord with past international practice or domestic law. Should the ICC wish to permit trials *in absentia*, certain changes would have to be made to the Statute and Rules of Procedure and Evidence to comply with the accused’s right to be present at trial.

### **1.1 *The Appeals Chamber’s Decision***

On 28 May 2020, the Appeals Chamber issued a decision in the on-going *Gbagbo et al.* case (*Gbagbo Appeals Decision*).<sup>4</sup> The primary purpose of the decision was two-fold: to deny Mr. Gbagbo’s request for reconsideration of a decision relating to an earlier appeal filed by the Prosecution, and to review the conditions of release imposed on the acquitted defendants. In that context, the *Gbagbo Appeals* decision makes several assertions about the accused’s right to be present at trial and how it should be understood in conjunction with the law relevant at the ICC. First, it suggests that there is nothing in the Statute, if ‘properly understood’, to prevent the Court from proceeding with the trial of an accused who is willfully absent.<sup>5</sup> Second, it explains that in its view ‘the aim’ of Article 63(1) of the Statute is to protect an accused who wishes to attend their trial, but who is unable to do so through no fault of

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<sup>4</sup> ICC, *Prosecutor v. Gbagbo et al.*, No ICC-02/11-01/15, Appeals Chamber, Public Redacted Decision on Counsel for Mr Gbagbo’s Request for Reconsideration of the ‘Judgment on the Prosecutor’s Appeal Against the Oral Decision of Trial Chamber I pursuant to Article 81(c)(i) of the Statute’ and on the Review of Condition on the Release of Mr Gbagbo and Mr Blé Goudé, 28 May 2020.

<sup>5</sup> *Ibid.*, para. 70.

their own.<sup>6</sup> In the opinion of the Appeals Chamber, that goal is perverted when an accused prevents trial from being conducted at all by refusing to appear.<sup>7</sup> Third, the Appeals Chamber claims its position is supported by ‘general principles of law’ derived from international and domestic law.<sup>8</sup> To better understand this decision it is necessary to examine how Article 63(1) has been understood in the past and to determine how international and domestic courts have treated the right to be present at trial.

## 2 The Proper Interpretation of Article 63(1)

The section of the *Gbagbo* Appeals Decision addressing trial *in absentia* is relatively brief, making it necessary to refer to other similar decisions to gain a better understanding of its basis. The author of the *Gbagbo* Appeals Decision, Judge Chile Eboe-Osuji has played a role in most of the ICC’s earlier rulings in favour of holding trials *in absentia*. Judge Eboe-Osuji joined majority opinions of the Trial Chambers in *Prosecutor v. Ruto et al.* (‘*Ruto* Trial Chamber Decision’) and *Prosecutor v. Kenyatta* (‘*Kenyatta* Trial Chamber Decision’) and later wrote a dissenting opinion following a Motion for Reconsideration in the *Kenyatta* case (‘*Kenyatta* Dissent’), all of which advocated for trials *in absentia* under some circumstances. Therefore, a combined reading of these decisions is instructive as better contextualises the arguments being advanced by the Appeals Chamber in the *Gbagbo* Appeals Decision.

In the *Gbagbo* Appeals Decision, the Appeals Chamber raises the idea that the Statute, ‘if properly understood’, does not prevent the ICC from conducting trial *in absentia*.<sup>9</sup> This is a recurring theme in the decisions on this issue, and one that the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent elaborate on. Both of these earlier decisions attempt to discern the ‘plain meaning’ of Article 63(1), finding that it only imposes a duty on the accused to be present during trial and does require the Court to only hold trial in the presence of the accused.<sup>10</sup> This interpretation is justified

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<sup>6</sup> *Ibid.*, para. 69.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, para. 70.

<sup>9</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 70.

<sup>10</sup> ICC, *Prosecutor v. Uhuru Kenyatta*, No. ICC-01/09-02/11, Trial Chamber, 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, 26 November 2013, paras. 72 (‘*Kenyatta*

on the basis that the Statute’s drafters would have used different language in Article 63(1) if they had wished to specifically prohibit trial from taking place in the accused’s absence.<sup>11</sup> In fact, the *Ruto* Trial Chamber Decision takes the position that Article 63(1) is not concerned with the rights of the accused at all, but only exists to impose a duty on the accused so that the Trial Chamber may ‘maintain judicial control over’ him or her.<sup>12</sup> Any right to be present the accused may possess can be found in Article 67(1)(d), which identifies the accused’s presence at trial as one of the minimum guarantees to which she or he is entitled.<sup>13</sup> Accordingly, the function of Article 67(1)(d) is to ensure that an accused is not prevented from attending trial if they should so desire.<sup>14</sup>

It must be noted that the ‘proper interpretation’ of the Statute described in the *Gbagbo* Appeals decision does not fully accord with the ‘plain meaning’ of the Statute identified in the *Ruto* Trial Chamber Decision or the *Kenyatta* dissent. The implication in the *Gbagbo* Appeals decision is that the purpose of Article 63(1) is to render illegal any trial that takes place in the absence of an accused who wants to be present during trial but is unable to attend through no fault of their own.<sup>15</sup> This interpretation suggests that Article 63(1) is concerned, at least in part, with both the accused’s right and duty to be present at trial. That interpretation differs from the *Ruto* Trial Chamber Decision and the *Kenyatta* dissent. Both of these decisions take the position that Article 63(1) is only concerned with the accused’s duty to be present.<sup>16</sup> It would therefore appear that the *Gbagbo* Appeals Decision does not entirely harmonise with these two earlier decisions when interpreting Article 63(1).

This discrepancy in how Article 63(1) has been interpreted in these decisions may largely be a matter of semantics as the *Gbagbo* Appeals decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* dissent all suggest that the accused has both a right and a duty to be present at trial regardless of the statutory basis for that inference. This is relatively non-controversial. A more contentious issue arises when

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Dissent’); ICC, *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11, Trial Chamber, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, paras. 43 (‘*Ruto* Trial Chamber Decision’).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ruto* Trial Chamber Decision, *supra* note 10, para. 53.

<sup>13</sup> *Ibid.*, paras. 77, 80; *see also* Art. 67(1)(d) of The Rome Statute of the International Criminal Court (‘ICC Statute’).

<sup>14</sup> *Kenyatta* Dissent, *supra* note 10, para. 80.

<sup>15</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 69.

<sup>16</sup> *Kenyatta* Dissent, *supra* note 10, para. 80; *Ruto* Trial Chamber Decision, *supra* note 10, paras. 39-40.

one considers how the Court may proceed when the accused voluntarily does not appear for trial. The *Ruto* Trial Chamber Decision and the *Kenyatta* take the position that Article 63(1) gives the Court an ‘unquestionable statutory basis’ to require the accused’s attendance at trial and that their failure to appear can result in the forfeiture of the right to be present.<sup>17</sup> This forfeiture of the right allows the Court to hold a trial *in absentia* ‘unconstrained by the elements that must be present in order to find waiver.’<sup>18</sup> It is through this interpretation of the Statute that those advocating in favour of trials *in absentia* have justified their position.

This understanding of Article 63(1) has not been widely embraced. In fact, a variety of Judges at the ICC have expressed a multitude of opinions about how to properly interpret Article 63(1). In *Ruto et al.*, a majority of the Appeals Chamber attributed a different meaning to Article 63(1) when it overruled the *Ruto* Trial Chamber Decision. There, the Appeals Chamber found that the Article’s inclusion in the Statute, was meant:

[T]o reinforce the right of the accused to be present at his or her trial and...to preclude any interpretation of the Statute that would allow the Court to proceed in the accused’s absence based on a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.<sup>19</sup>

In so finding, the Appeals Chamber essentially ascribed two purposes to the Article. The first is meant to reinforce the accused’s right to be present at trial. The second acts to prevent a finding that the Court can proceed in the accused’s absence on the basis of an implied waiver of that right. This ruling would appear to refute the interpretation of Article 63(1) advocated in the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent.

