In Absentia Proceedings and International Criminal Justice: Foundations, Operation, and Future Perspectives

Ilaria Zavoli

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

In the last decades, in absentia proceedings (i.e. criminal proceedings conducted in the defendant's absence) have fuelled much controversy among scholars for their alleged incompatibility with International Human Rights Law standards. However, the phenomenon of absent defendants in international criminal proceedings (especially when fugitives) is a serious threat to the achievement of justice at the international level, and it prompts pressing questions regarding the fight of impunity and the effective prosecution of international crimes.

This thesis seeks to shed light on in absentia proceedings, providing an innovative analysis of their theory and practice. It examines these proceedings in the context of International Criminal Justice and addresses the following research question: *what are the limits and prospects of the use of in absentia proceedings for the prosecution of international crimes in International Criminal Justice?* To answer this question, the author conducts a three-part study of international criminal proceedings in absentia that focuses on their *foundations*, *operation*, and *future perspectives*.

This thesis combines an examination of the existing literature on the topic (including relevant case law and provisions) with a critical analysis of the opinions of legal practitioners who have been and are involved in in absentia proceedings at the Special Tribunal for Lebanon and the International Criminal Court. Through this approach, the author seeks to provide an innovative, comprehensive study of in absentia proceedings that overcomes the traditional, limited scholarship's analysis of the topic.

The author posits that in absentia proceedings can play a significant role in International Criminal Justice for the prosecution of international crimes when the defendants are absent. However, they are limited by a set of theoretical (e.g. objectives of International Criminal Justice; International Human Rights Law standards) and practice-based elements (e.g. practice of international criminal tribunals; exigencies of the parties of international criminal cases). Ultimately, the author proposes a new understanding of these proceedings as useful, legally possible, but exceptional.

Outline

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Abbreviations

ASP	Assembly of States Parties
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal
MICT	Mechanism for International Criminal Tribunals
RP	Rules of Procedure
RPE	Rules of Procedure and Evidence
STL	Special Tribunal for Lebanon
St.	Statute
UNHR Committee	United Nations Human Rights Committee
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General

List of Instruments

ECHR

— — Art. 6.

French Criminal Procedure Code

— — Arts. 627-636.

ICC

Regulations of the Court

— — Reg. 31(3).

— — Reg. 31(4).

Rules of Procedure and Evidence

— — Rule 73.

— — Rule 117.

— — Rule 119.

— — Rule 121.

— — Rule 124.

— — Rule 125.

— — Rule 126.

— — Rule 129.

— — Rule 131.

— — Rule 134bis.

— — Rule 134ter.

— — Rule 134quater.

— — Rule 135.

— — Rule 135(4).

— — Rule 144.

— — Rule 149.

— — Rule 158.

— — Rule 170.

— — Rule 198.

— — Rule 225.

Statute

— — Preamble.

— — Art. 1.

— — Art. 5.

— — Art. 21(3).

— — Art. 51.

— — Art. 58.

— — Art. 58(7).

— — Art. 61(1).

— — Art. 61(2).

— — Art. 61(2)(b).

— — Art. 63.

— — Art. 63(1).

— — Art. 63(2).

— — Art. 64(8)(a).

— — Art. 79.

— — Art. 87(5).

— — Art. 87(7).

— — Art. 112.

— — Art. 121.

— — Art. 123.

ICCPR

ICTR

ICTY

STL

Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon

— — Art. 6(C).
— — Art. 8(C).
— — Art. 8(D).
— — Art. 8(E).

Rules of Procedure and Evidence

— — Rules 72(B).
— — Rule 76.
— — Rule 76(B).
— — Rule 76(E).
— — Rule 76bis.
— — Rule 94.
— — Rule 101.
— — Rule 102.
— — Rule 104.
— — Rule 105.
— — Rule 105bis.
— — Rule 106.
— — Rule 106(A)(iii).
— — Rule 107.
— — Rule 108.
— — Rule 109.
— — Rule 130.
— — Rule 138.
— — Rule 163.
— — Rule 175.
— — Rule 176.
— — Rule 189.

Statute

— — Art. 5.
— — Art. 16(4)(d).
— — Art. 20.
— — Art. 22.
— — Art. 22(1).
— — Art. 22(1)(a).
— — Art. 22(1)(b).
— — Art. 22(1)(c).
— — Art. 22(2).
— — Art. 22(2)(a).
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— — Art. 22(3).

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— — Prosecutor. Policy Paper on the Interests of Justice, September 2007. [Online]. [Accessed 3 June 2019]. Available from: www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

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ICTY. Code of Professional Conduct for Counsel Appearing before the International Tribunal, 12 June 1997.

STL. Annual Report 2009-2010.

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ICTY

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STL

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— — Appeal of the Oneissi Defence Against the Trial Chamber Decision on Reconsideration of the Trial In Absentia Decision, Appeals Chamber, 5 September 2012.

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Note to the Reader

In this thesis, the pronouns ‘he/she’, ‘his/her’, and ‘himself/herself’ have been used throughout the text when referring to the defendant (and the defence counsel) and the other parties of international criminal cases.

To maintain the anonymity of the legal practitioners interviewed for this thesis, the interviews have been referenced in this work using a coding system (i.e. a progressive numbering). When referencing the content of the interviews (with no direct quote), the abbreviation ‘e.g.’ has been used instead of ‘see’. This is because, under the ethical review agreement of this thesis, the transcriptions of the interviews are not accessible to other persons than the author of the thesis.

Introduction

This thesis examines the phenomenon of international criminal proceedings in absentia, i.e. international criminal proceedings conducted in the total or partial absence of a defendant.[1] In absentia proceedings have a long-standing history in both national and international criminal justice systems.[2] In International Criminal Justice, they have prompted various questions on the approach that international criminal tribunals should adopt when dealing with absent defendants. In particular, because the defendants' absence is a recurring issue in International Criminal Justice, the conduct of in absentia proceedings has been at the centre of extensive scholarly debate for years.[3] In this sense, some authors posit that 'in the history of International Criminal Justice, the concept of in absentia trials has always sparked some lively debate',[4] and 'trials in absentia are a current topic in the blossoming field of International Criminal Law'.[5]

However, it is with the most recent developments of the use of in absentia proceedings at international criminal tribunals that the topic has gained new momentum, forcing the scholarship and jurisprudence to consider it properly. In particular, the beginning of a total trial in absentia at the STL in the *Ayyash et al*. case 'puts this issue at the heart of academic attention',[6] and the literature is confronted with numerous problems that emerge from the practice of this case. These problems concern both the theoretical understanding and the practical consequences of in absentia proceedings for the work of international criminal tribunals and, more generally, International Criminal Justice.

For decades, in absentia proceedings have fuelled controversy among theorists and legal practitioners, but this controversial phenomenon has not been addressed appropriately. Indeed, the scholarship has examined in absentia proceedings with a certain superficial and descriptive approach, often confining the topic to the realm of dangerous oddities of International Criminal Procedure.[7] In particular, two problems have characterised the scholarship's attitude towards in absentia proceedings, impeding

[1] The definition and classification of these proceedings will be analysed in detail in Chapter 1, Section 1.2.
[2] See Knoops (2014); Shaw (2012); Schabas (2009a).
[3] For examples of those in favour, see Trad (2016); Shaw (2012). For examples of those against, see Jordash and Parker (2010).
[4] Zakerhossein and de Brouwer (2015, p.181).
[5] Strazzella (2010, p.216).
[6] Zakerhossein and de Brouwer (2015, p.182).
[7] For instance, Jordash and Parker (2010, p.509) argue that 'trials in absentia, by their very nature, are unequal and incomplete'.

it to form an objective understanding of these complex proceedings. These problems affect both the quantity (i.e. how much and how often the scholarship has considered the topic) and the quality (i.e. how well and how thoroughly the scholarship has examined the subject) of the scholarly analysis of these proceedings.

First of all, the study of in absentia proceedings has been scattered, with few contributions that have sporadically appeared in the academic literature in the past decades, and when this has happened, they have been concentrated in the span of few years.[8] This quantitative element would not be relevant in itself were it not for the nature of the proceedings considered and the triggering factor underpinning them (i.e. the defendant's absence). In other words, despite the recurring phenomenon of the defendants' absence from international criminal proceedings (as will also be highlighted in Chapter 2 of this thesis) and the need to tackle an exceptional situation, even with the use of in absentia proceedings, the scholarship has only focused on the topic sporadically.

This fact has resulted in a scattered, incomplete study of in absentia proceedings because there has not been a consistent evaluation of these throughout the years, but only when there have been specific developments before international criminal tribunals. For instance, when the ad hoc tribunals have allowed hearings for the confirmation of charges in absentia (under Rule 61 ICTY RPE); or when the STL has permitted the conduct of a total trial in absentia (under Art. 22 STL St.). The consequence of this has been a lack of full understanding of in absentia proceedings following the various phases of their development and considering the factors that have influenced it in International Criminal Justice.

Second, the study of in absentia proceedings is affected by various gaps and misunderstandings. In this sense, the scholarship has limited its analysis to some problematic aspects of in absentia proceedings and their possible violation of International Human Rights Law standards, particularly the rights of the absent defendant to a fair trial and a proper defence. Little attention has been given to other pivotal features of in absentia proceedings that have great importance in their assessment (e.g. their definition, the factors influencing their legal development, their practice and impact on the parties).

The result has been an incomplete study of the phenomenon that lacks depth and, more importantly, focuses mainly on the theoretical and legal framework of in

[8] Most of the scholarship's publications on the topic have come out between 1996-1999 (i.e. between the beginning of the work of the ad hoc tribunals and the creation of the ICC) and 2009-2010 (i.e. when the STL began its work).

absentia proceedings, with no consideration of their realities in the practice of international criminal tribunals. For instance, this means that, for the most part, the scholarship has not conducted empirical research on the use of in absentia proceedings and the effects that this has for international criminal cases, the parties, and the mandate of international criminal tribunals. The consequence of this lack of comprehensive analysis is the risk of a partial judgement that reiterates a traditional binary approach to in absentia proceedings (i.e. being in favour or against) with no objective evaluation of these important proceedings based upon their full range of applications and effects.

This thesis originates from the pressing necessity to fill the gaps existing in the literature on the topic and to propose an innovative understanding and evaluation of in absentia proceedings. In this sense, this work also aims to address the need to decipher the controversial nature of in absentia proceedings, which seems to be a point of consensus among scholars and legal practitioners. This choice is also due to the recent developments that have occurred in International Criminal Justice, with the first total trial in absentia conducted in modern history at the STL in *Ayyash et al.*[9] and the proposal to include trials in absentia in the Statute of a future Extraordinary Tribunal for Syria.[10] In particular, the author aims to analyse different aspects of in absentia proceedings, considering their limits and prospects for the prosecution of international crimes. Moreover, this thesis addresses the topic from an original, comprehensive perspective, which will go beyond the limited, polarised discussion of the scholarship. In so doing, the study seeks to give the right weight to a group of proceedings (i.e. in absentia proceedings) that are inherently part of International Criminal Justice and have played (and continue to play) a pivotal role in the prosecution of international crimes when the defendants are absent.

Ultimately, the author argues that in absentia proceedings have a significant role in International Criminal Justice for the prosecution of international crimes when the defendants are absent. However, their use is defined and limited by a set of theoretical (e.g. objectives of International Criminal Justice; International Human Rights Law standards) and practice-based elements (e.g. practice of international criminal tribunals; exigencies of the parties of international criminal cases). As a consequence, in absentia proceedings should be qualified as useful, legally possible, but exceptional in International Criminal Justice.

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[9] *The Prosecutor v. Ayyash et al.*, STL, case no. STL-11-01.

[10] The proposal has been advanced in 2013 by a group of academics; see Chautauqua Blueprint (2013). In particular, see Art. 26 of the draft Statute of this extraordinary tribunal that allows trials in absentia.

1.1. Scope of the Study and Research Questions

This thesis focuses on the phenomenon of in absentia proceedings, evaluating them in the context of International Criminal Justice. Traditionally, the scholarship has examined it only considering the specific case of trials in absentia and identifying the variety of proceedings that are part of the group of in absentia proceedings under the umbrella term 'trials in absentia'. However, as will be explained in Chapter 1 of this thesis,[11] in absentia proceedings should be treated as a general category within which there are various types of proceedings conducted in the defendant's partial or total absence. Therefore, this study takes a different approach, analysing the broader phenomenon of in absentia proceedings and not just focusing on trials in absentia. This approach permits the author to obtain a comprehensive understanding of the topic, introducing a novelty in the existing literature. Moreover, differently from the traditional scholarly research on the subject, it reveals the complexity of in absentia proceedings, by highlighting and scrutinising the differences that exist among them.

The overarching research question of this thesis is: *what are the limits and prospects of the use of in absentia proceedings for the prosecution of international crimes in International Criminal Justice?* This question originates from the considerations made previously about the gaps existing in the literature on the topic. Moreover, it raises from the need to reconsider in absentia proceedings as a problematic phenomenon and not as a 'problem' per se. Therefore, there should be a shift from the identification of these proceedings as an issue in International Criminal Justice to their qualification as proceedings with limits and prospects and in need of reform.

To address the overarching research question, the author considers three aspects of in absentia proceedings: (i) their *foundations*; (ii) their *operation*; and (iii) their *future perspectives*. This thesis analyses these aspects in the three Parts in which it is divided, and each Part seeks to answer two sub-research questions. Part I on the *Foundations* answers the following questions: (a) what are the theoretical boundaries to the use of in absentia proceedings in International Criminal Justice?; and (b) what are the legal boundaries to the use of in absentia proceedings in International Criminal Justice? Part II on the *Operation* considers the following questions: (a) what are the limits and prospects of in absentia proceedings in the practice of international criminal tribunals?; and (b) what are the limits and prospects of in absentia proceedings looking at the impact that these have on the parties? Part III on the *Future Perspectives* focuses

[11] See Chapter 1, Subsection 1.2.1.

on the following questions: (a) what are the alternatives to the use of in absentia proceedings if these are rejected in the future?; and (b) how should the future legal framework of in absentia proceedings look like if these are accepted in the future?

1.2. Methodology

In the analysis of in absentia proceedings, this thesis adopts a mixed methodology that includes both doctrinal analysis and empirical research. This methodology permits the author to achieve a comprehensive study of in absentia proceedings and gather additional, innovative data on these proceedings that have been disregarded so far by the scholarship. Indeed, through a combination of doctrinal analysis and empirical research, the study seeks to offer a complete assessment of in absentia proceedings that encompasses their theory but also their practical aspects, i.e. their use in the practice of international criminal tribunals.

The doctrinal analysis of the thesis relies upon a critical study of the relevant scholarship, case law, and provisions on in absentia proceedings, and it points out the key elements of the interpretation and evaluation of these proceedings that emerge from the literature. In particular, the author has examined in detail the literature on the topic of in absentia proceedings and on subjects strictly linked to these proceedings. For instance, the thesis includes a critical study of the literature on the objectives of International Criminal Justice, International Human Rights Law standards, alternative forms of justice at international level, and the needs and rights of the parties involved in international criminal cases. Moreover, the author has analysed the provisions and case law of five relevant international criminal tribunals: the IMT at Nuremberg, the ICTY, the ICTR, the ICC, and the STL. Specific attention has been given to three case studies that have been chosen for their importance concerning the conduct of partial or total in absentia proceedings. These case studies are: (a) the *Kenyatta*[12] and (b) *Ruto*[13] cases at the ICC, where the topic of partial in absentia proceedings has been debated and has prompted a change in the Rules of Procedure and Evidence of the Court; and (c) the *Ayyash et al.*[14] case at the STL, where the Tribunal conducts total in absentia proceedings.

The empirical research done for this thesis includes qualitative research in the form of semi-structured interviews conducted with relevant stakeholders at two

[12] *The Prosecutor v. Kenyatta*, ICC, case no. ICC-01/09-02/11.
[13] *The Prosecutor v. Ruto*, ICC, case no. ICC-01/09-01/11.
[14] *The Prosecutor v. Ayyash et al.*, STL, case no. STL-11-01.

international criminal tribunals, i.e. the ICC and the STL. The use of this methodology fulfils a double purpose. On the one side, it permits the author to provide a pragmatic perspective to the research and inform the findings obtained from the analysis of the literature and case-law on the topic.[15] In this sense, the empirical data gathered complement the doctrinal research of the thesis, by scrutinising in absentia proceedings also from a practice-based perspective.[16] On the other side, this empirical research is intended as an important instrument to fill in the gaps that exist in the literature and case-law on the practical consequences of in absentia proceedings.

By conducting semi-structured interviews, the author aimed at assessing in absentia proceedings in International Criminal Justice also through the lens of the expert opinions of the legal practitioners involved in these proceedings.[17] In so doing, the author uses the content of the interviews as part of the normative framework of reference to evaluate the limits and prospects of the use of in absentia proceedings in International Criminal Justice. In some parts of the thesis, the author has relied upon the interviews more than the findings of the doctrinal analysis because of the limited studies and research done on the topic by the scholarship, and because the interviews could provide additional, nuanced details on the practice of in absentia proceedings in specific contexts (i.e. the case studies used in the thesis).

The choice of conducting elite interviews was taken by the author after careful evaluation of the specifics of this methodology and its implications, as also discussed in the relevant literature.[18] Some benefits of this type of interviews are 'to provide information not recorded elsewhere'[19] and 'to understand the context, set the tone, or establish the atmosphere, of the area you are researching'.[20] Moreover, other scholars refer to the possibility to 'explain complex situations', to get 'a broad overview of issues' and to get an 'explanation of complex situations'.[21] Therefore, the underpinning positive outcome of the use of this methodology is to allow one to gather new, original information that would have not been available otherwise (e.g. through doctrinal research, quantitative analysis). As explained earlier in this Section, this is also the purpose of the qualitative research done for this thesis.

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[15] On the benefits of conducting qualitative research in the form of interviews, see King and Horrocks (2010).
[16] On the benefits of empirical legal research in addition to a doctrinal analysis, see Cane and Kritzer (2010, pp.875-1058).
[17] On the purpose of interviewing experts, see Bogner, Litting and Menz (2009).
[18] For instance, see Mickecz (2012); Harvey (2011); Litting (2009); Dexter (2006).
[19] Richards (1996, p.200).
[20] Ibid.
[21] Rose, Spinks, and Canhoto (2015, p.238).

Three aspects of this methodology were particularly relevant when conducting semi-structured interviews with stakeholders at international criminal tribunals: (i) the type of participants involved; [22] (ii) the approach of the researcher during the interviews;[23] and (iii) the methods used to do these interviews.[24] As discussed later, these two aspects have been carefully evaluated as part of the ethical considerations surrounding this research project (e.g. when deciding how to select the participants and how to anonymise the interviews). Here, it is necessary to recall the interpretation of these aspects and the guidelines provided by the literature to contextualise the methodology applied to this thesis.

Generally speaking, it is argued that conducting interviews with professionals and 'elite' members of society[25] (e.g. judges or legal practitioners) requires a certain attitude by the researcher involved.[26] In particular, it is said that 'like other types of interviews, the best way to conduct research on elite members will vary from one interview to another and researchers need to gauge early the atmosphere of the interview and adjust their behaviour, speaking voice and mannerisms accordingly'.[27] In other words, the researcher should be open to adapt his/her approach to the interview depending on the participant and the need to obtain the trust of the person.[28] Therefore, the interviews should be conducted always in a very professional way but at the same time with a certain flexibility to meet the needs of the participant (e.g. choice of environment for conducting the interview; not answering certain questions; not willing to interact too much).

When conducting the qualitative research for this thesis, the above-mentioned need for flexibility and adaptability has been taken into proper consideration, and the author has carefully adapted her attitude towards each interview specifically. For instance, a great variation has emerged among the interviewees, with some more open to discuss in absentia proceedings in detail and other more reluctant. In this sense, the author has strategically tailored the way in which the interviews were conducted to get as much information as possible even from those participants less incline to talk. As an example, ice breaking questions were asked at the beginning of the interviews or more

[22] See Harvey (2011, p.433); Smith (2006).
[23] See Aberbach and Rockman (2002); Berry (2002); Richards (1996).
[24] See Harvey (2011); Stephens (2007).
[25] There is no common definition of what 'elite' means and who the subjects part of this category are. For a discussion, see Harvey (2010); Stephens (2007); Smith (2006); McDowell (1998); Parry (1998).
[26] See Harvey (2011, p.434).
[27] Ibid., p.434.
[28] See Ostrander (1993).

explanation on the purpose of the research project was provided to the participants.[29] In so doing, the interviewees were put at ease and they were more engaged with the discussion.[30]

Moreover, an additional point relates to the fact that interviews with professionals might bring the additional problem of an unbalance of power between the researcher and the interviewee.[31] In this sense, when doing these interviews, one should be careful in presenting himself/herself as a professional expert of the subject that is the focus of the discussion, without being passive to the answers received and the attitude of the interviewee.[32] To this end, during the interviews done for this thesis, the researcher has asked open-ended questions and semi-structured questions to allow the participants to provide broad answers[33] but also to be able to react and follow-up actively on certain interesting points made and relevant ideas advanced by the interviewees.

Turning to the most appropriate methods for conducting the interviews, in the literature there are various suggestions. These go from the need to ask open-ended questions;[34] to the need to prepare on the single questions with an appropriate amount of research done to identify a possible lack of reliability of the answers received;[35] to the necessity to guarantee anonymity and avoid the gathering of sensitive data accidentally disclosed by the participants.[36]A broader discussion of this point with reference to this thesis is provided later when addressing the ethical issues underpinning the present study. Here, it should briefly be mentioned that, while preparing the conduct of the interviews with the legal practitioners, the researcher has kept in mind the various scholarly suggestions and the design of the interviews (starting with the questions) has followed the literature's relevant points. For instance, the interviews took place sometime after the research had started to allow the author to acquire an appropriate level of understanding of the topic, to conduct a rigorous literature review, and to design and organise the interview's questions in the most effective and methodologically-appropriate way.

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[29] On this method, see Gubrium and Holstein (2001).
[30] On the problems of reticent participants, see Petkov and Kaoullas (2016).
[31] See Lancaster (2017); Harvey (2011, p.439); Welch, Marschan-Piekkari, Penttinen and Tahvanainen (2002).
[32] See Berry (2002, p.681).
[33] As Harvey (2011, p.434) puts it 'it is generally advised, for example, to avoid asking elites closed-ended questions because they do not like to be confined to a restricted set of answers'.
[34] See Aberbach and Rockman (2002, p.674).
[35] See Berry (2002, p.680).
[36] See Lancaster (2017).

The empirical research conducted for this thesis has been subject to ethical review scrutiny and approval by the University of Leeds Research Ethics Committee (Ethics Ref. AREA 14-146). 16 anonymous semi-structured interviews were conducted during 24 months between October 2015 and September 2017, in the UK and The Netherlands. The interviews were organised and conducted over an extended period of 24 months because they were dependant on the interviewees' availability (or lack of) and the need to arrange the meetings in person (in the majority of cases) or via Skype/FaceTime (when face-to-face interviews were not possible).

Based on an initial plan to interview maximum 55 participants, the actual interviews involved 16 different legal practitioners, and these interviewees were chosen following two criteria. Some participants were selected because they are defence counsels, Prosecutors and legal representatives of victims involved in the three case studies chosen for this thesis. Other participants were selected for their expertise on the topic of in absentia proceedings in International Criminal Justice. To organise the interviews, the names and contact details of the participants were gathered using the information available on the websites of the Special Tribunal for Lebanon and the International Criminal Court or by contacting directly the relevant organs of these tribunals (e.g. Press Office, OTP, Defence Office, Registrar).

The participants were approached by email. Those who agreed to participate in the research project signed an informed consent statement. To this end, Standard Informed Consent Forms used at the University of Leeds were employed, and each interviewee received a copy of the signed and dated informed consent form. The interviews were conducted in person or via Skype/FaceTime, they were audio-recorded using an encrypted voice recorder, and they followed a series of questions prepared by the author (additional questions were asked during each interview). The interviews' length ranged from one hour to two hours per interview, and the author analysed the content of the interviews using the software NVIVO. The research findings so obtained are included in various parts of this thesis to inform the analysis of the study.

The potential ethical issues of the empirical research conducted for this thesis were identified and discussed in the ethical review application submitted to the University of Leeds Research Ethics Committee. These ethical issues related to four aspects of the research: (i) the methods used to do the interviews; (ii) the gathering of the informed consent of the participants; (iii) the level of confidentiality necessary; and (iv) the retention of data.

First of all, consideration was given to the possibility to do the interviews either in person or through questionnaires. The first option was preferred because it would have given the author the chance to receive more detailed answers, to have more interaction with the interviewees, to add some questions depending on the points raised during the interview and not to be constrained by the fixed number of questions indicated in a questionnaire.

Second, the author considered the possibility to receive either an oral or a written consent from the interviewees. The oral consent would have been a more informal way of approaching the interviewees and this would have been in line with the personal approach of the interviews. Nevertheless, a written consent was preferred because it provided a 'professional' and 'official' form to the interviews, and it also guaranteed the correct fulfilment of the University of Leeds ethical procedure, reassuring the interviewees of the professional approach adopted in the research. Therefore, prior to conducting the interviews the author submitted a consent form to the participants in order to gather their written consent. Those deciding to participate were required to sign two copies of the informed consent statement. One copy was given to the participants, the other was retained by the author.

The purpose of the study was described to all participants in the research by sending them via email an information sheet prior to the interviews. This document contained information on the content and aims of the research, the methods used for handling the participants' personal data, the justification for requesting their data, the duration of data use and storage and guarantees concerning the rightful use of data. Based on this information, participants were able to take an informed decision whether to participate in the interviews.

Third, regarding the confidentiality issue, the author decided to conduct anonymous interviews. In this sense, the interviews were voice-recorded but there were no names or other elements that could allow the identification of the participants in both the recordings and the transcripts of the interviews. This decision was taken for two reasons: (i) the need to have answers in the interviews as much sincere as possible. In this sense, it was assumed that a high level of anonymity would have guaranteed this result; and (ii) the need to avoid the identification of the interviewees who are involved in ongoing legal cases before international criminal tribunals. In this sense, a proper level of anonymity guaranteed a greater level of confidentiality and the possibility for participants to be free to give their point of view with no pressure of representing an 'official' position. Following these two points, the identity of the interviewees was

masked in the final research outputs included in the thesis, and the data collected during the interviews was entered in the thesis in a processed form. To this end, the author has used a coding system when quoting from or referring to the content of the interviews in the thesis.

Finally, as for the retention of data, the recordings of the interviews will be irreversibly deleted two years after the interviews have taken place. The transcripts will be irreversibly deleted three years after the research project has ended. The recordings and the transcripts have been stored in password-protected and encrypted computer files.

1.3. Outline of the Thesis

As discussed in Section 1.1., this thesis presents the topic of in absentia proceedings in International Criminal Justice considering three aspects: (i) their theoretical and legal framework of reference; (ii) their use and impact in the practice of international criminal tribunals; and (iii) the future approaches that International Criminal Justice might adopt towards these proceedings. The layout of the thesis follows this tripartite structure, and it includes three Parts in addition to an Introduction and a Conclusion. The three Parts are: (i) Part I on the *Foundations*; (ii) Part II, on the *Operation*; and (iii) Part III on the *Future Perspectives*. Each part of the thesis is subsequently divided into two Chapters, for a total of six Chapters.

Part I discusses the foundations of in absentia proceedings in International Criminal Justice, considering their *theoretical framework* (i.e. in Chapter 1) and *legal foundations* (i.e. in Chapter 2). This Part seeks to determine the basis of in absentia proceedings in the international legal system and to identify the relevant theoretical and legal issues that will inform the analysis of the other two Parts of the thesis.

Chapter 1 examines the relevant definition of in absentia proceedings (Section 1.2.) and analyses critically the theoretical constraints that exist upon their use in International Criminal Justice (Section 1.3.). To this end, the Chapter first dissects the concept of in absentia proceedings, looking at some problematic conceptual and theoretical aspects. In particular, the Chapter examines the definition of in absentia proceedings emerging from the literature and the expert opinions of the legal practitioners interviewed for this thesis. Drawing upon this analysis, the author provides a working definition of international criminal proceedings in absentia and classifies them based on three factors: (i) the qualification of the defendant’s absence; (ii) the

phase of the proceeding in which the absence occurs; and (iii) the reasons for the absence. The main argument of this Section is that the study of in absentia proceedings should include a reconsideration of their definition and classification to achieve a rigorous and more complete understanding of this phenomenon.

Moreover, the Chapter addresses the discussion on in absentia proceedings that exists in the literature and among the legal practitioners who have been involved in these proceedings. In so doing, the author defines the theoretical boundaries of in absentia proceedings by confronting the objectives of International Criminal Justice with the function of these proceedings. Then, the author examines the dichotomy that permeates the scholarly debate on in absentia proceedings, focusing on the civil law/common law divide and the meaning of the right to be present in International Criminal Justice. Finally, the author critically discusses the traditional choice of the suspension of the proceeding when a defendant is absent. The main argument of this Section is that in absentia proceedings should be evaluated more objectively by overcoming the binary nature of the arguments proposed in the debate on the topic.

Chapter 2 studies the legal development of in absentia proceedings before international criminal tribunals (Section 2.2.) and identifies the driving factors that have influenced the regulatory framework of these proceedings (Section 2.3.). The Chapter first discusses the legal evolution of in absentia proceedings at various international criminal courts, highlighting the regulatory patterns developed by these courts. In particular, the analysis spans from the IMT at Nuremberg until the STL, also considering the experience of the ad hoc tribunals and the ICC. In this Section, attention is given to the development of the concept of in absentia proceedings and its variations, especially looking at the differences and similarities of the procedural choices made by international criminal courts. The main argument of this Section is that despite the different regulatory choices of international criminal tribunals for in absentia proceedings, the legal framework presents some recurring elements that need to be considered in the future regulation of these proceedings.

Then, the Chapter addresses the topic through the lens of two groups of factors that result from the critical examination of the literature, case law, and opinions of legal practitioners who have been involved in in absentia proceedings. These groups of factors are: (a) courts, crimes, and defendants; and (b) and pragmatism and politics. In this Section, the author scrutinises the evolution of in absentia proceedings, going beyond a traditional historical and chronological discourse and determining the key elements of this development. Here, the argument advanced is that in addition to the

patterns identified in the previous Section, the regulation of in absentia proceedings has been characterised by some common factors that have shaped and defined it. The relevance of these factors provides further insight into the evolution of in absentia proceedings and some guidelines for their future regulation.

Part II presents a critical examination of the operation of in absentia proceedings, looking at their *practice* (i.e. in Chapter 3) and *impact* (i.e. in Chapter 4). This Part aims to understand the practical consequences of the conduct of in absentia proceedings for the prosecution of international crimes and the effects that these proceedings have on the parties involved.

Chapter 3 scrutinises the practice of in absentia proceedings in the three phases of an international criminal process, i.e. pre-trial (Section 3.2.), trial (Section 3.3.), and post-trial (Section 3.4.). For each of these phases, the author identifies the crucial elements of the practice of in absentia proceedings, discussing the regulation of these procedural elements at relevant international criminal tribunals and the issues emerging from their practice. In particular, concerning the pre-trial phase, the study focuses on the notification to an absent suspect and the confirmation of charges in absentia. Here, the author highlights the technical and procedural problems that exist for notifying the indictment to an absent person and the approaches adopted by some international criminal tribunals for confirming the charges in absentia (e.g. Rule 61 ICTY RPE). The analysis of the trial phase concentrates on the conduct of trials in absentia, distinguishing between partial and total trials in absentia. In particular, the author critically examines Rules 134bis, ter, and quater of the ICC RPE and Art. 22 of the STL St. Finally, regarding the post-trial phase, the author considers the appeal in absentia, the enforcement of a sentence in absentia, and the retrial. In this Section, the study discusses the practice of in absentia proceedings when there has been a conviction in absentia or the absent defendant has appeared before the judges at a later stage, and it underlines the procedural strategies adopted by international criminal tribunals, especially the STL.

The Chapter advances two arguments based on the experiences of international criminal tribunals. The first is that some of the practices adopted by these courts when dealing with in absentia proceedings can be used as guidelines for the future. The second argument is that the issues and negative outcomes of past judicial practices should be used constructively as a basis to improve the future use of in absentia proceedings.

Chapter 4 critically examines the impact of in absentia proceedings on the parties of international criminal cases, i.e. the Defence (Section 4.2.); the Prosecutor (Section 4.3.); and the victims and their legal representatives (Section 4.4.). For each party, the author discusses the advantages and disadvantages of the practice of in absentia proceedings, informing the analysis with a critical study of the existing literature on the topic and the opinions of the legal practitioners interviewed for this thesis. In the first Section, attention is given to the impact of in absentia proceedings on both the right to fair trial and the procedural strategies of the absent defendant and the defence counsel. The Chapter adopts a similar approach when focusing on the Prosecutor and the victims, and it identifies the most relevant effects of the conduct of in absentia proceedings on these parties. As for the Prosecutor, the Chapter highlights the impact of in absentia proceedings on her procedural strategy, particularly regarding evidence and the arrest of the absent defendant. Concerning the victims, the focus is on the impact on both the victims and their legal representatives. Attention is given to the positive (e.g. being heard and avoiding the suspension of the process) and negative consequences (e.g. physical absence of the defendant, possible issues with obtaining reparations) that the victims might encounter.

Ultimately, the Chapter argues that the evaluation of in absentia proceedings in International Criminal Justice should be holistic, including an assessment of their impact on the parties. This exercise would guarantee a better understanding of the phenomenon and a more legitimate use of these proceedings, particularly in light of some theoretical constraints identified in Chapter 2 (i.e. objectives of International Criminal Justice and pragmatism).

Part III examines the future approaches that the international legislator might adopt towards in absentia proceedings, analysing the *alternatives to in absentia proceedings* (i.e. in Chapter 5) and their *future* (i.e. in Chapter 6). This Part seeks to present two opposing perspectives: (a) the rejection of in absentia proceedings and their substitution with two alternatives, i.e. international civil proceedings in absentia or Transitional Justice mechanisms; and (b) the adoption and conduct of in absentia proceedings by international criminal tribunals based on a reformed legal framework that might include relevant policy recommendations proposed by the author.

Chapter 5 critically discusses two alternatives to the conduct of in absentia proceedings, identifying the reasons for their search (Section 5.2.) and their features, i.e. international civil proceedings in absentia (Section 5.3.) and Transitional Justice mechanisms (Section 5.4.). In particular, the author first considers the need for these

alternatives and their general features. Here, the study refers to the pluralism that exists in International Criminal Procedure and the possibility to find valid alternatives to in absentia proceedings. Moreover, referring to the opinions of the legal practitioners interviewed for this thesis, the author indicates some generic features that the proposed alternatives should have to substitute in absentia proceedings adequately. In the second Section, the Chapter considers the first alternative, i.e. international civil proceedings in absentia. The author scrutinises the procedural elements of these proceedings and some aspects that might be problematic in practice. In particular, the analysis discusses the extent to which civil proceedings in absentia can substitute criminal proceedings in absentia, looking at some theoretical constraints analysed in Chapter 1. In the third Section, the author examines the use of Transitional Justice mechanisms as substitutes to in absentia proceedings. As was done in the previous Section, the study considers some relevant procedural aspects of these proceedings, including those that might limit their use in practice. In so doing, the author assesses this option and establishes its value as a feasible alternative to in absentia proceedings.

The Chapter advances two arguments. First of all, the proposed alternatives should not be considered as a panacea for the problems emerging in in absentia proceedings because they present pros and cons as well. Therefore, they should be evaluated as exceptional proceedings to be conducted under defined circumstances and with specific procedural safeguards. Second, the proposed alternatives cannot have a general application to all international criminal cases with an absent defendant. This fact prompts the question of their value as effective, legitimate alternatives to in absentia proceedings, able to overcome the issues already emerging with these proceedings.

Chapter 6 addresses the question of the future of in absentia proceedings in International Criminal Justice by requalifying these proceedings as useful, legally possible, but exceptional (Section 6.2.) and advancing some policy recommendations for enhancing the legal framework of reference (Section 6.3.). In the first Section, the author argues that in absentia proceedings should be reconsidered, based on the analysis done in the previous Chapters of this thesis and the opinions of the legal practitioners who have been involved in these proceedings. To this end, the study examines three elements that will identify future in absentia proceedings. First, they are useful proceedings. That is, they permit international criminal tribunals to achieve some objectives part of their mandate identified in Chapter 1. In this sense, in absentia proceedings advance International Criminal Justice, and they permit to prosecute crimes that might go unpunished and provide justice to the victims. Second, they are legally

possible proceedings. This means that they are part of the procedural framework of International Criminal Justice and of the range of possible proceedings that international criminal tribunals can conduct when dealing with the defendant's absence. Third, they are exceptional proceedings. This means that they are not the ordinary way international criminal tribunals should conduct criminal proceedings, and they come at stake only when the circumstances of a case so require. In this regard, the defendant's absence and the incapacity of the tribunal to prosecute crimes would be the qualifying trigger for the conduct of in absentia proceedings. Moreover, these proceedings should follow a specific set of rules and standards that would permit them to be legitimate, although exceptional.

In the second Section, the author presents some policy recommendations to improve the existing legal framework of in absentia proceedings. These policy recommendations cover the three phases of an international criminal proceeding (i.e. pre-trial, trial, and post-trial) and they specifically tackle the procedural issues that have emerged in the analysis conducted in the previous Chapters of this thesis. In particular, concerning the pre-trial phase, the author proposes recommendations on: (a) the notification to an absent suspect; (b) the legal representation of the person; and (c) the confirmation of charges in absentia. As for the trial phase, the recommendations encompass: (a) the general conduct of a partial or total trial in absentia; (b) the evaluation of evidence; and (c) the procedural strategies of the parties. Finally, regarding the post-trial phase, the Section includes recommendations on: (a) the conduct of an appeal in absentia; (b) the enforcement of a sentence in absentia and the need to improve States' cooperation; and (c) the problematic conduct of a retrial.

Ultimately, the Chapter argues that in absentia proceedings need to be reconsidered for a future use in International Criminal Justice. This means to requalify them objectively and make some changes to their regulatory framework. This would guarantee a more legitimate use of in absentia proceedings for the prosecution of international crimes that will build on the one side, upon the exigencies of International Criminal Justice, international criminal institutions, and the parties of the cases; on the other side, upon the needs emerging from the practice of these proceedings that the literature has disregarded so far.

Overall, this thesis proposes that one should reconsider in absentia proceedings in International Criminal Justice, qualifying them as useful, legally possible, but exceptional proceedings. This research finding and the whole study conducted in this thesis will be valuable for advancing the scholarly understanding of the topic and

innovating the international legal practitioners' approach to criminal cases with absent defendants. Moreover, this work will have relevance beyond the audience of international theorists and legal practitioners. Indeed, it will also be significant for national criminal lawyers and the national debate that exists on in absentia proceedings (and that this study might inform). In particular, this might happen when considering the thesis' critical discussion of principles of criminal justice and human rights standards that are also relevant when assessing in absentia proceedings in national jurisdictions.

Part I. Foundations

This Part of the thesis examines the *foundations* of in absentia proceedings in International Criminal Justice. Traditionally, the scholarship has analysed the basis of in absentia proceedings looking at their history and compatibility with International Human Rights Law standards. Little attention has been given to other aspects of these proceedings that are fundamental for a proper understanding of their foundations in International Criminal Justice. These aspects are: (a) their definition; (b) their theoretical boundaries; (c) their normative patterns at international criminal tribunals; and (d) the driving factors underpinning their regulation.

This Part seeks to fill the above gaps and provide valuable insights that will also be relevant for Part II (*Operation*) and Part III (*Future Perspectives*) of this thesis. In particular, the study offers a comprehensive investigation of key elements of in absentia proceedings, such as their definition and the theoretical constraints upon their use in international criminal cases. Moreover, the analysis illustrates the evolution of in absentia proceedings, examining their experience at international criminal tribunals and the factors that have influenced their regulation.

This Part is divided into two Chapters. Chapter 1 presents the theoretical framework of the thesis. It provides relevant definitions and a classification (Section 1.2.) and explores the theoretical boundaries of the conduct of in absentia proceedings in International Criminal Justice (Section 1.3.). Chapter 2 analyses the legal foundations of international criminal proceedings in absentia. It scrutinises the development of their regulatory framework (Section 2.2.) and identifies the main factors that have influenced it (Section 2.3.).

Chapter 1. Theoretical Framework

1.1. Introduction

Traditionally, the scholarship has examined the theoretical foundations of international criminal proceedings in absentia looking primarily at their compatibility with International Human Rights Law (IHRL) standards.[1] Some authors argue that these proceedings are unfair because they do not guarantee equality of arms and an effective exercise of the rights of the Defence.[2] Others think that they are useful to overcome the challenges posed by a defendant whose absence might thwart the prosecution of crimes.[3] Others accept in absentia proceedings only as exceptional proceedings used under certain circumstances and with specific procedural safeguards (e.g. the retrial).[4]

This discussion disregards additional significant aspects of in absentia proceedings that should inform their analysis. A critical problem concerns the definition and classification of these proceedings in International Criminal Justice. The majority of the scholarship has investigated the topic focusing only on trials in absentia and overlooking other types of in absentia proceedings. For instance, few studies have considered pre-trial in absentia proceedings (e.g. confirmation of charges in absentia),[5] and none have examined post-trial in absentia proceedings (e.g. appeals in absentia). This fact causes a partial understanding of the phenomenon that impoverishes the debate on the subject and jeopardises any attempt to properly evaluate and (possibly) improve the use of in absentia proceedings.

This Chapter seeks to fill the gaps in the literature on the definition of in absentia proceedings and to critically examine the debate on their conduct in International Criminal Justice. The analysis determines the conceptual boundaries of in absentia proceedings and sets up the theoretical framework of reference for the other Chapters of this thesis. In particular, the Chapter examines different types of in absentia proceedings that will be considered in this work (i.e. in Chapter 3 on the *practice* and Chapter 4 on the *impact*). Moreover, it scrutinises the theoretical limitations to in absentia proceedings that are relevant when analysing their alternatives (i.e. in Chapter 5 on the *alternatives*) and their future use (i.e. in Chapter 6 on the *future*).

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[1] For instance, Knoops (2014); Shaw (2012); Schabas (2009a); Brown (1999).
[2] See Wheeler (2017); Zakerhossein and de Brouwer (2015); Jordash and Parker (2010); Riachy (2010).
[3] See Trad (2016); Shaw (2012); Jenks (2009).
[4] See Göhler (2016); Gardner (2011); Gaeta (2007).
[5] For instance, Stanković (2010); Ambos and Miller (2007); Furuya (1999).

This Chapter is divided into two Sections in addition to an Introduction and a Conclusion. The first Section presents relevant definitions and a classification (Section 1.2.). The author examines the scholarship and legal practitioners' struggle to define in absentia proceedings; clarifies some general concepts (e.g. international criminal proceedings, in absentia, defendant); and formally classifies in absentia proceedings using three criteria (e.g. qualification of the absence; phase of the proceeding; reasons for the absence). The second Section of the Chapter discusses the theoretical constraints upon the conduct of in absentia proceedings (Section 1.3.). Here, the analysis considers some relevant objectives of International Criminal Justice; the arguments for and against in absentia proceedings; and the traditional suspension of the proceeding that follows the defendant's absence in international criminal cases.

Ultimately, the author advances two ideas in this Chapter. First, it is argued that we need to reconsider and refine our understanding of in absentia proceedings, both regarding their definition and classification. This exercise is crucial for a correct evaluation of the limits and prospects of in absentia proceedings in International Criminal Justice. Second, it is posited that we need to overcome the rigid dichotomy of the scholarly debate on in absentia proceedings. Indeed, the exigencies of International Criminal Justice and international criminal cases require a non-binary, comprehensive approach that evaluates in absentia proceedings objectively and constructively.

1.2. Definitions and Classification

This Section focuses on the definitions and classification of in absentia proceedings. First, it examines the issues emerging from the attempts of the scholarship and the legal practitioners to define in absentia proceedings (Subsection 1.2.1.). Then it considers some general concepts that are part of the definition of in absentia proceedings used in this thesis (Subsection 1.2.2.). Finally, the author proposes a formal classification of these proceedings (Subsection 1.2.3.).

1.2.1. The Problematic Definition of In Absentia Proceedings

The scholarship has often overlooked the definition of in absentia proceedings, relying on generalisations and adopting an inconsistent approach. The question of what in

absentia proceedings are 'is oftentimes taken for granted',[6] although there is no consensus among the scholars and 'the term is not a straightforward and subtle expression'.[7] Therefore, there is a need for better definitions and classification to avoid a discussion affected by an intrinsic conceptual flaw that impedes a fully informed debate on in absentia proceedings.

To date, the scholarship's approach to defining in absentia proceedings has been problematic. First of all, there is no comprehensive study of these proceedings. Many scholars have focused only on trials in absentia, ignoring pre-trial or post-trial in absentia proceedings.[8] This exclusion does not derive from a selection among in absentia proceedings; instead, it is due to a conceptual overlap. Indeed, the scholars have interchangeably used the concept of 'in absentia proceedings' and 'trials in absentia', with no distinction between the two.[9] As a result, all in absentia proceedings are reduced to one type (i.e. trials in absentia), although their regulation, practice, and impact on the parties vary significantly (as will be explained in Chapters 2, 3, and 4). Moreover, this overlap contradicts the preference that emerges in the literature for some in absentia proceedings, which demonstrates the need to differentiate them. For instance, pre-trial in absentia proceedings are considered substantially different and more acceptable than trials in absentia because they do not determine guilt.[10]

Some scholars confirm this methodological problem, and they note that 'the legal literature tends to lump different types of in absentia trials together'.[11] However, this conceptual overlap is incorrect because it fails to acknowledge the existence of different in absentia proceedings, and it addresses the phenomenon simplistically. If not rectified, this would pose a risk of treating different proceedings alike, as if all in absentia proceedings shared the same features and they could be evaluated with no distinctions.

Second, the attempts made to classify in absentia proceedings (under the umbrella term 'trials in absentia') are complicated and incomplete.[12] They refer to particular procedural aspects of in absentia proceedings (e.g. improper notification of the charges; no defendant's arrest), without using general criteria. For instance, Gaeta

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[6] Zakerhossein and de Brouwer (2015, p.182).
[7] Ibid.
[8] For instance, Trad (2016); Shaw (2012); Jordash and Parker (2010); Riachy (2010); Jenks (2009); Gaeta (2007); Brown (1999); Schwartz (1996).
[9] This occurs also at the STL. See *The Prosecutor v. Ayyash et al*., STL, Order to Seize Trial Chamber (2011). Here, the Tribunal used the term 'proceedings in absentia' to refer to 'trials in absentia'.
[10] See Trendafilova (2009, pp.450-457); Brown (2008, p.94, ftn.154).
[11] Zakerhossein and de Brouwer (2015, p.184).
[12] For instance, Zakerhossein and de Brouwer (2015, p.184); Gaeta (2014).

distinguishes *trials in absentia proper* (i.e. when the defendant is notified 'but chooses not to appear in court for the entire duration of the trial, or at some of its hearings, or is excluded from the court due to misconduct of some type')[13] from *trials by default* (i.e. when the notification is missing, and the defendant has never appeared in court).[14] Other scholars differentiate the case where the defendant has been present in the proceeding but then has absconded, from the case where the person has never showed up.[15] In the first scenario, the defendant waives the right to be present, triggering the in absentia proceeding.[16] Instead, the second situation prompts questions about the defendant's knowledge of the charges and existence of the proceeding.[17]

The scholarship's approach might be helpful in determining the features of different in absentia proceedings and identifying their most problematic procedural aspects. However, due to its specific focus, this method has two important flaws. It disconnects the various types of in absentia proceedings from their common originating event, i.e. the defendant's absence. In other words, in absentia proceedings seem to be triggered by procedural issues (e.g. the lack of notification) rather than the defendant's physical absence. Moreover, it treats in absentia proceedings as 'separate boxes', with no link to each other. In this sense, the classification loses its common background (i.e. proceedings with an absent defendant), and some in absentia proceedings are excluded (e.g. the process where the person has never appeared or the notification is missing) because they do not fit in any of the categories created (they are even named differently).

Just like the scholarship, the legal practitioners interviewed for this thesis struggle to provide a clear and consistent definition of in absentia proceedings. They focus mainly on trials in absentia, overlapping different concepts. 'Trials in absentia' and 'in absentia proceedings' are often used as synonyms, arguing that 'there is one in absentia notion'[18] and 'the others are not very important; they exist, but they are not very important'.[19] Moreover, few legal practitioners refer to the general category of in absentia proceedings, saying that these go 'from the pre-trial until the sentencing'[20] and

[13] Gaeta (2014, p.230).
[14] See ibid.
[15] For instance, Schwarz (2016, p.102); Pons (2010, p.1310); Starygin and Selth (2005, p.171).
[16] See Starygin and Selth (2005, p.171).
[17] See ibid.
[18] Interview 05.
[19] Ibid.
[20] Interview 01.

recognising that a trial in absentia 'only focuses on judging and sentencing. So, it is a specific phase, within the in absentia proceeding'.[21]

When the legal practitioners prefer talking about trials in absentia, they give greater importance to the trial phase of an in absentia proceeding rather than other phases. For example, it is said that other in absentia proceedings 'exist like exceptions somewhere'[22] but 'they are not substantial'.[23] Therefore, the phenomenon is described within the limits of the trial phase, where the parties confront each other, and the guilt of the defendant is assessed. This is a significant element when determining which in absentia proceedings are of concern and most significant to the legal practitioners (this point will be recalled in Chapters 3 and 4).

The preference for trials in absentia might be due to the practitioners' primary (sometimes only) experience with these proceedings at international level in the trial phase of *Ayyash et al*.[24] This fact is problematic for the classification of in absentia proceedings because it shows a limited point of view on these proceedings and their development in different procedural phases. In other words, the lack of experience with in absentia proceedings in other phases (i.e. outside the trial phase) confines the definition of the interviewees to trials in absentia, and they do not consider other types. This is another important element to evaluate, especially when examining the future use of in absentia proceedings (i.e. in Chapter 6).

Other valuable points emerge when the legal practitioners interviewed for this thesis explain the details of trials in absentia. First of all, there is a lack of consensus on the constitutive elements of these proceedings. This means that trials in absentia are not uniquely defined and the practitioners contradict each other. For instance, one argues that a trial in absentia might involve a defendant who has been arrested and has appeared in court.[25] Others say that there should be no arrest[26] and the defendant should be a fugitive.[27] Moreover, some practitioners think that whenever the defendant has appeared in court, or there is a contact between the defendant and the defence counsel, there is no trial in absentia.[28] Indeed, the essence of this trial is the defendant's absence and the lack of contact between the person and the Defence team and the inability of the

[21] Ibid.
[22] Interview 05.
[23] Ibid.
[24] E.g. Interviews 02; 03; 04; 05; 06; 07; 10; 11. The case is *The Prosecutor v. Ayyash et al.*, STL, case no. STL-11-01.
[25] E.g. Interview 02.
[26] E.g. Interviews 05; 15.
[27] E.g. Interviews 03; 16.
[28] E.g. Interviews 03; 11. In Interview 15, it is suggested to call the former case trial in absentia 'class one' and the latter trial in absentia 'class two'.

defence counsel to take instructions.[29] In this sense, *Ayyash et al.* would be a classic example of trial in absentia.[30] Against this argument, it is posited that the trial at the STL is a trial by default because the absent defendants have never been arrested; instead, a trial in absentia needs the individual to be arrested, interviewed, or brought to court at least once.[31]

As it happens with the interviewees' definition of trials in absentia, the inconsistent interpretation of the constitutive elements of a trial in absentia might be the consequence of the different involvement of the legal practitioners with in absentia proceedings at international level. Indeed, the diverse personal experiences of these professionals seem to have an impact proportional to the amount of detail and clarity they provide when talking about trials in absentia.

Second, the interviewees describe trials in absentia referring to two subjects, i.e. the defendant and the defence counsel.[32] This fact shows that in the practitioners' view these in absentia proceedings have a specific focus. Indeed, the definition does not consider other subjects (e.g. the victims) or objectives (e.g. public order) than the Defence and its interests. The legal practitioners could have used a broader definition, saying that a trial in absentia is a proceeding where the defendant is absent, the victims participate as witnesses, and the ultimate purpose is the protection of public order or the prosecution of crimes. Instead, keeping a narrow focus, a trial in absentia is identified as conceptually linked to the Defence, and its definition reflects this connection. This is a relevant element when considering the impact on the parties (i.e. in Chapter 4) and the future use of in absentia proceedings (i.e. in Chapter 6).

Third, the legal practitioners tend to identify the absent defendant as a fugitive, particularly when referring to the voluntariness of the absence.[33] It is said that a trial in absentia occurs when the defendant is a 'deliberate and wilful absentee'[34] and 'refuses intentionally to present himself in front of justice'.[35] In this sense, for some interviewees, the qualification of the defendant as a fugitive is a legitimate reason to hold a trial in absentia[36] and a ground for discrimination from other cases where the proceeding cannot continue in absentia.

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[29] E.g. Interview 03.
[30] E.g. Interview 15.
[31] E.g. Interview 02.
[32] E.g. Interviews 02; 03; 05; 15; 16.
[33] E.g. Interview 09.
[34] Interview 06. Accord Interviews 03; 16.
[35] Interview 16.
[36] E.g. Interviews 03; 16.

This association raises important questions about the possible misuse of in absentia proceedings due to a mistaken assumption, i.e. the defendant is absent because he/she is a fugitive. In this sense, a practitioner worries that this assumption might become a dangerous shortcut to justify a trial in absentia when there is a notification of the charges, but the defendant has not surrendered voluntarily.[37] Indeed, the defendant's absence might hide an involuntary decision.[38] Therefore, a distinction should be drawn between 'the person is discoverable or has been discovered'[39] and 'knowledge of the person's existence'.[40] This point imposes a careful examination of the procedural safeguards of in absentia proceedings, especially when analysing their future use (i.e. in Chapter 6).

In conclusion, the scholarship and the legal practitioners interviewed for this thesis provide a definition of in absentia proceedings that lacks clarity and consistency. In this sense, 'it is not yet entirely clear what the notion of in absentia really means and in what circumstances an accused may have the legal status of "absent" from trial'.[41] However, this needs to change because without knowing precisely what in absentia proceedings mean and when they occur, it is impossible to discuss their limits and prospects in International Criminal Justice properly. In this thesis, the author uses the following definition of in absentia proceedings (analysed in the next Subsections 1.2.2. and 1.2.3.): *international criminal proceedings conducted in the total or partial absence of the defendant*.

1.2.2. General Concepts

This Subsection focuses on three concepts that are part of the definition of in absentia proceedings used in this thesis: (i) international criminal proceedings; (ii) in absentia; and (iii) defendant. The author analyses their meaning to clarify the context in which in absentia proceedings operate (i.e. International Criminal Procedure) and to identify some notions that are also relevant for other Chapters of this thesis.

[37] E.g. Interview 09.
[38] E.g. Interviews 13; 16.
[39] Interview 09.
[40] Ibid.
[41] Pons (2010, pp.1309-1310). See also Murtezić (2016, p.343).

1.2.2.1. International Criminal Proceedings

The concept of 'international criminal proceedings' refers to proceedings used in International Criminal Justice for the prosecution of international crimes. Generally speaking, 'international' means that international institutions conduct these proceedings (i.e. international criminal tribunals or courts) with the application of international principles and provisions (also part of International Criminal Procedure).[42] This element distinguishes them from national proceedings[43] and discriminates the applicable law of international courts from that of domestic courts.[44]

The international character of these proceedings also determines their peculiar scope and function. Indeed, they have a selective jurisdiction (not all perpetrators are prosecuted, and not all situations are investigated),[45] and they pertain crimes that are heinous core international crimes,[46] whose nature 'elevates them to a level where they are of "concern" to the international community'.[47] For instance, the International Criminal Court (ICC) has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.[48] The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) had jurisdiction over serious violations of International Humanitarian Law, genocide, and crimes against humanity.[49]

As a scholar underlines, also national courts can prosecute international crimes, but they apply International Criminal Law indirectly, and 'they operate within their domestic legal parameters […] even if prosecuting international crimes'.[50] Moreover, the function of international criminal proceedings is distinctive because they are conducted to achieve a plurality of objectives (as will be discussed in Subsection 1.3.1.) that do not necessarily correspond to those of national criminal proceedings.[51]

[42] See van Sliedregt (2014, pp.1141-1142); Mackenzie (2008, p.601). On the sources of International Criminal Procedure, see Mégret (2013, pp.68-73).
[43] See Jessberger (2009, pp.208ff.).
[44] International criminal tribunals have a jurisdiction complementary to national courts. See Stahn and El Zeidy (2011); Bergsmo, Bekou, and Jones (2010); El Zeidy (2008).
[45] See Zakerhossein (2017); Knoops (2014, p.98); Meyer (2014, p.919).
[46] On the definition of international crimes, see Heller (2017); van Sliedregt (2014, pp.1150ff.); Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, p.37).
[47] Schabas (2011a, p.90).
[48] See Art. 5 ICC St.
[49] See Arts. 1-5 ICTY St.; Arts. 1-4 ICTR St.
[50] Safferling (2012, p.7).
[51] See Ambos (2016, pp.46-56); Damaška (2009, p.177); Jessberger (2009, pp.208ff.).

The term ‘criminal’ means that these proceedings aim to prosecute crimes and establish the criminal responsibility for the wrongdoing occurred.[52] Moreover, the word ‘criminal’ contextualises these proceedings in the sphere of Public Law (i.e. Public International Law),[53] that pertains the relationship between individuals and the international community.[54] This recalls the ‘public function’ of international criminal proceedings and their role towards the international community as a whole, and not only the victims affected by international crimes.[55] They are used in the context of the perpetrator/international community relationship, and this fact carries a fundamental weight in the evaluation of in absentia proceedings. Indeed, as will be discussed in Subsection 1.3.1., relevant questions concern the ‘public function’ of in absentia proceedings and their capacity to fulfil the expectations and needs of the victims and the international community.

Furthermore, the criminal qualification of these proceedings distinguishes them from civil proceedings.[56] This is true regarding their outcomes (e.g. assessment of criminal responsibility and punishment) and the relationship among the parties involved, both concerning substantive principles (e.g. standard of proof) and procedural rights (e.g. right to counsel). This distinction will be further considered in Chapter 5 when analysing civil proceedings in absentia as an alternative to criminal proceedings in absentia.

Finally, ‘proceedings’ is a broad term in both its non-technical and legal meaning. In its non-technical use, it stands for a series of actions that follow a precise order and set of rules. The scholarship describes it as ‘an event or a series of activities involving a set procedure’.[57] Legally speaking, in criminal law a proceeding comprehends a series of phases and actions (including a trial), going from the pre-trial phase with the investigation, to the post-trial phase with the enforcement of a final sentence.[58]

Although some authors identify the entire criminal proceeding as a trial,[59] these are two separate, interconnected concepts. The word ‘trial’ refers only to a phase of the criminal proceeding that is defined as a ‘step in an action, prosecution or other judicial

[52] See Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, p.3); Garner (2009a p.1324); Spencer (2008, p.279).
[53] See Thorburn (2011); Garner (2009b, pp.1350-1351).
[54] See Safferling (2012, pp.70ff.); Brown (2011, pp.4 and 11-13).
[55] See Sloane (2007, pp.47-56); Pocar (2004).
[56] See Akande (2009, pp.265-267). Civil proceedings are those ‘of or relating to private rights and remedies that are sought by action or suit, as distinct from criminal proceedings’: Garner (2009c, p.279).
[57] Stevenson (2010a, p.1403).
[58] See Garner (2009a, p.1324).
[59] See Zakerhossein and de Brouwer (2015, p.183); Ambos (2013, p.161).

proceeding, by which the questions of fact and law in issue are decided'.[60] A trial includes actions that take place before a court with different parties involved, and it ends with the issue of a sentence.[61] Therefore, a criminal proceeding is a more inclusive category than a criminal trial, comprehensive of a trial phase and several other phases. In this sense, international criminal proceedings include a plurality of phases,[62] and this distinction is relevant for classifying international criminal proceedings in absentia.[63]

1.2.2.2. In Absentia

'In absentia' comes from Latin and it means 'in the absence of (someone)', referring to the absence of a person in a certain situation or event.[64] Although not indicated expressly in the Latin phrase, the term alludes to the *physical* absence of the person,[65] with no specific reference to his/her *mental* status, i.e. his/her 'mental fitness to plead'.[66] Therefore, in its original meaning the term 'in absentia' gives relevance to the physical absence of the defendant and identifies the person's mental illness as one of its possible components.

This approach has been maintained in International Criminal Justice. Indeed, as will be underlined in Subsection 1.2.3., in in absentia proceedings a mental illness can be a triggering element for the defendant's physical absence but not an autonomous form of absence. This is a necessary caveat because the distinction between having a defendant physically present in the courtroom (even mentally unfit) or the possibility to conduct a proceeding in the person's physical absence is an important aspect of the debate on in absentia proceedings and the interpretation of the right to be present in a criminal proceeding.[67]

In the context of criminal justice, 'in absentia' is used to indicate a proceeding where the defendant is absent.[68] It was first used in English in the 19th century,[69] and it has always been related to the way of conducting criminal proceedings. The term 'in

[60] Greenberg (2015, p.2297). See also Nerlich (2009, p.352); James (1986, p.2689); Burke (1977, p.1805).
[61] See Spencer (2008, pp.279-280). Garner (2009d, p.1644) defines it as 'a formal judicial examination of evidence and determination of legal claims in an adversary proceeding'.
[62] See Ambos (2016, p.334); Safferling (2012, pp.193-194); Nerlich (2009, pp.352-353).
[63] See Chapter 1, Subsection 1.2.3.
[64] See Stevenson (2010b, p.881); Garner (2009e, p.827); Morwood (2005a).
[65] See Zakerhossein and de Brouwer (2015, p.183).
[66] Mackay (2008, p.782).
[67] See Zakerhossein and de Brouwer (2015, p.183). This point will be further analysed in Chapter 1, Subsection 1.3.2.
[68] See Fellmeth and Horwitz (2009a); Safferling (2009a, p.542).
[69] Around 1831, according to the Online Etymology Dictionary (2018); and around 1886, according to the Merriam Webster Online Dictionary (2018).

absentia' is mainly used in English-speaking/common law countries, but the phenomenon is well-known also in civil law traditions where a different terminology is adopted. For instance, in France, the term 'contumace'[70] (i.e. default) was used until 2004; in Italy, it was called 'contumacia'[71] (i.e. default) until 2014; in Spanish-speaking countries, it is called 'rebeldìa'[72] (i.e. rebelliousness, defiance).

The use of the Latin expression 'in absentia' appears to be a more 'neutral' way of qualifying these proceedings and the defendant's absence. Indeed, in the French, Italian, and Spanish examples, the terminology finds its origins in the Latin words 'contumax' (i.e. stubborn, defiant)[73] and 'rebellis' (i.e. insurgent, rebellious)[74] that refer to the rebellion of a person against the criminal justice system and, therefore, qualify this behaviour negatively. The same negative meaning is attached to the English concept of 'contumacy' that means 'the refusal of a person to follow a court's order or direction'.[75] Therefore, with the term 'in absentia', the international legislator seems not to judge the person's absence negatively and uses the word only to describe a fact, i.e. there is an absence. This linguistic choice is confirmed in the provisions of the Statute of the Special Tribunal for Lebanon (STL) concerning in absentia proceedings.[76]

1.2.2.3. Defendant

This thesis considers international criminal proceedings where the 'defendant' is absent, referring to both a person not yet charged and a person already charged. However, as a caveat, it should be noted that when a person has not been charged yet, technically speaking he/she is not a 'defendant' but a 'suspect'. Indeed, a suspect is 'a person believed to have committed a crime or offence'.[77] This occurs in the pre-trial phase of a criminal proceeding where a person has not yet been formally charged, and the tribunal has not confirmed the charges.[78]

In international criminal proceedings, the ad hoc tribunals define the suspect as a person 'concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has

[70] See Arts. 627-636 French Criminal Procedure Code (pre-2004 reform).
[71] See Art. 487 Italian Criminal Procedure Code (pre-2014 reform).
[72] See Arts. 834-846 Spanish Criminal Procedure Code.
[73] Morwood (2005b).
[74] Morwood (2005c).
[75] Garner (2009f, p.380).
[76] See Art. 22 STL St. In the English version, it says 'in absentia'; in French, it says 'par défaut' (i.e. in absentia); in Arabic, it says 'ghiabiaan' (i.e. in absentia).
[77] Garner (2009g, p.1584).
[78] See Burke (1977, p.1734).

jurisdiction'.[79] The ICC instead does not use the term 'suspect', and the Prosecutor does not need to take any formal action to qualify a person as such.[80] However, despite the lack of a formal qualification, a 'suspect' is entitled to a series of rights during the pre-trial phase.[81]

The term defendant can mean 'accused'. This term identifies an individual who has been charged with one or more crimes and against whom the Prosecutor has brought a case.[82] A suspect becomes an 'accused' at the end of the pre-trial phase when the charges are formally confirmed, and the proceeding is ready to continue to the trial phase.[83] A person is an 'accused' until there is a judgment, and his/her guilt is assessed.[84] This happens in national and international criminal proceedings.[85]

Once a conviction has been issued, and the trial phase ends, the defendant becomes a 'convicted person'. This means that the person has been found guilty and a judgment of conviction has been rendered against him/her.[86] In International Criminal Justice, when the appeal phase concludes, and the judgment is final, the convicted defendants are transferred to specific countries where the sentence is enforced, and they are incarcerated in national prisons.[87] International criminal tribunal have rules on the enforcement of sentences and stipulate individual agreements with States to transfer convicted persons to their territories.[88]

Following the distinction mentioned above, in this thesis, the term 'defendant' is used when the author generally refers to international criminal proceedings in absentia. Instead, 'suspect', 'accused', and 'convicted person' are used when the relevant phase of a criminal proceeding in absentia is considered.

1.2.3. Classification of International Criminal Proceedings In Absentia

In absentia proceedings can be classified according to three criteria: (i) the qualification of the absence (total or partial); (ii) the phase of the proceeding in which the absence occurs (pre-trial, trial, or post-trial); and (iii) the reasons for the absence (fig. 1.1.).

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[79] Rule 2(A) ICTY RPE; Rule 2(A) ICTR RPE.
[80] See Alamuddin (2010, p.271); Zappalà (2009a, p.527); Calvo-Goller (2006, p.27).
[81] See Boas, Bischoff and Reid (2011, pp.109ff.); Zappalà (2009a, p.528).
[82] See Garner (2009h, p.482); Burke (1977, p.29).
[83] See Safferling (2009b, p.227).
[84] See ibid.
[85] See ibid.
[86] See Garner (2009i, p.693).
[87] See Schabas (2009b, pp.310-311).
[88] See Irving (2017); Holá and van Wijk (2014); Schabas (2009b, p.311).

General category	Subcategory (I) Qualification of the absence	Subcategory (II) Phase of the proceeding	Subcategory (III) Reasons for the absence
International Criminal Proceedings In Absentia	Total	Pre-trial	Unawareness
			State's intervention
		Trial	Health conditions
			Disruptive behaviour
	Partial		Waiver of the right to be present
		Post-trial	Absconding

Fig. 1.1. International Criminal Proceedings In Absentia - Classification

Through this classification, it is possible to identify 36 different types of international criminal proceedings in absentia (fig. 1.2.). However, not all 36 theoretical types of in absentia proceedings can occur. Sometimes, the combination of the three criteria above produces impossible results, where one criterion excludes another. For instance, this happens with total in absentia proceedings due to disruptive behaviour and partial in absentia proceedings due to unawareness (this second case relates to an involuntary absence that occurs when the person is absent because he/she does not know about the proceeding and the indictment, i.e. he/she is unaware). Indeed, the defendant's disruption and the partial absence presuppose the person's presence at least once before the judges. Moreover, among the possible in absentia proceedings, not all of them have already occurred in International Criminal Justice. For instance, this is the case of total trials in absentia proceedings due to health conditions; and total or partial in absentia proceedings due to State's intervention.

	Qualification of the absence	Phase of the proceeding	Reason for the absence	Is it possible?
1	Total	Pre-trial	Unawareness	Y
2	Total	Pre-trial	State's intervention	Y
3	Total	Pre-trial	Health conditions	Y
4	Total	Pre-trial	Disruptive behaviour	N
5	Total	Pre-trial	Waiver of the right to be present	Y
6	Total	Pre-trial	Absconding	Y
7	Total	Trial	Unawareness	Y
8	Total	Trial	State's intervention	Y
9	Total	Trial	Health conditions	Y
10	Total	Trial	Disruptive behaviour	N
11	Total	Trial	Waiver of the right to be present	Y
12	Total	Trial	Absconding	Y
13	Total	Post-trial	Unawareness	Y
14	Total	Post-trial	State's intervention	Y
15	Total	Post-trial	Health conditions	Y
16	Total	Post-trial	Disruptive behaviour	N
17	Total	Post-trial	Waiver of the right to be present	Y
18	Total	Post-trial	Absconding	Y
19	Partial	Pre-trial	Unawareness	N
20	Partial	Pre-trial	State's intervention	Y
21	Partial	Pre-trial	Health conditions	Y
22	Partial	Pre-trial	Disruptive behaviour	Y
23	Partial	Pre-trial	Waiver of the right to be present	Y
24	Partial	Pre-trial	Absconding	Y
25	Partial	Trial	Unawareness	N
26	Partial	Trial	State's intervention	Y
27	Partial	Trial	Health conditions	Y
28	Partial	Trial	Disruptive behaviour	Y
29	Partial	Trial	Waiver of the right to be present	Y
30	Partial	Trial	Absconding	Y
31	Partial	Post-trial	Unawareness	N
32	Partial	Post-trial	State's intervention	Y
33	Partial	Post-trial	Health conditions	Y
34	Partial	Post-trial	Disruptive behaviour	Y
35	Partial	Post-trial	Waiver of the right to be present	Y
36	Partial	Post-trial	Absconding	Y

Fig. 1.2. International Criminal Proceedings In Absentia - Possibility

The proposed classification does not include in absentia proceedings due to the defendant's death. Indeed, according to the *ratione personae* jurisdiction, in this case, the criminal proceeding needs to be terminated. However, this is a relevant procedural issue for in absentia proceedings, and it will be considered in Chapter 3 when analysing the death of a defendant in *Ayyash et al.* at the STL.[89]

[89] See Chapter 3, Subsection 3.2.1.

1.2.3.1. Qualification of the Absence

International criminal proceedings in absentia can be conducted in the *total* or *partial* absence of the defendant.[90] *Total* in absentia occurs when the defendant has never been present before the judges for the entire proceeding or a phase of the proceeding.[91] Some scholars argue that in this case 'the judicial system lacks control of the accused because the accused is at large',[92] and therefore, they identify the absent defendant as a fugitive. However, this description falls short of considering other cases in which the person is totally absent not because he/she absconds but for other reasons (e.g. State's intervention; unawareness). An example of a total in absentia proceeding is *Ayyash et al.* at the STL.[93] Here, all defendants are absent, and they have never been arrested, identified in person, or appeared before the judges. This is the most controversial case of in absentia proceedings, and it is highly criticised because it would violate the fairness of the trial, with specific reference to the infringement of the right to a defence, to present evidence, and to challenge the Prosecutor's case.[94]

Partial in absentia occurs when the defendant has been present before the judges at least once and then has not further participated in the proceeding or has been present intermittently.[95] There is no minimum number of absences, but what counts is that the presence has not been continuous. Some scholars argue that partial in absentia refers to 'situations in which the accused's waiver of the right to be present is implied'.[96] However, this assumption is misleading because it does not consider the cases where the waiver of the right to be present (even implied) triggers a total absence. Moreover, it is incorrect because, in the examples provided, it confuses cases of partial in absentia where there is no waiver of the right to be present because the person is disruptive and has been removed from the courtroom or is ill with true cases of waiver of the right to be present.[97] Examples of partial in absentia proceedings are the confirmation of charges in absentia in the pre-trial phase at the ICC;[98] and the excusal from being present at some trial hearings at the ICC.[99]

[90] See Trad (2016, p.40); Zakerhossein and de Brouwer (2015); Elberling (2012, p.36).
[91] See Trad (2016, p.40); Zakerhossein and de Brouwer (2015, p.183 and pp.184ff.).
[92] Zakerhossein and de Brouwer (2015, p.198).
[93] See *The Prosecutor v. Ayyash et al.*, STL, case no. STL-11-01.
[94] See Jordash and Parker (2010); Jenks (2009).
[95] See Trad (2016, p.40); Zakerhossein and de Brouwer (2015, p.183 and pp.209ff.).
[96] Zakerhossein and de Brouwer (2015, p.209).
[97] For instance, see Zakerhossein and de Brouwer (2015, pp.210-212).
[98] See Rules 124, 125, and 126 ICC RPE.
[99] See Rules 134bis, ter, and quater ICC RPE.

1.2.3.2. Phase of the Proceeding

The defendant's absence can occur in any phase of an international criminal proceeding. However, to date, the experience of in absentia proceedings in International Criminal Justice has been mainly limited to the pre-trial and trial phase. In this regard, two preliminary considerations are necessary.

First of all, no post-trial in absentia proceedings have occurred before international criminal tribunals (except in *Šešelj*).[100] This means that, although there have been confirmations of charges in absentia (e.g. at the ICTY) and trials in absentia (e.g. at the STL), almost no proceedings have been conducted in the total or partial absence of the defendant in appeal or retrial. This point raises questions about the preparedness of the legal system (i.e. the existence of appropriate regulation) and of the legal practitioners (i.e. their practice and approach) towards a phenomenon that exists mainly theoretically and might pose additional challenges when considered in practice. An analysis of this aspect will be included in Chapter 3, when examining the practice of in absentia proceedings in the post-trial phase; in Chapter 4, when discussing the impact of these proceedings on the Defence and the victims; and in Chapter 6, when proposing some recommendations for a future regulation of in absentia proceedings.

Second, the scholarly debate is more focused on the use of in absentia proceedings during the trial phase than the pre-trial phase. This is because in the latter there is no determination of guilt, whereas in a trial the judges determine the criminal liability of the absent defendant.[101] This point is relevant to understand the opposition to in absentia proceedings depending on the phase considered, and to assess the possible limitations to the conduct of different types of in absentia proceedings before international criminal courts (as will be examined in Subsection 1.3.2.).

In the pre-trial phase, in absentia proceedings are used mainly for the confirmation of charges. Here, in the majority of cases, the suspect relies on the defence counsel's actions, with no direct control over the Defence strategy.[102] As will be examined in Chapter 3 and 4, although the proceeding is still in an embryonic phase, the suspect's absence poses various challenges to the defence counsel, especially when opposing the Prosecutor's strategy and the decision to hold a trial in absentia. An example of pre-trial in absentia proceeding is the confirmation of charges in absentia at

[100] See *The Prosecutor v. Šešelj*, MICT, Order in Relation to the Appeal Hearing (2017).
[101] See Zakerhossein and de Brouwer (2015, p.188).
[102] See Elberling (2012, pp.52ff.).

the ICTY and ICTR[103] that takes place when an arrest warrant cannot be executed, and the indictment is submitted to the Trial Chamber for confirmation.