In truth, neither of the purposes identified in the *Ruto* Appeals Decision directly contradicts the interpretation of Article 63(1) set out in the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent. Both of these approaches to Article 63(1) stand for the proposition that the accused has a right to be

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<sup>17</sup> *Kenyatta* Dissent, *supra* note 10, para. 79; *Ruto* Trial Chamber Decision, *supra* note 10, para. 42.

<sup>18</sup> *Kenyatta* Dissent, *supra* note 10, para. 79.

<sup>19</sup> ICC, *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11, Appeals Chamber, 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”, 25 October 2013, para. 54 (*‘Ruto Appeals Decision’*).

present at trial. They also accept that an absent accused should not be found to have implicitly waived their right to be present. The difference between the interpretations can be found in the conclusions drawn from these seemingly compatible findings. Where the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent determine that Article 63(1) permits the Court to hold trials *in absentia* on the basis of forfeiture, therefore dispensing with the need to find an implied waiver, the implication of the Appeals Chamber's opinion is that the article was included in the Statute for the specific purpose of precluding the possibility of trials *in absentia*.<sup>20</sup> Therefore, while some of the reasoning may be the same, the outcome is entirely different.

Judge Kourula and Judge Ušaka also argue in favour of a different interpretation of Article 63(1) from that contained in the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent. In their Joint Separate Opinion to the *Ruto et al.* Appeals decision, Judge Kourula and Judge Ušaka assert that the Trial Chamber has a duty to ensure that trial takes place in the presence of the accused.<sup>21</sup> This stands in direct opposition to the belief expressed in the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent that the only duty described in the article is the one placed on the accused. Judge Kourula and Judge Ušaka go on to state that the ordinary meaning of Article 63(1) demonstrates that trial must take place in the presence of the accused.<sup>22</sup> They do concede that some absences from trial are permissible, but only those that are so inconsequential that they do not violate the fundamental requirement that the accused be present.<sup>23</sup> If one were to follow this approach, a trial conducted entirely in the absence of the accused would far exceed the type of *de minimis* absences permitted by the Statute. This directly conflicts with the plain meaning ascribed to the Statute in the in the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent.

Two other judges have also addressed this issue, albeit in less detail. Judge Carbuccia found in her dissenting opinion to the Trial Chamber's original decision in *Ruto et al.* that Article 63(1) clearly rules out proceeding in the accused's absence in

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<sup>20</sup> *Ibid.*, para. 53.

<sup>21</sup> ICC, *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11, Appeals Chamber, 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", 25 October 2013, para. 5.

<sup>22</sup> *Ibid.*, para. 10.

<sup>23</sup> *Ibid.*, para. 3.

any circumstances other than those found in Article 63(2).<sup>24</sup> Additionally, Judge Ozaki wrote in her partially dissenting opinion to the Trial Chamber's original *Kenyatta* decision that the ordinary meaning of Article 63(1) imposes a duty on the accused to be present during trial.<sup>25</sup> However, she goes on to state that the Court also has a corresponding duty to only conduct trial when the accused is present.<sup>26</sup> The ordinary meaning of Article 63(1), as understood by Judge Ozaki, is that the accused's presence is a requirement of trial necessitating that the accused be continuously and physically present.<sup>27</sup>

The wide range of different meanings ascribed to Article 63(1) suggests that the plain meaning of the article remains ambiguous. This does not mean that the interpretations set out in the decisions penned by Judge Eboe-Osuji are wrong; it is certainly possible that those decisions represent the correct understanding of the Statute. It does mean, however, that the matter is not as clear as the *Gbagbo* Appeals Decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent suggest. Rather than engage with the contrary jurisprudence and commentary on this issue in an effort to alleviate this ambiguity, the decisions choose to ignore it and instead try to bolster their arguments through reliance on an alleged general principle of law. Whether that general principle of law is as indisputable as suggested is also open to interpretation.

### **3 Trial *in absentia* as a General Principle of (International) Law**

In addition to suggesting that the Statute does not prevent the ICC from proceeding in the absence of a willfully absent accused, the *Gbagbo* Appeals Chamber also found that there is no general principle of law that would prevent it from holding trials under those circumstances.<sup>28</sup> The ICC's Statute allows the Court to be guided by general principles of law under certain circumstances. Article 21(1) of the Rome Statute identifies the three different types of law that the ICC can apply

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<sup>24</sup> ICC, *Prosecutor v. Ruto et al.*, No. ICC-01/09-01/11, Trial Chamber, Dissenting Opinion of Judge Herrera Carbuccion to the Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 13 June 2013, para. 5.

<sup>25</sup> ICC, *Prosecutor v. Kenyatta*, No. ICC-01/09-02/11, Trial Chamber, Partial Dissenting Opinion of Judge Ozaki to the Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013), para. 7.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, paras. 9-10.

<sup>28</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 70.

when reaching decisions and the hierarchy amongst those three types of law.<sup>29</sup> At the top of the pyramid are laws purposefully devised for the Court, including the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. Second on the list are different types of international law, with applicable treaties and principles and rules of international law being explicitly identified. Finally, if recourse to those two categories fails, the Court may then consider ‘general principles of law’ derived from national laws of legal systems of the world. Reliance on general principles of law is only permitted to the extent that those principles are consistent with the first two categories of laws identified by the Statute.<sup>30</sup>

There is an ambiguity in the Rome Statute about whether trial *in absentia* is permitted at the ICC which is evidenced by the different ways in which Article 63(1) has been interpreted. Therefore, recourse to the other applicable types of law is necessary to resolve this issue. Based on the hierarchy contained in Article 21(1), it is necessary to first consider whether it is permissible under international law to try a willfully absent accused *in absentia*. That is because the Statute clearly places principles and rules of international law ahead of general principles of law in the order of legal sources to be considered by the Court. The *Gbagbo* Appeals Decision cites the jurisprudence of the International Criminal Tribunal for Rwanda (‘ICTR’), the United Nations Human Rights Committee (‘UNHRC’) and the European Court of Human Rights (‘ECtHR’) in support of his proposition that a principle of international law exists allowing trial to continue against a willfully absent accused.<sup>31</sup> The relevant jurisprudence of each will be considered in turn to determine whether a principle or rule of international law exists supporting the Appeals Chamber’s conclusion.

The *Gbagbo* Appeals decision specifically identifies the Views expressed by the United Nations Human Rights Committee in *Mbenge v. Zaire* and the holdings of the European Court of Human Rights in three different cases as supporting its position that trials *in absentia* are permissible at the ICC. The Appeals Chamber suggests that those cases stand for the proposition that there is no ‘blanket prohibition’ against trials *in absentia* so long as certain criteria are met.<sup>32</sup> The *Gbagbo* Appeals decision describes those criteria as follows: 1) the accused has adequate notice of the

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<sup>29</sup> ICC Statute, *supra* note 13, Art. 28.

<sup>30</sup> *Ibid.*, Art. 21(3).

<sup>31</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 70.