The person can also be absent during the trial phase.[104] Trials in absentia include all actions done between the opening of the trial phase and the decision of the merits of the case with the issue of a judgment. As will be discussed in Chapter 4, the defendant's absence in the trial phase has various consequences for the Defence.[105] For instance, the defendant might not be able to examine witnesses, and help the defence counsel contest incriminating evidence, and his/her behaviour in court might not be scrutinised. The trial phase has a core function in a criminal proceeding, and the scholarship argues that trials in absentia affect the prosecution of international crimes in a phase that would require the presence of all parties.[106] In this sense, the defendant's absence alters the dynamics of the trial phase, and therefore it necessitates precise procedural safeguards in international criminal proceedings.[107] Examples of trials in absentia are the prosecution of Bormann at the IMT at Nuremberg[108] and *Ayyash et al*. at the STL.[109]

Post-trial in absentia proceedings relate to the appeal, the retrial, and the enforcement of a final sentence.[110] Here, the procedural rules applied are slightly different from those of the trial phase because the defendant has already been sentenced. Two questions arise: (i) what the relationship between the judgment of first instance and of appeal or retrial is;[111] and (ii) what happens to the execution of a sentence when the convicted person is absent, especially if fugitive.[112] These issues expose the problems of in absentia proceedings after the conclusion of the trial phase when the exigencies of International Criminal Justice and the principle of fair trial are still relevant. Indeed, there should be a possibility to appeal against a conviction in absentia or to have a retrial,[113] and the tribunal should enforce the sentence, despite the wilful absence of the convicted person, e.g. when absconding.[114]

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[103] See Rule 61 ICTY RPE and Rule 61 ICTR RPE. See also Cryer, Friman, Robinson and Wilmshurst (2010, p.461); Safferling (2009a, p.543); Furuya (1999).
[104] See Friman (1999, p.255).
[105] See Chapter 4, Subsections 4.2.1. and 4.2.2.
[106] See Jordash and Parker (2010, pp.503-504).
[107] See ibid.
[108] See *Trial of the Major War Criminals*, IMT, 14 November 1945 – 1 October 1946.
[109] See *The Prosecutor v. Ayyash et al.*, STL, case no. STL-11-01.
[110] See Calvo-Goller (2006, pp.115ff.).
[111] See Boas, Jackson, Roche, and Don Taylor III (2013, pp.942ff.).
[112] See Gilbert (2006, pp.136-137).
[113] See Boas, Bischoff and Reid (2011, pp.423ff.).
[114] On enforcement of sentences, see Abtahi and Arrigg Koh (2012).

1.2.3.3. Reasons for the Absence

The reasons for the defendant's absence are numerous,[115] and they vary depending on the circumstances of the case. A distinctive element is the *voluntariness* or *involuntariness* of the absence, i.e. whether the defendant has absented himself/herself voluntarily or the absence is involuntary.[116]

An *involuntary* absence is due to external factors to the defendant's will and behaviour. The first case is unawareness. This occurs when the defendant is absent because he/she does not know about the proceeding and the indictment. Here, the absence is entirely involuntary, and the defendant has no choice whether to participate because he/she is unaware. The scholarship has named this type of absence 'by default', in opposition to proceedings where the defendant is notified adequately.[117] This term underlines the continuation of the proceeding despite the lack of information given to the defendant; however, the concept is misleading. Indeed, even if the defendant is unaware of the process, this is still an in absentia proceeding because the person is absent and cannot participate because he/she does not know about the process. Moreover, the distinction by default/in absentia is confusing because it seems as if a proceeding by default had nothing in common with other in absentia proceedings. This might be true regarding the notification, but it is incorrect if we consider the mere defendant's physical absence.

Unawareness is usually seen as an obstacle to the conduct of international criminal proceedings in absentia.[118] It is argued that a pivotal procedural safeguard of criminal proceedings is the person's awareness of the charges and the process. Without this safeguard, in absentia proceedings would infringe his/her rights (e.g. the right to be informed of the charges).[119] As will be discussed in Chapter 3, a procedural issue, therefore, is how to guarantee that the person is fully informed and properly notified.[120]

State's intervention can also cause an involuntary absence of the defendant. Here, the State impedes the defendant to be present and to participate in the proceeding.[121] This might happen when the State has interests in the case at stake (e.g. political, economic) and the participation of the defendant would go against them. To

[115] See Zakerhossein and de Brouwer (2015, p.183).
[116] E.g. Interview 09.
[117] See Gaeta (2007, p.230).
[118] See Jordash and Parker (2010, p.491); Jenks (2009, p.81).
[119] See ibid.
[120] See Chapter 3, Subsection 3.2.1.
[121] See Jordash and Parker (2010, p.497).

date, there have been no examples of in absentia proceedings due to State's intervention in International Criminal Justice. However, the scholarship has pointed out the risks of this scenario,[122] arguing that international criminal tribunals should adopt a set of procedural safeguards to avoid a process in the involuntary absence of the defendant.[123] Allowing in absentia proceedings, when the defendant cannot freely choose to be present, would create issues for the fairness of the proceeding. For instance, it would infringe the defendant's right to a defence and to submit evidence, which are key safeguards under IHRL.

The defendant's health conditions can also cause the absence.[124] If the court considers the person 'unfit', it exempts him/her from being present, and usually, the proceeding does not continue.[125] Fitness to stand trial is a matter of procedural fairness and 'once fitness is restored, the trial process can commence or continue'.[126] An example is when the defendant is in the court's custody but cannot participate in the proceeding adequately because he/she is ill. The illness can be physical (i.e. affecting the body) or mental (i.e. affecting the thinking, feeling, or mood), and it is particularly relevant when it is chronic and incapacitating. The judges must evaluate the defendant's health conditions and decide whether he/she can attend the proceeding in person. The decision includes a careful consideration of medical reports:[127] if evidence shows that the defendant is unfit, the court can authorise the absence, and the proceeding is usually adjourned. In this way, the interests of the defendant are protected, and there is no risk of conducting a proceeding when the person is unfit.[128] As will be analysed in Chapter 2, the issue of an unfit defendant was discussed at the IMT at Nuremberg, and the judges distinguished between a fugitive and an unfit defendant.[129]

A *voluntary* absence occurs when the defendant decides not to participate in the proceeding. A first case is disruptive behaviour. This happens when the judges remove the defendant from the courtroom, but the absence is voluntary due to his/her behaviour.[130] The person is not affected by a mental or physical illness (otherwise, the situation would qualify as involuntary absence), and he/she 'intentionally disrupts the trial by, for example, repeatedly speaking out of turn, shouting over the judges or

[122] See ibid. See also Pons (2010, pp.1311ff.).
[123] See Pons (2010, p.1314).
[124] See Elberling (2012, p.36).
[125] See Schabas (2010, p.758).
[126] Knoops (2017, p.22).
[127] For instance, see Rule 135 ICC RPE.
[128] On fitness to stand trial, see Freckelton and Karagiannakis (2014); Weiner (2007).
[129] See Chapter 2, Subsection 2.2.1. See also Knoops (2017, p.23).
[130] See McDermott, Y. (2016, p.68); Boas, Bischoff and Reid (2011, pp.273-276).

prosecution attorneys, or berating witnesses'.[131] The absence of the defendant is necessary to preserve the expeditiousness of the proceeding,[132] preventing any harassment of the court and obstruction of justice. In this case, 'the accused forfeits the right to be present with such undue behaviour'.[133] In any phase of the proceeding, the judges can warn the defendant of the possibility to be removed from the courtroom without interrupting the process.[134] The removal must last 'only for such duration as is strictly required',[135] and the defendant is readmitted into the courtroom as soon as the disruption ends. This situation occurred at the ICTY in *Šešelj*,[136] although no defendant at the ICTY and ICTR has been barred continuously from trial 'for persistent and substantially disruptive behaviour'.[137]

The waiver of the right to be present is another case of voluntary absence. This occurs when the defendant has waived the right to be present at the proceeding.[138] The waiver can be used in any phase of the proceeding, even if the person has only been present at some hearings. Its justification lies in recognising the right to be present in international criminal proceedings as a right and not an obligation (this point will be discussed in Subsection 1.3.2.). Indeed, the defendant owns many rights, including the right to be present at the proceeding,[139] and he/she can decide to waive them. The waiver has to respect some conditions to be lawful, and the defendant can always decide to withdraw it and participate in the proceeding at a later stage. Examples are provided at the ICC with Rules 134bis, ter, and quater RPE that allow the defendant to waive the right to be present at some hearings; and at the ICTR in *Barayagwiza*[140] where the defendant waived the right to be present at some trial hearings.

Finally, a last scenario is absconding. This happens when the person is a fugitive, aware of the existence of the proceeding, and he/she decides to avoid the prosecution by fleeing.[141] In this case, an interviewee argues that the proceeding should continue despite the person's absence.[142] Interestingly, among the legal practitioners interviewed for this thesis, those who in principle oppose in absentia proceedings,

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[131] Boas, Bischoff and Reid (2011, p.273).
[132] See Tochilovsky (2008, p.258).
[133] Safferling (2012, p.398).
[134] See Tochilovsky (2008, p.258).
[135] Calvo-Goller (2006, p.229).
[136] *The Prosecutor v. Šešelj*, ICTY, case no. IT-03-67.
[137] Acquaviva, Combs, Heikkila, Linton, McDermott and Vasiliev (2013, p.753).
[138] See McDermott, Y. (2016, p.69); Boas, Bischoff and Reid (2011, p.273); Ferguson (2002).
[139] See McDermott, Y. (2016, p.69).
[140] *The Prosecutor v. Nahimana et al.*, ICTR, case no. ICTR-99-52.
[141] See McDermott, Y. (2016, p.70).
[142] E.g. Interview 16.

recognise value to the prosecution of fugitives.[143] An example of this case is *Ayyash et al.* at the STL where all defendants are tried in absentia because they are qualified as fugitives.[144]

1.3. Theoretical Constraints Upon In Absentia Proceedings

This Section presents some reflections on three theoretical constraints upon the use of in absentia proceedings in International Criminal Justice: (i) the fulfilment of the objectives of International Criminal Justice (Subsection 1.3.1.); (ii) the dichotomy existing in the debate on in absentia proceedings (Subsection 1.3.2.); and (iii) the traditional suspension of the proceeding (Subsection 1.3.3.).

1.3.1. In Absentia Proceedings and the Objectives of International Criminal Justice

International criminal proceedings need to achieve a set of objectives to be legitimate,[145] to answer social needs,[146] and to fulfil substantive International Criminal Law.[147] The scholarship has scrutinised these objectives, debating their value for international criminal tribunals[148] and arguing that 'forms of justice suitable for attaining some ends may not be suitable for attaining others'.[149] This is a relevant point to support the idea that in absentia proceedings should be evaluated in light of the pursuit only of some objectives. Moreover, it is said that 'the purposes for which the law is deployed significantly influence how it is deployed'.[150] Therefore, it is essential to analyse the relationship between in absentia proceedings and the objectives of International Criminal Justice to understand the extent to which these proceedings can fulfil them. The findings of this analysis will also be recalled in Chapter 5 when considering the alternatives to in absentia proceedings, and in Chapter 6 when discussing the future of these proceedings.

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[143] E.g. Interviews 03; 06; 09.
[144] See *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012, paras.3 and 111).
[145] To address the discrepancy between their expectations and reality. See de Hoon (2018, p.20); Mariniello (2015a, pp.2-4); Ryngaert (2009).
[146] See Klamberg (2012, p.594; 2010, p.280).
[147] See Safferling (2012, p.64).
[148] For instance, McDermott, Y. (2016, pp.126-130); Mariniello (2015a, pp.2-4); de Lint, Marmo and Chazal (2014, pp.131ff.); Ohlin (2013).
[149] Damaška (2009, p.175).
[150] Keenan (2016, p.423).

Among the objectives identified by the scholarship,[151] there are four that are relevant to in absentia proceedings: (i) the fight of impunity; (ii) punishment; (iii) the creation of a historical record; and (iv) to serve the interests of the victims.[152] These objectives have been selected based on a thorough and rigorous analysis of the literature on the use of in absentia proceedings in International Criminal Justice. In other words, the selection criterion has been the preference (and prominence) emerging in the literature of some objectives over others when considering in absentia proceedings and their use for the prosecution of international crimes. As an example, some scholars discuss the issue of accountability and fight of impunity in in absentia proceedings;[153] others consider the problem of guaranteeing punishment through proceedings with an absent defendant;[154] others address the possibility to achieve a historical record of the case when the defendant is tried in absentia.[155] From this analysis, it has emerged that the four objectives mentioned above are distinct but interconnected, and they permeate International Criminal Justice, guiding the work of international criminal tribunals.[156] They have some features that are important for in absentia proceedings: (a) overabundance; (b) competition; and (c) lack of hierarchy.[157]

It is argued that the objectives are too many, and international criminal tribunals cannot achieve all of them.[158] Therefore, more emphasis should be placed on some (e.g. the creation of a historical record and victims' participation), rather than others.[159] However, the balance among different interests and the emphasis placed upon them should follow a case-by-case approach.[160] This would permit problematic proceedings (e.g. in absentia proceedings) to fulfil some objectives without worrying to achieve all of them. Moreover, a selection of the objectives would benefit the defendant because the judges would have fewer justifications to allow in absentia proceedings. In other words, the judges would not allow in absentia proceedings if these did not permit to achieve the objectives part of their mandate.

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[151] See Ambos (2016, pp.44ff.); Ohlin (2013, pp.55ff.); Cryer, Friman, Robinson and Wilmshurst (2010, pp.22ff.); Klamberg (2010).
[152] The legal practitioners interviewed for this thesis have recalled them as well. E.g. Interviews 02; 03; 04; 08; 09; 11; 13; 15; 16.
[153] See Wheeler (2017, pp.69-74); Negri (2007).
[154] See Zakerhossein and de Brouwer (2015, p.199); Shaw (2012, pp.137-139); Tassara (2009, p.170).
[155] See Schwarz (2016, p.114); Safferling (2009a, p.542).
[156] For instance, see Preamble ICC St.
[157] See Ohlin (2013); Damaška (2009; 2008).
[158] See Ohlin (2013, p.56); Damaška (2009, p.178).
[159] See Damaška (2008, pp.340ff.).
[160] See Klamberg (2010, pp.293-296).

The objectives can also compete with each other.[161] Even if they might be achieved singularly, sometimes international criminal tribunals struggle to pursue them in parallel.[162] However, this issue is not endemic to in absentia proceedings as one interviewee argues,[163] but it is inherent to all International Criminal Justice proceedings. This fact determines a similarity between in absentia proceedings and ordinary proceedings.

There is also no hierarchy among the objectives.[164] This would guarantee to avoid a rigid evaluation of the compatibility of in absentia proceedings with the objectives of International Criminal Justice. Indeed, this fact would allow objectives' pluralism in in absentia proceedings, in line with the idea that 'different objectives might be appropriate for each different stage of the proceedings',[165] and 'these different objectives should then be balanced differently in the various phases of the process of international criminal adjudication'.[166]

The first objective relevant to in absentia proceedings is the fight of impunity.[167] This means to contrast the commission of international crimes, bringing the perpetrators to justice;[168] and to guarantee that the crimes committed do not go unpunished[169] with a deterrent effect on criminals.[170] Despite its importance, this objective is criticised because it is difficult to achieve, especially when the perpetrators are high-profile individuals.[171] In this sense, the scholarship often describes the fight of impunity as too theoretical or 'purely legal'.[172]

This objective is particularly important in proceedings with fugitives.[173] One scholar argues that in absentia proceedings would guarantee the prosecution of criminals who otherwise will escape justice because they abscond and are not arrested.[174] In this sense, the problem of lack of States' cooperation[175] would be overcome and the criticisms against in absentia proceedings would be invalid because 'when public trials of defendants who have freely and knowingly chosen not to be

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[161] See Ohlin (2013, p.56); Klamberg (2010, p.281); Damaška (2009, pp.178-179).
[162] See Keenan (2016, pp.443-444).
[163] E.g. Interview 09.
[164] See Damaška (2009, p.179).
[165] D'Ascoli (2016, p.329).
[166] Ibid.
[167] On this objective, see Mariniello (2015a, p.3); Fry (2014, pp.255ff.); Beigbeder (2005).
[168] See Preamble ICC St.
[169] See ibid.
[170] See Akhavan (2001).
[171] See Beigbeder (2005); Robertson (2005).
[172] Kendall (2014, p.66).
[173] See Negri (2007, p.29).
[174] See Schwartz (1996, p.12).
[175] See ibid. See also Friman (2010, p.352).

present are compared to totalitarian practices, it is suggested that the fault lies with the analogy, not the system'.[176] The interests of justice must prevail, and there must be a proper answer to the commission of crimes. Therefore, 'the defendant's absence from the trial cannot of itself halt the course of justice';[177] in absentia proceedings are not 'what we would prefer',[178] but they are 'better than ignoring the defendant's defiance',[179] allowing the fugitives to achieve impunity.[180]

Others say that in absentia proceedings do not help the fight against impunity because the proceeding is transformed into a 'mock trial'; an academic exercise[181] that signals a failure of the legal system to guarantee the defendant's presence in the proceeding.[182] Indeed, due to the serious nature of the crimes prosecuted and the unique features of international criminal proceedings, 'only trials conducted in the presence of the defendant generate legitimacy within the international community'.[183] Moreover, a legal practitioner interviewed for this thesis says that in absentia proceedings would transform the proceeding into an 'inquiry',[184] and they would not answer the principal concern of a criminal proceeding, i.e. 'to see if the Prosecution's case against an identified defendant can be proved'.[185] Therefore, 'we need to be honest about that and say that this is more of a fact-finding, a truth-finding exercise than a criminal trial'.[186]

A second important objective is punishment.[187] This is a debated objective in International Criminal Justice, and it involves a variety of considerations (e.g. legal, political, and philosophical).[188] In International Criminal Justice punishment entails more than a retributive approach to crimes, guaranteeing the pursuit of restorative justice.[189] In this sense, international criminal tribunals impose sentences, but they also need to consider the impact of sentencing on the rehabilitation of the individual and the reconciliation of the parties.[190] However, despite this innovative interpretation, 'these

[176] Starkey (1979, p.742).
[177] Riachy (2010, p.1297).
[178] Schwartz (1996, p.14).
[179] Ibid.
[180] See ibid.
[181] E.g. Interview 11.
[182] E.g. Interview 09.
[183] Knoops (2014, p.341). In Interview 08, it is said that 'the trial works better if the accused is in the courtroom. Both for individual deterrence and general deterrence'.
[184] Interview 02.
[185] Ibid.
[186] Ibid.
[187] See Henham (2016); Ohlin (2013, pp.59-60); Drumbl (2007).
[188] See Chehtman (2010); Luban (2010, pp.575-577).
[189] See Findlay and Henham (2011; 2010).
[190] See D'Ascoli (2016); Drumbl (2016, pp.94-95).

rationales […] are not particularly salient',[191] and 'reconciliation overall has not received much more than lip service'.[192]

Punishment must also be understood in light of other objectives of international criminal proceedings and the various interests involved. Therefore, it should be evaluated considering the peculiarities of international criminal cases, both for their goals and procedural necessities.[193] In this sense, punishment does not only mean the physical incarceration of a perpetrator,[194] but it includes different consequences for the convicted person (e.g. civil reparations), and international criminal proceedings can also punish the defendant not immediately after the issue of a sentence but when the person is apprehended (as it happens in in absentia proceedings).

In the context of in absentia proceedings, this objective is problematic. For some, punishment would be impossible or unlikely if the defendant is tried in absentia and the tribunal has no one in custody.[195] Even if a conviction were issued, the defendant would not face the consequences of the decision (i.e. he/she would not be put in prison for it),[196] and a conviction in absentia brings about 'a sense of spuriousness'.[197] Moreover, the defendant's absence would affect negatively 'the settlement of guilt'[198] function of international criminal proceedings.[199] Instead, others argue that in absentia proceedings would achieve a form of punishment because the conduct of the proceeding and a conviction can be considered a punishment themselves. This idea follows the so-called 'expressive deterrence' argument,[200] according to which it should be necessary to focus 'less on the deterrent value of punishment itself, and more on the secondary stigmatising effects of the punishment'.[201] With punishment, the international community expresses its condemnation and outrage, and the result is 'to strengthen faith in the rule of law among the general public'.[202]

Another relevant objective is the creation of a historical record.[203] While prosecuting international crimes, international criminal tribunals should also be involved in determining the history of the case at stake. In this sense, it has been said

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[191] Drumbl (2016, p.94).
[192] Ibid.
[193] See Findlay and Henham (2010, pp.209ff.).
[194] See ibid.
[195] See Zakerhossein and de Brouwer (2015, p.199); Tassara (2009, p.170).
[196] The enforcement of a sentence in absentia will be analysed in Chapter 3, Subsection 3.4.2.
[197] Chehtman (2010, p.166).
[198] Schwarz (2016, p.115).
[199] See ibid.
[200] See Cronin-Furman and Taub (2016, p.436).
[201] Ibid.
[202] Drumbl (2016, p.94).
[203] See Ohlin (2013, pp.60 and 62).

that 'there is a right to have history written correctly'.[204] Some have recognised this objective as 'indispensable for historians and political scientists seeking to comprehend an armed conflict'.[205] However, criticisms are mounted about the possibility to achieve this objective through international criminal proceedings.[206] It is said that it might be better pursued with inquiry commissions, without the necessity to rely upon criminal prosecutions.[207] Moreover, this objective poses other challenges to international criminal tribunals because they do not have sufficient time and resources to do so, and they would operate with a different spectrum, i.e. assessing the case of each party rather than taking a detached stance from the facts.[208]

The historical record function of in absentia proceedings is debated, but there are sound arguments to support its value. First, 'from a victims' perspective and from a public's perspective, it is important for them to know what has happened',[209] and this would be possible with in absentia proceedings.[210] Second, the historical record produced in in absentia proceedings recalls the 'didactic' function of International Criminal Law, going beyond the single case at stake. This means to speak to a broad audience 'in much the same way that history speaks to a larger audience that extends geographically and temporally from the courtroom'.[211] Third, in in absentia proceedings, the historical record would guarantee the preservation of evidence and to promptly start a process, without waiting for the defendant to be arrested or appear in court. Therefore, in absentia proceedings would allow 'to collect evidence and to establish the truth'[212] with no risk to lose documents and witnesses.[213] In this regard, these proceedings would guarantee to avoid 'any lengthy lapse of time between the pre-trial and the trial phase'.[214]

Finally, an important objective is victims' participation.[215] Nowadays, victims can be parties to international criminal proceedings, being heard and receiving compensation for the wrongdoing suffered.[216] Some oppose this objective for fear that the victims will trump the defendant's rights, e.g. the right to a defence and to receive

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[204] Interview 06.
[205] Ashby Wilson (2011, p.69).
[206] See Boas and Chifflet (2017, p.23); Ambos (2016, p.56). Accord Interview 09.
[207] E.g. Interviews 04; 09.
[208] See Damaška (2009; 2008).
[209] Interview 04.
[210] See ibid.
[211] Ohlin (2013, p.62).
[212] Safferling (2009a, p.542). See also Bellelli (2016, pp.446-447).
[213] E.g. Interview 04.
[214] Bellelli (2016, p.447).
[215] See Tibori-Szabò and Hirst (2017); Ohlin (2013, pp.64-66); Klamberg (2010, pp.290-291).
[216] See Funk (2015, pp.79-92).

an unbiased judgment.[217] However, it is also recognised that victims' participation permits to properly answer the demands of justice by those affected by the crimes and to have more inclusive prosecutions.[218]

As will be discussed in Chapter 4, to serve the interests of the victims in international criminal proceedings (especially in in absentia proceedings) is problematic.[219] One scholar thinks that the victims would be advantaged, and the tribunal might favour them with a biased judgment.[220] An interviewee argues that the victims would not receive any justice because 'you cannot have justice in a vacuum, in a non-space'.[221] Moreover, the work of the defence counsel would be more difficult because obliged to confront two parties, i.e. the Prosecution and the victims. Others say that in absentia proceedings can guarantee justice to victims and they can have a healing effect.[222] Indeed, despite the defendant's absence, these proceedings allow the victims to have a prosecution of the crimes,[223] guaranteeing that the proceeding is not disrupted and that they can obtain justice with the determination of criminal responsibility. Moreover, based on a conviction, the victims can obtain civil reparations in a subsequent civil proceeding.[224] Although a sentence might not be enforced in the short-term (especially in the case of fugitives), the victims can continue their life with the reparation received, avoiding being victimised twice with no compensation. These arguments are criticised when considering the aim of criminal proceedings, and it is said that 'it is the plain right of the accused to try to avoid prosecution by absconding as, otherwise, he would be coerced to give himself in. The general healing process is merely a side effect of a criminal trial and not its main objective'.[225]

In conclusion, from the above analysis two points emerge. First, the objectives of International Criminal Justice do not necessarily hinder the conduct of in absentia proceedings. They only set the boundaries of the practice of these proceedings, indicating their focus and guaranteeing an alignment to the goals of the criminal justice system in which these operate. The simultaneous achievement of all four objectives analysed above might be problematic in the context of in absentia proceedings.

[217] See de Hemptinne (2010); Trumbull IV (2008).
[218] See Moffett (2014); McGonigle Leyh (2011).
[219] See Chapter 4, Subsection 4.4.1.
[220] See Trumbull IV (2008).
[221] Interview 09.
[222] See Ntanda Nsereko (2016, p.444).
[223] E.g. Interviews 04; 06; 16.
[224] This point will be discussed in Chapter 4, Section 4.4. and Chapter 5, Section 5.3.
[225] Safferling (2009a, p.543).

However, specific adjustments and solutions emerge from the operation of these proceedings, as will be discussed in Chapter 3 and 4.

Second, in principle, the objectives of International Criminal Justice do not limit the use of in absentia proceedings, and these proceedings offer an opportunity to achieve justice under exceptional circumstances. Indeed, through the selection of the objectives that are relevant for the case at stake, in absentia proceedings fit within the objectives' pluralism that characterises International Criminal Justice. Moreover, as will discussed in Chapter 4, in absentia proceedings would permit to achieve certain objectives that in ordinary international criminal proceedings are overlooked or do not necessarily have the same importance as others, e.g. the creation of a historical record and victims' participation.[226]

1.3.2. Debating In Absentia Proceedings: Review of a Dichotomy

The debate on the use of in absentia proceedings in International Criminal Justice is characterised by a dichotomy that encompasses two interrelated aspects: (i) the common law/civil law divide; and (ii) the qualification of the right to be present in International Criminal Justice.

1.3.2.1. In Absentia Proceedings and the Common Law/Civil Law Divide

In absentia proceedings are usually analysed through the lens of the common law/civil law divide,[227] i.e. whether they are compatible with adversarial criminal justice (and the common law tradition) or with inquisitorial criminal justice (and the civil law tradition).[228]

In common law systems in absentia proceedings are not allowed, or they are used in limited cases.[229] The criminal proceeding follows an adversarial model where all parties must be present[230] to establish the facts of the case through confrontation,[231] and the case is then decided by preferring the case of one of the two parties.[232] In this context, some say that in absentia proceedings would violate the principles of natural

[226] See Chapter 4, Subsection 4.4.1.
[227] E.g. Interviews 05; 12; 15; 16. Generally, for a discussion of the civil law/common law divide, see Delmas-Marty (2009; 2003); Damaška (2009; 2008).
[228] See Carter and Pocar (2013); Ambos (2007).
[229] See Knoops (2014, p.327); Schabas (2011a, p.305).
[230] On the origins of adversarial criminal justice, see Hostettler (2006); Kubicek (2006); Langbein (2003).
[231] See Dammer and Albanese (2013, p.127); Reichel (2013); Neubauer and Meinhold (2012, p.28).
[232] See Deffains and Demougin (2008, pp.35-36).

justice (i.e. 'rules that provide a minimum standard of procedural fairness'[233]).[234] In particular, they would infringe the *audi alteram partem* principle[235] (i.e. hear the other side) according to which 'a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side's case'.[236] The judges must hear the version of any party involved in a criminal proceeding, but in absentia proceedings would alter this equilibrium because they impede the court to hear the reasons of the defendant in person.

The Anglo-American systems do not accept in absentia proceedings also because there is a 'societal interest in having the defendant present'[237] to guarantee a certain scrutiny (e.g. through public hearings).[238] Indeed, 'the judge or the jury can then assess the defendant, his or her demeanour and possibly credibility'.[239] Moreover, the defendant has some procedural rights that need to be protected, such as 'to listen to the evidence and mount a defence, to present evidence and witnesses on their behalf, […] to be present to explain their actions and to present their side of the case'.[240] In this sense, the adversarial model would be incompatible with in absentia proceedings due to the absence of a fundamental actor.

Civil law traditions usually favour in absentia proceedings,[241] and 'the roots of trials in absentia can be found in French law in the Criminal Ordinance of 1670'.[242] Criminal justice is based on an inquisitorial model[243] that aims to protect the interests of justice and prosecute the crimes committed (even in absentia).[244] The focus is not on the confrontation of the parties but on the research of the 'truth' with a judicial determination of the facts of the case.[245] In this sense, it is argued that International Criminal Justice requires a more inquisitorial approach because 'prosecution and punishment of international crimes is not a business of two contestants; it is premised upon a public interest in justice and implicates the whole international community'.[246] The aim of international criminal proceedings would be 'the pursuit of truth and

[233] Law (2015, p.411).
[234] See Summers (2007, p.69).
[235] See Asser (1994).
[236] Law (2015, p.411).
[237] Weissbrodt and Wolfrum (1998, p.194).
[238] See ibid.
[239] Ibid., p.214.
[240] Strazzella (2010, p.214).
[241] See Riachy (2010, p.1297).
[242] Knoops (2014, p.327).
[243] See Vogenauer (2008, p.590).
[244] See Haveman, Kavran and Nicholls (2003, pp.255ff.).
[245] Dammer and Albanese (2013, pp.129-130); Joyce and Wain (2010, p.96).
[246] STL, Explanatory Memorandum (2009, para.3). Accord Interview 07.

justice',[247] and to this end, the trials 'are conducted under a spotlight – the close scrutiny of the whole international community – which would not tolerate any abuse, bias or unfair treatment'.[248]

Notwithstanding the above debate, 'the scholarship no longer regards International Criminal Procedure as a collection of predominantly common law and civil law particles, but has started viewing it as a *sui generis* system'.[249] In this regard, in absentia proceedings have been examined trying to overcome the traditional common law/civil law divide. It is said that it is incorrect to present the issue of in absentia proceedings 'as one of principled difference with the common law system',[250] and 'the fact that common law jurisdictions make a number of exceptions […] shows that this is not an issue of fundamental values so much as one of different practice'.[251] Therefore, the dividing line between those in favour and those against in absentia proceedings becomes thinner, and the discussion shifts from a 'national'-driven perspective on criminal proceedings towards a more 'international' discourse. In this regard, the scholarship reminds us the relevance of in absentia proceedings in International Criminal Justice, affirming that 'providing for the possibility of in absentia trials is rather ground-breaking in terms of the development of international criminal procedural law'.[252]

The legal practitioners interviewed for this thesis share similar views on the topic. They consider in absentia proceedings 'second-class justice'[253] and non-ideal situations.[254] They say that 'it is always better to have someone physically present during the trial',[255] and this 'just seems more natural, more right'.[256] This would bring many advantages, including the possibility for the defendant to provide his/her account of the facts of the case,[257] and for the Prosecutor and the judges to identify the person[258] and scrutinise his/her behaviour in court.[259]

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[247] STL, Explanatory Memorandum (2009, para.38).
[248] Ibid. However, this position has been contested because it diverts the attention from the defendant, and 'these claims show confusion between the procedural arrangements of certain systems and the objectives of that system': Jacobs (2014, p.115).
[249] Fry (2014, p.251). See also Ambos (2007).
[250] Schabas (2011a, p.305).
[251] Ibid.
[252] Aptel (2007, p.1122).
[253] Interview 10.
[254] E.g. Interviews 01; 02; 10.
[255] Interview 01. Accord Interview 02.
[256] Interview 03.
[257] E.g. Interview 02.
[258] E.g. Interview 06.
[259] E.g. Interview 03.

However, although coming from a specific common law or civil law background, when examining in absentia in light of the objectives of International Criminal Justice the legal practitioners abandon a rigid interpretation of these proceedings. For instance, common law lawyers either maintain a strict opinion on the topic,[260] or they are open, saying that with a trial in absentia the defendants 'are double protected'[261] because 'they have a veto right for retrial in the event they are arrested',[262] or that despite being contrary to in absentia, this can be accepted 'in extreme circumstances'[263] and in the case of fugitives. In this sense, one practitioner says: 'I am not in favour. I think that if the accused absconds after the trial has begun, in that situation, I think [the trial] should continue. But generally speaking, I am not in favour of trials in absentia'.[264] Likewise, civil law practitioners either accept in absentia proceedings[265] or reject them, saying that 'it is like playing Hamlet without the prince. All the parties are present in the trial except the main actor'.[266]

Finally, the acceptance of in absentia proceedings also depends on the conditions for their use.[267] Many legal practitioners do not oppose in absentia proceedings if procedural safeguards are in place and certain 'fundamental principles'[268] are respected in every stage of the proceeding.[269] These include: (a) the maintenance of the defence counsel/defendant relationship (e.g. the right to be represented by a defence counsel; the right to have contacts with and receive information from the defendant);[270] (b) the right to have an effective remedy against the ruling of the court;[271] and (c) the certainty over the defendant's awareness of the proceeding.[272]

1.3.2.2. The Right to Be Present in International Criminal Justice

The debate on in absentia proceedings encompasses a discussion of the conditions for their conduct,[273] including the defendant's right to be present in the process.[274] Indeed,

[260] E.g. Interview 09.
[261] Interview 04.
[262] Ibid. Accord Interviews 02; 03; 07.
[263] Interview 03. Accord Interview 06.
[264] Interview 08.
[265] E.g. Interviews 01; 07; 12; 14.
[266] Interview 05.
[267] E.g. Interviews 01; 9; 10.
[268] Interview 01.
[269] E.g. ibid.
[270] E.g. Interviews 01; 06.
[271] E.g. Interview 01.
[272] E.g. Interview 10.
[273] See Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, pp.347ff.).
[274] See ibid., pp.357-362.

the acceptance of in absentia proceedings heavily relies on the significance given to the defendant's presence in the courtroom.[275] Some national legal systems admit a fictional presence of the defendant through the defence counsel; others require attendance of the proceeding in person.[276] In International Criminal Justice, the right to be present has been identified both as a right and as an obligation.[277]

The interpretation of this right has important consequences for in absentia proceedings. If considered a *right*, it can be waived,[278] and the person can be tried in absentia. Some scholars support this idea by saying that 'there is no ban on holding an in absentia trial anymore since such right is not a non-derogable right, but a waivable one'.[279] Instead, if the defendant's presence in the proceeding is a *duty*, the person is obliged to appear in court, and the tribunal must guarantee his/her physical presence.[280] Therefore, in absentia proceedings would violate this obligation. In this thesis, it is posited that a proper analysis of in absentia proceedings should include a reconsideration of the right to be present in the proceeding. Indeed, 'like many such truisms, the view that a criminal defendant should appear at his trial needs re-evaluation. In the context of modern trials, it is no longer obvious that a fair trial requires the presence of the defendant'.[281]

1.3.2.2.1. The Right to Be Present and International Human Rights Law Standards

In International Criminal Justice, a strong relationship exists between international criminal tribunals and IHRL.[282] For instance, at the ICC, the application and interpretation of the provisions 'must be consistent with internationally recognised human rights'.[283] This relationship is characterised by a significant influence that IHRL exercises over international criminal proceedings,[284] including in absentia proceedings.[285] As an example, the STL Statute incorporates some IHRL principles on

[275] See Summers (2007, pp.63ff.).
[276] See Tochilovsky (2008, p.301).
[277] For a discussion, see Wheeler (2017).
[278] See ibid., p.101. In this thesis, reference is made to the concept of 'right' in a Hohfeldian sense, i.e. a right is correlative to a duty. See Hohfeld (1917, p.710).
[279] Zakerhossein and de Brouwer (2015, p.212).
[280] See ibid.
[281] Cohen (1973, p.155).
[282] See Lobba and Mariniello (2017); Zeegers (2016); Zappalà (2003).
[283] See Art. 21(3) ICC St.
[284] See Zeegers (2016, pp.47ff.); Morris and Scharf (1998, pp.411-412). On the ECtHR, see Schabas (2011c); Cassese (2003).
[285] See Ruggeri (2017, pp.554-559).

trials in absentia,[286] and 'the judges apply the Tribunal's trial in absentia provisions in a manner that is consistent with international human rights jurisprudence'.[287] In particular, IHRL standards have been recalled about the notification of the indictment to an absent defendant.[288]

In this context, respecting the principle of fair trial is a key component of the work of international criminal tribunals,[289] and its violation can affect the legitimacy of their proceedings.[290] As already mentioned, there is a debate on the compatibility of in absentia proceedings with IHRL standards[291] (e.g. the principle of fair trial), and harsh criticisms are mounted against these proceedings. For instance, it is argued that they do not permit the defendant 'to effectively participate in the trial and present an adequate defence',[292] and they prevent a confrontation among the parties and that all parties are heard.[293]

A fundamental point of this debate relates to the need to combine in absentia proceedings with the principle of fair trial.[294] Two institutions have addressed this issue in IHRL: the UN Human Rights Committee (UNHR Committee) with its interpretation of the International Covenant on Civil and Political Rights (ICCPR); and the European Court of Human Rights (ECtHR) with its interpretation of the European Convention on Human Rights (ECHR).

Art. 14(3) ICCPR[295] provides minimum guarantees for any defendant involved in a criminal proceeding,[296] and among them, there is the right 'to be tried in his presence'.[297] This right is included under the general provision of Art. 14 ICCPR dedicated to the fairness of the proceeding and, therefore, it can be considered an essential element of fair trial.[298] A scholar thinks that Art. 14 ICCPR prohibits in absentia proceedings, specifically trials in absentia.[299] The idea is that the defendant's

[286] See UNSG, Report 893 (2006, para.33). For an analysis, see Gradoni (2013, pp.77-78).
[287] Swart (2014, p.e115).
[288] See *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia, (2012, para.32).
[289] See Damaška (2012); Noel (2011); Schomburg (2009); McGowan Davis (2008).
[290] 'An accused party's access to fundamental fair trial rights is a key indicator of equitability in any system of criminal justice, as proceedings lose their credibility and integrity without the consistent application of due process standards': Schomburg (2009, p.1).
[291] See Schwarz (2016); Jordash and Parker (2010); Jenks (2009); Schomburg (2009, pp.15-16).
[292] Bassiouni (2013, p.818).
[293] E.g. Interview 05.
[294] E.g. Interview 03.
[295] For an analysis, see Joseph and Castan (2013, pp.430ff.).
[296] E.g. the right to be informed of the proceedings and the charges; to examine witnesses; to have a defence counsel.
[297] Art. 14(3)(d) ICCPR.
[298] See Safferling (2009a, p.542).
[299] See Bassiouni (1993, p.280).

presence is necessary in criminal proceedings[300] and the provision creates an obligation upon the States ruling out in absentia proceedings.[301] With no defendant present, there would be a violation of Art. 14(3)(d) ICCPR and, subsequently, of States' obligations under IHRL.[302]

Others instead argue for the compatibility of in absentia proceedings with Art. 14(3)(d) ICCPR. On the one side, the provision guarantees a *right* to be present at trial, and it does not impose an *obligation* to attend the proceeding.[303] Therefore, the defendant has the choice to exercise it or not. Indeed, the right to be present is included in the provision, but the provision does not explicitly prohibit in absentia proceedings.[304] The scholarship confirms this when saying that in the *travaux préparatoires* of the ICCPR 'the issue whether the express inclusion of the right to be present might have hampered trials in absentia in general […] was simply not discussed at all'.[305] On the other side, the right to be present should be considered a right and not an obligation to protect the defendant from the 'failures' of the legal system.[306] Put differently, the incapacity of international criminal tribunals to conduct expeditious proceedings should be counterbalanced by granting the defendant a free exercise of the right to be present. Indeed, the person should not bear the consequences of delays that are the result of a slow action of the Prosecutor or the Tribunal.[307]

The UNHR Committee has interpreted Art. 14(3)(d) ICCPR in its Comment 32[308] and its decisions *Mbenge v. Zaire*[309] and *Maleki v. Italy*.[310] First of all, the Committee says that 'the provision requires that accused persons are entitled to be present during their trial'.[311] To be 'entitled' of a right means that the defendant can exercise it, but there is no 'duty'. The UNHR Committee confirms this when saying that in absentia proceedings can be used 'in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in

[300] 'In principle, a criminal trial without the presence of the accused is inconsistent with the main aims and purposes of the modern understandings of criminal prosecution': Safferling (2009a, p.542). See also Zhang (2009).
[301] See Safferling (2009a, p.542).
[302] The States that have signed and ratified the ICCPR must respect its provisions; otherwise they incur in a violation of their obligations under IHRL.
[303] On the distinction between rights and duties, see Hohfeld (1917).
[304] See Gaeta (2014, p.238).
[305] Ibid.
[306] Interview 04.
[307] E.g. ibid.
[308] See UNHR Committee, General Comment 32 (2007).
[309] See *Mbenge v. Zaire*, UNHR Committee, Communication no. 16/1977.
[310] See *Maleki v. Italy*, UNHR Committee, Communication no. 699/1996.
[311] UNHR Committee, General Comment 32 (2007, para.36).

advance, decline to exercise their right to be present'.[312] Therefore, in absentia proceedings are allowed when the defendant does not want to exercise the right to be present.

Second, the right to be present is not 'absolute'.[313] This means that it can be limited when there are specific exigencies of the legal system and provided that the rights of the defendant are adequately protected. In this sense, in absentia proceedings are used to accommodate the exigencies of a proper administration of justice.[314] In any case, the violation of Art. 14(3)(d) ICCPR could be remedied if the defendant had a right to retrial.[315] Thus, the retrial is a remedy for the violation of the right to be present; as discussed later in this Subsection, the ECtHR has accepted the same argument.

Third, the use of in absentia proceedings does not violate IHRL per se.[316] No provision of the ICCPR states so, and Comment 32 affirms that they are permissible when certain conditions are met. Indeed, the Committee states that 'such trials are only compatible with article 14, paragraph 3(d) if the necessary steps are taken to summon defendant persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance'.[317] Therefore, specific procedural safeguards should be respected to avoid that the defendant is tried unlawfully.

The ECtHR has provided a similar interpretation of the principle of fair trial and the use of in absentia proceedings when considering Art. 6 ECHR.[318] This provision regards the fairness of the criminal proceeding, and it provides for a series of procedural safeguards for the defendant,[319] encompassing both substantive and procedural rights.[320] Unlike Art. 14(3)(d) ICCPR, Art. 6 does not refer to the right to be present in the proceeding. Nonetheless, the subsequent ECtHR and scholarship's interpretation has determined that this right can be derived indirectly from the provision.[321] Indeed, to exercise the rights enshrined in Art. 6 ECHR, the defendant needs to be present before

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[312] Ibid., para.36.
[313] Knoops (2014, p.329).
[314] See *Mbenge v. Zaire*, UNHR Committee, Decision (1983, para.14.1).
[315] See *Maleki v. Italy*, UNHR Committee, Decision (1999, para.9.5). See also Knoops (2014, p.329).
[316] See *Mbenge v. Zaire*, UNHR Committee, Decision (1983, para.14.1); *Maleki v. Italy*, UNHR Committee, Decision (1999, para.9.3).
[317] UNHR Committee, General Comment 32 (2007, para.36).
[318] For an analysis, see Goss (2014); Sayers (2014); Arangüena Fanego (2012, pp.153ff.).
[319] E.g. the right to be informed promptly of the charges; to prepare adequately his/her defence; to defend himself/herself in person or through a defence counsel; to examine witnesses and submit evidence.
[320] See Lautenbach (2013, pp.174ff.).
[321] See Clayton and Tomlinson (2009, p.860); Harris, O'Boyle and Warbrick (2009, p.250); Summers (2007, pp.116–123); Trechsel (2006, pp.252-261).

the judges.[322] Therefore, the right to be present is part of the fairness of the proceeding and underpins the exercise of other procedural rights of the defendant.

The ECtHR has interpreted Art. 6 in a policy paper[323] and in its case law.[324] In particular, the Court has focused on: (i) the nature of the right to be present in the proceeding; (ii) the possibility to conduct in absentia proceedings under certain circumstances; and (iii) the procedural safeguards that must be present in in absentia proceedings.[325]

First of all, the right to be present in the proceeding is implicit in Art. 6 ECHR.[326] Indeed, the right derives from the 'object and purpose of the Article taken as a whole'[327] and the fact that, without being present, the exercise of the rights enshrined in Art. 6 ECHR would be difficult.[328] Therefore, the ECtHR recognises the right to be present as part of the general right to fair trial. The Court has also affirmed that the principle of fair trial plays a pivotal role in modern legal systems, especially in criminal justice,[329] and 'the guarantees contained in paragraph 3 of Article 6 […] are constituent elements, amongst others, of the general notion of a fair trial'.[330]

Second, the right to be present is not absolute.[331] It can be limited when certain conditions are met (e.g. the defendant has waived the right to be present; the notification is properly done), and specific procedural safeguards are present (e.g. the appeal; the retrial).[332] Indeed, the rejection of in absentia proceedings 'may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice'.[333] Therefore, the use of in absentia proceedings in some cases is necessary, particularly when the defendant's absence hinders the prosecution of crimes and the achievement of justice. As a result,

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[322] See *Colozza v. Italy*, ECtHR, Judgment (1985, para.27).
[323] See ECtHR, Guide (2014).
[324] For instance, see *Medenica v. Switzerland*, ECtHR, App. no. 20491/92; *Krombach v. France*, ECtHR, App. no. 29731/96; *Sejdovic v. Italy*, ECtHR, App. no. 56581/00; *Somogyi v. Italy*, ECtHR, App. no. 67972/01.
[325] See *Colozza v. Italy*, ECtHR, Judgment (1985, paras.26-31).
[326] See *Colozza v. Italy*, ECtHR, Judgment (1985, para.27); *Brozicek v. Italy*, ECtHR, Judgment (1989, para.45); *F.C.B. v. Italy*, ECtHR, Judgment (1991, para.33); *T. v. Italy*, ECtHR, Judgment (1992, para.26); *Somogyi v. Italy*, ECtHR, Judgment (2004, para.65). See also Goss (2014, pp.90ff.).
[327] *Colozza v. Italy*, ECtHR, para.27.
[328] See ECtHR, Guide (2014, para.164).
[329] See *Colozza v. Italy*, ECtHR, Judgment (1985, para.32); *F.C.B. v. Italy*, ECtHR, para.35.
[330] *Colozza v. Italy*, ECtHR, Judgment (1985, para.26); *F.C.B. v. Italy*, ECtHR, Judgment (1991, para.29); *T. v. Italy*, ECtHR, Judgment (1992, para.25).
[331] The defendant should appear at trial 'both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim […] and of the witnesses': *Poitrimol v. France*, ECtHR, Judgment (1993, para.35).
[332] The same limitation applies to the right to access a Court. See *Eliazer v. The Netherlands*, ECtHR, Judgment (2001, para.30).
[333] *Colozza v. Italy*, ECtHR, Judgment (1985, para.29).

'proceedings held in an accused's absence are not in principle incompatible with the Convention'.[334] In this sense, the Court does not reject in absentia a priori, but it accepts it when certain conditions are met.[335] In so doing, it seeks to combine the apparently opposing interests of the defendant and the legal system. This guarantees consistency of the legal systems that conduct in absentia proceedings with the provisions of the ECHR.

Third, the use of in absentia proceedings must be linked to procedural safeguards (e.g. the right to have a defence counsel,[336] the right to retrial)[337] to avoid a 'denial of justice'.[338] These remedies should guarantee 'a fresh determination of the merits of the charge, in respect of both law and fact'.[339] They relate to: (a) the use of the right to be present at trial and its waiver; (b) the methods of notification to the absent defendant; (c) the remedies against a conviction in absentia; and (d) other cases in which in absentia proceedings should be limited.

The waiver must be unequivocal and freely expressed by the defendant.[340] It is argued that the Court has recognised the possibility of waiving the right to be present at trial because 'the Convention confers individual rights, not obligations'[341] and 'it is the accused who decides whether to exercise these rights. The waiver, thus, can be regarded as an integral part of the relevant individual right'.[342] In any case, there must be certainty over the defendant's knowledge. Thus, the way in which the defendant is notified is fundamental to guarantee awareness of the proceeding and knowledge of the consequences of the absence.[343]

The notification is a crucial element, but it is insufficient to have 'vague' or 'informal' notifications; they must respect minimum standards for being lawful.[344] In this sense, 'it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights'.[345]

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[334] *Poitrimol v. France*, ECtHR, Judgment (1993, para.31). See also ECtHR, Guide (2014, para.165).
[335] *Poitrimol v. France*, ECtHR, Judgment (1993, para.31); *Krombach v. France*, ECtHR, Judgment (2001, para.85).
[336] See *Colozza v. Italy*, ECtHR, Judgment (1985, para.34); *Lala v. The Netherlands*, ECtHR, Judgment (1994, paras.33-34); *Pelladoah v. The Netherlands*, ECtHR, Judgment (1994, para.40); *Van Geyseghem v. Belgium*, ECtHR, Judgment (1999, paras.33-35); *Krombach v. France*, ECtHR, Judgment (2001, para.89).
[337] See *Thomann v. Switzerland*, ECtHR, Judgment (1996, paras.30-36).
[338] Ibid. See also *Stoichkov v. Bulgaria*, ECtHR, Judgment (2005, para.56); *Sejdovic v. Italy*, ECtHR, Judgment (2006, para.84).
[339] Ibid.
[340] See *Poitrimol v. France*, ECtHR, Judgment (1993, paras.29-39); *Sejdovic v. Italy*, ECtHR, Judgment (2006, paras.96-104); Safferling (2009a, p.542).
[341] Bose (2011, p.500).
[342] Ibid.
[343] See *Brozicek v. Italy*, ECtHR, Judgment (1989, para.45).
[344] *T. v. Italy*, ECtHR, Judgment (1992, para.28).
[345] Ibid.

The defendant's awareness must be effective and not just constructive (i.e. derived implicitly). It is not possible to rely solely on the 'presumption' that the defendant has waived the right to be present,[346] but diligence must be used to assess the adequacy of the notification and that 'the rights guaranteed by Article 6 are enjoyed in an effective manner'.[347]

The remedies available to the defendant must guarantee that a competent judicial authority hears the case for its merits and procedural issues.[348] This means that to be efficient, the judge should review the case in its entirety, with no prejudice for the defendant. In the words of the Court, 'that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge'.[349] Therefore, the defendant must be able to appear before the tribunal, contest the charges, and confront the Prosecutor.

Moreover, the ECtHR affirms that to fulfil the requirements of Art. 6 ECHR States 'enjoy a wide discretion',[350] but 'the resources under domestic law must be shown to be effective'[351] (in its supervisory role, the Court will check that this is the case). Once again, the Court does not rule out in absentia proceedings, but it indicates the duty of States to respect the conditions provided in Art. 6 ECHR. The ECtHR is careful in determining the appropriate remedies because these represent the counter-measures to be used when there is unlawful conduct of an in absentia proceeding.[352] Therefore, the defendant needs effective remedies to contest the decision of the judges to exclude him/her from the proceeding. In addition, the Court underlines that the mere absence of the person from the courtroom does not entitle the criminal legal system to get rid of his/her right to appeal the decision of the judges.[353]

In conclusion, the analysis done presents three findings. First of all, IHRL standards have had a significant influence on the legal development of in absentia proceedings in International Criminal Justice. This influence emerges for the interpretation of the right to be present in the proceeding and the justifications underpinning the conduct of in absentia proceedings. In particular, the jurisprudence of

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[346] See ibid.
[347] Ibid.
[348] See *Sejdovic v. Italy*, ECtHR, Judgment (2006, para.82).
[349] *Colozza v. Italy*, ECtHR, Judgment (1985, para.29); *Poitrimol v. France*, ECtHR, Judgment (1993, para.31); *Medenica v. Switzerland*, ECtHR, Judgment (2001, para.54).
[350] *Colozza v. Italy*, ECtHR, Judgment (1985, para.30); *Medenica v. Switzerland*, ECtHR, Judgment (2001, para.55).
[351] Ibid.
[352] For instance, a 'late appeal' is not sufficient. See *Colozza v. Italy*, ECtHR, Judgment (1985, para.31).
[353] See *Poitrimol v. France*, ECtHR, Judgment (1993, para.38). Moreover, there is no need to surrender to have a retrial. See *Krombach v. France*, ECtHR, Judgment (2001, para.87).

the STL has recalled IHRL standards, and the judges have issued decisions in line with them. This element is relevant when discussing the future legal framework of in absentia proceedings in International Criminal Justice (i.e. in Chapter 6).

Second, according to the interpretation of the UNHR Committee and the ECtHR, in absentia proceedings are admissible, provided that they are compatible with the standards set in IHRL. This finding overcomes some criticisms mounted against in absentia proceedings because it shows that in absentia proceedings are admissible under IHRL and they do not necessarily violate the principle of fair trial. In this sense, this finding confirms the need for a more objective approach to in absentia proceedings, avoiding a biased evaluation. This point will be recalled when analysing the future of in absentia proceedings as 'legally possible' proceedings in International Criminal Justice (i.e. in Chapter 6).

Finally, under IHRL standards, the use of in absentia proceedings involves a series of considerations. These are: (a) the need to recognise the right to be present in the proceeding as inherent to the principle of fair trial; (b) the possibility to limit this right when the interests of justice so require; and (c) the need to provide specific procedural safeguards to an absent defendant (e.g. right to be properly notified; right to have effective remedies against a conviction in absentia). These elements will be recalled when analysing the practice of in absentia proceedings (i.e. in Chapter 3); the impact of these proceedings on the parties, especially the Defence (i.e. in Chapter 4); and the recommendations for a future use of in absentia proceedings (i.e. in Chapter 6).

1.3.2.2.2. The Right to Be Present and International Criminal Proceedings

The first meaning attributed to the defendant's presence in an international criminal proceeding is that of *physical* presence. The person can only participate in the proceeding by being present before the judges in person. Therefore, the right to be present assumes a strong connotation, becoming an obligation to participate.[354] The critics of in absentia proceedings follow this interpretation, and they say that 'the physical presence of an accused before a court is one of the most basic and common precepts underpinning a fair criminal trial'.[355] Indeed, this presence guarantees procedural equality among the parties and the need 'to ensure that justice is not only

[354] See Wheeler (2017, pp.107ff.). Accord Interviews 05; 09.
[355] Jordash and Parker (2010, p.50).

done but is seen to be done'.[356] Therefore, the defendant's physical presence becomes a core element of the proceeding that does not admit exceptions.[357]

Others scholars confirm this point saying that 'it is a fundamental principle of the law of criminal procedure that an accused must be physically present at the trial so that he can participate in a meaningful and informed manner in the criminal proceedings instituted against him'.[358] In this sense, 'the accused's other rights […] are dependent on his right to be present at the trial'.[359] As a consequence, 'trials in absentia should be the exception and not the norm' [360] because 'the accused's presence and personal participation in the trial are fundamental to a "just and fair" trial'.[361] It is clear that this interpretation leads to a refusal of in absentia proceedings, besides certain cases provided in the Statutes of international criminal tribunals.[362]

Not all scholars agree with this strict interpretation, and some perceive the defendant's absence not as a grave deficiency of the proceeding but as a possible situation that should be regulated.[363] Therefore, there are some cases where the defendant can be tried in absentia. For instance, 'in certain situations, society is not willing to allow defendants to frustrate trials and society's interest in progressing to a result',[364] and therefore 'a balance is struck'[365] between the right to be present at trial and the prosecution of crimes in absentia.[366]

The other two interpretations of the right to be present in the proceeding are civil law-oriented, favouring exceptions to the defendant's physical presence in the courtroom. They are cases of 'constructive presence' where the non-corporeal presence is treated 'as the equivalent of physical presence'.[367] However, it should be noted that 'this agent-representation and constructive presence is much more accepted and widely available in non-criminal cases than in criminal ones'.[368]

The first interpretation permits the defendant to participate in the proceeding without being physically present, using technological means and a defence counsel duly instructed. For instance, the person follows the trial via video-link or other technologies

[356] Bassiouni (2008, pp.595-596).
[357] See Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, p.357).
[358] Cassim (2005, p.285).
[359] Ibid.
[360] Ibid., p.286.
[361] Ibid.
[362] See Rule 61 ICTY RPE; Rule 61 ICTR RPE.
[363] See Schabas (2011b, p.380); Tochilovsky (2008, p.301).
[364] Strazzella (2010, p.216).
[365] Ibid.
[366] See ibid.
[367] Ibid., p.215.
[368] Ibid., p.216.

that facilitate long-distance participation in the proceeding,[369] and the defence counsel receives instructions in this way. Here, the presence of the defendant is not 'physical' but 'virtual': he/she is at the same time physically absent, but virtually present and legally represented. This interpretation does not seem to be in contrast with the right to be present. Indeed, this right can be guaranteed with: (a) an alternative form of presence (e.g. via video-link); (b) a defence counsel present before the court; and (c) a defendant who has the control over the Defence strategy and has instructed the counsel.

The second case of 'constructive presence' requires neither a physical presence nor the use of technology. Only an instructed defence counsel is present before the judges, and no video-link or other forms of virtual participation are used. In this case, if the defendant appears before the judges once and then is not present, he/she is still considered 'procedurally' present.[370] It is argued that 'the physical presence of the accused at trial is not necessarily required, in that his "legal presence" may suffice under certain conditions'.[371] The principle '*semel praesens, semper praesens*' (i.e. present once, always present) applies,[372] and there is a need to reconceptualise the notion of 'being present'. Indeed, we need to distinguish a right to be present from a physical point of view, from a right to be present from a procedural point of view.

The choice among the three interpretations recalled leads to different ways of conducting international criminal proceedings. If we consider the physical presence of the defendant as an essential element of the proceeding for its legitimacy and fairness, it is impossible to accept in absentia proceedings. With an opposite interpretation in absentia proceedings are admissible. Indeed, the rationale is that 'a trial may otherwise be obstructed by an absconding or interrupting defendant, and concerns for the defendant's liberties do not play a role'.[373] Therefore, a correct application of the law imposes a careful consideration of the several meanings of the right to be present in the proceeding.

Moreover, even if a defendant is physically present in the courtroom, this does not mean that he/she is in effect 'present' because 'presence at trial should imply more than mere physical presence'.[374] For instance, the proceeding should be conducted in a language the defendant comprehends, and the person must have the proper mental

[369] See Boas, Bischoff and Reid (2011, pp.272-276); Strazzella (2010).
[370] At the STL, this case does not trigger a proceeding in absentia. See STL, Explanatory Memorandum (2009, para.39).
[371] Ibid.
[372] See Gaeta (2014, p.233).
[373] Göhler (2016, p.475).
[374] Schabas (2011a, p.306). See also Cassim (2005, p.301).

capacity to understand what is happening. In this sense, 'the accused must be present in a comprehensive sense, including both his physical and psychological state, for otherwise the prohibition of trial in absentia would be deprived of any substance'.[375]

This point relates to the fitness to stand trial, which involves both a physical and mental capacity of the defendant. Once again, the right to be present is subject to interpretation: it can be linked to the physical presence of the defendant, but it is not limited to a 'corporal' requirement. This caveat is important to evaluate in absentia proceedings because it reinforces the idea that the need for a physical presence of the defendant cannot be a justification for rejecting these proceedings. Indeed, the mere physical presence in the courtroom does not fulfil the concept of 'full participation' in the proceeding, as it might be that the person is not 'mentally' fit to stand trial and the presence is not 'full'. Therefore, the opposition to in absentia proceedings based upon a *physical* requirement is not convincing.

A debate on the nature of the right to be present in the proceeding also emerges from the opinion of the legal practitioners interviewed for this thesis. Some say that although the presence of the defendant is preferable, there are exceptional cases where the proceeding can be in absentia.[376] For instance, when the defendant absconds after having attended the proceeding, or when the defendant has waived the right to be present. In this sense, the presence of the defendant in the proceeding is not an obligation but a right.[377] Others argue that the defendant should be obliged to be present in court because this is 'an integral part of the fairness of the trial',[378] and it is important for the victims 'so he can hear about the crimes he is personally responsible for'.[379] Nonetheless, the majority of the legal practitioners interviewed recognise the right to be present as a right and not an obligation. In particular, they say that although the defendant's presence in the proceeding should be the primary goal, it cannot be said that 'a defendant does not have the right to waive that right'.[380] Therefore, the waiver of the right would be legitimate and in line with the freedom of choice given to the defendant for the exercise of his/her procedural rights.

In conclusion, two points emerge from the analysis of the scholarship and the legal practitioners' views. First of all, the right to be present in the proceeding is considered to be the norm. This means that the defendant should be present in an

[375] Ambos (2013, p.433).
[376] E.g. Interviews 02; 03; 09; 16.
[377] E.g. Interview 02.
[378] Interview 07.
[379] Interview 08.
[380] Interview 02.

international criminal proceeding and any absence is an exceptional situation. Second, there are valid arguments to interpret the right to be present in a proceeding as a right and not an obligation. This means that the defendant can freely exercise and waive it, but an international criminal tribunal can also limit it, e.g. deciding to conduct an in absentia proceeding.

1.3.3. The Traditional Suspension of the Proceeding: An Evaluation

In International Criminal Justice, when the defendant is absent, the proceeding is usually suspended for the duration of the absence.[381] The idea is to reject in absentia proceedings and any prosecution that takes place when the defendant is absent. Indeed, 'until a defendant is at least captured and brought into the judicial system, trials do not proceed',[382] and this happens 'even if the formal charges have been brought against the defendant but the defendant remains unlocated or uncaptured'.[383]

Despite its procedural nature, the suspension of the proceeding can be recognised as an additional theoretical constraint to the use of in absentia proceedings in International Criminal Justice. Indeed, it is based on an important theoretical premise: the traditional rejection of in absentia proceedings. In this regard, one should keep in mind that theoretical constraints of in absentia proceedings are not only those that are embedded in the theory of this legal phenomenon (i.e. they have a theoretical nature) but also those that are the direct consequence of a theoretical choice and are based on a specific theory (i.e. the suspension of the proceeding as a consequence of the rejection of in absentia proceedings).[384] Therefore, this traditional choice of international criminal tribunals (also present in the literature) needs to be discussed when analysing the theoretical boundaries of in absentia proceedings. In so doing, the examination of these constraints is complete, and it covers all the relevant aspects that characterise in absentia proceedings in International Criminal Justice.

With the suspension, the proceeding is conducted only at the pre-trial phase, with the issue of an arrest warrant (or a summons to appear) and the holding of a hearing for the confirmation of charges.[385] Because the proceeding is halted before the

[381] This suspension must not be confused with the stay of the proceeding at the parties' request or for other procedural issues (e.g. the collection of evidence).
[382] Strazzella (2010, p.213).
[383] Ibid.
[384] On this point and the complexities of law-making in International Criminal Justice, see Vasiliev (2016, pp.356-362).
[385] See Rule 61 ICTY RPE; Rule 61 ICTR RPE; Art. 61 ICC St. On the details of the pre-trial phase activities, see Chapter 3, Section 3.2.

beginning of the trial phase, the suspension is an interruption of the process but also the starting point for the conduct of an ordinary proceeding when the person is present.[386] The suspension pursues two interrelated goals: (i) it 'freezes' the proceeding, permitting its reopening when the circumstances of the person change; and (ii) it 'preserves' the proceeding (e.g. evidence and procedural activity), avoiding actions that might be prejudicial for the suspect. In this sense, the suspect's absence is an extraordinary situation that requires exceptional measures. The suspension allows the tribunal to halt the process (that usually has no interruptions) to deal with an unusual circumstance (i.e. the absence of one of the parties).[387]

This solution is problematic because it does not address the needs of the victims properly,[388] hiding its real nature under the cover of being 'temporary'. Indeed, in theory, the suspension should be brief and promptly withdrawn; in reality, it can last for years, and it represents the permanent status of the proceeding.[389] This means that the proceeding is de facto 'interrupted' and not just 'stayed', especially when considering the issues of States' cooperation and the execution of arrest warrants. In this sense, the tribunal protects the suspect because the person is not prosecuted until he/she can fully participate in the trial phase. However, the suspension can have adverse effects on the suspect because, for instance, the evidence in his/her favour might not be available when the proceeding resumes.[390] In this sense, the temporal proximity of the exculpatory evidence to the events under examination would not be the same.[391]

The suspension of the proceeding includes four elements: (i) the person's absence; (ii) the issue of an arrest warrant (or summons to appear); (iii) the possible conduct of a hearing for the confirmation of the charges in absentia; and (iv) the suspension of the proceeding before the trial phase. The suspect's absence justifies the suspension because if there were no absent person, there would be no necessity to suspend the proceeding. This element also determines the length of the suspension.[392] Indeed, if the person is absent because unfit, the length might be limited up until his/her health conditions improve.[393] Instead, if he/she is a fugitive, the suspension can last for

[386] The proceeding will resume at the trial phase, with the Trial Chamber conducting the hearings and ensuring that all procedural safeguards are respected. See on the suspension, Petrova (2019, p.50).
[387] On the suspension of the proceeding, see McDonald and Swaak-Goldman (2000, pp.446-447).
[388] E.g. Interviews 04; 16.
[389] E.g. Interview 04. At the ICTY, Mladić and Karadžić have been at large for 16 and 13 years respectively, and this has also been the length of the suspension of their proceedings.
[390] See Alamuddin (2010); e.g. Interview 04.
[391] On the need to have temporal proximity, see Klamberg (2013); e.g Interview 04.
[392] There is no standard length for the suspension and international criminal tribunals adopt a case-by-case approach.
[393] See Rule 135(4) ICC RPE.

years until he/she is arrested or surrenders.[394]

The issue of an arrest warrant (or summons to appear) guarantees that sufficient attempts have been made to have the suspect present before the judges.[395] The conditions for the issue of an arrest warrant (or a summons to appear) are detailed in the rules of international criminal tribunals, and they are particularly relevant when the person absconds.[396] As will be discussed in Chapter 3, international criminal tribunals permit to hold a hearing in absentia[397] but only in the pre-trial phase and when certain conditions are met.[398] This is because the tribunal needs to assess the validity of the Prosecutor's *prima facie* case.

One of the advantages of the suspension of the proceeding is that its adversarial nature is maintained, and due process standards are protected.[399] Indeed, there is no prosecution of crimes *ex parte* and the trial does not start until the person appears before the judges. Moreover, it is less likely that an appeal will be filed for a violation of the principle of fair trial.[400] Indeed, the proceeding is halted before the parties can present their case at trial and unless the suspect's human rights (e.g. the right to have a defence counsel) have been violated in the pre-trial phase, the proceeding is shielded from possible challenges, as it might instead happen in an in absentia proceeding. Moreover, the relationship between the defence counsel and the suspect is not affected, and the former does not prepare a Defence strategy without instructions.[401]

For these reasons, the suspension of the proceeding might be recognised as a 'precaution' taken by the tribunal to protect the fairness of the process and the legitimacy of the court.[402] However, given the halt of the prosecution, the victims have to wait until the person is apprehended or shows up. Furthermore, no evidence can be used, and the risk of losing important witnesses or documents increases. Indeed, if the proceeding is suspended, it remains at an initial stage, and there is no possibility to continue to the trial phase, and the evidence cannot be presented in court.

When evaluating the suspension of the proceeding attention should also be given to the possible drawbacks of this solution that are often overlooked in the literature on

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[394] At the ICTY the maximum length has been 16 years; at the ICTR, 22 years; at the ICC, 13 years.
[395] On arrest warrants issued by international criminal tribunals, see de Meester, Pitcher, Rastan and Sluiter (2013, pp.313-321).
[396] See ibid., pp.250-251.
[397] See Rule 61 ICTY RPE; Rule 61 ICTR RPE; Art. 61(2) ICC St. On the confirmation of charges at the ICC, see Nerlich (2012); in absentia, see Friman (2001).
[398] See Chapter 3, Subsection 3.2.2. See also Schabas (2010, pp.736-737).
[399] That is, to have all parties present in the courtroom; to guarantee their full participation equally; to permit both parties to submit evidence. On equality of arms, see Safferling (2009c).
[400] This might happen in trials in absentia. See Jordash and Parker (2010).
[401] As it might occur in in absentia proceedings. See Chapter 4, Subsection 4.2.2.
[402] See Gosnell (2013).

in absentia proceedings. Indeed, as already highlighted, the suspension of the proceeding is part of the theoretical constraints of in absentia proceedings, but it cannot be simplistically accepted as a 'good' solution a priori. It needs to be assessed by looking also at the possible problems emerging from its practice. In so doing, some counter arguments to the traditional suspension of the proceeding and rejection of in absentia proceedings emerge, and it is possible to identify some strengths of in absentia proceedings as proceedings able to overcome these issues, being better fitted for prosecuting absent defendants. In other words, a thorough analysis of the traditional suspension of the proceeding permits one to identify additional limits to the rejection of in absentia proceedings (part of their theoretical constraints) and to obtain a more rigorous evaluation of the traditional approach of the literature and case law on the topic.

Having said this, there are two issues that emerge from the suspension of the proceeding: (a) the States' lack of cooperation with international criminal tribunals (e.g. the ICC); and (b) the States' duty to arrest the person and bring him/her to court. First of all, a wanted suspect might not be arrested due to the impossibility, inability, or unwillingness of national authorities. As an example, a State can be unable to arrest the person because it lacks the necessary economic, political, or military resources.[403] Moreover, it can be unwilling to arrest the suspect because it would not be in its interests. In all these cases, the arrest warrant is not executed, and it remains a dead letter, with detrimental effects for the continuation of the proceeding.

States' lack of cooperation with international criminal courts is an endemic problem in International Criminal Justice.[404] It disrupts the work of international criminal tribunals, impeding the apprehension of wanted individuals and hindering a proper conduct of investigations and prosecution of international crimes.[405] The lack of cooperation has short-term effects (for the ongoing case) and long-term effects (for future or concurrent cases). Indeed, States' refusal to cooperate with an international criminal tribunal creates a dangerous precedent, supporting the idea that States can disregard their duties towards a specific court.[406] Moreover, this situation undermines the pursuit of the objectives of International Criminal Justice, and it increases the

[403] Indeed, 'the political and military situation may make the cooperation impossible or ineffective even though that State is willing to do so': Furuya (1999, pp.635-636).
[404] See Bekou and Birkett (2016); Barnes (2011); Wartanian (2005).
[405] It affects the effectiveness of international criminal tribunals. See Jones (2016, pp.185ff.); UNSC, Press Release (2016); UNSC, Press Release (2013).
[406] In this sense, 'there is an immense gap between what international law jurists and scholars perceive as a binding obligation on States on one hand, and national security concerns and States' unwillingness to cooperate on the other hand': Demirdjian (2010, p.182).

criticisms on the ineffectiveness of international criminal tribunals.[407]

The need to arrest a suspect at all costs to continue the proceeding has two negative consequences. First, the national authorities' willingness to cooperate with a tribunal might have adverse effects if a warrant is wrongly executed.[408] Indeed, once the person is detected in a country, it is essential that the arrest and rendition to an international criminal tribunal follow a lawful procedure.[409] Doing otherwise would undermine the subsequent criminal proceeding. In this regard, some problems might arise for the legality of: (a) the execution of the arrest warrant; and (b) the transfer of the person to an international criminal court.

National authorities usually execute the arrest warrants because international tribunals do not have police forces.[410] This fact permits national authorities to arrest the person in a territory and social context that they know well. However, the lack of direct control over the operation by an international criminal court might facilitate illegal arrests.[411] For instance, this happens when violence is used, and procedural safeguards are not respected (e.g. the right to communicate with a defence counsel after the arrest).

The illegality of the arrests might also prompt an issue with rendition,[412] i.e. the arrest and transfer of a person by national authorities to other domestic or international authorities. This concept has become relevant with the phenomenon of 'extraordinary renditions' that has characterised the 'war on terror' of the past decades.[413] Illegal renditions have occurred at the ICTY and ICTR, and this has spawned a debate on the modalities for the execution of arrest warrants by national authorities.[414] In particular, it is said that the cooperation system is 'vague on the identification of enforcement competence and the means of enforcement'.[415] This leads to problems because 'the lack of State cooperation in the arrest and transfer of indictees hinders the adjudicative process and leaves enforcement susceptible to irregular rendition'.[416]

Another issue might concern the modalities of the arrest. States' use of illegal methods to arrest a fugitive can be due to the pressure to execute a warrant in line with

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[407] See Wald (2012, p.259).
[408] See McDermott (2015); Dtubak (2012); Sluiter (2003); Ülgen (2003).
[409] See Stroh (2001).
[410] See Gillett (2008).
[411] In this case, it is possible to request a stay of the proceeding. See McDermott, H. (2016); de Meester, Pitcher, Rastan and Sluiter (2013, pp.355ff.).
[412] See Currie (2007).
[413] See Duffy and Kostas (2012).
[414] See Pitcher (2018, pp.356ff.).
[415] Ülgen (2003, p.442).
[416] Ibid.

the *male captus, bene detentus* theory.[417] According to this theory, when a suspect is arrested, independently from the methods used and the fact that the arrest is illegal, the previous illegality is legitimised if the person is brought to justice and receives a fair trial.[418] Thus, the necessity to detain the suspect and ensure that the person is present before the judges overturn the illegality of the arrest.[419] This theory has been recalled at the ICTY where an illegal arrest was justified on the ground of the interests of justice.[420] It is argued that the application of the theory to the ICC might undermine the legitimacy of the Court, legitimising a violation of the suspect's rights and reinforcing the opposition to the Court's work.[421] In absentia proceedings would prevent these problems because they 'allow justice to make its course vis-à-vis an accused who is absconding or has found refuge in an uncooperative country, without tempting the competent authorities to have recourse to the odious practice of renditions'.[422]

In conclusion, from the foregoing considerations on the strengths and limits of the suspension of the proceeding it emerges that this solution works if priority is given to the protection of the suspect's interests. However, this is a quite limited choice because it is oriented towards the maintenance of a 'typical' adversarial criminal proceeding, where all the parties must be present, and there is no room for discussion of a different way of dealing with the person's absence (e.g. in absentia proceedings).

1.4. Conclusion

This Chapter has examined the theoretical framework of in absentia proceedings in International Criminal Justice, focusing on their definition and classification and the theoretical constraints upon their use in international criminal cases. The findings of the Chapter will also inform the study conducted in Part II (*Operation*) and Part III (*Future Perspectives*) of this thesis.

The Chapter presents three findings. First of all, the definition of in absentia proceedings has been so far problematic because the scholarship has not studied them with a comprehensive and consistent approach. The scholarship has often overlooked the complexity of in absentia proceedings, overlapping different concepts and focusing

[417] For an analysis, see Paulussen (2010).
[418] See Fellmeth and Horwitz (2009b).
[419] In this sense, 'the interest in effectively prosecuting the core international crimes outweighs any messiness left behind': Currie (2007, p.370).
[420] See *The Prosecutor v. Dragan Nikolić*, ICTY, case no. IT-94-2.
[421] See Currie (2007, p.387).
[422] Gaeta (2014, p.250).

on one type, i.e. trials in absentia. This has created a limited and incorrect understanding of these proceedings, impeding to conduct a complete study.

This Chapter has taken a different approach, looking at the differences existing among in absentia proceedings. In particular, the study has made clear the often-mistaken distinction between trials in absentia (as a specific category) and in absentia proceedings (as a general category), underlying their conceptual and practical differences. Moreover, overcoming the limits of the approach of the scholarship and the legal practitioners, the analysis has identified an overarching working definition that can be used to refer to all types of in absentia proceedings. The definition is: *international criminal proceedings conducted in the total or partial absence of the defendant*.

Second, international criminal proceedings in absentia are a complex and multifaceted phenomenon that needs to be studied considering their features and classifying them accordingly. However, the traditional study of in absentia proceedings has not been systematic because the scholarship has not used a structured method of analysis. As a result, the classification of in absentia proceedings has been scattered, and it has not relied on clear, precise criteria.

This Chapter has adopted a structured classification where international criminal proceedings in absentia are distinguished based upon three criteria: (i) the qualification of the defendant's absence; (ii) the phase of the proceeding in which the absence occurs; and (iii) the reasons for the absence. Following this classification, the Chapter has shown that there are 36 theoretical types of in absentia proceedings in International Criminal Justice. However, not all of them are possible in practice, as in the case of total in absentia proceedings due to a disruptive behaviour.