<sup>32</sup> *Ibid.*

proceedings; 2) he or she declines to exercise their right to be present, waives that right or absconds; and 3) measures are taken to ensure that trial is fair.<sup>33</sup>

### 3.1 *What constitutes adequate notice in international criminal law?*

The first criterion identified in the *Gbagbo* Appeals decision is that the accused has adequate notice of the proceedings against them. The UNHRC wrestled with this issue in *Mbenge v. Zaire*, a matter involving an accused who was twice convicted *in absentia*, and sentenced to death in both instances.<sup>34</sup> He alleged in his communication to the UNHRC that in both instances he learned of the proceedings through the media and that he was never summoned to appear for trial.<sup>35</sup> In its views, the UNHRC found that *in absentia* proceedings are justified in some instances, but that for those proceedings to be valid the accused must be notified about the proceedings against them and of the date and place of trial.<sup>36</sup> The Committee reinforced the importance of notifying the accused of the date and time of trial in *Osiyuk v. Belarus*, when it determined that the trial court's failure to inform the accused of that information violated the accused's right to be present.<sup>37</sup> This interpretation of the notice requirement is also reinforced by the jurisprudence of the ECtHR and the ICTR. In *Sibgatullin v. Russia*, the ECtHR determined that before a court can find that the accused waived his or her right to be present, it must first establish '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.'<sup>38</sup> Therefore, a review of the relevant international law would suggest that, to the extent that there is a principle of international law permitting trials *in absentia*, it requires that the accused have notice not only of the existence of the proceedings, but that they are also informed of the date and location of trial so that they can exercise the right to be present.

The requirement that the accused be told not only that proceedings have been instituted against them, but also the date and location of trial, goes beyond the obligations of the appropriate notice requirement identified in the *Gbagbo* Appeals

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<sup>33</sup> *Ibid.*

<sup>34</sup> UNHRC, *Mbenge v. Zaire*, Comm. No. 16/1977, Views, 25 March 1983, paras. 1.2-2.2.

<sup>35</sup> *Ibid.*, para. 2.2.

<sup>36</sup> *Ibid.*, para. 14.1.

<sup>37</sup> UNHRC, *Osiyuk v. Belarus*, Comm. No. 1311/2004, Views, 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' (CCPR/C/GC/32), para. 36.

<sup>38</sup> ECtHR, *Sibgatullin v. Russia*, App. No. 32165/02, Judgment, 14 September 2009, para. 46.

decision. This distinction is significant because it appears the Appeals Chamber applies the wrong notice standard in its decision. The Appeals Chamber asserts that because both Mr. Gbagbo and Mr. Blé Goudé have previously appeared before the Court, they have received proper notice sufficient to allow the Court to proceed in their absence if either fails to attend any future trial hearings.<sup>39</sup> This conclusion is based on the fact that both men made an initial appearance before the Court, thus satisfying the requirements of Article 60 of the Statute.<sup>40</sup> However, the notice requirement contained in Article 60 is not as extensive as what is required by the UNHRC, the ECtHR and the ICTR.

Article 60 only requires that the Pre-Trial Chamber satisfy itself that the accused has notice of two things: what crimes are alleged against them and what rights they have under the Statute.<sup>41</sup> This falls short of the standard identified by the UNHRC, the ECtHR and the ICTR. Therefore, notice provided in compliance with Article 60 is not, by itself, sufficient under international law to allow proceedings to take place *in absentia*. Notice would only be sufficient when the accused is informed what they are accused of and when and where they will be tried for those alleged crimes. The ICC's current procedure makes it impossible for an accused to learn all of that information during the Article 60 initial proceedings in large part because it is fair to early in the process for a trial date to be set. Therefore, that hearing alone can never be sufficient to provide an accused with proper notice justifying trial *in absentia*.

### **3.2 *The Accused Declines to Exercise the Right to be Present, Waives the Right or Absconds***

In addition to discussing the requisite notice needed before trial can be held *in absentia*, the *Gbagbo* Appeals decision also identifies three actions that, when performed by the accused, permits the ICC to proceed *in absentia*. They are when an accused: 1) waives the right to be present; 2) declines to exercise their right to be present; or 3) absconds.<sup>42</sup> Framing this as three different ways an accused can indicate that they will not attend trial, with only one explicitly involving waiver, appears to suggest that waiver is only one way in which the accused can demonstrate their assent

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<sup>39</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 68.

<sup>40</sup> *Ibid.*

<sup>41</sup> ICC Statute, *supra* note 13, Art. 60.

<sup>42</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 70.

to trial taking place in their absence. In fact, it is more appropriate to see these three actions as all being a form of waiver, with the first constituting an explicit waiver and the second and third and third representing types of implicit waiver.

This is confirmed when one compares the three types of absences identified in the *Gbagbo* Appeals decision to the three examples of waiver identified by the ECtHR. The three ways the European Court has identified that an accused can unequivocally waive the right to be present are: by stating publicly or in writing that he or she does not intend to participate in trial; where the evidence unequivocally shows that the accused was aware of the charges and still did not appear; or where the accused has become aware of the proceedings from unofficial sources and intentionally evades an attempted arrest.<sup>43</sup> The first of these describes an explicit waiver, the second describes an accused that declines to participate and the third depicts an accused who has absconded. The similarities between these examples and those provided in the *Gbagbo* Appeals decision are striking supporting the conclusion that all three types of absence are a form of waiver.

### 3.2.1 The Accused Waives the Right to be Present

The first scenario suggested by the *Gbagbo* Appeals decision whereby a trial chamber can proceed against an absent accused arises when the accused waives their right to be present. The Rome Statute and the ICC's Rules of Procedure and Evidence both contain indications of when the Court may proceed against the accused on the basis of a waiver. The only statutory provision permitting the accused to absent themselves from trial is found in Article 61. This provision relates exclusively to the Confirmation of Charges proceedings held before a Pre-Trial Chamber of the Court. It permits the Pre-Trial Chamber to proceed with the Confirmation of Charges hearing in the accused's absence under two circumstances. They are when the accused has: 1) waived their right to be present; or 2) fled or otherwise cannot be found and all reasonable steps are taken to inform them the hearing is taking place.<sup>44</sup>

The Statute is silent about what form waiver can take when an accused wishes to allow the Confirmation of Charges Hearing to proceed *in absentia*. However, Article 61(2)(a) is made operative by Rule 124 of the Rules of Procedure and

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<sup>43</sup> ECtHR, *Shkalla v. Albania*, App. No. 26866/05, Judgment, 10 August 2011, para. 70; citing ECtHR, *Iavarazzo v. Italy*, App. No. 50489/99, Judgment, 4 December 2001.

<sup>44</sup> ICC Statute, *supra* note 13, Art. 61; the second of these two clauses relates to an absconding accused, which is discussed in detail in section 3.2.3.

Evidence, which requires the accused seeking to absent themselves from the hearing to submit a written request for permission to be allowed to waive his or her right to be present.<sup>45</sup> Under the rule, the Pre-Trial Chamber can elect to conduct consultations with the parties and waiver will 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.<sup>46</sup> This procedure has been used by the Court in the past and in each instance it was determined that the accused was aware of their rights and the consequences of waiving them.<sup>47</sup> Proceeding in this way guarantees that the accused is aware of what rights they are giving up by choosing not to attend the hearing.