Third, three main theoretical constraints limit the use of in absentia proceedings in International Criminal Justice, i.e. the fulfilment of the objectives of International Criminal Justice; the common law/civil law divide; and the traditional suspension of the proceeding. A detailed analysis of these constraints permits one to understand better the criticisms mounted by the scholarship and the legal practitioners against the use of in absentia proceedings in international criminal cases.

This Chapter has critically examined these three constraints, indicating some aspects that are relevant when evaluating in absentia proceedings for the prosecution of international crimes. In particular, these proceedings should be 'tested' against the arguments advanced in the civil law/common law debate and for the suspension of the proceeding to determine the necessary changes to the legal framework of these proceedings. Moreover, a proper research on in absentia proceedings should rethink

them in light of the objectives of International Criminal Justice that they can achieve effectively. This means that in absentia proceedings cannot be accepted or rejected a priori, but research, analysis, and an in-depth study are essential.

This examination will be done in the next Chapters of this thesis. Taking into account the theoretical framework set up in this Chapter, the study will consider: (a) the legal foundations of in absentia proceedings (i.e. in Chapter 2); (b) the practice of these proceedings before international criminal tribunals (i.e. in Chapter 3); (c) the impact of in absentia proceedings on the parties of international criminal cases (i.e. in Chapter 4); (d) the alternatives to in absentia proceedings (i.e. in Chapter 5); and (e) the future of in absentia proceedings in International Criminal Justice (i.e. in Chapter 6).

Chapter 2. Legal Foundations of In Absentia Proceedings

2.1. Introduction

This Chapter focuses on the *legal foundations* of in absentia proceedings in International Criminal Justice. The Chapter investigates the legal development of these proceedings in relevant institutional and regulatory contexts. In particular, it scrutinises the features and dynamics of the legal framework of in absentia proceedings at five international criminal tribunals.

The traditional analysis of the legal development of in absentia proceedings has resulted in a chronological account of their use at international criminal tribunals.[1] This approach has some merits because it provides a historical understanding of these proceedings and identifies the phases of their 'evolution' in International Criminal Justice.[2] However, the study is overly descriptive and lacks critical depth. Moreover, in its analysis, the scholarship has discussed the compatibility of in absentia proceedings with IHRL.[3] However, it has not investigated the influence of other factors (e.g. the type of crimes, courts, and defendants; pragmatism and politics) that have contributed to the legal development of these proceedings. These gaps impede a comprehensive study of the phenomenon and a proper understanding of its dynamics.

This Chapter seeks to overcome these limitations with an innovative examination of the regulatory framework of in absentia proceedings. To this end, the study analyses critically the provisions and jurisprudence of international criminal tribunals concerning in absentia proceedings. Moreover, it discusses the relevant factors that have influenced the legal framework of in absentia proceedings at these tribunals. The purpose of the Chapter is twofold: (i) to understand the evolution of in absentia proceedings more thoroughly, going beyond a traditional historical and chronological discourse; and (ii) to identify the key elements of the regulation of in absentia proceedings in International Criminal Justice.

The substance of this Chapter is also important for the analysis done in other Chapters of the thesis. Indeed, its findings are relevant for the examination of the use of in absentia proceedings in concrete cases (Chapter 3 on the *practice* and Chapter 4 on the *impact*). Moreover, these findings will prove valuable when discussing the policy recommendations for a future use of in absentia proceedings (Chapter 6 on the *future*).

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[1] For instance, Shaw (2012); Jenks (2009); Schabas (2009a).
[2] For instance, Zakerhossein and de Brouwer (2015); Knoops (2014); Friman (2010).
[3] For instance, Gardner (2011); Jordash and Parker (2010); Jenks (2009).

The Chapter is divided into two Sections in addition to an Introduction and a Conclusion. The first Section examines the development of in absentia proceedings through the provisions and case law of five international criminal tribunals (Section 2.2.). The analysis considers three stages of this development: (i) the origins at the International Military Tribunal at Nuremberg (Subsection 2.2.1.); (ii) the modern phase at the ad hoc tribunals (i.e. ICTY and ICTR) and the ICC (Subsection 2.2.2.); and (iii) the recent experience at the STL (Subsection 2.2.3.). The second Section of the Chapter analyses critically the relevant factors that have influenced the legal framework of international criminal proceedings in absentia (Section 2.3.). The focus is on two groups of factors: (i) courts, crimes, and defendants (Subsection 2.3.1.); and (ii) pragmatism and politics (Subsection 2.3.2.).

Ultimately, the author argues that despite the diverse approaches of international criminal tribunals towards in absentia proceedings, the legal framework presents some recurring elements. These form regulatory patterns that characterise the legal development of in absentia proceedings. For instance, international criminal courts have regulated the notification to absent suspects, pre-trial in absentia proceedings (e.g. confirmation of charges in absentia), and total trials in absentia similarly. These patterns are particularly important when discussing the operation of in absentia proceedings (i.e. in Chapters 3 and 4) and their future regulation in International Criminal Justice (i.e. in Chapter 6). Indeed, they help us to define the components of the legal framework of reference and to maintain consistency within it.

2.2. Legal Development of In Absentia Proceedings at International Criminal Tribunals

This Section focuses on the legal development of in absentia proceedings at five international criminal tribunals. First, it examines the origins at the International Military Tribunal at Nuremberg (Subsection 2.2.1.). Then the author analyses the approach of the ad hoc tribunals and the ICC (Subsection 2.2.2.). Finally, the Section discusses the recent experience at the STL (Subsection 2.2.3.).

2.2.1. The Origins: The International Military Tribunal at Nuremberg

The first use of in absentia proceedings in International Criminal Justice occurred at the International Military Tribunal (IMT) at Nuremberg.[4] This Tribunal was established after the Second World War to try 'the major war criminals of the European Axis'[5] for crimes against peace, war crimes, and crimes against humanity.[6] The IMT is a leading tribunal in International Criminal Justice for the principles developed and the ground-breaking interpretation of the law applicable in international criminal proceedings.[7] In this sense, the scholarship refers to a 'Nuremberg legacy',[8] which also concerns in absentia proceedings.[9]

The IMT provisions were the result of a complex negotiation[10] and 'relied heavily on American Prosecutor's and trial process rules'.[11] However, to 'prevent any action which [would] cause unreasonable delay'[12] (e.g. the inability to arrest a defendant), there were some exceptions to the common law tradition. One exception was the possibility to conduct trials in absentia under Art. 12 IMT Charter.[13] As will be discussed in this Subsection, at the IMT this option was invoked for fugitives (i.e. total in absentia due to absconding) and defendants who were unfit to stand trial (i.e. total in absentia due to health conditions).

The analysis of Art. 12 IMT Charter reveals some interesting points. First of all, the provision talked of 'proceedings' in the defendant's absence,[14] although the rest of the Charter referred to a 'trial'.[15] Therefore, there was an overlap of the two concepts. It should be noted that at the IMT the proceeding only encompassed the pre-trial and trial phases; no appeal or retrial were allowed.[16] Hence, the term 'proceeding' was used to refer to the trial phase (even if a pre-trial phase existed), and Art. 12 regulated trials in absentia. This first point demonstrates that: (a) initially in absentia proceedings and

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[4] On the Tribunal and its work, see Reginbogin, Safferling and Hippel (2011); Mettraux (2008); Ginsburgs and Kudriavtsev (1990).
[5] Art. 1 IMT Charter.
[6] See Art. 6 IMT Charter.
[7] See Reginbogin, Safferling and Hippel (2011); Cryer (2009); Griech-Polelle (2009).
[8] See Bassiouni (2008); Blumenthal and McCormack (2008); Tomuschat (2006).
[9] See Knoops (2014, p.332); Koller (2014, pp.591-592).
[10] See London Agreement, IMT (1945). See also Heller (2011, pp.159ff.); Cryer (2009, p.441); Ginsburgs and Kudriavtsev (1990, pp.67ff.).
[11] Calvo-Goller (2006, p.10).
[12] McDermott (2013, p.775).
[13] The provision stated 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'.
[14] See ibid.
[15] See Arts. 1, 3, 4, 6, 9, 10, 15, 16, 17, 18, 22, 23, 24, 30 IMT Charter.
[16] See Art. 26 IMT Charter.

trials in absentia coincided; and (b) they were regulated only at the trial phase due to a peculiar layout of the process.

Second, the Tribunal had the right to try a person in absentia when certain conditions were met.[17] Being a right and not a duty meant that the judges could control its exercise. Trials in absentia were allowed at the IMT, but they were exceptional proceedings subject to the discretion of the Tribunal.[18] Their qualification as proceedings of last resort also emerges from the layout of the Charter. Indeed, Art. 12 was included at the end of Section II on *Jurisdiction and General Principles*, after the provisions on ordinary proceedings.

Third, the suspect could be tried in absentia when not found[19] (i.e. when not arrested).[20] The Charter did not distinguish between voluntary and involuntary absence, and it only referred to the inability of the Tribunal to find the person. Therefore, there was no blame on the person for the absence (e.g. saying that he/she was a fugitive, or avoided justice), and Art. 12 IMT Charter focused on the actions of the judicial authorities. Trials in absentia were not a 'punishment' for the suspect's behaviour but the result of the unsuccessful searches of the Tribunal. This can be contrasted with Art. 18 IMT Charter, according to which 'to deal summarily with any contumacy'[21] (e.g. a disruptive defendant) the Tribunal could impose an 'appropriate punishment', including the removal of the defendant or his/her lawyer from the courtroom.[22] Therefore, the approach of the IMT was more 'punitive' for cases of partial in absentia due to contumacy (i.e. Art. 18) than for trials in absentia due to a lack of arrest (i.e. Art. 12). This point shows that at the IMT trials in absentia were conceived more positively than partial in absentia whereas, nowadays, the approach is opposite (as will be discussed in Subsections 2.2.2. and 2.2.3).

Fourth, trials in absentia could also be conducted when it was necessary for any reason and in the interests of justice.[23] However, in this way, the decision of the judges to hold a trial in absentia was discretionary and based upon vague elements. Indeed, Art. 12 IMT Charter did not specify what constituted 'any reason' and 'interests of justice'; as discussed later in this Subsection, this became procedurally problematic for the Tribunal. Indeed, the judges did not have guidelines for their decision and were left with

[17] See Art. 12 IMT Charter.
[18] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, pp.5, 12, and 13).
[19] See Art. 12 IMT Charter.
[20] At the IMT, no summons to appear were used for the defendants.
[21] Art. 18 IMT Charter.
[22] See ibid.
[23] See Art. 12 IMT Charter.

a broad discretion. Furthermore, there was no clarity on what 'necessary' meant. It might have been because there was no alternative to fulfil the interests of justice or to achieve the aims of the Tribunal or for the time constraints of the trial. The choice was left to the discretion of the judges. In fact, it might be argued that the provision contradicted the idea of trials in absentia as a proceeding of 'last resort'. Indeed, the judges were allowed to use them whenever they ascertained a compelling reason to do so.

The IMT decided two relevant cases of absent defendants: Bormann[24] and Krupp von Bohlen.[25] Martin Bormann was never arrested and was sentenced to death in absentia.[26] The Tribunal made several attempts to notify him the indictment, but he was never found.[27] Therefore, the Tribunal decided to try him in absentia.[28] Gustav Krupp von Bohlen was arrested, but he was affected by a severe mental illness and was unfit to participate in the trial 'without danger to his life'.[29] The judges decided that in his case a trial in absentia would not have been in the interest of justice: 'when nature, rather than flight or contumacy has rendered such a trial impossible, it is not in accordance with justice that the case should proceed in the absence of a defendant'.[30]

In both cases, the IMT considered three elements that are relevant in the legal development of in absentia proceedings and that influenced other international criminal tribunals (as will be explained in Subsections 2.2.2. and 2.2.3.): (i) the value and function of trials in absentia; (ii) the classification of absent defendants; and (iii) the procedural issues emerging in a trial in absentia.

First of all, it was argued that trials in absentia were not ideal in international criminal cases, even if the Charter regulated them.[31] Indeed, they posed considerable disadvantages and difficulties to the defence counsels.[32] Therefore, the choice to conduct trials in absentia should include an accurate evaluation of their impact on the Defence, considering them as exceptional proceedings. Moreover, the use of trials in absentia was justified in the 'interests of justice'. The problem is how to define these interests and safeguard the defendant's right to fair trial. This concept is still debated

[24] On Bormann, see Dear and Foot (2005).
[25] See Knoops (2017, pp.22-23).
[26] See *Trial of the Major War Criminals*, IMT, Sentences (1946).
[27] Bormann's remains were found in 1972 in Berlin and subsequently identified with a DNA test. See Anslinger, Weichhold, Keil, Bayer, and Eisenmenger (2001).
[28] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (17 November 1945, p.28).
[29] *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, p.1). See also Weiner (2007, p.191).
[30] *Trial of the Major War Criminals*, IMT, Preliminary Hearing (15 November 1945, p.21).
[31] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, pp.2-3).
[32] See ibid., p.5.

nowadays,[33] especially when considering in absentia proceedings as necessary to achieve international justice.[34] As already mentioned, the IMT decided that for Krupp von Bohlen the threshold was not reached, and a trial in absentia would have been contrary to justice.[35] However, the judges adopted a case-by-case approach without providing guidelines for the application of the principle to other cases.

The parties' submissions offered more guidance on the point. The Defence argued that 'justice' was a key concept, and under Art. 12 IMT Charter, it meant 'just procedure'[36] and that 'an equitable judgment is guaranteed'.[37] This would not have been the case if the defendant was unable to participate in the proceeding, to prepare a defence, and to understand the indictment due to poor health conditions.[38] In this sense, a trial in absentia would not have been in the interest of justice also under the 'generally recognised principles of the law and procedure of civilised States'[39] (the Statute of the International Court of Justice prohibited a trial of an incapable defendant). Moreover, the Charter granted the defendants specific rights that needed to be exercised *in persona*; this would have been impossible in a trial in absentia.[40] On the other side, the Prosecutors argued that the interests of justice included the 'world opinion' and the need of the international community to try those responsible without undue delay.[41] But, as the Defence stated, 'the demands of world opinion and the demands of justice may be in contradiction to each other'.[42]

Second, even if Art. 12 IMT Charter admitted trials in absentia, the personal conditions of the defendant and the factual circumstances of the case required proper consideration. In this regard, there should be a distinction between an ill defendant and one absconding. The former could obtain a postponement of the trial until fit to attend; the latter should be tried in absentia. Indeed, a fugitive deliberately chooses to avoid the trial and 'makes himself responsible for the disadvantages and dangers entailed by his absence'.[43] Thus, there is a significant difference between a defendant unfit to stand trial and a fugitive because only the latter can defend himself/herself in court.[44] Moreover, an ill defendant might be unaware of the proceeding or unable to understand the

[33] See Pons (2010); ICC, Policy Paper (2007); Robinson (2003).
[34] See Bellelli (2016, pp.443-447).
[35] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (15 November 1945, p.21).
[36] *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, p.2).
[37] Ibid.
[38] See ibid.
[39] See ibid., pp.2-3.
[40] See ibid.
[41] See *Trial of the Major War Criminals*, IMT, Answer of the U.S. Prosecution to the Motion (1945).
[42] *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, p.4).
[43] Ibid.
[44] See ibid.

indictment. In this regard, the Tribunal 'did set forth specific criteria to evaluate competency, although evidentiary standards, including a determination of the burden of proof, were not established at that time'.[45] Other international criminal tribunals have adopted a similar distinction for absent defendants,[46] and this is also included in the classification of in absentia proceedings discussed in Chapter 1 (i.e. in absentia due to absconding and in absentia due to health conditions).

Third, a trial in absentia presents some procedural issues. For instance, at the IMT importance was given to the direct examination of the defendant's behaviour and physical presence in the courtroom. However, in the trial in absentia against Krupp von Bohlen, the judges could not have evaluated his personality.[47] Moreover, there might be problems to notify the defendant. To ensure the fairness of the trial in absentia at the IMT, specific rules had to be respected,[48] including the notification of the indictment in the forms prescribed by the Court.[49] For instance, the Tribunal distinguished Bormann's position from other defendants[50] and ordered a public notification using the radio and newspapers.[51] This is the first example of public notification in an in absentia case using public media,[52] and it distinguishes in absentia proceedings from ordinary proceedings (where the notification is done in person). Furthermore, the person needs to understand the notification. For instance, it was argued that Krupp von Bohlen was unaware of the proceeding and the charges due to his health conditions.[53] Therefore, the Tribunal has to guarantee that the suspect is 'properly' notified, i.e. he/she is aware of the indictment and the consequences of non-appearance at trial.

Finally, two interesting points emerged about the applicable law in a trial in absentia and the right to have a remedy against a conviction issued in absentia. Trials in absentia need to be regulated by a relevant Statute (e.g. Art. 12 IMT Charter), and they need to respect the general principles of International Law recognised by civilised nations.[54] As discussed in Chapter 1, nowadays it is similarly argued that in absentia proceedings need to respect both the procedural rules of an international criminal tribunal and the objectives of International Criminal Justice.

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[45] Knoops (2017, p.25).
[46] See *The Prosecutor v. Strugar*, ICTY, Decision Re the Defence Motion (2004, para.32).
[47] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, p.3).
[48] See Art. 13 IMT Charter.
[49] See Rule 2(b) IMT RP.
[50] See *Trial of the Major War Criminals*, IMT, Order of the Tribunal Regarding Notice to Bormann (1945).
[51] See ibid.
[52] Rule 2(a) IMT RP stated that: 'any individual defendant not in custody shall be informed of the indictment against him […] by notice in such form and manner as the Tribunal may prescribe'.
[53] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (14 November 1945, p.1).
[54] See ibid., p.2.

As for the conviction in absentia, Art. 26 IMT Charter stated that 'the judgment of the Tribunal […] shall be final and not subject to review'.[55] Therefore, there was no review for the sentences of the Tribunal, including those issued in absentia. This choice has been criticised for violating the principle of due process.[56] Indeed, the defendants had no right to appeal or have a retrial, although they could be tried in absentia and sentenced to death. This shows that initially in absentia proceedings lacked pivotal procedural safeguards (e.g. the retrial), and they were a 'draft' version of modern in absentia proceedings. Nonetheless, as will be discussed in Subsections 2.2.2. and 2.2.3., this pioneering, 'unsophisticated' model provided the first guidelines for the legal development of in absentia proceedings at international criminal tribunals.

2.2.2. Towards Modern In Absentia Proceedings: The Ad Hoc Tribunals and the International Criminal Court

After the experience of the IMT, the legal framework of in absentia proceedings further developed with the establishment of the ad hoc tribunals and the ICC. A two-fold approach has characterised this development. On the one side, partial in absentia proceedings have been accepted in the pre-trial and trial phases. On the other side, these international criminal tribunals have ruled out total trial in absentia. Therefore, following the IMT example, in absentia proceedings have been maintained but there has been a regulatory shift from total trial to partial trial in absentia.

The UN Security Council established the ICTY and the ICTR[57] to prosecute the crimes committed in the Former Yugoslavia and Rwanda.[58] The judges drafted the Rules of Procedure of these tribunals,[59] and the legal development of in absentia proceedings has been subject to judiciary choices. Indeed, the judges had direct control over the conduct of these proceedings, adapting them to the needs of the Tribunals.[60] This differs from the IMT approach where States negotiated the provisions, and the judges had no role in their creation. This point will be recalled when looking at the practice of in absentia proceedings (i.e. in Chapter 3) and their future regulation (i.e. in Chapter 6).

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[55] Art. 26 IMT Charter.
[56] See McKeown (2014, p.131).
[57] See UNSC, Res. 827 (1993); UNSC, Res. 955 (1994).
[58] See Art. 1 ICTY St.; Art. 1 ICTR St.
[59] See Art. 15 ICTY St.; Art. 14 ICTR St.
[60] See Sluiter (2010).

At the ad hoc tribunals, in absentia proceedings have been regulated in the pre-trial and trial phases but total trials in absentia have been rejected. The rejection of total trials in absentia at the ICTY (that also affected the ICTR) was first stated in a 1993 Report of the UN Secretary-General.[61] Here, it was argued that these proceedings would have been inconsistent with Art. 14 ICCPR.[62] However, as will be explained in Subsection 2.3.2., this assumption is incorrect, and it is based 'on a mistaken understanding of the International Covenant'.[63] On the contrary, some judges at the ICTY argued in favour of total trials in absentia, considering it in line with an inquisitorial system of criminal justice and a more streamlined process.[64] Nonetheless, total trials in absentia were not allowed at the ad hoc tribunals.[65]

Despite this rigorous approach to total trials in absentia, the phenomenon of absent defendants was a challenging reality at the ICTY and ICTR, especially at the beginning of their work.[66] The Tribunals experienced difficulties in apprehending fugitives and dealing with persons that refused to appear in court because they did not recognise its legitimacy.[67] In these cases, the person's absence undermined the pursuit of justice and the prosecution of crimes. A partial solution was found with the creation of an exceptional proceeding under Rule 61: pre-trial in absentia proceedings for the confirmation of charges.[68]

Rule 61 was necessary to proceed with the initial stages of the case, for the Tribunal 'to fulfil its pedagogical role and to highlight the injustice of accused persons remaining at liberty when they had been accused of appalling crimes'.[69] The provision was used when, after the issue of an arrest warrant, the person was not found or arrested, and national authorities did not cooperate to execute the warrant.[70] Therefore, Rule 61 permitted the Tribunal to bypass this deadlock, guaranteeing the confirmation of the charges without undue delay.[71]

Rule 61 did not mention the concept of in absentia proceedings, and it referred to a '*failure to execute a warrant*'.[72] In particular, the provision considered cases where

[61] See UNSG, Report 25704 (1993).
[62] See ibid., para.101.
[63] Schwartz (1996, p.12).
[64] See Cassese (1997).
[65] See Brown (2008, pp.94-95); Schabas (2006, pp.419-421).
[66] See Brown (2008, pp.69-101); Arbour (2004, p.397).
[67] For instance, see *The Prosecutor v. Milošević*, ICTY, case no. IT-02-54.
[68] See Calvo-Goller (2006, p.42).
[69] Jones and Powles (2003, p.568).
[70] See Friman (2009a, p.494); Brown (2008, pp.96-97).
[71] According to Friman (2009a, p.494): 'this represents an innovative procedural solution and an example of what has been described as "purpose-made rules"'.
[72] Rule 61 ICTY RPE; Rule 61 ICTR RPE (emphasis added).

the personal notification was not possible,[73] and the whereabouts of the suspect was unknown.[74] Therefore, as at the IMT, the focus was on the failure of the Tribunal to arrest the suspect and no reference was made to the behaviour of the person, e.g. he/she was a fugitive. Like Art. 12 IMT Charter, Rule 61 did not provide a 'punishment' for the suspect, and it considered only the actions of the Tribunal. Hence, in absentia proceedings were exceptional proceedings triggered by a deficiency of the Tribunal (i.e. the inability to execute an arrest warrant).[75] Rule 61 also stressed the need for an expeditious proceeding when saying that pre-trial in absentia proceedings could begin if *within a reasonable time* an arrest warrant was not executed.[76] Using the same rationale of the IMT (i.e. to avoid delays), pre-trial in absentia proceedings were used to ensure an expeditious process and an effective use of the sources at the disposal of the Tribunal.[77]

The confirmation of charges in absentia was a proceeding *ex parte*.[78] Indeed, the Prosecutor's case was presented to the judges with no participation of the suspect.[79] As the scholarship underlines, this was a controversial aspect of Rule 61 because it limited the actions of the Defence.[80] Indeed, the Defence could not challenge the inculpatory evidence and the decision on the existence of reasonable grounds to believe the person committed the crimes. Moreover, Rule 61 mentioned some actions available after the confirmation of the charges in absentia. These included the issue of an international arrest warrant and the freeze of the suspect's assets.[81] These elements are important because they indicate the willingness of the Tribunal to prevent that a person escaped justice indefinitely.[82] Indeed, they sought to limit the possibility for the fugitive to stay at large, putting pressure on States to execute an international arrest warrant.[83]

The use of Rule 61 in the jurisprudence of the ICTY has been limited and at the ICTR has never occurred.[84] For this reason, it has been argued that they are now 'little more than a historical curiosity',[85] and they 'have been subsequently replaced by other

[73] See Rule 61(A) ICTY RPE; Rule 61(A) ICTR RPE.
[74] See Rule 61(A)(ii) ICTY RPE; Rule 61(A)(ii) ICTR RPE.
[75] See Trendafilova (2009, p.451, ftn.14); Calvo-Goller (2006, p.42).
[76] Rule 61(A) ICTY RPE; Rule 61(A) ICTR RPE (emphasis added).
[77] See Friman (2009a, p.495); Trendafilova (2009, p.451, ftn.14).
[78] See Calvo-Goller (2006, p.42).
[79] See Stanković (2010).
[80] See ibid., pp.32-36.
[81] See Rule 61(D) ICTY RPE; Rule 61(D) ICTR RPE.
[82] See McDonald (2004, pp.560-562).
[83] See Friman (2010, pp.350-351; 2009b, p.495); Stanković (2010, p.3).
[84] See Friman (2010, p.343).
[85] Schabas (2006, p.383).

strategies like non-public, "sealed" indictments'.[86] This replacement was due in part to concerns of creating an unbalance between the Defence and the Prosecutor and for fear of allowing total trials in absentia at the ad hoc tribunals.[87] In this sense, Rule 61 was problematic because: (a) it permitted to conduct a crucial part of the proceeding in the suspect's absence; and (b) its nature was similar to the prohibited total trials in absentia, and for this reason it was called 'quasi-in absentia proceeding' (as will be discussed in Chapter 3).[88] It is argued that Rule 61 violated the principle of equality of arms and undermined the Defence's action and strategy.[89] Indeed, 'only one side of the story is presented in court, and this partial record constitutes the basis for the Trial Chamber determination'.[90] Additional concerns have been expressed about the fact that, although Rule 61 did not ascertain the guilt of the person, 'the determination includes findings both on questions of law and of fact, which, in practice, may have legal significance in subsequent proceedings'.[91]

Besides the cases regulated by Rule 61, at the ad hoc tribunals in absentia proceedings occurred due to: (a) disruptive behaviour;[92] (b) health conditions; or (c) waiver of the right to be present.[93] For instance, at the ICTY, the defendant was removed from the courtroom because disruptive in *Mrkšić et al*.,[94] *Nikolić*,[95] *Martić*,[96] *Rajić*,[97] *Mladić*,[98] and *Karadzić*.[99] In these cases, the removal of a disruptive defendant was justified for the need to guarantee a good administration of justice 'or to maintain the dignity and decorum of the proceedings'.[100] The decision of the Tribunal was taken after warning the disruptive defendant, therefore giving him/her the possibility to stop the undue behaviour before being removed from the courtroom.[101] In this sense, Elberling argues that the provision 'sets rather high prerequisites for removal'.[102] As discussed in the literature, this procedure was effective in finding a balance between the

[86] Friman (2009a, p.495).
[87] Ibid.
[88] See Stanković (2010).
[89] See ibid., pp.32-36.
[90] Friman (2009a, p.495).
[91] Ibid.
[92] See Rule 80 ICTY RPE.
[93] See Elberling (2012, pp.49ff.); Brown (2008, pp.94-95). On the jurisprudence concerning a disruptive defendant, see Acquaviva, Combs, Heikkila, Linton, McDermott and Vasiliev (2013, pp.752-757); Tochilovsky (2008, pp.257-259); Scharf (2007).
[94] *The Prosecutor v. Mrkšić, Radić and Šljivančanin*, ICTY, case no. IT-95-13/1.
[95] *The Prosecutor v. Nikolić*, ICTY, case no. IT-94-2.
[96] *The Prosecutor v. Martić*, ICTY, case no. IT-95-11.
[97] *The Prosecutor v. Rajić*, ICTY, case no. IT-95-12.
[98] *The Prosecutor v. Mladić*, case no. IT-09-92.
[99] *The Prosecutor v. Karadžić*, ICTY, case no. IT-95-5/18.
[100] Rule 80(A) ICTY RPE.
[101] See Rule 80(B) ICTY RPE.
[102] Elberling (2012, p.49).

right of the defendant to behave freely and the need to protect the proceeding and permit an orderly conduct of the process.[103] In this sense, it is argued that 'the duty of a war crimes tribunal to ensure that a trial is fair has been interpreted as including concerns that go beyond just those of the accused'.[104] An additional interesting aspect of this procedure was also the fact that, as a scholar underlines, 'in order to proceed around the right to be present, courts typically consider defendants to have waived the right'.[105] Therefore, there was a presumption as to the waiver of the right to be present and the qualification (as discussed in Chapter 1 when classifying the absences)[106] of the disruptive behaviour as a form of voluntary absence alongside the waiver of the right and absconding.

At the ICTR, the leading case has been *Zigiranyirazo*.[107] In particular, at the ICTR there was a change in the RPE, and the Tribunal allowed partial in absentia proceedings when the defendant: (a) refused to be present at trial; and (b) disrupted the proceeding.[108] Here, the peculiar approach to partial in absentia proceedings was the fact that the decision of the ICTR 'seems to indicate that proceedings might even be held in the absence of a defendant who is not only willing, but who would, were it not for obstacles imposed by the Chamber, be able to appear'.[109] Therefore, in this situation the Tribunal 'stretched' the rules on in absentia proceedings to allow a partial in absentia that before other courts would have not been permitted.

In some cases, ill defendants have been granted the possibility not to be present and obtain a suspension of the proceeding.[110] As the scholarship highlights, in these cases, the ad hoc tribunals had problems in finding appropriate solutions that guaranteed the principle of fair trial and the right to be present in the proceeding.[111] Here, the courts have applied a 'proportionality' test that is 'the same as that used to determine whether to impose counsel on a self-represented accused despite the latter's lack of consent'.[112] The elements of the test are that 'the disruption caused to the trial must be substantial'[113] and 'the accused's absence must be limited to the minimum extent

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[103] See Acquaviva, Combs, Heikkila, Linton, McDermott and Vasiliev (2013, p.766); Scharf (2007, pp.156-157).
[104] Ibid., p.157.
[105] Jalloh (2013, p.160).
[106] See Chapter 1, Subsection 1.2.3.
[107] *Zigiranyirazo v. The Prosecutor*, ICTR, case no. ICTR-01-73.
[108] See Robinson (2010, pp.645-646).
[109] Elberling (2012, p.49).
[110] See Knoops (2014, pp.163-165); Khan and Dixon (2005, p.350).
[111] See Boas, Bischoff and Reid (2011, p.274).
[112] Ibid.
[113] Ibid.

necessary'.[114] Moreover, it is argued that the presumption of the waiver of the right to be present discussed earlier in relation to disruptive defendants might emerge also for ill accused.[115] Indeed, it 'permits a non-disruptive defendant to take a sick day or to be absent from court for good reasons such as ill health while giving his principled indication that the trial may proceed'.[116]

Finally, cases of partial in absentia proceedings occurred at the ad hoc tribunals when the defendants refused to participate in the process because they argued they could not obtain a fair trial.[117] This happened in *Barayagwiza*,[118] where the ICTR decided to proceed in the defendant's absence due to his/her refusal to appear at trial, considering this as a waiver of the right to be present.[119] This choice is interesting (although arguable) because it shows how sometimes the ad hoc tribunals have compared different situations (i.e. refusal to appear and waiver of the right to be present) for a practical necessity (i.e. to avoid delays). As discussed above, the same has happened with disruptive behaviours and ill accused. This choice is in line with the need of a tribunal to continue the proceeding despite the defendant's waiver of the right to be present for whatever reason this might be triggered. Indeed, even when the accused does not recognise the legitimacy of the tribunal at stake (or, better, especially when this happens), the judges need to preserve the entire process and guarantee that the prosecution of crimes continues.[120] Otherwise, any defendant (particularly political authorities and high-profile ones) might have an easy way out from the proceeding by contesting the legitimacy of the institution and the whole procedural framework.[121]

Turning to the ICC, this Court was established by an international agreement[122] as a permanent court for the prosecution of 'the most serious crimes of international concern'.[123] The Assembly of State Parties (ASP) creates and amends its provisions, and the judges are not involved in the law-making process.[124] In this regard, the scholarship refers to a 'rejection of the "judge-legislator"',[125] and this fact has played an

[114] Ibid.
[115] See Jalloh (2013, p.160).
[116] Ibid.
[117] As it happened in the Milošević case. For a discussion, see Ashby Wilson (2011, pp.112ff.).
[118] See *The Prosecutor v. Barayagwiza*, ICTR, case no. ICTR-97-19.
[119] See ibid., Decision on Defence Counsel Motion (2000, paras.5-7).
[120] See Cryer, Friman, Robinson and Wilmshurst (2010, pp.133ff.).
[121] On the attempts of defendants to challenge the legitimacy of international tribunals, see Dieckmann and O'Leary (2017, pp.251-252).
[122] See ICC St.
[123] Art. 1 ICC St.
[124] See Arts. 51, 121, and 123 ICC St.
[125] Guariglia (2002, p.1115).

important role in the regulatory development of in absentia proceedings (as will be explained in Subsection 2.3.1.).

Since its creation, the ICC has permitted partial in absentia proceedings but not total trials in absentia. The reasons for this choice are similar to those at the ICTY and ICTR, and in this sense, the scholarship argues that although not explicitly prohibited, total trials in absentia are not permitted.[126] However, as will be explained in Chapter 3, in 2013 the ASP amended the Rules of Procedure, allowing partial trials in absentia.[127] Therefore, at present, the ICC allows partial pre-trial in absentia proceedings and partial trials in absentia. The provisions of reference are: (a) Art. 61(2) St. combined with Rules 124, 125, and 126 RPE; and (b) Art. 63 St. combined with Rules 134bis, ter, and quater RPE.

In the pre-trial phase, the person must be present before the judges, including for the confirmation of charges.[128] However, Art. 61(2) St. allows hearings in absentia when certain conditions are met, and the specific circumstances of the case so require.[129] Rules 124, 125, and 126 RPE specify the details of this procedure. The Court has used Art. 61(2) St. when the suspect was not present for various reasons. For instance, this provision has been invoked in *Katanga*[130] (in the Court's custody but waived the right to be present), *Gaddafi*[131] (arrested by national authorities but not transferred to the Court) and *Abdallah Banda*[132] (appeared once but then absconded).

This provision includes a series of interesting elements. First of all, the hearing can be held in absentia when the person 'has waived his or her right to be present' or 'has fled' or 'cannot be found'.[133] This means that the Court allows pre-trial in absentia proceeding due to a voluntary absence (i.e. waiver of the right to be present; absconding) or the impossibility for the proceeding authorities to find him/her. This is a similar approach to Art. 12 IMT Charter and Rule 61 RPE ICTY and ICTR.[134] However, differently from the IMT and the ad hoc tribunals, reference is made to both sides, i.e. the suspect's behaviour and the failure of the tribunal to arrest him/her. Hence, the actions of both subjects can trigger in absentia proceedings.

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[126] See Safferling (2009a, p.543); Brown (2008, pp.94-95); Schabas (2006, p.419).
[127] See Rules 134bis, ter, and quater ICC RPE adopted by ICC, ASP Resolution 7 (2013). See Chapter 3, Subsection 3.3.1.
[128] See Art. 61(1) ICC St.
[129] See Schabas (2010, pp.736-738).
[130] See *The Prosecutor v. Katanga*, ICC, case no. ICC-01/04-01/07.
[131] See *The Prosecutor v. Gaddafi et al.*, ICC, case no. ICC-01/11-01/11.
[132] See *The Prosecutor v. Abdallah Banda and Jerbo*, ICC, case no. ICC-02/05-03/09.
[133] See Art. 61(2) ICC St.; Rules 124, 125, and 126 ICC RPE.
[134] See Terrier (2002, p.1283).

Second, there is a procedural safeguard to limit the use of pre-trial in absentia proceedings and to ensure that the person is adequately informed of the process. Indeed, the Court has to take 'all reasonable steps' to guarantee his/her appearance before the judges and his/her awareness of the charges and the hearing to confirm those charges.[135] However, Art. 61(2) St. does not say what constitutes 'all reasonable steps', and the judges have the discretion to decide it.[136] This discretionary power is a controversial aspect of pre-trial in absentia proceedings, and it has also been recalled at the STL (as will be discussed in Chapter 3).[137]

Third, when the Tribunal decides to hold the confirmation of charges in absentia, it can also appoint a counsel to represent the suspect in the hearing.[138] However, this decision is discretionary, and the situation needs to satisfy the 'interests of justice'.[139] This part of Art. 61(2) St. raises concerns for its compatibility with the person's right to have an adequate Defence in the pre-trial phase. Indeed, the presence of the defence counsel in a pivotal phase of the proceeding (i.e. the charges are confirmed, and the proceeding is set to continue to the trial phase) is not guaranteed.