The choice to include this provision at the Confirmation of Charges stage has been interpreted as a concession to those national delegations in favour of allowing *in absentia* trials at the ICC.<sup>48</sup> If true, this explanation supports the idea that the drafters of the Rome Statute did not intend for trials to be conducted *in absentia*. Further, the inclusion of a waiver procedure in Article 61 applicable only during the Confirmation of Charges stage of proceedings suggests that the omission of a similar procedure during the trial stage of proceedings was intentional. 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 ICC's Rules of Procedure and Evidence also contain provisions whereby the accused can waive their right to be present during trial. Rules 134 *ter* and 134 *quater* were added to the Rules in 2013 in response to sustained criticism directed at the Court for its insistence on the presence of the defendants during trial proceedings in the cases arising out of the 2007-08 post-election violence in Kenya. Both Uhuru Kenyatta and William Ruto sought to absent themselves from their respective trials following their election as president and deputy president in March 2013. During the Assembly of State Parties in November 2013, various African nations, including Botswana, Republic of Congo, Côte d'Ivoire, the Gambia, Ghana, Namibia, Nigeria,

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<sup>45</sup> Rule 124, International Criminal Court Rules of Procedure and Evidence (as amended 2013) ('ICC RPE').

<sup>46</sup> *Ibid.*

<sup>47</sup> ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Pre-Trial Chamber, Transcript, Confirmation of Charges Hearing, 11 July 2008, p. 23, lines 23–25; 24, lines 1–10; ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Pre-Trial Chamber, Decision on Issues Related to the Hearing on the Confirmation of Charges, 17 November 2010, para. 4.

<sup>48</sup> Gregory S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations', 45 *Colum J Transnatl L* (2007) 635-710, 683.

South Africa, and Uganda (on behalf of the African Union), raised the issue of amending the Rome Statute to provide greater protection for sitting heads of state.<sup>49</sup> Several non-African Union states parties, most notably New Zealand, advocated in favour of a compromise position. Instead of amending the Statute, which likely would have proven to be an arduous process, New Zealand (and several other states) suggested amending the Rules of Procedure and Evidence, ‘that deal with the practical problems that can arise where defendants wish to cooperate with the Court, but where extraordinary circumstances exist.’<sup>50</sup> As a result, Rules 134 *bis*, 134 *ter* and 134 *quater* were added to the Rules of Procedure and Evidence.

Of these new rules, only the latter two deal with waiver of the right to be present (Rule 134 *bis* permits the accused to attend trial through an alternative means, i.e. videoconferencing technology). Rule 134 *ter* authorises the accused to submit a written request to the relevant trial chamber asking that they be excused from ‘part or parts’ of the trial.<sup>51</sup> Before granting such a request, the trial chamber must find that four criteria have been met. They are: 1) exceptional circumstances justify the absence(s); 2) alternative measures, such as changing the trial schedule or briefly adjourning the trial would be inadequate; 3) the accused explicitly waives their right to be present; and 4) the accused’s rights are fully protected in their absence.<sup>52</sup> Rule 134 *quater* contains similar provisions, but can only be invoked by an accused wishing to absent themselves so that they may ‘fulfill extraordinary public duties at the highest national level’.<sup>53</sup> It also does not limit the accused’s possible absence to only part or parts of the trial, meaning that the accused could potentially absent themselves from the entirety of trial.<sup>54</sup>

It could be argued that both Mr. Gbagbo and Mr. Blé Goudé explicitly waived their right to be present permitting trial to take place in their absence should they not appear. Both men were required to sign ‘an undertaking’ in which they agreed that

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<sup>49</sup> Statements made by the representatives of Botswana, Republic of Congo, Côte d’Ivoire, the Gambia, Ghana, Namibia, Nigeria, South Africa, and Uganda (on behalf of the African Union) during the General Debate, 12 Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 21 November 2013, <asp.iccpi.int/en\_menus/asp/sessions/general%20debate/Pages/general%20debate%20\_%20twelfth%20session.aspx>, accessed 13 August 2020.

<sup>50</sup> Statement by the representative of New Zealand, 12<sup>th</sup> Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, 21 November 2013, <asp.iccpi.int/iccdocs/asp\_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-NZ-ENG.pdf>, accessed on 13 August 2020.

<sup>51</sup> ICC RPE, *supra* note 45, Rule 134 *ter*.

<sup>52</sup> *Ibid.*

<sup>53</sup> ICC RPE, *supra* note 45, Rule 134 *quater*.

<sup>54</sup> *Ibid.*

trial could proceed in their absence should they fail to appear. However, close examination of the circumstances upon which that ‘waiver’ was obtained indicates that it does not meet the minimum safeguards for effective waiver outlined by the ECtHR and previously adopted by the International Criminal Court.<sup>55</sup> As the ECtHR made clear, the decision to waive the right to be present must be the result of the accused’s own free will and not the product of pressure or compulsion. Here, it could be argued, that predicating a prisoner’s release from custody on their agreement to waive their right to be present at any future trial is the product of pressure or compulsion and thus not an expression of the individual’s free will. Thus, any waiver made under those conditions would be invalid and could not justify proceeding in the accused’s absence. This would mean that the requirements of either Rule 134 *ter* or Rule 134 *quater* would still need to be complied with before trial could be conducted in the absence of Mr. Gbagbo or Mr. Blé Goudé.

Rules 124, 134 *ter* and 134 *quater* only permit the International Criminal Court to proceed in the accused’s absence upon the accused’s written request and when accompanied by an explicit waiver of their right to be present. None of these rules permit the Court to proceed on the basis of an implicit waiver as expressly advocated by Judge Eboe-Osuji in his *Kenyatta* dissent and implicitly asserted by the Appeals Chamber in the *Gbagbo* Appeals decision. Further, there are no other provisions in the Statute or the Rules of Procedure and Evidence that permit the Court to proceed on the basis of an implied waiver of the right to be present.

Some might challenge this conclusion based on a superficial reading of Article 63(2) of the Statute. Article 63(2) states that if the accused ‘continues to disrupt the trial’ the Trial Chamber may order the removal of the accused from the courtroom.<sup>56</sup> This provision has been described by some as the only exception to the rule that the accused must be present during trial at the International Criminal Court.<sup>57</sup> To the extent that this is true, it is a type of absence based on an implied waiver of the right to be present, as the accused is being excluded on the basis of his actions rather than an explicit written or oral statement that they wish to be removed from the courtroom.

However, Article 63(2), when correctly understood, is not describing a type of absence but should instead be construed as establishing an alternative means by which

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<sup>55</sup> *Ruto* Appeals Decision, *supra* note 19, para. 51.

<sup>56</sup> ICC Statute, *supra* note 13, Art. 63(2).

<sup>57</sup> *Ruto* Trial Chamber Decision, *supra* note 10, para. 5; Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003), p. 402.

the accused can be present during trial. The article states that when an accused is removed from the courtroom the trial chamber must make provision ‘for him or her to observe the trial and instruct counsel from outside the courtroom.’<sup>58</sup> That means that the accused is still able to follow the proceedings and participate in trial even if they are not physically present in the courtroom. International criminal justice institutions have increasingly recognized that the right to be present at trial is met when an accused can understand and participate in proceedings regardless of whether they are actually physically present in the courtroom.<sup>59</sup> This is in recognition of the fact that so long as conditions exist to permit the accused to exercise the right to be present, their actual physical location is irrelevant.

Rule 134 *bis* supports this understanding of Article 63(2). Rule 134 *bis* permits an accused to request that they be permitted to attend part or parts of trial through the use of video technology rather than in-person appearance in the courtroom.<sup>60</sup> The rule does not describe an accused who participates in trial in this manner as absent, but instead finds that they are ‘allowed to be present through the use of video technology.’<sup>61</sup> This is analogous to the Article 63(2) provision stating that when a disruptive accused is removed from the courtroom provisions must be made to permit them to observe trial and instruct counsel ‘through the use of communications technology.’<sup>62</sup> To the extent that participation through video technology is considered an alternative means of being present, so too should participation by communications technology. Understanding the Statute in this way also resolves what has been considered a tension in the Statute between the Article 63 declaration that ‘the accused shall be present during trial’ and the Article 63(2) pronouncement that appears to introduce an exception to that general rule. However, if Article 63(2) is read as describing an alternative means of attendance that tension disappears. In both instances the accused is present during trial, just not physically present, meaning that the different provisions of the Statute remain in harmony.