Art. 63 ICC St. has been identified as the key provision for the discussion on the prohibition of total trials in absentia at the ICC.[140] This provision is debated because some consider it an obstacle to allowing total trials in absentia at the ICC;[141] whereas others do not rule out this possibility for the future.[142] Art. 63 St. refers to the trial phase of the proceeding, and it sets out the rules for a 'trial in the presence of the accused'.[143] Although the provision refers to a trial in the accused's presence, this does not exclude in absentia proceedings. Indeed, Art. 63 St. does not state that 'all trials at the ICC must be conducted in the presence of the accused' or 'the ICC does not allow trials in absentia'. On the contrary, Art. 63 St. just refers to one type of trial (i.e. where the defendant is present), leaving open the possibility to have additional trials conducted in the defendant's absence. A similar interpretation has been given also in the literature, when underlying that the ICC Statute leaves open the door for exceptional situations in which the defendant's absence is allowed.[144] For instance, this is the case of a disruptive

[135] See Art. 61(2)(b) ICC St.
[136] See Stahn (2009, p.266).
[137] See Chapter 3, Subsection 3.2.2.
[138] See Art. 61(2) ICC St.
[139] Ibid.
[140] See Ambos (2016, pp.162ff.); Zakerhossein and de Brouwer (2015, p.192); Schabas (2010, pp.750-759).
[141] See Zakerhossein and de Brouwer (2015, p.192).
[142] See Shaw (2012); Brown (1999).
[143] See the heading of Art. 63 ICC St.
[144] See Ambos (2016, p.164).

accused and 'one may accept as a further exception the situation where an accused cannot be present for a prolonged period of time due to health reasons'.[145]

Art. 63(1) St. states 'the accused *shall* be present during the trial'.[146] As the scholarship underlines, 'the issue appears to hinge on how to interpret the clause':[147] (a) whether the Statute creates an obligation or it makes a strong 'suggestion' in this sense;[148] and (b) whether the indication is for the defendant or the criminal justice system.[149] The creation of an obligation seems to be confirmed in Art. 37 of the draft Statute created by the International Law Commission, where saying that 'as a *general rule*, the accused *should* be present during the trial'.[150] The cases of trials in absentia included in Art. 37[151] are exceptions to this general obligation. However, in the literature there is no consensus as to the existence of a 'duty'.[152] Indeed, it is argued that presence at trial might be a right under the ICC Statute because this 'seems to be confirmed by the fact that the right to be present is also mentioned in the central rights provisions of the Statute and thus seems to constitute just another fair trial right'.[153]

Looking at the subject of the obligation, there is a lack of clarity. The Statute does not specify if it is the defendant who is obliged to be present at trial, or if it is the Court that needs to guarantee his/her presence. This distinction gets to the core of the debate on the nature of the right to be present at trial (as discussed in Chapter 1, Subsection 1.3.2.) and the identification of trials in absentia as a 'punishment' for the defendant. If the obligation is intended for the defendant, presence at trial is not a right, and the conduct of trials in absentia might be seen as 'punitive' tool for absent defendants. Instead, if the obligation is for the Tribunal, the burden is on the court, and the conduct of trials in absentia is in line with the approach taken at the IMT, i.e. a Court's failure would trigger trials in absentia.

Art. 63(2) St. allows for an exception to the presence of the defendant at trial when disruptive, and the Court decides to remove him/her from the courtroom.[154] As the scholarship points out, this choice is similar to that of the IMT and the ad hoc

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[145] Ibid.
[146] Art. 63(1) ICC St. (emphasis added).
[147] Gaeta (2014, p.232). In the same sense, see Ambos (2016, p.164).
[148] See Ambos (2016, pp.164-165).
[149] See Gaeta (2014, p.232).
[150] Art. 37(1) ILC Draft Statute (emphasis added).
[151] See Art. 37(2) ILC Draft Statute.
[152] For a discussion, see Wheeler (2019, pp.22-23); Ambos (2016, p.164); Schabas (2011a, pp.285ff.).
[153] Ambos (2016, p.164).
[154] According to Art. 63(2) ICC St., 'if the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused'.

tribunals.[155] Once removed, the defendant can attend the trial and instruct the defence counsel using technology.[156] Therefore, the Court can derogate the presence at trial, but only 'in exceptional circumstances'[157] and 'for such duration as is strictly required'.[158] As it happened with the ad hoc tribunals, the rationale is to rely upon a measure of 'last resort' to maintain the good administration of justice and avoid any undue delays in the prosecution of international crimes.[159] However, the removal should be accompanied by some safeguards: this can be done 'so long as it [the ICC] provides alternative ways for him [the defendant] to observe the trial and to instruct counsel from outside the courtroom'.[160]

Finally, Rules 134bis, ter, and quater ICC RPE are linked to Art. 63 St. These will be further analysed in Chapter 3, but here it is worth underlining that, for the first time, they regulate partial trials in absentia at the ICC.[161] These trials are possible only when the defendant has a certain qualification and public duties to perform (e.g. as head of State or high-ranking official).[162] In this sense, Rules 134bis, ter, and quater are considered 'unsatisfactory',[163] because they seem to contradict the prohibition enshrined in Art. 63 St. and they create a controversial distinction among defendants based on their functions and qualification.[164] In particular, the contradiction would emerge from the parallel reading of Art. 63 ICC St. and these rules, and also by analysing the *travaux préparatoires* of the Rome Statute.[165]

These rules have been invoked in *Kenyatta*[166] and *Ruto*[167] where the Court decided to excuse the defendants from being present at trial due to their duties as President and Vice-President of Kenya respectively. According to a part of the scholarship, the new Rules 134bis, ter, and quater allow the ICC to be more flexible, and the judges had the possibility to express their 'judicial creativity'[168] and propose an 'acrobatic'[169] interpretation of the RPE and the Statute, by allowing exceptional cases in

[155] See Acquaviva, Combs, Heikkila, Linton, McDermott and Vasiliev (2013, pp.756-757).
[156] See Art. 63(2) ICC St.
[157] Ibid.
[158] Ibid.
[159] See Jalloh (2013, p.160).
[160] Ibid.
[161] See Chapter 3, Subsection 3.3.1.
[162] For an analysis, see Göhler (2016).
[163] Ibid., p.506.
[164] See Bitti (2015, p.417).
[165] See ibid., p.418.
[166] See *The Prosecutor v. Kenyatta*, ICC, Decision on Defence Request for Conditional Excusal (2013).
[167] See *The Prosecutor v. Ruto*, ICC, Decision on Mr Ruto's Request for Excusal (2013).
[168] Göhler (2016, p.489).
[169] Ibid., p.490.

which a defendant can be absent despite the general limitation on trials in absentia that exists at the ICC.[170]

In conclusion, from the above analysis three points emerge. First, the ad hoc tribunals and the ICC have used in absentia proceedings in the pre-trial and trial phases. This means that they have no experience of post-trial in absentia proceedings and there is a regulatory gap (Chapter 3 will further analyse this point).[171] Second, there is a growing judiciary discretion for the regulation of in absentia proceedings. Although not all judges are involved in the law-making process, they can still influence the change of rules of a tribunal (e.g. the ICC) based on the exigencies of the case at stake. This element suggests a need for flexibility when dealing with in absentia proceedings and the fact that these controversial proceedings require a set of rules that can answer the needs of the judicial practice properly. This point will be recalled in Chapter 6 when discussing the future of in absentia proceedings.

Finally, there is an 'expansion' of the use of in absentia proceedings by international criminal tribunals. Since the IMT (where only total trials in absentia were permitted), additional types of in absentia proceedings have been allowed in different phases of the process. This progressive 'opening' of the regulatory framework towards in absentia proceedings has permitted international criminal tribunals to overcome the challenges posed by the defendant's absence. However, as in the case of Rules 134bis, ter, and quater ICC RPE, it has also created an internal conflict with the existing provisions of the tribunals. This issue will be further analysed in Chapter 6 when discussing the policy recommendations for future in absentia proceedings.[172]

2.2.3. Recent Developments: The Experience of the Special Tribunal for Lebanon

A fundamental development of the regulation of in absentia proceedings has occurred at the Special Tribunal for Lebanon (STL). The STL was established in 2007[173] to prosecute the crimes committed in Lebanon linked to the murder of the former Prime Minister Rafiq Hariri.[174] Five individuals have been indicted for these crimes,[175] but

[170] See ibid., pp.489ff.
[171] See Chapter 3, Section 3.4.
[172] See Chapter 6, Section 6.3.
[173] See UNSC, Res. 1757 (2007).
[174] See ibid., Art. 1(1).
[175] The accused are involved in the *Ayyash et al.* case and in the *Merhi* case. The two cases have been merged in 2014 following a decision of the Trial Chamber of the STL on 11 February 2014. See *The Prosecutor v. Ayyash et al.*, STL, Decision on Trial Management (2014).

they are all fugitives, and the Tribunal has decided to try them in absentia.[176] The STL is a court of 'international character',[177] and its legal framework is the result of negotiations between the UN and the Lebanese authorities, influenced by various factors (as will be discussed in Section 2.3.).

The STL is the first tribunal in International Criminal Justice that allows in absentia proceedings for all the phases of the process. This is an innovative development for two reasons. First, drawing upon the experience of the IMT, it extends the conduct of in absentia proceedings beyond the trial phase. It is argued that the STL is a *unicum* because it allows total trials in absentia,[178] but this has already happened at the IMT; the difference is that the STL permits total in absentia proceedings also in the pre-trial and post-trial phases. Second, the STL reflects the regulation of the ad hoc tribunals and the ICC with regards to pre-trial in absentia proceedings. However, it broadens the use of in absentia also to the trial and post-trial phases. Once again, the STL builds on the experience of previous tribunals adopting a similar regulatory approach, and then it moves forward expanding the regulation of in absentia proceedings.

The leading provision is Art. 22 STL St.[179] This provision regulates trials in absentia with a focus on three types of total trials in absentia, i.e. due to a waiver of the right to be present; State's intervention; absconding.[180] These cases should be distinguished from those where the defendant has appeared in court but does not want to participate anymore or has been removed for being disruptive.[181] In so doing, the Statute limits trials in absentia to some types of absence (as it occurred with Art. 12 IMT Charter). Hence, trials in absentia are not always allowed, but they require a precise factual background to justify their use. This fact supports the idea that these exceptional proceedings do not have a universal application to all cases of defendant's absence.

The judges have discretion over the use of trials in absentia. In this regard, Art. 22 St. states that 'the Special Tribunal *shall* conduct trial proceedings in the absence of the accused'.[182] The term 'shall' expresses firm determination to do something, but it does not mean that there is an obligation to conduct trials in absentia. Like at the IMT, the judges evaluate the circumstances of the case and then decide whether to hold a trial

[176] See *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia (2012); *The Prosecutor v. Merhi*, STL, Decision to Hold Trial In Absentia (2013).
[177] See Tabbarah (2014, pp.32-49); Schabas (2008).
[178] See Jacobs (2014, p.113).
[179] For an analysis, see Gaeta (2014).
[180] See Art. 22(1)(a), (b) and (c) STL St.
[181] See Jacobs (2014, p.114).
[182] Art. 22(1) STL St. (emphasis added).

in absentia. This case-by-case approach is also significant to limit an illegitimate use of trials in absentia.

Trials in absentia are not a 'punishment' of the absent defendant, and the Statute does not put any blame on him/her for the absence. The three situations listed in Art. 22 St. that trigger the use of trials in absentia[183] are remarkably similar to those recalled by previous tribunals for both pre-trial and trial in absentia proceedings.[184] For instance, the waiver of the right to be present and the incapacity of the Tribunal to arrest the suspect. The fact that the absences are due to both the person's decision and the actions of the Tribunal supports the idea of a 'shared' responsibility in this sense. In other words, trials in absentia are not ascribed to the suspect's behaviour, but they depend on various circumstances, including the Tribunal's failure to guarantee his/her presence at trial.

The procedural limitations to trials in absentia also extend to the procedural safeguards that are enshrined in Art. 22 St.[185] For instance, these include the need for the suspect to be properly notified and to be represented by a defence counsel. The most interesting and innovative safeguard is the right to retrial.[186] As will be discussed in Subsection 2.3.2., the retrial is part of IHRL standards, and it is a fundamental aspect of the legal development of in absentia proceedings at the STL. However, its formulation is problematic. Indeed, Art. 22 St. does not provide much detail on it, and it only specifies the cases in which this right can be invoked. As will be discussed in Chapter 3, there are crucial aspects of the retrial that are missing (e.g. the details of its procedure and the indication of the tribunal competent to conduct it), and this leaves a critical gap in the regulation of trials in absentia at the STL.[187]

The regulation of in absentia proceedings at the STL is also enshrined in other relevant provisions, i.e. Rules 104-109 STL RPE. These rules make essential distinctions among various suspect's absences: only some of them trigger a trial in absentia. For instance, Rule 104 explicitly states that 'proceedings shall not be in absentia if an accused appears before the Tribunal in person, by video-conference, or by counsel appointed or accepted by him'.[188] Moreover, Rules 105bis and 106 (recalling Art. 22 St.) specify the cases in which the Tribunal shall conduct proceedings in absentia.

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[183] See Art. 22(1) STL St.
[184] See Art. 12 IMT Charter; Rule 61 ICTY RPE; Rule 61 ICTR RPE.
[185] See Art. 22(2) STL St.
[186] See Art. 22(3) STL St. For an analysis, se Gaeta (2014, pp.242-249).
[187] See Chapter 3, Subsection 3.4.3.
[188] Rule 104 STL RPE.

According to the former President of the STL Antonio Cassese, the absences described by Rules 104 and 105 RPE are not cases of 'in absentia' because 'the accused is not considered "absent" from the proceedings in a legal sense, but only physically not present before the Tribunal. As such he cannot subsequently enjoy a right to retrial that in absentia proceedings would allow'.[189] This is an interesting interpretation because it recalls the discussion seen in Chapter 1 on the meaning of 'in absentia' and the right to be present in the proceeding,[190] identifying in absentia as a 'procedural absence' that is not connected with the defendant's physical absence. Hence, in absentia proceedings transcend a mere physical requirement, and the focus is on the lack of participation in the proceeding broadly understood (i.e. unawareness and no legal representation). Moreover, because the retrial is allowed only for some types of in absentia proceedings, this remedy is case-limited and has no general application. This is an important aspect in the study of the practice (i.e. in Chapter 3) and future regulation (i.e. in Chapter 6) of in absentia proceedings.

Rule 107 RPE makes clear that the rules used in the three phases of ordinary proceedings (i.e. pre-trial, trial, and appeal) 'shall apply mutatis mutandis to proceedings in absentia'.[191] This choice would guarantee harmonised standards between ordinary and exceptional proceedings (e.g. trials in absentia). However, a legal practitioner interviewed for this thesis contests this decision by saying that the law applicable cannot be the same because of a substantial difference, i.e. the defendant's absence.[192] Moreover, Rules 108 and 109 regulate partial in absentia proceedings where, after an initial absence, the defendant shows up during (before the decision of the Trial Chamber) or after (before the decision of the Appeals Chamber or after it) the proceeding in absentia. These rules provide some indications on the retrial, but they do not specify how this will be carried out, e.g. what court will conduct it.

A final consideration regards two other provisions that are relevant for the conduct of in absentia proceedings. According to Rule 76 RPE, the STL can notify the indictment personally or publicly. The personal notification is done 'by giving the accused a copy of the indictment, together with the summons to appear or the warrant of arrest'.[193] The public notification occurs when alternative methods are used, 'including procedures of public advertisement',[194] such as the use of newspapers or the radio.[195]

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[189] STL, Explanatory Memorandum (2009, para.39).
[190] See Chapter 1, Subsections 1.2.2. and 1.3.2.
[191] Rule 107 STL RPE.
[192] E.g. Interview 05.
[193] Rule 76(B) STL RPE.
[194] Rule 76(E) STL RPE.

This is in line with the approach of previous tribunals, e.g. public notifications through media at the IMT.

Art. 5 St. concerns the principle of *ne bis in idem*, and it refers only to cases decided by the STL that cannot be tried before national courts. Nothing is said about the possible retrial before the STL. Moreover, this provision 'only applies to final decisions. Consequently, a judgment rendered in absentia does not fall under that category',[196] and 'an accused has no guarantee that he will not be retried were he to be acquitted at the end of in absentia proceedings'.[197] Thus, the provision unduly differentiates among the defendants and undermines the use of in absentia proceedings. Indeed, if the *ne bis in idem* principle is not applicable to these proceedings, then they might be questioned for their legitimacy within International Criminal Justice. This point will be further discussed in Chapter 3 when analysing the appeal in absentia and retrial.[198]

The leading case at the STL on in absentia proceedings is *Ayyash et al*.[199] (this case will also be analysed in Chapter 3).[200] The decision to conduct trials in absentia has been highly contested by the parties.[201] This fact demonstrates the controversy surrounding the conduct of in absentia proceedings at the STL. Moreover, it indicates an increased level of discussion of the conduct of in absentia proceedings that is considerably different from the experience of the IMT. Indeed, at the IMT the trial in absentia against Bormann was relatively straightforward, and Art. 12 IMT Charter was applied with few objections from the Defence. Instead, at the STL the decision has been difficult and characterised by several procedural challenges.

In deciding to hold a trial in absentia, the judges have primarily focused on a particular aspect: the application of Rule 106(A)(iii).[202] In so doing (and under Defence's pressure), they have shed light on the 'all reasonable steps' test required to conduct a trial in absentia. After careful examination of the provision's meaning and use concerning 'appearance at trial' and 'being informed of the charges', the judges

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[195] See Rule 76bis STL RPE.
[196] *The Prosecutor v. Ayyash et al*., STL, Request Defence Badreddine for Reconsideration (2012, para.64).
[197] *The Prosecutor v. Ayyash et al*., STL, Public Redacted Version Appeal Badreddine Defence (2012, para.38).
[198] See Chapter 3, Subsections 3.4.1. and 3.4.3.
[199] See *The Prosecutor v. Ayyash et al*., STL, case no. STL-11-01.
[200] See Chapter 3, Subsection 3.3.1.
[201] See *The Prosecutor v. Ayyash et al*., STL, Appeal Oneissi Defence (2012); *The Prosecutor v. Ayyash et al*., STL, Public Redacted Version Appeal Badreddine Defence (2012); *The Prosecutor v. Ayyash et al*., STL, Request Defence Badreddine for Reconsideration (2012); *The Prosecutor v. Ayyash et al*., STL, Request Oneissi Defence for Reconsideration (2012); *The Prosecutor v. Ayyash et al*., STL, Sabra's Appeal (2012); *The Prosecutor v. Ayyash et al*., STL, Sabra Motion for Reconsideration (2012).
[202] See *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia (2012).

concluded that the test was met, and the defendants could be tried in absentia.[203] This aspect will be recalled when analysing the conditions for conducting trials in absentia (i.e. in Chapter 3) and when discussing the recommendations for their future regulation (i.e. in Chapter 6).

In conclusion, the STL has adopted some procedural solutions developed by previous tribunals (e.g. public notifications; total trials in absentia). This evokes a sense of continuity of the regulation of in absentia proceedings by different international criminal tribunals. It also confirms the existence of a procedural pattern in the regulatory development of these proceedings. These findings are particularly significant for the analysis of the practice and impact of in absentia proceedings (i.e. in Chapters 3 and 4) and their future regulation (i.e. in Chapter 6).

Moreover, despite their exceptional nature, at the STL trials in absentia have become 'standard' proceedings because all defendants are absent. This is problematic because (as will be discussed in Chapter 3)[204] the Tribunal seems to treat in absentia proceedings like ordinary proceedings, with few procedural differences. However, this underestimates the substantial differences that exist between the two cases. This finding will be considered in Chapter 6 when discussing the future of in absentia proceedings in International Criminal Justice.

Finally, the provisions of the STL are innovative because they allow total trials in absentia. However, there are many aspects of these proceedings that are unregulated and left to judiciary interpretation with a case-by-case approach. For instance, the issue of the application of the 'all reasonable steps' test under Rule 106 RPE. This aspect will be further scrutinised in Chapter 3 when analysing the practice of in absentia proceedings and the gaps of their legal framework.

2.3. Relevant Factors in the Regulation of In Absentia Proceedings

This Section focuses on the driving factors of the legal development of in absentia proceedings in International Criminal Justice. The author proposes a study of these factors dividing them into two categories: (i) courts, crimes, and defendants; and (ii) pragmatism and politics.

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[203] The Appeals Chamber later upheld this decision. See *The Prosecutor v. Ayyash et al*., STL, Decision on Defence Appeals (2012).
[204] See Chapter 3, Subsection 3.3.1.

2.3.1. Courts, Crimes, and Defendants

The first group of driving factors in the legal development of in absentia proceedings includes: (a) the features of the international criminal tribunals involved; (b) the types of crimes prosecuted; and (c) the types of defendants tried in in absentia proceedings. These three factors have influenced the regulation of in absentia proceedings differently, but they have all informed the work of the five international criminal tribunals considered in this thesis.

The nature of the court involved and its legal culture have played a crucial role. In certain cases, the nature of international criminal tribunals has determined their inclination towards a more or less extensive use of in absentia proceedings. For instance, at the IMT total trials in absentia were allowed by a Tribunal that had a military and temporary nature.[205] For this reason, 'the trials were to be confined to expeditious hearing of the issues raised by the charges, to prevent unreasonable delay, to rule out irrelevant issues and statements, and to deal summarily with any contumacy by the accused or their counsels'.[206] Thus, trials in absentia were part of a judicial strategy aimed at expeditiousness, fairness, and effectiveness of the trial.[207] On the contrary, total trials in absentia have been rejected at the ICC, a permanent court with no time constraints, a broader mandate, and more financial resources than other international criminal tribunals. Therefore, it can suspend a proceeding for a long period if a defendant is absent to avoid the use of in absentia proceedings.

Another key element is the legal culture underpinning international criminal tribunals.[208] As seen in Chapter 1, the debate on in absentia proceedings often involves a discussion of the adversarial or inquisitorial nature of the criminal justice system of reference.[209] Similar considerations are made when establishing a new international criminal tribunal.[210] In this sense, it is argued that 'a lot of those questions are linked to the procedural system you choose',[211] and the situations can vary 'just because of the procedural system you choose'.[212]

In the case of the STL, the legal culture has been a central factor for the regulation of in absentia proceedings. It is said that many of the criticisms mounted

[205] On the nature of the IMT and its derived procedural features, see Cryer (2009).
[206] Calvo-Goller (2006, pp.10-11).
[207] See ibid.
[208] See Campbell (2013); Schuon (2010); Ambos (2007).
[209] See Chapter 1, Subsection 1.3.2.
[210] See van Sliedregt and Vasiliev (2014a, p.30).
[211] Interview 13. On this point, see also Campbell (2013); Almqvist (2006).
[212] Interview 13. See also Almqvist (2006).

against trials in absentia at the STL are due to the fact that people 'do not understand the mentality because it is a very difficult one, and it is a very different legal culture'.[213] The legal framework of the Tribunal was created with the aim to include elements of two systems of criminal justice, i.e. civil law and common law.[214] In this sense, there was a need to find a 'balance' between the two, and 'that balance would be determined by such important characteristics as the tribunal's founding instrument, jurisdiction, applicable law, location, composition and financial arrangements'. [215] The UN Secretary-General said that 'the Special Tribunal for Lebanon is the first United Nations-assisted tribunal to combine substantial elements of both legal systems',[216] and in this regard trials in absentia are among 'the most notable manifestations of civil law elements'.[217]

Whether this mixing has worked is debatable. [218] In his Explanatory Memorandum on the STL RPE, President Cassese wrote that the two models were not 'irreconcilable',[219] and with emphatic language he added that this had been a 'healthy development' for International Criminal Justice.[220] Others are less enthusiastic, arguing that trials in absentia at the STL are based on a 'normative bias'[221] and a particular way of considering 'justice' and its achievement in international criminal proceedings.[222] Moreover, concerns have been expressed for the use of a concept of civil law (i.e. trials in absentia) 'out of context'[223] and 'without the parameters that make sure that it works properly'.[224] This has generated a 'hybrid monster'[225] because 'the notion of a trial in absentia in a largely adversarial system does not work'.[226]

It is noteworthy that in absentia proceedings are already present in the Lebanese criminal justice system, and they are part of the Lebanese legal tradition.[227] In this regard, in the analysis of the Rules of Procedure and the decisions of the STL or other international criminal tribunals, attention must be given to the national legal background

[213] Interview 05. On the clash of legal cultures in International Criminal Justice, see Schuon (2010).
[214] See UNSG, Report 893 (2006, para.8).
[215] UNSG, Report 176 (2006, para.5) (emphasis added).
[216] UNSG, Report 893 (2006, para.9). See also ibid., para.32.
[217] Ibid.
[218] See Schabas (2008); Fassbender (2007). Accord Interview 16.
[219] STL, Explanatory Memorandum (2009, para.3).
[220] Ibid.
[221] Jacobs (2014, p.114).
[222] See ibid., pp.114-115.
[223] See Skilbeck (2010, pp.459-461). Accord Interview 14.
[224] Interview 14.
[225] Ibid. See also Skilbeck (2010).
[226] Interview 15.
[227] See Riachy (2010). Accord Interview 05.

of these courts and the legal and social context in which they operate.[228] In this sense, 'domestic procedural standards are of course much more likely to be significant before even partially hybrid tribunals',[229] and in the case of the STL they are 'much more indebted to the Romano-Germanic tradition, and therefore more likely to be interpreted by drawing on that tradition'.[230] For historical reasons, trials in absentia are part of the Lebanese criminal justice system, resembling the principles and proceedings of French criminal law.[231] The existence of this legal tradition has been a significant reason for the 'import' of trials in absentia.[232] It is said that 'the possibility of trials in absentia would likely not have been envisaged if it had not been part of the Lebanese legal culture'.[233]

Another factor that can influence the regulation of in absentia proceedings is the type of crimes that the tribunal prosecutes.[234] So far, in absentia proceedings have been used for prosecuting different crimes, from war crimes and crimes against humanity to terrorism. Therefore, the scope of these proceedings has been broad, and they have adapted to various criminal contexts. However, a universal conduct of in absentia proceedings is debated.[235] Similarly to the debate ongoing among scholars,[236] some legal practitioners interviewed for this thesis discuss whether heinous crimes like genocide, war crimes or crimes against humanity should be the subject of in absentia proceedings. Indeed, 'these are crimes where he [the defendant] should be present. If the charges have been confirmed against that person, whether he wants to be present or not, he is toughly locked'.[237] Another thinks that in absentia proceedings should be conducted only for the prosecution of specific crimes because these exceptional proceedings are not suitable for all crimes.[238] For instance, in absentia proceedings might not be the right choice in war-torn countries. Indeed, although they might break the control circle over the narrative of the conflict, they would be 'easier to disregard'.[239]

The type of crimes considered can also affect the capacity of the tribunal to execute arrest warrants and bring perpetrators to justice. The conduct of in absentia

[228] See Werle and Jessberger (2014, pp.65-66).
[229] Mégret (2013, pp.72-73).
[230] Ibid.
[231] See Riachy (2010). Accord Interview 10.
[232] E.g. Interview 13.
[233] Michel (2014, pp.28-29).
[234] On the challenges that the nature of crimes poses to international prosecutions, see Fry (2016); Gow, Kerr and Pajić (2014); Harmon and Gaynor (2004).
[235] A similar discussion occurs when considering national courts and universal jurisdiction in absentia. See Kress (2006); Colangelo (2005); Poels (2005); Rabinovitch (2005); O'Keefe (2004); El Zeidy (2003).
[236] See Shaw (2012); Rabinovitch (2005); El Zeidy (2003).
[237] Interview 08.
[238] E.g. Interview 15. For a discussion of this point, see Colangelo (2005).
[239] Interview 03.

proceedings might overcome this problem. For instance, at the ICTY, pre-trial in absentia proceedings were allowed when the crimes and the conflict were ended by a political compromise and this 'left indicted persons at large and often, de facto, in positions of power'.[240] Another example is the STL, where there is 'the difficulty to identify and arrest the perpetrators and the refusal of the States where they resign to cooperate with the tribunal. So, the practice of trials in absentia becomes justified'.[241] However, on the other side, some crimes like terrorism might create additional issues for the protection of the tribunal and the parties involved.[242] Therefore, when conducting in absentia proceedings, we have to be very careful 'to protect the system, to protect maybe the defence lawyer, to protect the victims'.[243]

Another valuable point concerns the fact that some crimes pose more challenges than others. For instance, crimes like terrorism convey a 'sense of urgency'[244] because it is more likely that the defendant will escape justice.[245] Therefore, from a practical point of view, they require an effective action of an international criminal tribunal to avoid delays and the defendant's escape.[246]

A last relevant factor is the number and type of defendants involved in a case. The number of defendants tried in an international criminal case has influenced the decision to include a provision on in absentia proceedings in the Statute of the Tribunal concerned. For instance, at the STL in absentia proceedings have been favoured by the need to guarantee that in cases with multiple defendants, the absence of some of them would not disrupt the proceeding. According to the UN Secretary-General, 'where the conduct of joint trials for some or all of the cases falling within the jurisdiction of the tribunal is likely, it would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused'.[247]

The type of defendants involved is another significant element,[248] and a legal practitioner interviewed for this thesis says that it is not necessarily 'a bad thing that certain decisions are taken based on who the defendants are'.[249] In this sense, the defendant's qualification or personal circumstances might influence the decision to hold

[240] Jones and Powles (2003, p.568).
[241] Interview 05.
[242] See Sader (2007). Accord Interview 01.
[243] Interview 01.
[244] Interview 03.
[245] E.g. ibid.
[246] Ibid. See also Pons (2010); Swart (2007).
[247] UNSG, Report 893 (2006, para.32(b)).
[248] See Göhler (2016); Schwartz (1996). Accord Interview 03.
[249] Interview 07.

a proceeding in absentia.[250] In this regard, concerns are raised for the possibility that, depending on the defendant involved, 'when you have the provision of trials in absentia you kind of feel less insisting on securing the arrest'.[251] However, this should not prevent any tribunal from pursuing the arrest of high-profile individuals.[252] For instance, at the ICTY, 'it was certainly correct to investigate and prosecute Slobodan Milošević. Even though the chances of arresting him were extremely low at that time'.[253] In this sense, in absentia proceedings might be a preferred option when there are high-profile individuals,[254] but specific procedural safeguards are required (e.g. right to have a defence counsel) as in *Kenyatta* and *Ruto*.[255]

In conclusion, this Subsection has demonstrated that the regulation of in absentia proceedings has been influenced by the courts, crimes, and defendants involved in these proceedings. These factors will be further analysed when examining the practice of in absentia proceedings in Chapter 3. For instance, they will be relevant in the discussion of the issue of partial trials in absentia at the ICC and the retrial and its problematic aspects. These factors will also be recalled when defining the characteristics of the future regulation of in absentia proceedings in Chapter 6.

2.3.2. Pragmatism and Politics

The scholarship identifies pragmatism and politics as 'common denominators for national and international jurisdictions'.[328] They concern 'the limit to the enforcement of arrest warrants issued for persons holding official positions and sometimes sitting at the highest level of the State's hierarchy'[329] and 'the political tension originated by conflicting views on assertions of jurisdictions or denial of immunities'.[330] As a preliminary consideration, sometimes, these two factors are connected, and they share similar aspects. In particular, this happens when they are considered as driving factors for the implementation of International Criminal Justice through international criminal proceedings.[331] Indeed, in this case, pragmatism and politics have a similar effect: to

[250] As it has happened at the ICC with the introduction of the new Rules 134bis, ter, and quarter. E.g. Interview 13.
[251] Ibid.
[252] See Göhler (2016); Given (2014). Accord Interview 08.
[253] Ibid.
[254] See Given (2014). Accord Interview 01.
[255] E.g. Interview 01.
[328] Bellelli (2016, p.434).
[329] Ibid.
[330] Ibid.
[331] See Graubart (2010); Clark (2008); Roach (2006); Boister (1998).

influence the shape of particular proceedings and the prosecution of crimes by international criminal tribunals. This has also happened in the legal development of in absentia proceedings when both factors have been involved in the implementation of these proceedings.[332]

In this context, this Subsection examines pragmatism and politics specifically concerning the implementation of in absentia proceedings and pointing out their influence on the legal development of these proceedings. To this end, the Subsection first considers the practical necessities emerging from the defendant's absence. In other words, pragmatism is analysed concerning some pragmatic perspectives that emphasise the need to pursue justice and fairness. For instance, the need to execute arrest warrants and properly notify the absent suspect. Moreover, the Subsection analyses the role of politics in shaping the provisions on in absentia proceedings. In particular, when it provides 'pragmatic' solutions to international criminal tribunals that deal with absent defendants. For instance, supporting the regulation of trials in absentia at the STL and the creation of Rules 134bis, ter, and quater ICC RPE.

The regulation of in absentia proceedings in International Criminal Justice suggests that many tribunals have been influenced by the adoption of a pragmatic approach to the prosecution of international crimes.[333] As an example, at the STL, the judges have drafted the Rules of Procedure of the Tribunal 'giving due consideration to the specific circumstances of the matter at hand'.[334] A legal practitioner interviewed for this thesis thinks that this will also be the approach adopted in the future, and pragmatism 'will be part of the negotiation and the way of creating the statute of future tribunals'.[335]

The pragmatic approach of international criminal tribunals concerns various substantive and procedural issues.[336] A first substantive pragmatic issue is the need to guarantee the prosecution of crimes and justice to victims, despite the defendant's absence. The idea is that 'the defendant's absence from the trial cannot of itself halt the course of justice which must continue to move forward regardless of his absence in order to achieve its result'.[337] In this sense, 'a trial – even one conducted in the absence of the accused – is a requisite step towards restoring, in the long run, the social peace

[332] See Zakerhossein and De Brouwer (2015, p.189); Jordash and Parker (2010, p.489); Poels (2005).
[333] For instance, on pragmatism at the ICTY and ICTR, see Zakerhossein and de Brouwer (2015, pp.187-189); at the STL, see Gardner (2011).
[334] UNSG, Report 176 (2006, para.8).
[335] Interview 01.
[336] See Snyder and Vinjamuri (2003).
[337] Interview 05.

disturbed by these crimes'[338] and the refusal of the defendant to attend the proceeding 'will not halt the (admittedly, sometimes slow but) always inexorable pursuit of justice'.[339]

This pragmatic approach has been adopted at the ICTY and ICTR when pre-trial in absentia proceedings have been included in their Statutes and Rules of Procedure.[340] Rule 61 'was aimed firstly at forcing the apprehension by allowing the Security Council to be notified of a failure of a State to cooperate'.[341] This necessity derived, among other reasons, from the fact that total trials in absentia were not permitted at the ad hoc tribunals. Therefore, Rule 61 was necessary to guarantee that the work of the ICTY and ICTR was not undermined by the lack of available proceedings to deal with the suspect's absence.[342] In this sense, the judges 'wanted to show that the court was doing something',[343] and this was also important in light of States' substantial financial contributions.[344]

However, the judges at the ICTY and ICTR did not go beyond the practical necessity to guarantee the confirmation of charges in absentia. Indeed, they did not allow total trials in absentia and 'addressed the problem of the failure to execute order for arrest and transfer by providing for a special indictment procedure without going as far as authorising trials in absentia'.[345] According to a legal practitioner interviewed for this thesis, the reason for this choice was presumably that 'the cooperation between States was bigger and more effective'[346] than at the STL, and trials in absentia were unnecessary because 'everybody was sure that they would have gotten the person and the accused before the trial'.[347]

Another practical reason for the adoption of Rule 61 was the preservation of evidence ahead of a trial in the defendant's presence.[348] Rule 61 permitted to collect evidence (e.g. documents; witnesses) that could be lost before the beginning of the trial phase and while the person was not in the custody of the tribunal. This is a peculiar justification for allowing in absentia, compared to the traditional approach of ordinary criminal proceedings where evidence is collected only at trial. For this reason, some call

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[338] *The Prosecutor v. Ayyash et al*., STL, Order Pursuant to Rule 76(E) (2011, para.22).
[339] Ibid.
[340] See Morris and Scharf (1998, p.504).
[341] *The Prosecutor v. Ayyash et al*., STL, Request Defence Badreddine for Reconsideration (2012, para.27).
[342] See *The Prosecutor v. Rajić*, ICTY, Rule 61 Decision, Separate Opinion of Judge Sidhwa (1996).
[343] Interview 08.
[344] E.g. ibid.
[345] Morris and Scharf (1998, p.504).
[346] Interview 01.
[347] Ibid.
[348] See Elberling (2012, p.48); Friman (1999, p.257). Accord Interviews 02; 04.

it 'special procedure',[349] others 'aside criminal justice'[350] or 'outreach publicity'.[351] In any case, Rule 61 was conceived as an effective procedural option that could address the practical need to fulfil victims' expectations towards the prosecution of crimes.[352] In this context, the phrase 'something is better than nothing' had a practical configuration.[353]

Pragmatism has been a relevant factor to overcome substantial practical issues also at the STL.[354] Here, pragmatism has been a justification not for the general conduct of in absentia proceedings (i.e. theoretically) but for the practical implementation of these proceedings. In this sense, in absentia proceedings have been used to achieve justice for the victims and guarantee a trial in the defendant's absence also in highly politicised and unstable political contexts.[355] According to a legal practitioner interviewed for this thesis, when the STL was created the concern was that a proceeding would not have started for twenty or twenty-five years because of the inability to arrest the fugitives.[356] Therefore, trials in absentia were included in the Statute, and this was not an accidental choice.[357] Indeed, 'in absentia proceedings was being contemplated so as not to accept that justice be stopped because of the absence of goodwill of some players such as State players'.[358] In this sense, with trials in absentia, the STL wanted to send a message[359] and have a practical tool because the absent defendants (especially fugitives) would not have engaged with the proceeding anyway.[360]

However, criticisms are mounted over the pragmatic result obtained with in absentia proceedings.[361] Some interviewees argue that nobody benefits from the decision to hold a trial in absentia if the defendant is not there,[362] and trials in absentia should not be used to justify the failure of the tribunal to arrest the person.[363] Moreover, trials in absentia are a 'mock case',[364] and they demonstrate that 'the Prosecution was so

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[349] Interview 04. See also Friman (2009a, p.494).
[350] Interview 03.
[351] Ibid.
[352] See Quintal (1998). Accord Interview 03.
[353] Ibid.
[354] See Gaeta (2014, p.250).
[355] Indeed, 'the rationale behind this legal regulation is clear: international justice must not be thwarted, either by the will of the accused to evade justice, or by the intent of a State to shelter such an accused by refusing to hand him over to the international tribunal': STL, Annual Report (2009-2010, para.37).
[356] E.g. Interview 15.
[357] Interview 11.
[358] *The Prosecutor v. Ayyash et al.*, STL, Hearing Pursuant to Rule 106 (2011, para.60).
[359] E.g. Interview 13.
[360] See Gardner (2011). Accord Interview 15.
[361] For a discussion, see Jordash and Parker (2010); Jenks (2009); Serra (2008).
[362] E.g. Interview 09.
[363] E.g. Interview 13.
[364] Ibid.

keen to try to you they really wanted to proceed with that case, that they would have acquiesced in almost anything'.[365]

A first procedural issue for international criminal tribunals when a defendant is absent is the need to execute an arrest warrant. As discussed in Chapter 1, these courts do not have police forces at their disposal, and the execution of arrest warrants depends on the intervention of national authorities.[366] This means that the enforcement at international level faces more challenges than at national level, and it is argued that there is a 'semi-detached' system in international justice.[367]

In this context, the use of in absentia proceedings would pragmatically solve the arrest problem.[368] This has been the case of pre-trial in absentia proceedings at the ICTY and ICTR. The confirmation of charges in absentia was conceived as a pragmatic solution to speed up the process and overcome the arrest problem that affected the work of the tribunals in the first years.[369] Indeed, according to a legal practitioner interviewed for this thesis, 'there was a concern about whether that tribunal was going to actually last to be able to do anything',[370] and 'there was a lot of pressure to do something'.[371] However, the use of Rule 61 did not prevent the ICTY from achieving its mandate and arrest all suspects. In absentia proceedings were not used as a panacea for the lack of arrests, and all efforts were made to guarantee the execution of the arrest warrants.[372] For an interviewee, this was possible because 'they had boots on the ground in Bosnia',[373] and in this sense 'it makes a huge difference as to what influence the court has over the region where the crimes are committed'.[374]

When considering partial trials in absentia at the ICC under Rules 134bis, ter, and quater, it is argued that this is a pragmatic solution.[375] In particular, trials in absentia avoid risking the lives of soldiers in the execution of arrests of high-profile suspects and create a 'very safe environment'.[376] Moreover, with them, it is possible to find the suspects wanted, 'senior politicians who may be current heads of State or senior, current senior politicians, and this is a pragmatic solution'.[377]

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[365] Interview 15.
[366] See Chapter 1, Subsection 1.3.3.
[367] Interview 09. See also Meernik (2013); Lamont (2010).
[368] See Given (2014).
[369] See Zakerhosssein and de Brouwer (2015, p.189); Thieroff and Amley (1998, pp.234 and 251).
[370] Interview 03.
[371] Ibid.
[372] See Zhou (2006); McDonald (2004).
[373] Interview 06.
[374] Ibid.
[375] See Göhler (2016); Arrigg Koh (2015). Accord Interview 02.
[376] Interview 13.
[377] Interview 02.