While there are some situations in international criminal law where an accused may waive the right to be present at trial, they do not all comply with the Rome

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<sup>58</sup> ICC Statute, *supra* note 13, Art. 63(2).

<sup>59</sup> Caleb H Wheeler, *The Right To Be Present At Trial In International Criminal Law* (Brill, Leiden, 2018), p. 234.

<sup>60</sup> ICC RPE, *supra* note 45, Rule 134 *bis*.

<sup>61</sup> *Ibid.*

<sup>62</sup> ICC Statute, *supra* note 13, Art. 63(2).

Statute. The ICC's Statute and the Rules of Procedure and Evidence are quite clear that waiver of the right to be present must be explicit and should generally be in writing. There is no provision in either the Statute or the Rules of Procedure and Evidence to suggest that waiver can be implied. Portions of the trial may proceed in the accused's absence, but only when accompanied by an explicit waiver of the right to be present that is freely given and free from compulsion. Therefore, the suggestion in the concluding paragraphs of the *Gbagbo* Appeals decision that any future trial proceedings may be held in the absence of Mr. Gbagbo or Mr. Blé Goudé should they fail to appear is unsupported by the Statute and rules governing the Court. As a result, the Appeals Chamber's decision is overly broad and fails to properly account for the unique structure of the ICC.

### 3.2.2 Declining to exercise the right to be present

As a preliminary matter, it is necessary to make clear that there is a difference between an accused who does not attend trial and one who declines to attend or refuses to attend. To not attend is objective, it simply means that the trial is taking place and the accused is not there. To decline to attend or to refuse to attend is subjective, it involves an accused who has notice of the proceedings and who decides, for whatever reason, that they do not wish to be present during trial. It is only really in the latter situation that an accused can be seen as waiving their right to be present. The ECtHR has explained in a number of decisions that the right to be present may be waived either explicitly or implicitly, however for the waiver to be valid it must be unequivocal.<sup>63</sup> An accused who does not attend trial, without some indication as to why they did not attend, cannot be seen as waiving the right to be present because it is impossible for the trying court to find that the decision not to appear is unequivocal.

The jurisprudence of the ICTR, the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the Special Court for Sierra Leone ('SCSL') supports the conclusion that an accused who declines to exercise the right to be present is implicitly waiving that right. The ICTR's Appeals Chamber makes this clear in its Appeals Judgment in *Prosecutor v. Nahimana*. The *Gbagbo* Appeals

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<sup>63</sup> ECtHR, *Sejdovic v. Italy*, App. No. 56581/00, Judgment, 1 March 2006, para. 86; ECtHR, *Poitrinol v. France*, Judgment, App. No. 14032/88, 23 November 1993, para. 31; ECtHR, *Kwiatkowska v. Italy*, 52868/99, Judgment, 30 November 2000; ECtHR, *Shkalla v. Albania*, App. No. 26866/05, Judgment, 10 August 2011, para. 70; citing ECtHR, *T. v. Italy*, App. No. 14104/88, Judgment, 12 October 1992, para. 28.

decision relies on the *Nahimana* decision for the proposition that, ‘it is not impermissible to proceed with a trial in the absence of an accused who knowingly refuses to be present’ during their trial.<sup>64</sup> What the *Gbagbo* Appeals decision fails to mention is that the *Nahimana* decision was justified on the basis that the defendant’s refusal to appear constituted an implicit waiver of the right to be present.<sup>65</sup> The ICTR’s Appeals Chamber went on to find that trials *in absentia* are permissible so long as the accused exercises a free, unequivocal and knowledgeable waiver of the right to be present.<sup>66</sup> In this instance, the defendant’s refusal to appear constituted such a waiver and that the Trial Chamber did not act in error by proceeding in his absence.<sup>67</sup>

The ICTY also found that an accused’s refusal to attend trial should be treated as an implicit waiver of the right to be present. In the *Čelibici Camp* case, the ICTY’s Trial Chamber drew a direct link between the accused’s decision not to attend trial and waiver. In reference to one of the defendants, Zdravko Mucić, who refused to appear for trial, it stated, ‘[i]f he wants to stay away, he has to forgo his rights – he has to waive his right to be present.’<sup>68</sup> The SCSL also found that the refusal to appear and waiver were linked. Charles Taylor regularly absented himself from his trial, although he did not always explicitly waive his right to be present. On those occasions when he did not, the SCSL interpreted his refusal to appear as a waiver of the right to be present.<sup>69</sup> On this basis, and despite the fact it is listed separately from waiver in the *Gbagbo* Appeals decision, the decision not to attend should be understood as a type of implicit waiver subject to the same rules as other forms of waiver.

If a refusal to attend is to be considered an implied form of waiver, as it appears it must be under international law, it is necessary to guarantee that the accused has all of the information necessary to make an informed decision not to appear. As previously discussed, that includes knowing not only the nature of the charges alleged, but also the date and location of trial. The *Gbagbo* Appeals decision

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<sup>64</sup> *Gbagbo* Appeals Decision, *supra* note 4, para. 70.

<sup>65</sup> ICTR, *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, para. 116.

<sup>66</sup> *Ibid.*, para. 109.

<sup>67</sup> *Ibid.*, para. 116.

<sup>68</sup> ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Trial Transcript, 16 April 1998, p. 11262, lines 2-3.

<sup>69</sup> SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Trial Transcript, 4 June 2007, p. 258, lines 28–29; p. 259, line 1; p. 267, lines 4–16; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Trial Transcript, 25 June 2007, p. 342, lines 13–19.

makes no mention of any need to inform the accused of the date and location of trial before proceeding against them. Instead, it relies on the fact that Mr. Gbagbo and Mr. Blé Goudé had been made sufficiently aware of the proceedings as a result of their previous appearances before the Court. That approach does not comport with international law and therefore it cannot form a permissible basis for proceeding *in absentia* at the ICC. Ensuring that the accused is informed of the date and location of trial could cure this problem as it would then allow the accused to make an informed decision as to whether they wish to attend their trial. This does not, of course, avoid the problem that there does not appear to be any legal basis for finding that an accused at the ICC may implicitly waive their right to be present at trial.

### 3.2.3 When an accused absconds

The *Gbagbo* Appeals decision also indicates that a trial chamber can hold a trial *in absentia* when the accused absconds. In international criminal law, an absconding accused is generally one who 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.<sup>70</sup> Because being in the custody of the court, and then being released, is a prerequisite to absconding, it is reasonable to surmise that an accused who 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*.<sup>71</sup>

The Rome Statute contains a provision under which the ICC can proceed against an absconding accused, however it only applies to the Confirmation of Charges proceedings and not to trial.<sup>72</sup> Article 61(2)(b) of the Statute allows the Pre-Trial Chamber to hold the Confirmation of Charges hearing in the accused's absence when they have 'fled or cannot be found and all reasonable steps' have been taken to secure their appearance.<sup>73</sup> The Court has yet to elaborate on what the phrase 'all reasonable steps' means in the context of Article 61(2)(b). Despite this, the wording of this subsection is important for another reason. It states that all reasonable steps

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<sup>70</sup> 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, London, 2009), p. 378.

<sup>71</sup> Cassese, *supra* note 57, p. 402.