The use of in absentia proceedings as an answer to the arrest warrant problem is not exempt from criticism.[378] This is true especially concerning the effectiveness of international criminal tribunals. A legal practitioner interviewed for this thesis says that in absentia proceedings should never be used if the tribunal involved is unable to arrest the suspects and guarantee their presence at trial.[379] For instance, the STL should not have allowed in absentia proceedings when it became apparent that all suspects could not be arrested and they were at large.[380] Indeed, 'just because they have the right to do it, does not mean that it was right to do it'.[381] Moreover, trials in absentia would be 'a sign of the weakness of the State'[382] because this cannot execute the arrest warrant.[383] With a cynical view, it is argued that sometimes it is as if the Tribunal says to the criminals: 'do not come. You can escape. We can have the whole process, and I do not know, one day maybe you will appear again in 10, 15, 20 years, it depends'.[384]

Another pragmatic procedural issue is States' lack of cooperation.[385] The problem of international criminal tribunals is not only the defendants' voluntary absence but also 'the impotence and intransigence of the authorities to execute the warrant to arrest them'.[386] In this sense, the system in place for cooperation in International Criminal Justice is affected by substantial flaws, including the creation of 'a conflict between the obligation to execute arrest warrants and the interest in impunity provisions relevant to reaching peace agreements'.[387] If States do not cooperate to arrest a suspect, the tribunal might be forced to suspend the proceeding indefinitely. To a certain extent, the use of in absentia proceedings overcomes this issue (as it happened at the ICTY).[388] The scholarship emphasises that, although in absentia proceedings should not be a primary choice, given the unwillingness of States to cooperate fully with international criminal tribunals (especially for the execution of international arrest warrants) these proceedings 'are better than ignoring the defendants' defiance'.[389]

However, the use of in absentia proceedings might also exacerbate the lack of cooperation. This can happen especially when the suspects are high-profile

[378] See Given (2014); Jordash and Parker (2010).
[379] E.g. Interview 05.
[380] See Jordash and Parker (2010). Accord Interview 06.
[381] Interview 06.
[382] Interview 05.
[383] See Jordash and Parker (2010, p.489).
[384] Interview 05.
[385] On in absentia proceedings and States' cooperation (or lack of), see Jordash and Parker (2010, p.489); Pons (2010); Swart (2007); Gaeta (2007, p.1174).
[386] Interview 06.
[387] Bellelli (2016, p.436).
[388] For a discussion at the STL, see Pons (2010).
[389] Schwartz (1996, p.14).

individuals.[390] For instance, some States might disrupt their cooperation for the fear that their head of State or high-ranking official might be tried unfairly.[391] Another case might be when the alleged perpetrators are still in power in a country, and this affects the cooperation with the tribunal.[392] But 'cooperation is something that you are relying throughout all the proceedings. It does not end the minute the guy has been arrested'.[393]

The arguments discussed above seem to pull towards opposite directions, and therefore they do not provide sufficient guidance. Indeed, some argue that it would be 'pragmatic' to prosecute international crimes to fulfil the objectives of International Criminal Justice; others think that 'pragmatism' requires non-prosecution to preserve States' cooperation. In the same sense, a legal practitioner interviewed for this thesis argues that a priority should be to make arrest procedures more effective, and the focus should not be on how and when to use in absentia proceedings.[394] Another says that the success of the balance depends on 'what you're seeking',[395] and 'sometimes when you get too close to somebody or something then you don't get cooperation'.[396]

Finally, a pragmatic procedural issue has concerned the possibility to notify the absent suspect using a public notification. As already discussed, this has happened at the IMT and the STL, and the purpose was to bypass the deadlock of the impossibility to serve the notice personally.[397] Therefore, the pragmatic aim is to allow the Tribunal to overcome the lack of personal notification and guarantee the continuation of the proceeding. At the STL, it was noted that the order to do the notification in an alternative manner is 'a preliminary step towards the possible initiation of a trial in absentia'.[398] Therefore, the public notification is a pragmatic solution to move forward in the proceeding and have a trial in absentia.[399]

As a concluding remark, from the analysis above emerges that pragmatism cannot be considered a theoretical justification of in absentia proceedings but is only relevant for the implementation of International Criminal Justice (e.g. to solve the arrest issue; to overcome States' lack of cooperation). This means that pragmatism is normatively empty and does not provide sufficient guidance on the specific rules that

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[390] See Jordash and Parker (2010, p.489); Pons (2010). Accord Interviews 02; 04.
[391] See Pons (2010, pp.1311ff.). Accord Interview 02.
[392] See Pons (2010). Accord Interview 03.
[393] Interview 02.
[394] E.g. Interview 08. In the same sense, Jordash and Parker (2010, p.489).
[395] Interview 03.
[396] Ibid.
[397] See Chapter 2, Sections 2.2.1. and 2.2.3.
[398] *The Prosecutor v. Ayyash et al*., STL, Order Pursuant to Rule 76(E) (2011, para.14).
[399] See Gardner (2012, pp.135-136).

concern in absentia proceedings.[400] Therefore, this author posits that it should be considered as a driving factor in the legal development of in absentia proceedings in the sense of influencing it, albeit only from the outside, without being capable of creating provisions directly. Moreover, to appreciate its full potential, it should be considered in combination with other driving factors that have normative value (e.g. IHRL standards).

A second relevant factor (sometimes linked or overlapped with pragmatism) is politics.[401] Some argue that international criminal tribunals for their very nature are 'political'[402] because they are created under States' influence[403] that affects both their mandate and their procedural rules.[404] In this sense, all international criminal tribunals 'have a baggage or realpolitik which is often buried in the processes leading to the ending of the conflicts that brought about these international criminal justice institutions'.[405] Some even say that international criminal tribunals can be used as 'political tools'.[406] For instance, this might be the case when their statutes 'extend the mission of these courts well above and beyond attributing individual guilt',[407] and this distorts the legal system. Moreover, in absentia proceedings might be 'exploited in dictatorial regimes as a means for condemning political opponents'.[408]

The influence of politics in the creation of provisions on in absentia proceedings has been evident since the experience of the IMT. According to the scholarship, Art. 12 IMT Charter was justified for the grave nature of the crimes committed and the compromise reached between countries of civil law (i.e. France) and common law (i.e. UK and USA).[409]

Politics has also influenced the regulation of in absentia proceedings at more recent tribunals. A first example is the creation of Rules 134bis, ter, and quater RPE ICC. These provisions have been influenced by the political pressure coming out from the *Kenyatta* and *Ruto* cases,[410] and their introduction has been criticised as 'political interference'.[411] These cases show that politics is certainly an important factor,

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[400] On the debate on the pragmatic value of in absentia proceedings, see Schabas (2010, p.961).
[401] On the intersection between International Criminal Justice and politics, see Shraga (2009).
[402] Interview 05.
[403] E.g. Interview 06.
[404] E.g. Interview 05. See also, Bassiouni (2016; 2010; 2006).
[405] Bassiouni (2016, p.360).
[406] Interview 09. Likewise, Bassiouni (2016, p.373) affirms that international bureaucracy is used 'to achieve political ends' and when International Criminal Justice initiatives are brought under the control of the UN, 'then it becomes much easier to manipulate outcomes by instrumentalising the political and bureaucratic processes of this institution'.
[407] Interview 11.
[408] Interview 05. See also Bellelli (2016, p.435).
[409] See Zakerhossein and de Brouwer (2015, p.185).
[410] See Arrigg Koh (2015).
[411] Ambos (2016, p.368).

especially when the procedural rules of international criminal tribunals regard high-ranking officials or heads of State (and this creates a connection with pragmatism).[412] The scholarship affirms that 'the ICC is a still-maturing institution, confronting sensitive legal issues of first impression that inextricably carry political implications',[413] and there is an 'ASP's willingness to proactively shape the RPE and course of proceedings, especially in legal matters with broader diplomatic implications'.[414] The legal practitioners interviewed for this thesis express similar views, and they argue that the acceptance of partial trials in absentia at the ICC 'it was actually a political decision'.[415] Indeed, the rejection of total trials in absentia is a political decision because the ASP lacks too much confidence in the ICC 'to put their faith in such a blind operation'.[416]

A second example is the regulation of in absentia proceedings at the STL, especially total trials in absentia. An interviewee thinks that the decision to allow trials in absentia was political because 'that was the only way to sell the Statute which had that provision'.[417] Some elements of the creation of this Tribunal are significant in this sense. First, the creation of the STL involved a series of consultations where important aspects of the future Tribunal were discussed.[418] One point regarded the choice of the Tribunal's applicable law and the drafting of its Rules of Procedure and Evidence. In this sense, the Tribunal also considered the views of the UN Security Council members.[419] As the UN Secretary-General affirms, 'these consultations have in many ways shaped the legal choices made in the tribunal's founding instruments'.[420] Therefore the Security Council members could influence the legal framework of the Tribunal, guiding the choice of jurisdiction and applicable law. For instance, this has happened with the choice of crimes that was limited to terrorism and related offences (e.g. murder), excluding international crimes like crimes against humanity.[421] Moreover, the political origin of the Statute is confirmed by the fact that this was presented for the first time as an attachment to the UNSC Resolution 1757/2007 and not as an independent document of the UN.

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[412] See ibid., p.162.
[413] Arrigg Koh (2015, p.5).
[414] Ibid. See also Ambos (2016, p.165).
[415] Interview 07.
[416] Interview 09.
[417] Interview 10.
[418] See UNSG, Report 176 (2006, para.3).
[419] See UNSG, Report 893 (2006, para.2).
[420] Ibid., para.4.
[421] On this and the influence of politics for the establishment of the STL, see Shraga (2009, pp.168-169).

Second, in absentia proceedings were discussed during the negotiations between the UN and the Lebanese national authorities before the establishment of the Tribunal.[422] These negotiations involved judicial experts (e.g. senior Lebanese judges and two former presidents of the ICTY) and political authorities.[423] The UN team asked the Lebanese authorities clarifications on the Lebanese criminal code approach and underlined the need for a careful evaluation of the features of these proceedings and the necessary procedural safeguards attached.[424] In this regard, the Lebanese delegation requested to include trials in absentia in the Statute of the Tribunal 'to ensure that the legal process was not indefinitely delayed because of the absence of some accused'.[425]

The legal practitioners interviewed for this thesis confirm this political influence.[426] For instance, they argue that this is evident when looking at Rule 8 of the Code of Conduct for the Defence Counsels which prevents any contact between the defence counsel and the defendant.[427] In their view, this is justified for the fact that *Ayyash et al.* is a highly politically sensitive case, and it is a way 'to prevent any political problems which can bring other matters, which have nothing to do with the case'.[428] Moreover, an interviewee thinks that the influence of politics on the regulation of in absentia proceedings at the STL is often overlooked by the scholars and the practitioners that work at the Tribunal. In this sense, there is 'a conspiracy of silence'[429] to make things look better than they are (i.e. about the success of trials in absentia). However, 'it is a fraud',[430] and the conduct of a trial in absentia is 'purely symbolical and political'.[431]

In conclusion, the regulation of in absentia proceedings has been deeply influenced by the pragmatic and political choices of international criminal tribunals. These factors have played a central role in adapting the theoretical rules of the courts to the practice of the cases at stake. As a consequence, their legal development has been characterised by a strong connection with the implementation of International Criminal Justice. This finding will also be scrutinised in Chapter 3 when analysing the practice of in absentia proceedings.

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[422] See Michel (2014).
[423] See UNSG, Report 893 (2006, para.3).
[424] See Tabbarah (2014, p.37).
[425] Ibid., p.49.
[426] E.g. Interviews 05; 08; 14.
[427] E.g. Interview 12.
[428] Interview 01.
[429] Interview 11.
[430] Ibid.
[431] Ibid. See also Jacobs (2009).

2.4. Conclusion

This Chapter has examined the legal foundations of in absentia proceedings in International Criminal Justice, analysing their evolution at five international criminal tribunals and discussing the factors that have influenced them.

The study presents two findings. First of all, the legal development of in absentia proceedings includes recurring regulatory elements, and it is based on shared legislative approaches. Traditionally, the scholarship has studied the regulation of in absentia proceedings focusing on the provisions of single tribunals and underlying the differences existing among the courts' approaches. This has produced a scattered picture of the regulation, depicting it as an inconsistent phenomenon, divided into the various experiences of international criminal tribunals.

This Chapter has reached a different conclusion, and it has demonstrated that international criminal tribunals have developed common patterns when regulating in absentia proceedings. Although the tribunals have addressed in absentia proceeding independently, they have adopted common regulatory approaches that have been used as points of reference. For instance, shared standards have emerged for the notification to an absent suspect and the distinction among different types of in absentia, i.e. due to health conditions or absconding. Common approaches have also occurred in the conduct of pre-trial in absentia proceedings (i.e. confirmation of charges in absentia) and total trials in absentia.

This finding is significant because it identifies some core procedural aspects of in absentia proceedings that have been maintained throughout their development. These aspects act as guidelines for the creation of the future regulatory framework on in absentia proceedings. In particular, the analysis of this Chapter will be relevant in Chapter 6 when discussing the policy recommendations for their future legal framework.

A second finding of the Chapter is that the legal development of in absentia proceedings includes specific factors that have influenced their regulation at international criminal tribunals. Most of the scholarship has disregarded these factors, with few authors considering them partially and with no critical depth. This has resulted in an incomplete study of the legal framework on in absentia proceedings.

This Chapter has adopted a different approach, discussing the driving factors of the regulation of in absentia proceedings comprehensively. First of all, international criminal tribunals have been influenced by their configuration (e.g. duration, mandate),

the type of crimes prosecuted, and the defendants involved. Moreover, pragmatism and politics have influenced international criminal tribunals. Indeed, these courts have considered the practical necessities and the political implications of the cases at stake and have regulated in absentia proceedings accordingly.

This finding broadens the discourse on in absentia proceedings, pointing out some aspects less investigated by the scholarship. Indeed, it identifies the full range of factors to be considered when examining the limits and prospects of in absentia proceedings in International Criminal Justice. These factors should also inform the discussion of the future regulation of these proceedings.

In obtaining the findings above, this Chapter has completed the analysis done in Part I on the *Foundations* of in absentia proceedings in International Criminal Justice. Drawing upon the theoretical and legal foundations of these proceedings, the remaining two Parts of the thesis will examine in turn: (a) the *Operation* of in absentia proceedings, looking at their practice in concrete cases (Chapter 3) and impact on the parties (Chapter 4); and (b) the *Future Perspectives* on these proceedings, considering their alternatives (Chapter 5) and future regulation (Chapter 6).

Part II. Operation

This Part focuses on the *operation* of in absentia proceedings in International Criminal Justice. To date, the study of in absentia proceedings has primarily examined the theoretical issues that surround these proceedings. The scholarship has overlooked the practice of in absentia proceedings at international criminal tribunals and their impact on the parties of international criminal cases. However, this examination is crucial for a comprehensive understanding of the phenomenon and to assess its limits and prospects in International Criminal Justice. Moreover, a thorough scrutiny is necessary to identify the procedural differences of the various types of in absentia proceedings and to determine the features of their future regulation.

This Part aims to fill the gaps that exist in the literature about the operation of in absentia proceedings. To this end, the author proposes a critical study of their procedural characteristics and effects for the parties involved. In so doing, this Part completes the study of in absentia proceedings conducted in Part I (*Foundations*). Indeed, it examines the practical realities of these proceedings that are complementary to their theoretical framework. Moreover, this Part presents some findings that are relevant to Part III (*Future Perspectives*). Indeed, it determines the most problematic procedural aspects of in absentia proceedings that are relevant in the future regulation of these proceedings.

This Part is divided into two Chapters. Chapter 3 scrutinises the practice of in absentia proceedings, addressing key procedural aspects of the pre-trial (Section 3.2.), trial (Section 3.3.), and post-trial phases (Section 3.4.). Chapter 4 analyses the impact of in absentia proceedings on the parties, assessing their consequences for the Defence (Section 4.2.), the Prosecutor (Section 4.3.), and the victims (Section 4.4.).

Chapter 3. Practice of In Absentia Proceedings

3.1. Introduction

This Chapter focuses on the *practice* of in absentia proceedings in International Criminal Justice. The Chapter investigates the problematic procedural aspects that emerge when in absentia proceedings are conducted by international criminal tribunals. In particular, the study includes a rigorous analysis of the use of in absentia proceedings in case-based contexts, pointing out the procedural strengths and limitations of these proceedings.

In the past, international criminal tribunals have interpreted the rules on in absentia proceedings, adapting them to the reality of international criminal cases.[1] This shift from theory to practice is fundamental to give concrete application to abstract rules and maintain consistency in the work of the tribunals.[2] Indeed, 'extracting general rules and principles from the diverse practices of the various international criminal tribunals and courts is necessary in order to enable one to draw lessons of broader validity and application'.[3] In this sense, international criminal courts have 'tested' and 'shaped' in absentia proceedings in real cases, establishing important standards to guarantee a proper conduct of these proceedings. However, the scholarship has neglected this practice, except for few studies on some procedural aspects (e.g. confirmation of charges in absentia, partial in absentia at the ICC).[4]

This Chapter aims to fill this gap by analysing the relevant procedural elements of in absentia proceedings and including original research inputs from interviews with legal practitioners. The purpose of this Chapter is twofold: (a) to study the *modus operandi* of in absentia proceedings in the distinct phases of international criminal proceedings (i.e. pre-trial, trial, and post-trial); and (b) to analyse their practice in specific case studies, through an examination of the informed opinions of core actors.

The study presented in this Chapter is also significant for the analysis included in other Chapters of the thesis. Indeed, it defines the procedural framework of reference for the parties of in absentia proceedings (e.g. Chapter 4 on the *impact*). This framework is also considered when looking at other solutions used to deal with the defendant's absence (e.g. Chapter 5 on the *alternatives*). Finally, it identifies the procedural aspects

[1] For instance, in *Ayyash et al.* at the STL; *Kenyatta* and *Ruto* at the ICC.
[2] On the importance of practice in International Law and International Criminal Law, see Meierhenrich (2013).
[3] Zappalà (2013, p.41).
[4] For instance, Göhler (2016); Schwarz (2016); Mignot-Mahdavi (2014).

of in absentia proceedings that would require an intervention in the future (e.g. Chapter 6 on the *future*).

The Chapter is divided into three Sections in addition to an Introduction and a Conclusion. The first Section considers some procedural features of in absentia proceedings in the pre-trial phase (Section 3.2.). In particular, the author focuses on the notification to an absent suspect (Subsection 3.2.1.) and the confirmation of charges in absentia (Subsection 3.2.2.). The second Section examines in absentia proceedings in the trial phase (Section 3.3.), considering in particular trials in absentia (Subsection 3.3.1.). The last Section of the Chapter analyses the conduct of in absentia proceedings in the post-trial phase (Section 3.4.). Here, the author examines the challenges of an appeal conducted in absentia (Subsection 3.4.1.); the enforcement of a sentence issued in absentia (Subsection 3.4.2.); and the retrial (Subsection 3.4.3.).

Ultimately, the author advances two arguments in this Chapter. First of all, in all phases of a criminal process in absentia proceedings present problematic aspects and the judges need to intervene to overcome these challenges. In this context, the author argues that some of the established practices of in absentia proceedings can be used as guidelines for the future. Second, in each phase of international criminal proceedings, the judges have had a certain level of discretion in the conduct of in absentia proceedings. However, not all tailored solutions have been successful. Therefore, it is posited that there should be a reconsideration of the tribunals' practices to improve the use of in absentia proceedings in International Criminal Justice.

3.2. Pre-Trial Phase

Generally speaking, international criminal proceedings follow a three-phase structure: pre-trial, trial, and post-trial.[5] The pre-trial phase is located between the investigations and the trial phase[6] and it 'begins with the Prosecution's submission of proposed charges and ends with the commencement of trial'.[7] This phase is conducted before a Pre-trial Chamber or a Trial Chamber that checks the Prosecutor's actions and the

[5] The literature has proposed other classifications, but all these interpretations agree on the existence of these three phases. For instance, see Olásolo (2005, p.51). The pre-trial phase is preceded by the Prosecutor's investigations conducted to gather evidence for a later confirmation of the charges. The investigations are not considered in the present analysis because they are not relevant for the position of the defendant in an in absentia proceeding. On the investigations, see de Meester, Pitcher, Rastan and Sluiter (2013, pp.172ff.); Gustafson (2009a, p.386).

[6] See Ambos and Miller (2007, p.338). On the relationship between these phases, see De Smet (2009, pp.415ff.).

[7] Boas, Bischoff and Reid (2011, p.177).

lawfulness of the procedure.[8] The Chamber acts 'as a restraint on the Prosecutor, by protecting the person from a frivolous trial',[9] and it also protects the Tribunal 'from unnecessarily committing its resources to a futile process'.[10] In this phase, the person is informed of the charges and can start preparing a defence for the trial phase.[11] At this stage, he/she is still considered a 'suspect' until the charges are confirmed.[12]

There are two problematic aspects of the use of in absentia proceedings in the pre-trial phase: (i) the notification to an absent suspect; and (ii) the confirmation of charges in absentia.[13] These are crucial elements of the process, and they need to follow certain standards to guarantee the fairness and lawfulness of the proceeding in all its phases.[14]

3.2.1. Notification to an Absent Suspect

Before starting a trial, the Prosecutor needs to file an 'indictment', i.e. a document that contains the charges against a suspect.[15] With the indictment, the Prosecutor informs the person of the existence of the proceeding[16] and determines the scope of the trial.[17] After the indictment has been prepared, it needs to be notified to the suspect.[18] The notification of the indictment is a core element for the fairness of international criminal proceedings[19] because it ensures that the person is aware of the process and the charges and that he/she can start preparing a defence assisted by a defence counsel.[20]

The notification of the indictment plays a pivotal role also in in absentia proceedings; if missing or done incorrectly, it affects the legitimacy of the entire proceeding.[21] Given the complexity of in absentia proceedings and the possibility that the absent suspect might be unaware of the proceeding and the charges, the court should check the notification procedure carefully. A legal practitioner interviewed for this

[8] See Safferling (2012, p.194).
[9] Bekou (2006, p.5).
[10] Ibid.
[11] On the function of the pre-trial phase, see Harmon (2007); Higgings (2007); Bekou (2006).
[12] See Zappalà (2009a, pp.527-528).
[13] On these two elements at the ICC, see Trendafilova (2009).
[14] See Trendafilova (2009); Russell-Brown (2003). In Interview 01, the interviewee commented that 'you can't deal at all with the trial phase if there was a problem during the pre-trial phase'.
[15] See Locke (2012, pp.604ff.); Gustafson (2009b, p.363); Calvo-Goller (2006, pp.31-41).
[16] See Locke (2012, p.604).
[17] See Friman, Brady, Costi, Guariglia and Stuckenberg (2013, p.383).
[18] See Rules 51 and 53bis ICTY RPE; Rules 51 and 53bis ICTR RPE; Rules 121 and 129 ICC RPE; Rules 72(B) and 76 STL RPE.
[19] See Knittel (2012). See Rules 53bis and 60 ICTY RPE; Rules 53bis and 60 ICTR RPE; Art. 22 STL St. and Rules 76 and 76bis STL RPE.
[20] See Friman, Brady, Costi, Guariglia and Stuckenberg (2013, p.383).
[21] See Gaeta (2014, pp.237-248); Jenks (2009).

thesis confirms this point and argues that the notification is a pivotal part of the process and 'you can't start the proceeding'[22] without it. It is also posited that the notification requires a duty of the Tribunal, but also some action from the defence counsel.[23] Indeed, the counsel needs to inform the person of the consequences of the absence and provide legal advice.[24]

However, not all interviewees see the notification as a fundamental procedural element, and one says that in absentia proceedings should rely on other methods, e.g. sealed warrants.[25] Other legal practitioners even say that there should be no notification,[26] and if a Tribunal fails to apprehend a suspect there should not be 'too much emphasis'[27] on the notification; the focus should be on the arrest problem. This view demonstrates the concern that the notification could jeopardise the attempts to arrest the suspect (especially if fugitive). Indeed, once notified, the fugitive will be aware of the existence of a proceeding and, therefore, might abscond even more. This is a compelling argument, but it is not convincing. Indeed, it fails to acknowledge that to have a fair criminal proceeding, certain procedural safeguards (e.g. a proper notification) should be maintained,[28] and they cannot be sacrificed in light of the need to execute arrest warrants.

The notification in in absentia proceedings is problematic.[29] A first issue concerns the relationship between the conduct of a trial in absentia and the notification to an absent suspect. The idea is that in absentia proceedings should not be justified because a proper notification has been done, given that the problem of the person's absence persists. For instance, the STL has justified trials in absentia because a proper notification was done; otherwise, this would not have been possible.[30] In this sense, some legal practitioners interviewed for this thesis think that the notification is 'utterly factious',[31] a political decision[32] of the system not to guarantee fairness but to justify itself.[33] As one legal practitioner colourfully puts it, trying to notify a suspect after failing to arrest him/her 'it's like trying to eat the banana peel after you have eaten the

[22] Interview 01.
[23] E.g. Interview 02.
[24] E.g. ibid.
[25] E.g. Interview 08.
[26] E.g. ibid.
[27] Interview 11.
[28] See Chapter 1, Subsection 1.3.2.
[29] E.g. Interview 14.
[30] E.g. Interview 09.
[31] Ibid.
[32] E.g. Interview 05.
[33] E.g. Interview 09.

banana'.[34] Others instead think that because the notification is a pivotal element of in absentia proceedings, it needs to be done adequately, despite its challenges.[35] In this sense, the focus should be on the reality of the case, i.e. the failure to arrest a suspect,[36] and because *ad impossibilia nemo tenetur* (i.e. nobody is held to the impossible), 'we have to arrive at something possible and rational'.[37]

Furthermore, a proper notification might not reveal the reason for the person's absence. In this sense, the legal practitioners interviewed for this thesis think that sometimes there is a 'disconnection' between the reality of the cases at stake and the decisions of the judges.[38] For instance, it might be that the suspect is prevented from being present under duress[39] or he/she is dead.[40] Especially in total in absentia proceedings (e.g. at the STL) nobody has ever seen the suspects, and the Tribunal can only make conjectures about their circumstances,[41] deciding to try them in absentia after a certain period.[42] Some legal practitioners think that the entire process has been 'vague',[43] lacking essential information on the absent persons and relying on an approach that was 'unsatisfactory'[44] and a 'shame'.[45] Therefore, the system should be improved to guarantee a successful notification;[46] the STL's approach has 'just made people more cynical about the whole exercise than anything else.[47]

Finally, the circumstances of the case (e.g. the political situation of the country where the notification has to be carried out)[48] and States' cooperation[49] can determine the notification success or failure.[50] Therefore, the Tribunal needs to evaluate the possibility to execute an arrest warrant in concrete.[51] According to the legal practitioners interviewed for this thesis, this means that the judges should adopt a case-by-case approach,[52] being aware of the practical issues of the case at stake.[53] Indeed,

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[34] Interview 11.
[35] E.g. Interviews 05; 10.
[36] E.g. Interview 14.
[37] Interview 16.
[38] E.g. Interview 13.
[39] E.g. Interview 10.
[40] E.g. ibid.
[41] E.g. Interviews 09; 10.
[42] E.g. Interview 11.
[43] Interview 01.
[44] Ibid. Accord Interview 11.
[45] Interview 02.
[46] E.g. Interview 11.
[47] E.g. ibid.
[48] E.g. Interviews 02; 03.
[49] E.g. Interviews 02; 04; 15.
[50] E.g. Interviews 01; 02.
[51] E.g. Interview 04.
[52] E.g. Interview 10.
[53] E.g. Interview 01.

'what is reasonable varies from place to place':[54] for instance, there is a great difference between trials in absentia and the notification at the IMT in 1945 and at the STL in 2011.[55] They should also consider the specifics of the case, using the findings of the Prosecutor's on the whereabouts of the absent suspects.[56]

3.2.1.1. Types of Notification

In the practice of international criminal tribunals, there are two possible procedures for the notification of the indictment. First of all, the notification can be *personal*.[57] This means that the indictment is transmitted to national authorities to serve the notice on the suspect.[58] A legal practitioner interviewed for this thesis argues that this is the best method of notification,[59] and international criminal tribunals should always try to do it in the first place.[60] Another instead says that this is not a significant aspect of the proceeding; the focus should be on arresting the person.[61] Second, even if the personal notification fails, the Tribunal can rely on a *public* notification, using public announcements and the media (e.g. radio, television, newspapers, the Internet).[62]

The two methods of notification are problematic in in absentia proceedings. Indeed, personal notification is controversial for the place where it has to be done and because the national authorities in charge of notifying the indictment might not find the absent suspect. The place of the notification is usually the last place of residence of the suspect (i.e. where he/she had last lived).[63] When the person is not found there, or the residence cannot be determined with certainty, other places are considered, e.g. where his/her family lives, his/her working place.[64] The decision relies upon the information at the disposal of the Tribunal and the Prosecutor.[65] However, this choice is not always straightforward, especially when the country of reference is socially and politically unstable and its territory is not easily accessible.[66]

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[54] Interview 15.
[55] E.g. ibid.
[56] E.g. Interview 04.
[57] See Rule 53bis ICTY RPE; Rule 53bis ICTR RPE; Rule 76 STL RPE; Reg. 31(3) and (4) ICC Regs.
[58] See Rule 55(E) ICTY RPE; Rule 55(A) ICTR RPE.
[59] E.g. Interview 03.
[60] E.g. ibid.
[61] E.g. Interview 06.
[62] See Rule 60 ICTY RPE; Rule 60 ICTR RPE; Rule 76bis STL RPE.
[63] See *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012, paras.45ff.). Accord Interview 01.
[64] See *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012, paras.45ff.).
[65] See ibid., para.46.
[66] This has been the case with Bosnia and Herzegovina, Lebanon, and many African countries. See Abass (2013); Oko (2007); Harmon and Gaynor (2004).

Moreover, the concept of personal notification is subject to interpretation. Sometimes, it means serving the document directly on the individual, i.e. the indictment is handed to the suspect.[67] Other times, the document is given to the relatives or other persons close to the suspect.[68] In other cases, the notification is done by leaving the indictment at the disposal of the suspect, with no necessity to give it to a specific person.[69] The choice among the different options depends upon the social, political, and legal context in which the notification must be carried out. In this sense, international criminal courts adopt different approaches.

At the ICTY and ICTR, the notification is done in person, serving the indictment on the suspect and giving him/her a certified copy of the document.[70] The ICC has adopted a similar strategy: the notification is personal.[71] At the STL, personal notifications are done: (a) when the suspect is tried in an ordinary proceeding (here the person receives a certified copy of the document);[72] and (b) when the person is tried in absentia (here he/she needs to be served with the indictment or notice needs to be given otherwise).[73] However, concerns have been expressed for the methods used at the STL. For instance, it is said that the Lebanese authorities have not made all necessary efforts to find the suspects and personal notification has failed because of a lack of political willingness.[74] These concerns are confirmed when the Tribunal states that 'the judicial police […] knocked on the door of the address but received no answer',[75] 'they knocked on the door on two different occasions but received no answer',[76] and they asked for information on the whereabouts of the accused to their neighbours and employers, with no result.[77] According to a legal practitioner interviewed for this thesis, this personal notification is 'insufficient',[78] and more compelling methods should be used.[79]

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[67] See Rule 53bis ICTY RPE; Rule 53bis ICTR RPE; Rule 76(B) STL RPE. The practice of international criminal tribunals has followed these rules precisely: Trechsel (2011, p.161).
[68] As it happened at the STL.
[69] For instance, the indictment is affixed on the door of the place of residence or of another relevant place. See *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia (2012, paras.83, 84, 89, 90, 103, 104).
[70] See Rule 53bis ICTY RPE; Rule 53bis ICTR RPE. These tribunals require the defendant to be in their custody at the time of the notification. See Rule 53bis(A) ICTY RPE; Rule 53bis(A) ICTR RPE.
[71] See Reg. 31(3) ICC Regs. See also Art. 58(7) ICC St. that refers to a personal notification for the summons to appear.
[72] See Rule 76(B) STL RPE.
[73] See Art. 22(2)(a) STL St.
[74] E.g. Interviews 05; 10.
[75] *The Prosecutor v. Ayyash et al*., STL, Order Pursuant to Rule 76(E) (2011, para.9).
[76] Ibid., para.10.
[77] See ibid., paras.8-12.
[78] Interview 10.
[79] E.g. ibid.

Public notification seeks to overcome the above problems, and according to a legal practitioner interviewed for this thesis it is 'pretty standard practice'[80] and 'good enough in a lot of circumstances'.[81] This might be even a better method for international criminal proceedings with fugitives. Indeed, the suspect is notified through public media, and this has two consequences.[82] First, the indictment is highly publicised, and it is communicated through various methods, guaranteeing a varied approach to the notification process.[83] Second, thanks to this widespread publicity, there is transparency and public awareness of the entire process.[84] In this sense, a public notification might increase the possibilities to arrest the person, as more people would know about the arrest warrant.[85]

However, public notification presents similar problems to personal notification for: (a) the place of the notification; and (b) the methods used. The tribunal must decide whether to do the notification only in a specific country or also somewhere else.[86] For instance, it might be possible to do the notification in surrounding countries[87] or rely on the publicity of the arrest warrant via the work of other institutions, e.g. Interpol.[88] However, this idea is debated, and an interviewee points out that it should be reconsidered because 'you only know if there is an international arrest warrant out for you in reality if you go to the website of the Interpol'.[89] Therefore, there might be a problem for the absent suspect's full awareness. In principle, it is possible to choose several countries and entities for the notification, 'but a court has to be able to justify why it does that and why it stops where it stops'.[90]

The decision on where to notify the indictment can have consequences for the effectiveness of the notification and the legitimacy of a trial in absentia.[91] Indeed, as in the case of the STL, the Tribunal must be satisfied that the notification has been done in the relevant territory, and this idea needs to be supported by substantial evidence.[92] In this sense, a criticism might be that the fugitive has fled the country in which the

[80] Interview 06.
[81] Ibid.
[82] On the relationship between public media and international criminal tribunals, Simons (2009, p.7).
[83] For instance, the indictment can be communicated on the Internet, with television broadcasting, social media, online newspapers and magazines, online forums and blog posts.
[84] Transparency and public scrutiny are fundamental principles of the work of international criminal tribunals. See Schrag (2004).
[85] E.g. Interview 15. See also Schabas (2006, p.24).
[86] E.g. Interview 07.
[87] E.g. Interview 10.
[88] E.g. Interview 01.
[89] Interview 02.
[90] Interview 07.
[91] E.g. Interview 06.
[92] E.g. Interview 02.

notification is done, and he/she is abroad.[93] For instance, this might be the case when the crimes prosecuted are terrorism or serious violations of human rights and the suspect has economic and political means to remain at large. In these cases, the tribunal should use additional information to track down the person and do the notification effectively.

As for the methods used, a public notification relies on the use of public media.[94] At the IMT, the Tribunal published the indictment in various newspapers, and it made radio announcements; [95] at the ICTY, the Tribunal used newspapers advertisements, radio and television announcements; [96] at the STL, newspapers, television, and posters were used.[97] The problem is how to determine with certainty the suspect's awareness through public media. Indeed, this type of notification might be insufficient.[98] For instance, while hiding in a remote place, the person might not have access to public media. On this point, some legal practitioners interviewed for this thesis say that nowadays the use of social media is widespread and, therefore, 'it's just not reasonable'[99] that an absent suspect does not know about a proceeding.[100] Others argue that the Tribunal needs to prove with certainty that the absent person is aware of the public notification, and the judges 'have to go further than simply saying "it has been in the newspapers"'.[101] Indeed, the presumption that the suspect is certainly aware is 'a step too far'.[102]

At the STL, a legal practitioner thinks that the method used is commonly accepted in many jurisdictions around the world.[103] The Tribunal has confirmed this idea when approving the methods used for the public notification because 'the evidence establishes that massive if not blanket coverage was given in the Lebanese media',[104] and 'it is inconceivable that they could be unaware that they have been indicted'.[105] Therefore, international criminal tribunals should establish specific criteria for public notifications, such as the need to broadcast the notification over a sufficiently long

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[93] E.g. ibid.
[94] E.g. television, radio, social media, posters.
[95] See *Trial of the Major War Criminals*, IMT, Order of the Tribunal Regarding Notice to Bormann (1945).
[96] For instance, in the *Martić*, *Rajić*, *Karadzić*, and *Mladić* cases.
[97] See *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012, paras.45ff.).
[98] 'In giving notice by publication, the tribunal assumes that the accused will view the notice or learn of it from someone who does': Jenks (2009, p.82).
[99] Interview 06.
[100] E.g. Interviews 03; 06; 10.
[101] Interview 02.
[102] Ibid.
[103] E.g. Interview 06.
[104] *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia (2012, para.106).
[105] Ibid.

period and to involve a wide range of media.[106] Indeed, there should be a 'rigorous standard, requiring meaningful efforts to effect service through a variety of channels'.[107]

3.2.1.2. Living Suspects and Required Threshold

There are other two significant elements for the notification to an absent suspect. The first is the determination of whether the person is alive:[108] if the person is dead, the proceeding must terminate and cannot continue in absentia.[109] This assessment is crucial for the notification process and for conducting a trial in absentia,[110] especially in the case of total in absentia proceedings due to absconding.[111] Indeed, 'the point of being a fugitive is not to be found',[112] and this creates additional issues for proving that a person is alive.