<sup>72</sup> ICC Statute, *supra* note 13, Art. 61(2)(b).

<sup>73</sup> *Ibid.*

must be taken to accomplish three different goals. First, they must be taken to secure the accused's appearance before the Court. Second, all reasonable steps have to be taken to inform the accused of the charges against them. Finally, it is also necessary to take all reasonable steps to inform the suspect that a hearing is going to be held. The third part directly relates to the importance of informing the accused of the date and location of the trial.

The reason all reasonable steps must be taken to accomplish these three purposes is to guarantee that the accused has all of the information necessary to allow them to participate in the hearing and still chooses not to do so. It is meant to eliminate the possibility that the accused's non-appearance resulted from anything other than their decision not to attend. There is no point in taking all reasonable steps to inform someone that a hearing is going to be held against them if they are not simultaneously informed about when and where they can participate in that proceeding. The existence of the hearing has no meaning to the accused if their participation is impossible because they do not know how to appear. Therefore, it is implicit in Article 61(2)(b) that the accused be told when and where the hearing will take place.

There is no corresponding provision in the Rome Statute permitting a trial chamber to try the accused *in absentia*. Further, it is far from certain that a general principle of international law exists permitting the trial of an absent accused to continue. The Statutes and Rules of Procedure and Evidence of the different international and internationalised criminal justice institutions are largely silent as to whether a trial *in absentia* can be conducted when the accused has absconded. The International Law Commission and the Preparatory Committee responsible for developing a draft statute for the ICC both considered including a provision in the Statute allowing trial to continue when the accused absconded or refused to appear at trial.<sup>74</sup> In the end, no such rule was included in the Rome Statute. This lack of authority leads to the conclusion that there is no general principle of international law permitting the ICC to proceed against an absconding accused.

It may, however, be possible to extrapolate a general principle of law based on domestic law in favour of trying an absconding accused. A general principle of law

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<sup>74</sup> 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', as reported in M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-By-Article Evolution of the Statute*, vol. 2 (Transnational Publishers, Inc., Ardsley, 2005), pp. 455-57.

can be found by surveying domestic legal systems finding one of two things: that most or all nations of the world follow the same approach to the legal issue or that it is a principle common to all of the major legal systems.<sup>75</sup> While a study examining how every legal system addresses this issue would be an overwhelming undertaking, a review of a sample of relevant domestic law is instructive. Attention has largely been paid to how common law countries approach this issue as most civil law countries take a much more permissive attitude towards trial *in absentia* and do not prohibit trying an absconding accused.

The United States' federal court system only allows trials *in absentia* in very limited circumstances. One of the few exceptions, found in Rule 43(c) of the United States' Federal Rules of Criminal Procedure, permits courts to depart from the general requirement that the accused be present for all stages of the proceedings when the accused absconds from trial.<sup>76</sup> An absence occurring under these circumstances is considered an implicit waiver of the right to be present, an approach confirmed by the United States Supreme Court in *Crosby v. The United States*.<sup>77</sup>

The British House of Lords has taken an even more permissive approach when deciding the law of England and Wales as to this issue. Historically, English and Welsh courts rejected trials *in absentia* when the accused stands accused of a felony.<sup>78</sup> That position began to change during the course of the 20<sup>th</sup> century and now it is accepted that the trial court may conduct trial against an absent accused when they deliberately absent themselves from trial.<sup>79</sup> That being said, it is implicit in the opinions of several of the law lords sitting in *R v. Jones (Anthony William)* that the accused must be aware of the date and time of trial before it can be found that they chose not to attend or were indifferent to the consequences of their non-appearance.<sup>80</sup>

There are also a number of other common law countries that follow a similar procedure. The Code of Criminal Procedure in Bangladesh authorises courts to try an absconding accused *in absentia*.<sup>81</sup> However, before they can proceed in that manner, they must make an effort to notify the accused through the media that proceedings

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<sup>75</sup> ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Appeals Judgement, 15 July 1999, para. 225.

<sup>76</sup> Federal Rules of Criminal Procedure, United States of America (2017), rule 43(c).

<sup>77</sup> *Crosby v. The United States*, 506 U.S. 255, 261 (1993).

<sup>78</sup> William Blackstone, *Blackstone's Commentaries on the Laws of England*, Book IV, Chapter 24.

<sup>79</sup> *R. v. Jones (Anthony William)*, [2002] UKHL 5 [HL]; (Sweet & Maxwell, London, 2015), p. 335; *R. v. Leigh James O'Hare*, [2006] EWCA Crim 471.

<sup>80</sup> *R. v. Jones*, *supra* note 79, paras. 12, 22.

<sup>81</sup> Bangladesh Code of Criminal Procedure of 1898, section 339B.

have been instituted against them and directing them to attend trial.<sup>82</sup> The court is only required to take these steps if the accused has not yet appeared before it, in the case of an accused that has made a preliminary appearance trial *in absentia* may be held without first trying to notify the accused.<sup>83</sup> Further, Kenya's Criminal Procedure Code allows trial to continue *in absentia* in some circumstances if the accused fails to appear following an adjournment.<sup>84</sup> However, this provision is only applicable when the accused does not stand accused of a felony.<sup>85</sup> When the accused faces felony charges the evidence must be taken in the presence of the accused.<sup>86</sup>

In the past, Kenyan law contained a provision permitting magistrates to record the deposition testimony of witnesses against an absconding accused, but that provision has since been repealed.<sup>87</sup> This practice is still followed in some countries and represents an intermediary position between suspending trial as a result of the accused's absence and conducting trials *in absentia*. The Pakistani Code of Criminal Procedure authorises courts to record evidence in the form of deposition testimony against absconding accused that can later be given in evidence should the accused come under the jurisdiction of the court.<sup>88</sup> India also permits the taking of deposition testimony that can later be used against an absconding accused.<sup>89</sup>

This procedure has an analog in international criminal law. The Rules of Procedure and Evidence at both the ICTY and ICTR contained a provision permitting the Tribunals to hear witness testimony against an absent accused. The wording of Rule 61 is similar in both sets of rules and its effect is identical. Rule 61 states that when the whereabouts of the accused are unknown, and 'all reasonable steps' have been taken to locate the accused, the tribunal can order the Prosecutor to submit the indictment against the absent accused to the relevant Trial Chamber in open court.<sup>90</sup> After such an order is made, the Prosecutor must submit the indictment to the Trial Chamber at which point the Prosecutor may examine witnesses whose statements

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Kenya Code of Criminal Procedure (revised edition 2012), section 206.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, section 194.

<sup>87</sup> Douglas Brown, *Criminal Procedure in Uganda and Kenya* (Sweet & Maxwell, London, 1965), p. 47; *see also* Kenya Code of Criminal Procedure, *supra* note 84, section 153.

<sup>88</sup> Pakistan Code of Criminal Procedure (1898, as amended by Act 2 of 1997), Art. 512.

<sup>89</sup> India Code of Criminal Procedure (1973), Art. 299(1).

<sup>90</sup> Rule 61(a), ICTY Rules of Procedure and Evidence (as amended 8 July 2015); Rule 61(a), ICTR Rules of Procedure and Evidence (as amended 13 May 2015).

were provided to the judge who confirmed the indictment against the accused.<sup>91</sup> Based on that evidence, the Trial Chamber may reach a determination that there are reasonable grounds to believe that the accused committed the alleged crimes.<sup>92</sup>

While there is no real prohibition against trying an absconding accused in most civil law countries, there are some prominent examples of states that do not permit trials *in absentia*, but that do allow trial to continue if the accused absconds after the beginning of proceedings. The German Code of Criminal Procedure permits trial to continue against an absconding 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.<sup>93</sup> Turkey follows a somewhat similar procedure in its Penal Procedure Code. It allows trial to continue in the accused's absence 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.<sup>94</sup> In Turkey, trial can also be conducted in the absence of an accused who has not testified so long as sufficient evidence exists to sustain a judgment other than conviction.<sup>95</sup>

Finally, there are also some examples of states that do not appear to allow *in absentia* proceedings against absconding accused, or only permit it under very limited circumstances. The Nigerian Criminal Procedure Act states that all accused must be physically present in the courtroom during the entirety of trial.<sup>96</sup> The only exception to this requirement is that trial may continue in the absence of a disruptive accused.<sup>97</sup> There is no provision authorising the continuance of trial in the absence of an absconding accused. This is confirmed in the Administration of Criminal Justice Act, 2015, which reiterates the general rule that trial must be held in the presence of the accused.<sup>98</sup> It also does not contain an exception allowing trial to continue in the absence of an absconding accused. South Africa follows the same procedure by making it a requirement that all criminal trials must take place in the accused's

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<sup>91</sup> Rule 61(b), ICTY Rules of Procedure and Evidence (as amended 8 July 2015); Rule 61(b), ICTR Rules of Procedure and Evidence (as amended 13 May 2015).

<sup>92</sup> Rule 61(c), ICTY Rules of Procedure and Evidence (as amended 8 July 2015); Rule 61(c), ICTR Rules of Procedure and Evidence (as amended 13 May 2015).

<sup>93</sup> The German Code of Criminal Procedure (as amended 23 April 2014), section 231(2).

<sup>94</sup> Code of Criminal Procedure, Turkey (2009), Art. 194.

<sup>95</sup> *Ibid.*, p. 193.

<sup>96</sup> Nigeria Criminal Procedure Act (1990), Art. 210.

<sup>97</sup> *Ibid.*

<sup>98</sup> Nigeria Administration of Criminal Justice Act (2015), Section 266.

presence.<sup>99</sup> The South African Criminal Procedure Act does contain an exception permitting a trial court to proceed against an absconding accused. This exception is quite narrow, it is only applicable when the trial involves multiple defendants and it requires a finding that the proceedings cannot be postponed without causing undue prejudice, embarrassment or inconvenience to the other accused, the prosecution or the prospective witnesses.<sup>100</sup>

While these are only a handful of examples, it is illustrative of the variety of different practices that abound with regard to whether trial can continue against an absconding accused. Contrary to the inference suggested by the *Gbagbo* Appeals decision, state practice with regard to this issue is far from uniform, making it impossible to conclude that a general principle of law exists. Even if it were possible to conclude that such a principle does exist, some commentators have expressed unease with applying national approaches to trying absconding accused to international criminal law proceedings. A particular concern is that proceeding under these circumstances could create a negative public perception about the fairness of international criminal trials, which could, in turn, threaten the overall legitimacy of international criminal justice institutions.<sup>101</sup> This lack of uniformity of approaches to the issue of how to treat an absconding accused, combined with the potential harm such a proceeding might cause, militates against finding the existence of the general principle of law proposed in the *Gbagbo* Appeals decision.

#### 3.2.4 Forfeiture of the right to be present as a basis for conducting trial *in absentia*

Although not specifically raised in the *Gbagbo* Appeals decision, the *Ruto* Trial Chamber Decision and the *Kenyatta* Dissent have previously taken the position that trials *in absentia* are permissible on the basis that the accused's failure to appear constitutes a forfeiture of their right to be present.<sup>102</sup> In essence, Article 63(1) of the Rome Statute is seen as imposing a duty on the accused requiring them to appear for trial. If the accused fails to appear at trial in compliance with that obligation her or she has forfeited the right to be present and the trial chamber may conduct a trial *in absentia*. The trial chamber need not consider why the accused did not appear, or

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<sup>99</sup> South Africa Criminal Procedure Act 51 of 1977, Art. 158.

<sup>100</sup> *Ibid.*, Art. 159(2)(b).

<sup>101</sup> Cassese, *supra* note 57, p. 404.

<sup>102</sup> *Kenyatta* Dissent, *supra* note 10, para. 79; *Ruto* Trial Chamber Decision, *supra* note 10, para. 42.

whether the accused was aware of the consequences of their non-appearance as they would in the case of a waiver.<sup>103</sup> That is because a finding of forfeiture is ‘unconstrained by the elements that must be present in order to find waiver’.<sup>104</sup>

Forfeiture is seen as being distinct from waiver, largely as a result of how each becomes operative.<sup>105</sup> While both waiver and forfeiture involve the holder of a right relinquishing that right, the way in which the right is repudiated is different. When a court finds that a right has been waived it must conclude that the holder of the right made a conscious decision to waive the right, that they understood what the right protects and the consequences that would result from waiving it.<sup>106</sup> Forfeiture, conversely, occurs by operation of law without accounting for the accused’s state of mind.<sup>107</sup>

There are two possible bases for finding that an accused has forfeited their right to be present at trial. The first reason is when the accused intentionally interferes with the proper administration of justice. The proper administration of justice is often cited as one of the key reasons why courts should require the accused’s attendance during trial. Under this approach, 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.<sup>108</sup> Forfeiture under these circumstances is considered an appropriate sanction for an accused who fails to comply with the duty to present at trial.

The relationship between the proper administration of justice and trials *in absentia* is based on a comment made by the UNHRC. In its Views in *Mbenge v. Zaire*, the UNHRC states that *in absentia* proceedings ‘are in some circumstances... permissible in the interest of the proper administration of justice.’<sup>109</sup> Although the UNHRC only identified one such circumstance, that implicitly involves the waiver of

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<sup>103</sup> *Kenyatta* Dissent, *supra* note 10, para. 79.

<sup>104</sup> *Ibid.*

<sup>105</sup> Martin Böse, ‘Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia’, 37 *N.C. JIL & Comm. Reg.* (2011) 489-510, 500; Christoph J.M. Safferling, *International Criminal Procedure* (Oxford University Press, Oxford, 2012), p. 400.

<sup>106</sup> Peter Westen, ‘Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure’, 75 *Michigan LR* (1977) 1214-1261, 1214, 1235-37.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Mbenge*, *supra* note 34, para. 9.1; 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’, 8 *JICJ* (2010) 1307-1321, 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* (Oxford University Press, Oxford, 2014), p. 237.

<sup>109</sup> *Mbenge*, *supra* note 34, para. 14.1.

the right to be present, the use of the plural form of ‘circumstance’ 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.<sup>110</sup> It has been left to individual courts and tribunals to conclude when those circumstances arise.

The SCSL has a fairly extensive record of considering the relationship between the proper administration of justice and the right to be present. In *Prosecutor v. Sesay et al.*, the SCSL’s Trial 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.’<sup>111</sup> 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 SCSL.<sup>112</sup> 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.’<sup>113</sup> The SCSL echoed this sentiment in *Prosecutor v. 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.’<sup>114</sup>

The Appeals Chamber of the ICTY also identified the proper administration of justice as a reason to continue trial in the accused’s absence. Its general position was that trials *in absentia* were impermissible before the Tribunal, even when the accused waives their right to be present.<sup>115</sup> That being said, the Appeals Chamber identified an exception to that basic rule whereby it could conduct *in absentia* proceedings in matters involving the secondary jurisdiction of the Tribunal. It justified holding these proceedings *in absentia* on the basis that those matters involved ‘obstructing the administration of justice.’<sup>116</sup> It can be inferred from this ruling that *in absentia* trials are justified in all instances where the accused is seen as obstructing the

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<sup>110</sup> *Ibid.*

<sup>111</sup> SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court of Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, para. 8.

<sup>112</sup> *Ibid.*, para. 2.

<sup>113</sup> *Ibid.*, para. 8.

<sup>114</sup> SCSL, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Trial Chamber, 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, 1 October 2004, para. 22.

<sup>115</sup> ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, Appeals Chamber, Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59.

<sup>116</sup> *Ibid.*

administration of justice. From that, it follows that the Tribunal does not consider it to be an obstruction of justice when the accused is absent from trial when being tried for primary jurisdiction crimes.

Ultimately, the trouble with using violations of the proper administration of justice as a justification for trying an accused *in absentia* is that the term lacks a set meaning in the international law context.<sup>117</sup> Because it lacks a clear definition it means that *in absentia* trials could be conducted under any circumstances so long as they can be brought under the ambit of ‘proper administration of justice.’<sup>118</sup> This grants the trial chamber a tremendous amount of discretion to determine whether something comports with the proper administration of justice. This, in turn, can make the trial court’s decisions appear rather arbitrary, which could have an effect on how the ICC is perceived. Therefore, should the ICC wish to use the proper administration of justice as a reason to proceed against an absent accused, it should make every effort to identify what that phrase means so as to ensure full confidence in its future decisions.

The second justification for finding that the accused forfeited their right to be present is through the application of the proportionality principle as used by the *ad hoc* tribunals. 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.<sup>119</sup> While neither tribunal had the opportunity to apply the principle to an absconding accused, the ICTR did use it in several other instances involving the right to be present.

In *Prosecutor v. Zigiranyirazo*, Trial Chamber III was confronted with a witness who, out of fear for his safety, refused to travel to Arusha to testify during the trial.<sup>120</sup> In an effort to find a way to facilitate his testimony, the Trial Chamber ordered that arrangements be made for him to testify in The Hague with all of the

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<sup>117</sup> Nina Jørgensen, ‘The Right of the Accused to Self-Representation Before International Criminal Tribunals’ 98 *American Journal of International Law* (2004) 711, 722.

<sup>118</sup> Pons, *supra* note 108, p. 1318.

<sup>119</sup> ICTR, *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, Appeals Chamber, Decision on Interlocutory Appeal, 30 October 2006), para. 14; ICTY, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Appeals Chamber, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 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* (Oxford University Press, Oxford, 2013), p. 753.

<sup>120</sup> ICTR, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Appeals Chamber, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 34.

parties present.<sup>121</sup> The defendant was then denied entry to the Netherlands and, instead of postponing the witness's testimony until another solution could be found, the Trial Chamber allowed the witness to testify outside of the defendant's physical presence.<sup>122</sup> The defendant then challenged that decision on the basis that his right to be present had been violated.<sup>123</sup> The Appeals Chamber agreed with him, and by applying the proportionality principle, found 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.<sup>124</sup> In this instance, the Trial Chamber's decision was found to be disproportional and constituted an unwarranted and unnecessary restriction on the defendant's fair trial rights.<sup>125</sup>

The ICTR took a somewhat different approach to absences resulting from illness. In *Prosecutor v. Bagosora et al.*, Trial Chamber I was confronted with an accused who voluntarily absented himself from trial on the basis of two medical reports indicating that he was too ill to attend.<sup>126</sup> The Trial Chamber disagreed and chose to continue in the accused's absence as he was not given authorization to miss trial. The Trial Chamber reached its decision through the application of the proportionality principle. It 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 could result if trial was postponed outweighed the remote possibility that the accused would be prejudiced if those witnesses were examined in his absence.<sup>127</sup> The Appeals Chamber agreed and found that the accused's unauthorised absence constituted a forfeiture of his right to be present at trial.<sup>128</sup> What apparently distinguishes these two decisions is the degree to which the accused's decision not to appear was voluntary.

Trials *in absentia* are often used to condemn what is perceived as the accused's 'bad faith conduct' of not attending trial when ordered to do so and

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<sup>121</sup> *Ibid.*

<sup>122</sup> ICTR, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Appeals Chamber, Decision on Interlocutory Appeal, 30 October 2006, para. 5.

<sup>123</sup> *Ibid.*, para. 7.

<sup>124</sup> *Ibid.*, paras. 17-21.

<sup>125</sup> *Ibid.*, para. 22.

<sup>126</sup> ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Trial Chamber, Decision on Nsengiyumva Motions to Call Doctors and Recall Eight Witnesses, 19 April 2007, paras. 5, 7.

<sup>127</sup> ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Trial Chamber, Judgement and Sentence, 18 December 2008, para. 131.

<sup>128</sup> ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-A, Trial Chamber, Judgement, 14 December 2011, para. 48.

consequently disrupting the smooth progress of trial.<sup>129</sup> This is reflected in both of the justifications underpinning forfeiture as a reason to proceed against an absent accused. What constitutes bad faith conduct is open to interpretation and is many times dependent on the context in which the behaviour is being exhibited. However, it can generally be observed that trial courts make a distinction between what they consider to be voluntary absences on the part of the accused and absences that are not the product of their own volition.<sup>130</sup> This can sometimes be a crude distinction, but it reinforces how important it is that the accused has all of the information necessary to make an informed decision about whether or not they wish to appear. To the extent that forfeiture is justified on the basis that the accused's absence is the result of a voluntary decision not to appear, then it is imperative that they know not only what they have been charged with, but also when, where and how they can appear.

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. Basing the decision to proceed in the absence of the accused on forfeiture rather than waiver fundamentally alters the character of the right to be present. It makes it more of a duty imposed on the accused and less of a right controlled by them. The failing of forfeiture, and the reason it should be used with caution as a justification for proceeding *in absentia*, is that it does not account for the requirement that the accused's decision not to attend trial must be unequivocal. Therefore, it should only be used as the reason for holding a trial *in absentia* when adequate steps are taken to guarantee that the accused's non-appearance is the result of a genuine choice to be absent and is not the action of an inadequately informed accused. The approach advocated in the *Gbagbo* Appeals decision does not mandate that the accused have all of the necessary information before they can be tried *in absentia* and as a result forfeiture of the right to be present does not form an adequate basis on which to proceed.

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<sup>129</sup> 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, Leiden, 2009), p. 449; Gaeta, *supra* note 108, p. 237.

<sup>130</sup> Wheeler, *supra* note 59, p. 198.

#### 4 Conclusion

The *Gbagbo* Appeals decision proposes what could be a monumental change to how trials are conducted at the ICC. Should the Court begin to try the accused *in absentia* it could expedite the trial process and deliver justice to more victims of atrocity crimes. Unfortunately, what the Appeals Chamber proposes does not appear to comport with either the Statute or international criminal law as a whole. What the Appeals Chamber has done is rely on a highly disputed interpretation of the Rome Statute and to selectively choose jurisprudence from other courts that appears to support its position when viewed from a particular perspective. However, when other understandings of the Statute are taken into account and the external law relied on is placed back into context, it becomes apparent that what the Court is advocating is not countenanced in the Statute nor is it authorised by a principle of law. As it currently stands, no legal basis exists permitting a future trial chamber of the ICC to proceed *in absentia* against Mr. Gbagbo or Mr. Blé Goudé. Further, even if the defects in the procedure could be cured, primarily by ensuring that the defendants have notice of the date and location of trial, there is still significant disagreement about whether the Statute can be interpreted in the manner suggested by the Appeals Chamber. These obstacles appear too significant to overcome and it is unlikely that trial *in absentia* will become a feature of trials at the ICC.