In this regard, international criminal tribunals have adopted different strategies. At the IMT, the judges allowed a trial in absentia against Bormann on the presumption that he was still alive and there was no contrary evidence.[113] At the ICTY and ICTR, the judges have relied on the issue of official death certificates or on DNA tests to prove the death of absent suspects.[114] However, a common difficulty is how the judges can decide the issue, without relying on biased considerations and wrong presumptions. As in the case of personal and public notifications, the judges must establish criteria that will inform their decision. These guidelines should consider the factual, social, and political circumstances of the case and the type of crimes prosecuted to understand if there is a high probability that the person is dead at the time of the notification.

However, the decision on an absent suspect's death might be problematic (especially with a fugitive). For instance, according to a legal practitioner interviewed for this thesis, there might be additional issues if the defence counsel wants to appeal the decision of the Tribunal that considers the person alive (as it happened at the STL).[115] Indeed, if the Trial Chamber decides that the person is dead and the Appeals

[106] E.g. Interview 03.
[107] *The Prosecutor v. Ayyash et al.*, STL, Order Pursuant to Rule 76(E) (2011, para.16).
[108] E.g. Interviews 01; 03.
[109] On the topic, see Bachvarova (2012); Elberling (2012, pp.14ff.).
[110] This point was also raised by the Defence in *Ayyash et al*. For instance, see *The Prosecutor v. Ayyash et al.*, STL, Sabra Motion for Reconsideration (2012, paras.12-17).
[111] E.g. Interview 04.
[112] Ibid.
[113] See *Trial of the Major War Criminals*, IMT, Preliminary Hearing (17 November 1945, p.28).
[114] See Elberling (2012, p.16).
[115] E.g. Interview 06.

Chamber instead argues that there is insufficient evidence to prove the death, there are two contradictory outcomes.[116]

Attention must also be given to other two points: (a) the general approach a tribunal should have on the issue; and (b) the evidence needed to prove that an absent suspect is alive. It is argued that a tribunal has a positive duty to prove that a suspect is alive,[117] and the court should consider the various interests at stake (i.e. the rights of the victims, the interests of the accused, and those of the public).[118] Moreover, the tribunal should make a concrete evaluation of the case,[119] giving the possibility to the Defence team to investigate the person's circumstances,[120] and working on the presumption that the suspect is alive.[121]

International criminal tribunals do not adopt a common standard for the evidence of the death. Some courts rely on death certificates and official documents that can prove the person is dead or alive.[122] Others (e.g. the STL) have made a holistic evaluation of the evidence, without relying on a death certificate. In the case of the STL, the decision of the Tribunal has been highly contested.[123] An interesting argument is advanced by the legal practitioners interviewed for this thesis when saying that the Tribunal needs to decide using 'conclusive evidence',[124] and this can include death certificates[125] and DNA tests,[126] as it happens in national jurisdictions.[127] However, problems might arise when the country of reference is unable or unwilling to issue the official documents required (e.g. death certificates). In these cases, it is argued that the court should rely on other evidence (globally considered)[128] that can prove the person's death according to the standard chosen.[129]

Moreover, there is no common standard of proof: at the STL, the judges have relied upon a balance of probabilities, rather than the beyond reasonable doubt standard. Once again, this decision is debated, and some legal practitioners interviewed for this

[116] E.g. ibid.
[117] Interview 10.
[118] E.g. Interview 04.
[119] E.g. Interview 13.
[120] E.g. Interview 04.
[121] E.g. Interview 03.
[122] This method is used also when it is necessary to prove the victims' death. See, for instance, Citroni (2014).
[123] E.g. Interview 10.
[124] Interview 06. Accord Interviews 04; 07.
[125] E.g. Interview 01.
[126] E.g. Interview 13.
[127] E.g. Interview 06.
[128] E.g. Interview 13.
[129] E.g. Interviews 02; 10.

thesis are in favour,[130] others strongly against.[131] The idea is that to prove life and death there are two 'totally different tests'.[132] These tests are like 'communicating vases': if there is evidence that someone is dead, then there is less evidence that he/she is alive.[133]

Another controversial element is the threshold that international criminal tribunals have to meet for the notification of the indictment. Indeed, the tribunals must use some criteria to assess the notification and guarantee that the suspect knows about the charges and the proceeding. At the STL, it has been used the 'all reasonable steps' test.[134] This refers to the measures adopted by the Prosecutor and the national authorities in Lebanon to notify the suspects.[135] This test is highly debated.[136] In *Ayyash et al.,* the defence counsels contested the decision of the Trial Chamber that the test was satisfied.[137] First of all, it has been posited that the threshold was not reached because the notification's elements (e.g. the place and methods) were not satisfactory.[138] However, some legal practitioners interviewed for this thesis have expressed support for the STL approach by saying that the test was applied properly by the Tribunal.[139] Second, the Tribunal can use various means to fulfil the test,[140] but it needs to clarify the steps that are part of the test and provide specific details.[141] Third, to achieve a successful outcome of the notification and guarantee that 'all reasonable steps' have been taken, the Tribunal should engage more with certain actors, such as States and political authorities.[142]

The Trial Chamber and the Appeals Chamber decided that the test was fulfilled.[143] President Cassese noted that this 'should be treated as a rigorous standard, requiring meaningful efforts to effect service through a variety of channels',[144] and this is because 'it is in the best interests not only of the accused but also of the Tribunal […] for each accused to be present and to fully participate in his own defence'.[145] There is

[130] E.g. Interviews 13; 16.
[131] E.g. Interview 07.
[132] Interview 10.
[133] E.g. Interview 13.
[134] Art. 22(1) STL St.
[135] See Art. 22(1)(c) STL St.
[136] For instance, see Jenks (2009).
[137] See *The Prosecutor v. Ayyash et al*., STL, Request Defence Badreddine for Reconsideration (2012); *The Prosecutor v. Ayyash et al*., STL, Request Oneissi Defence for Reconsideration (2012).
[138] E.g. Interviews 02; 03.
[139] E.g. Interviews 04; 07; 12; 14.
[140] E.g. Interviews 04; 10.
[141] E.g. Interview 04.
[142] E.g. Interviews 02; 14; 15.
[143] See *The Prosecutor v. Ayyash et al*., STL, Decision on Defence Appeals (2012); *The Prosecutor v. Ayyash et al*., STL, Decision on Reconsideration (2012).
[144] *The Prosecutor v. Ayyash et al.*, STL, Order Pursuant to Rule 76(E) (2011, para.16).
[145] Ibid., para.15.

no definition of what 'all reasonable steps' means and, according to the Trial Chamber, this must be determined from the circumstances of the case and 'not in the abstract, but rather by examining the totality of the prevailing circumstances'.[146]

The judges drew three distinctions on what 'all reasonable steps' means: (i) in general; (ii) in the Lebanese criminal procedure; and (iii) before other international criminal tribunals. In particular, the judges distinguished the threshold required to secure the person's appearance from that required to notify the charges, considering the former of a higher standard, e.g. it 'may require the use of force, whereas the mere notification of a charge, of itself, will not'.[147] In this sense, this distinction has been usually applied for the confirmation of charges under Rule 61 at the ICTY and ICTR, but here, due to the nature of the proceeding, there is a lower standard than for a trial in absentia.[148] Indeed, as will be discussed in Subsection 3.2.2., the nature of Rule 61 proceeding is that of 'a declaration of the sufficiency or otherwise of the Prosecution's evidence at a prima facie level, as opposed to an adjudication of criminal responsibility'.[149]

3.2.2. Confirmation of Charges In Absentia

The confirmation of charges precedes the opening of the trial phase, and it aims to check the status of the case before the beginning of the 'core' phase of an international criminal proceeding.[150] Some international criminal tribunals hold the confirmation of charges after the issue of an arrest warrant;[151] others before it.[152] The confirmation of charges includes a hearing that is held *ex parte* with the sole presence of the Prosecutor and the Judges, or it also involves the Defence.[153] Although these three actors are allowed to be present at the hearing, there are some aspects of the confirmation of charges that are challenging in in absentia proceedings. These are: (i) the nature of this proceeding; and (ii) the Defence's presence at the hearing.

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[146] *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012, para.28).
[147] Ibid., para.30.
[148] Ibid., para.37.
[149] Ibid.
[150] See Stegmiller (2015, p.891); Nerlich (2012); Ambos and Miller (2007, p.341).
[151] See Art. 58 ICC St. and Rule 121 ICC RPE.
[152] See Art. 19 ICTY St. and Rule 47 ICTY RPE; Art. 18 ICTR St. and Rule 47 ICTR RPE.
[153] At the ICTY and ICTR is held *ex parte*; at the ICC the Defence is present; and at the STL there is a representative of the Defence Office.

As discussed in Chapter 2, the confirmation of charges in absentia has been regulated at the ICTY and ICTR,[154] and in some cases the confirmation of charges has been carried out in absentia[155] when the suspects were fugitives and could not be apprehended before the beginning of the trial phase.[156] Rule 61 has been the object of much debate.[157] Some say that this is 'an incomplete process',[158] and it is 'purely symbolical'[159] because it does not determine any criminal responsibility and it advances the case only partially. In this sense, 'it offers nothing' to the victims,[160] because there is no suspect in the courtroom and no determination of guilt.[161]

Moreover, it is said that the confirmation of charges in absentia resembles a trial in absentia, as in both cases the person is not present before the judges and cannot challenge the Prosecutor's strategy.[162] In this sense, the confirmation of charges would be a 'quasi-trial' or 'mini-trial' in absentia, and it would violate the suspect's rights (e.g. the presumption of innocence).[163] These criticisms are valid, as it is necessary to determine the nature of the confirmation of charges in absentia and exclude a possible pre-conviction of the person before the trial phase. Moreover, the concern of the possible overlapping of the functions of the two phases is legitimate. Indeed, the rules regulating a proceeding in absentia must clearly distinguish the various phases of the proceeding itself because peculiar issues and needs correspond to each phase. However, not all scholars and practitioners are against pre-trial in absentia proceedings, and some say that the confirmation of charges in absentia is a necessary innovation in International Criminal Justice.[165]

Furthermore, it is argued that Rule 61 does not allow a 'mini-trial' in absentia because there is no determination of guilt.[167] Indeed, the tribunal limits its considerations to the existence of a *prima facie* case[168] or the 'substantial grounds to believe' that the suspect has committed the crimes.[169] Therefore, the confirmation of

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[154] See Chapter 2, Subsection 2.2.2.
[155] For instance, see *The Prosecutor v. Nikolić*, ICTY, case no. IT-94-2; *The Prosecutor v. Martić*, ICTY, case no. IT-95-11; *The Prosecutor v. Rajić*, ICTY, case no. IT-95-12; *The Prosecutor v. Mrksić, Radić and Šljivančanin*, ICTY, case no. IT-95-13/1; *The Prosecutor v. Mladić*, ICTY, case no. IT-09-92.
[156] See Kerr (2004, p.100); Vohrah (2004).
[157] See Friman (2009a, pp.494-495); Thieroff and Amley (1998).
[158] Interview 01.
[159] Interview 11.
[160] E.g. Interview 07.
[161] E.g. ibid.
[162] See Stankovic (2010).
[163] See Gordon (2007, p.641).
[165] See Friman (2009a, p.494). Accord Interviews 03; 10.
[167] See Hildreth (1998, p.502). Accord Interview 02.
[168] E.g. Interview 06.
[169] See De Beco (2007, p.470).

charges is not a 'trial', and it does not have the same function.[170] Indeed, in a trial, the Court decides the criminal liability of the accused, and it issues a verdict; in the confirmation of charges, this does not happen. Therefore, the confirmation of charges in absentia is 'less prejudicial to the accused',[171] and it achieves different goals than a trial in absentia.[172] For instance, it aims at 'the creation of a public record'[173] to undermine the attempt of fugitives to avoid any prosecution and determination of accountability.[174] Moreover, the burden of proof differ in the two phases.[175] Indeed, in the confirmation of charges in absentia, the Court must establish that there are 'reasonable grounds to believe' that the suspect has committed the crimes.[176] Instead, at trial, the Court must prove the guilt of the accused 'beyond reasonable doubt'.[177]

At the STL a Defence Office has been created to support the Defence in in absentia proceedings.[178] This is an independent organ that cooperates with the Defence teams in the best interests of the absent suspect,[179] but it is not linked directly to the person. This means that it has no direct connection with the suspects and this permits it to avoid possible conflict of interests emerging in the pre-trial phase[180] and to undermine the subsequent action of the defence counsels.[181] On this point, a legal practitioner interviewed for this thesis argues that the Defence Office does not discuss the evidence of the case at pre-trial but only the possibility to conduct a trial in the suspect's absence.[182] Therefore, 'it is well placed to argue this point'.[183]

The Defence Office is an important innovation in International Criminal Justice, and it represents an additional safeguard for the Defence in in absentia proceedings.[184] It is considered a better choice than not having a defence counsel present during the

[170] See Calvo-Goller (2006, p.40). Accord Interview 13.
[171] Interview 03.
[172] The primary function of Rule 61 is 'to publicize globally the oftentimes heinous acts allegedly committed by the accused': Hildreth (1998, p.512). In Interview 05, it is argued that Rule 61 ICTY and ICTR RPE is better than having a total trial in absentia as under Art. 22 STL St.
[172] See Nagan (1995, p.160).
[173] Ibid., p.161.
[174] See ibid.
[175] See Miraglia (2008, p.489). Accord Interviews 02; 15.
[176] See Patel King (1997). On the disclosure of evidence at the ICC, see Mariniello (2015b); Caianiello (2010).
[177] Contrary to this position, some scholars have affirmed that in both cases the standard of proof permits the tribunal to make a 'determination of guilt': Gordon (2007, p.641).
[178] The Defence Office is one of the four organs of the STL and a *unicum* in the history of international criminal tribunals. For an analysis, see Jones and Zgonec-Rožej (2014, pp.191ff.).
[179] As part of its duties 'the office thus brings institutional weight to bear for the defendants and their counsel, to permit access to the country and investigations, in a manner similar to the way the prosecutor could take such arrangements for granted at the SCSL and other ad hoc courts': Jalloh (2014, p.799).
[180] E.g. Interviews 04; 07.
[181] E.g. Interview 15.
[182] E.g. Interview 03.
[183] Ibid.
[184] E.g. Interview 01.

confirmation of charges,[185] and it is argued that it is 'a consequence of equality of arms'.[186] Indeed, the Defence Office was created to balance two possible conflicting elements: the conduct of in absentia proceedings and the absence of support for the Defence (that is already undermined by the lack of instructions from the defendant).[187] In this regard, given its importance for guaranteeing an effective defence and supporting the defence counsels, some interviewees say that the Defence Office should always be present in international criminal tribunals.[188] Although created as a safeguard for in absentia proceedings, it should become an organ of all international criminal tribunals.[189]

A second relevant aspect of the confirmation of charges in absentia is the participation of the Defence in the hearing.[190] One of the principles of international criminal proceedings to guarantee fair trial is the possibility for the defendant to have a defence counsel.[191] This is true in any criminal proceeding, including in absentia proceedings.[192] The defence counsel can be chosen by the defendant or is appointed by the Tribunal.[193] In the pre-trial phase, the defence counsel's functions are various and very important. For instance, the counsel 'may object to the charges […], challenge the prosecution's evidence, and present defence evidence'.[194]

Despite this pivotal role, in the confirmation of charges in absentia, sometimes the choice of international criminal tribunals has been to hold the hearing without a defence counsel.[195] Therefore, the problem is the protection of the person's rights in a sensitive phase of the proceeding. In this regard, the legal practitioners interviewed for this thesis express concerns about this lack of legal representation. For instance, they say that the fairness of the proceeding is compromised if the absent suspect is not represented by a defence counsel,[196] and it would be better to have a defence counsel appointed already in the pre-trial phase.[197]

In the practice of international criminal tribunals, the question has been addressed by considering the interests at stake, i.e. those of the Defence and the

[185] E.g. Interview 05.
[186] Ibid.
[187] E.g. ibid.
[188] E.g. Interviews 03; 05.
[189] E.g. ibid.
[190] E.g. Interview 07.
[191] See Bassiouni (2013, pp.818ff.); De Bertodano (2009, pp.292-294).
[192] See Jacobs (2014).
[193] See Gut, Kirsch, Mundis and Taylor (2013, pp.1204ff.).
[194] Gallant (2000, p.38).
[195] See Friman (2009a, p.494).
[196] E.g. Interview 01.
[197] E.g. Interview 16.

Prosecution. In *Ayyash et al.*, the defence counsels have contested the fact that at the hearing confirming the charges and deciding on whether to hold a trial in absentia,[198] only a representative of the Defence Office was present with no defence counsels.[199] Moreover, criticisms have been mounted for the late appointment of the defence counsels after the confirmation of the charges and the decision to hold a trial in absentia.[200] It has been argued that 'proceeding with a trial in absentia without hearing the counsel for the accused jeopardises the integrity of the entire trial proceedings'.[201]

These concerns are significant for two reasons. First, when the defendant is absent from the proceeding, there is a fundamental need to be defended properly by a defence counsel (albeit one appointed by the Court). The proceedings cannot be fair if, in a pivotal stage like the confirmation of charges or the decision to hold a trial in absentia, no defence counsel is present. The Defence Office cannot substitute the role of a defence counsel, and it cannot act as if it is representing the defendant's interests.[202] Indeed, the Defence Office is only an organ that supports the action of the defence counsels (e.g. for funding),[203] but it does not represent the defendant's specific interests.[204] In *Ayyash et al.*, the Defence Office participated in the hearings where the Trial Chamber decided to hold a trial in absentia but made no significant contribution to the cause of the absent defendants. It 'flagged the question of the general fairness to accused persons of in absentia proceedings but reserved any argument on the issue to assigned or appointed defence counsel, at the appropriate time in the future'.[205] Therefore, the condition to have a defence counsel is not fulfilled, and the defence strategy can be affected negatively.[206] The result is a 'duplication' of in absentia: there is no defence counsel and no defendant in court.

Second, the right to have a defence counsel must be recognised in every phase of international criminal proceedings, and not only in the trial phase.[207] This means that a suspect shall have a counsel even in the pre-trial phase, representing his/her interests

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[198] See *The Prosecutor v. Ayyash et al.*, STL, Decision to Hold Trial In Absentia (2012).
[199] See *The Prosecutor v. Ayyash et al.*, STL, Request Defence Badreddine for Reconsideration (2012, para.11); *The Prosecutor v. Ayyash et al.*, STL, Request Oneissi Defence for Reconsideration (2012, paras.21-31).
[200] See *The Prosecutor v. Ayyash et al.*, STL, Request Defence Badreddine for Reconsideration (2012, para.11); *The Prosecutor v. Ayyash et al.*, STL, Request Oneissi Defence for Reconsideration (2012, paras.21-31). Accord Interviews 01; 02.
[201] *The Prosecutor v. Ayyash et al*., STL, Ayyash Motion Joining Sabra Motion (2012, para.1).
[202] E.g. Interview 01.
[203] See Jones and Zgonec-Rožej (2014, p.192).
[204] E.g. Interview 03.
[205] *The Prosecutor v. Ayyash et al*., STL, Decision to Hold Trial In Absentia (2012, para.18).
[206] E.g. Interview 01.
[207] On this right in international criminal proceedings, see Bohlander, Boed and Wilson (2006).

and advancing a positive case.[208] As the scholarship argues, 'initial representation of accused persons would be required and might be particularly useful given the possibility of in absentia trials'.[209] Besides, without a counsel present, the absent person cannot have a proper defence. Indeed, the counsel cannot present evidence and contest the Prosecutor's case. Thus, there is an undue disparity among the parties, and this infringes equality of arms, a fundamental component of the principle of fair trial.

To conclude, different opinions are expressed on the confirmation of charges in absentia. On the one side, criticisms are mounted because the process seems to be a 'show trial', with scarce consideration of the suspect's rights.[210] It is said that 'the benefit of this process was obviously to satisfy the appetite of the press for access to the investigative phase of the work of the Tribunal - a phase not typically conducted in public'.[211] In so doing, 'the process led to the increased visibility of the Tribunal and provided a forum to mobilize public opinion in favour of aggressive arrest initiatives and budgetary support'.[212] On the other side, the confirmation of charges in absentia is seen as a process through which victims 'can have a voice' in the proceeding.[213] In this sense, 'Rule 61 was adopted with the hope that it will allow victims a formal means of redress when war crimes suspects are not present before the court'.[214]

3.3. Trial Phase

The trial phase is the 'central and most visible phase of an international criminal prosecution'.[215] It goes from the moment in which the pre-trial judge refers the case to the Trial Chamber until the issue of a judgment that establishes the responsibility for the crimes committed.[216] In the trial phase, the proceeding enters the 'core' part of the adversarial confrontation of the parties. Here, the Prosecutor and the Defence present their reconstruction of the facts of the case, and they submit the supporting evidence to the judges.[217]

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[208] Ibid., pp.22-25.
[209] Jalloh (2014, p.815).
[210] See, for instance, Stanković (2010, pp.18ff.); Russell-Brown (2003, p.130).
[211] Arbour (2004, p.399).
[212] Ibid.
[213] See Hildreth (1998, p.514); Quintal (1998).
[214] Hildreth (1998, p.501).
[215] Boas, Bischoff and Reid (2011, p.251).
[216] See Boas, Bischoff and Reid (2011, pp.276ff.), Safferling (2012, pp.378ff.).
[217] For instance, at the ICTY and ICTR, see Friman (2009b, p.366).

3.3.1. Trials In Absentia

As discussed in Chapter 1, the accused's absence during the trial phase can have different forms, and it can result in a partial or total trial in absentia.[218] Indeed, the accused can be (a) absent since the beginning of the trial (e.g. total in absentia due to absconding or unawareness); (b) present at the beginning and absent later on (e.g. partial trial in absentia due to absconding or waiver of the right to be present); (c) present for the main part of the trial phase but absent for some specific hearings (e.g. partial trial in absentia due to waiver of the right to be present). As discussed in Chapter 2, all these cases are regulated by international criminal tribunals, with the majority of provisions concerning partial trial in absentia.[219] An important exception is the STL that allows total trials in absentia.

Trials in absentia are not different from ordinary trials for the rules applied, except for the fact that the accused is not physically present in the courtroom. For instance, evidence must be submitted and disclosed by the parties to the judges; there are opening and closing statements of the parties; and the entire proceeding is conducted under the aegis of the principle of fair trial and its corollaries. Recalling the classification of trials in absentia presented in Chapter 1, the author considers the various types of trials in absentia underlying the relevant issues emerging from the practice of international criminal tribunals.

Starting with partial trials in absentia, international criminal tribunals generally allow the trial to continue in the defendant's absence when he/she has been present before the judges at least once and then has been absent for various reasons.[220] The initial presence in the proceeding is therefore pivotal for allowing the continuation of the proceeding in partial in absentia. As mentioned in Chapter 1, the reasons for the partial defendant's absence from trial vary.[221]

If the accused is ill[222] and the illness is permanent, the proceeding is suspended because the accused must be able to participate fully in the trial, with no physical or mental impediments.[223] This situation is similar to the accused's death during the trial

[218] See Chapter 1, Subsection 1.2.3. Trials in absentia have received more attention in the literature than other in absentia proceedings. See Zakerhossein and de Brouwer (2015); Shaw (2012); Gaeta (2007); Brown (1999).
[219] See Chapter 2, Section 2.2.
[220] See Zakerhossein and de Brouwer (2015, pp.209ff.).
[221] See Chapter 1, Subsection 1.2.3.
[222] On the topic, see Freckelton and Karagiannakis (2014).
[223] See Schabas (2010, p.758).

that impedes the continuation of the proceeding. In both cases, the accused is not any more part of the proceeding and cannot be prosecuted.

When the accused is disruptive[225] the judges can remove him/her from the courtroom,[226] but he/she is still part of the trial: either following the proceeding through video-link[227] or without following it being tried partially in absentia.[228] However, the accused is readmitted into the courtroom as soon as possible, to let the proceeding continue normally.[229]

If the accused decides to waive his/her right to be present at trial,[230] international criminal tribunals guarantee this choice[231] but (as discussed in Chapter 1) the waiver must have certain characteristics to be valid.[232] If all conditions are met, the accused is entitled to be absent. This case shows how a partial trial in absentia can be triggered by an accused that does not want to be present at trial. In this sense, in absentia is not 'imposed' upon the accused or decided *ex parte*, but it is the expression of the defendant's free choice.

An interesting and controversial case has occurred at the ICC, where two accused (i.e. Kenyatta and Ruto) have asked the Court to be excused from being continuously present at trial due to their official duties as President and Vice-President of Kenya.[233] This request has been followed by a change in the Rules of Procedure of the ICC and the introduction of Rules 134bis, ter and quater that permit an accused to be partially absent from the proceeding.[234] This is a unique case in International Criminal Justice, as the ICC is the only international criminal tribunal to allow this type of in absentia proceedings, where the accused can attend the trial 'on and off' due to his/her public duties.[235] This possibility contradicts the general approach adopted at the ICC to require an accused to be always physically present at trial, and it seems to violate equality among defendants, as only those that have a public function in a country can benefit from the new rules.[236]

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[225] On the topic, see Scharf (2007; 2006). When referring to the ICC, Gaeta (2014, p.232) calls this 'trial in absentia proper', i.e. where the accused has been notified in person and he has appeared in court.
[226] See Rule 80(B) ICTY RPE; Rule 80(B) ICTR RPE; Art. 63(2) ICC St. and Rule 170 ICC RPE; Rule 138 STL RPE.
[227] See Art. 63(2) ICC St.; Rule 81bis ICTY RPE; Rule 105 STL RPE.
[228] See Rule 82bis ICTR RPE.
[229] See Art. 63(2) ICC St.; Rule 82bis ICTR RPE.
[230] See Art. 22(1)(a) STL St. and Rule 106 STL RPE.
[231] See Zakerhossein and de Brouwer (2015, pp.207-209).
[232] See Chapter 1, Subsection 1.3.2.
[233] For an analysis, see Schwarz (2016); Hansen (2013); Chapter 2, Subsection 2.2.2.
[234] See ICC ASP, Res. 7 (2013).
[235] See Mignot-Mahdavi (2014).
[236] See Knottnerus (2014).

The legal practitioners interviewed for this thesis advance some interesting arguments on these new rules. One says that there might be a problem for their compatibility with the existing provisions of the ICC Statute.[237] Indeed, as discussed in Chapter 2, the ICC Statute seems to rule out trials in absentia (even partial trials in absentia).[238] The fact that Rules 134bis, ter, and quater allow this possibility might create an internal regulatory contradiction, and this would also affect the practice of the Tribunal.[239] The judges would find themselves in the uneasy position to justify the conduct of partial trials in absentia when the Statute of the ICC is tailored for a proceeding where the defendant should be present. This is an important point that needs to be considered when discussing the recommendations for a future use of in absentia proceedings (i.e. in Chapter 6) because it indicates the possible statutory limits to trials in absentia in a tribunal with a consolidated regulatory framework.

Another point relates to the possible discrimination among absent defendants derived from the Rules.[240] In this regard, criticisms are mounted against the undue distinction based on the public functions of a defendant, and it is argued that this treatment is 'unfair' because the role of the defendant cannot justify the fact that 'you are the only one who benefits from not being present during your trial'.[241] This argument is relevant because it indicates the need for a careful evaluation of the regulation and practice of trials in absentia to achieve a non-discriminatory treatment of different absent defendants.

There is also a problem for the future practice of in absentia proceedings and the use of trials in absentia.[242] Indeed, as it happens with their regulation, in the practice of these proceedings there is an issue for the future decisions of international criminal tribunals regarding the so-called 'part time accused'.[243] Indeed, the judges need to provide guidelines on partial trials in absentia, i.e. to indicate 'where to draw the line'[244] for allowing these proceedings.

When the accused has appeared once before the judges but then has absconded,[245] no provisions regulate the accused's absence after the commencement of the trial phase. This legislative gap must be filled, as there is a risk of legal uncertainty

[237] E.g. Interview 08.
[238] See Chapter 2, Subsection 2.2.2.
[239] E.g. ibid.
[240] E.g. Interviews 02; 03; 07; 08; 10; 16.
[241] Interview 04.
[242] E.g. Interview 03.
[243] Interview 15.
[244] E.g. Interviews 03; 09.
[245] See Zakerhossein and de Brouwer (2015, p.191); Gaeta (2014, p.233).

and inability to solve future issues with fugitives. At present, it seems that the applicable rule is to suspend the proceeding and wait until the accused is arrested or surrenders. However, this option raises similar problems to the traditional choice of suspending the proceeding discussed in Chapter 1.[246]

Turning to total trials in absentia, the relevant practice is that of the STL when applying art. 22 STL St. The Tribunal allows for the conduct of trials in absentia when certain conditions are met, and specific procedural safeguards are fulfilled.[247] Trials in absentia are considered exceptional: the STL Statute affirms the accused's right to be tried in his/her presence and then refers to the exception of a trial conducted in absentia.[248] Total trials in absentia are the most controversial type of trials in absentia, and many scholars and legal practitioners contest them.[249] As will be examined in Chapter 4, these trials pose various procedural challenges to the parties, especially the Defence.[250] Indeed, the accused's total absence obliges the parties to adapt to this exceptional situation, using different procedural strategies. At the STL, the experience of total trials in absentia has been highly debated by the scholarship,[251] and also the legal practitioners interviewed for this thesis have expressed concerns.

A preliminary issue is the fact that before conducting total trials in absentia the STL could have relied better on the work of an important organ created for this Tribunal: the pre-trial judge.[252] This organ would be helpful in preparing the case, leading the investigations alongside the Prosecutor, and bringing it to the Trial Chamber to have an expeditious trial.[253] However, according to the literature and a legal practitioner interviewed for this thesis, this organ did not work and *Ayyash et al.* resembles an ordinary proceeding.[254] This means that the potential benefits of the work of the pre-trial judge are wasted, and the total trial in absentia has become lengthy and even more problematic.[255] This is a valuable aspect to consider when proposing some recommendations for a future use of in absentia proceedings in International Criminal Justice (i.e. in Chapter 6).

Another point concerns two interrelated aspects. First, the suitability of a case to have the trial phase conducted in absentia, i.e. the fact that a trial in absentia is a

[246] See Chapter 1, Subsection 1.3.3.
[247] See Art. 22 STL St. and Rules 105bis-108 STL RPE.
[248] See Art. 16(4)(d) STL St. compared to Art. 22 STL St.
[249] For instance, see Wheeler (2017); Jordash and Parker (2010).
[250] See Chapter 4, Sections 4.2., 4.3., and 4.4.
[251] See Trad (2016); Gardner (2011); Jordash and Parker (2010); Jenks (2009).
[252] On the pre-trial judge at the STL, see Wählisch (2012).
[253] See Hrdličková (2019, pp.211ff.); Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, p.372).
[254] See Jones and Zgonec-Rožej (2014, p.200). Accord Interview 01.
[255] Ibid.

valuable choice for the case at stake. According to the legal practitioners interviewed for this thesis, the judges should consider: (a) the distinction between practical issues (also concerning procedural strategy) and issues of fairness;[256] and (b) the technical difficulties of the case at stake (e.g. technical evidence).[257] On the other side, the practice of the Tribunal should also reflect the opinion of those working with in absentia proceedings in practice.[258] This means to acknowledge the points raised by the legal practitioners working at a certain tribunal. For instance, at the STL there is a problem on how to consider these opinions. Indeed, on the one side, there is a feeling that these people have 'less room for criticising the institution',[259] and on the other side, 'there is this assumption that if you work for the Defence but you're in the institution you cannot be independent. But there is not the same assumption for the Prosecution who is exactly in the same situation'.[260]

A final point concerns the accused's death during the trial phase. This is a similar issue to the one discussed in the pre-trial phase, i.e. to prove that a defendant is alive. Here, the Tribunal must use clear criteria for determining the defendant's death with certainty, as it happens when the court must decide if the person is alive to prosecute him/her in absentia. At the STL, once one accused has been declared dead, the Trial Chamber had to decide on the continuation of the proceeding against him/her. With a controversial decision[261] (including a dissenting opinion)[262] the Tribunal has allowed the trial to continue until the Prosecutor receives further information officially confirming the accused's death. The defence counsels have contested the decision, and they have filed an Appeal affirming the death of the defendant.[263]

This case shows how difficult the decision on the death of an accused tried in absentia can be for an international criminal tribunal. In particular, the issue is to decide which documents are sufficient to establish the death and which authority should issue them. As discussed in Subsection 3.2.1., in the past, international criminal tribunals have relied upon official death certificates or DNA tests to prove that certain remains belonged to an accused. At the STL, the Tribunal established the defendant's death following a high threshold, given the complex political and social situation in Lebanon.

[256] E.g. Interview 02.
[257] E.g. Interviews 10; 13.
[258] E.g. Interview 13.
[259] Ibid.
[260] Ibid.
[261] See *The Prosecutor v. Ayyash et al.*, STL, Reasons for Interim Decision on the Death (2016).
[262] See *The Prosecutor v. Ayyash et al.*, STL, Dissenting Opinion Judge Braidy (2016).
[263] See *The Prosecutor v. Ayyash et al.*, STL, Badreddine Interlocutory Appeal (2016).

For these reasons, the decision of the Trial Chamber seems to be correct, and it permits the judges to decide the case 'beyond reasonable doubt'.

3.4. Post-Trial Phase

Once the trial phase is finished, and the Tribunal has issued a final decision on the merits of a case, the proceeding enters into its last phase, i.e. the post-trial phase. This goes from the issue of a sentence in the first instance to the retrial.[264] It includes all actions that occur after the accused has been convicted, and it serves a dual purpose: (i) to enforce the sentence issued; and (ii) to permit the convicted defendant to have a remedy against the conviction.[265] The post-trial phase concludes the *iter* of the prosecution of international crimes and represents the last stage of the tripartite structure of international criminal proceedings.

As discussed in Chapters 1 and 2, post-trial in absentia proceedings are not included properly in the regulatory framework of the five international criminal tribunals considered in this thesis.[266] Nonetheless, they need to be addressed in this thesis because they will be relevant in Chapter 6 when discussing the future of in absentia proceedings. In this regard, this Subsection discusses three aspects: (i) the conduct of an appeal in absentia, when an accused is absent from trial and the Defence wants to challenge the conviction issued by the Trial Chamber;[267] (ii) the enforcement of a sentence issued in absentia with the need to find the convicted person to transfer him/her to a State; and (iii) the possibility for an accused convicted in absentia to have a retrial.

3.4.1. Appeal In Absentia

In international criminal proceedings, the main functions of an appeal are: (a) to challenge a judgment rendered in the first instance (i.e. by a Trial Chamber); and (b) to have the merits of the case re-determined by the judges.[268] The Appeals Chamber is composed of judges that are different from the ones sitting in the Trial Chamber to

[264] On post-trial proceedings, see Calvo-Goller (2006, pp.115ff.).
[265] On the purpose and components of the post-trial phase, see Boas, Jackson, Roche, and Don Taylor III (2013, pp.942-1014).
[266] See Chapter 1, Subsection 1.2.3. and Chapter 2, Section 2.2.
[267] For an in-depth analysis of the appeal stage, see Boas, Jackson, Roche, and Don Taylor III (2013, pp.942-1014); Book (2011).
[268] See Zappalà (2009b, pp.246-247).

avoid biases and preconceptions.[269] Moreover, the Appeals Chamber is entitled to consider new evidence (although in limited cases),[270] and it is not bound by the decision taken in the first instance.[271]

In the case of an appeal in absentia (especially in the case of total post-trial in absentia), the judges might need to decide the case without any information coming from the defendant and based on the evidence presented by the defence counsel and the Prosecutor.[272] Therefore, the Appeals Chamber experiences similar issues for the fairness of the proceeding and the use of evidence as those of a trial in absentia. At the STL, the Statute prescribes the application of the same standards and rules to both the trial in absentia and the appeal in absentia.[273] In this sense, the appeal deals with the defendant's absence like the trial phase and the judges decide the merits of the case based on similar evidence. Indeed, when an accused is absent at trial and continues to be absent in appeal, the defence counsel cannot submit additional evidence unless he/she has had access to further information without the defendant's help. The appeal in absentia, therefore, raises two main questions: (i) whether it is legally justified to conduct an appeal in absentia, despite the continuous defendant's absence; and (ii) whether the defence counsel can file an appeal on behalf of the absent defendant.

The first question relates to the need to have an efficient administration of justice by international criminal tribunals, for a good use of the resources available and to achieve a justified result with the proceeding.[274] In other words, the issue is to conduct a proceeding that is legally justified to guarantee a fair trial to the accused, without embarking on 'a non-sense judicial adventure'.[275] Indeed, the right to have an appeal in absentia cannot be taken for granted, but it must be considered as a necessary element for the fairness of the in absentia proceeding.[276]

In the case of in absentia proceedings, although there is already the possibility to have a retrial, an appeal can be an additional choice at the disposal of the Defence to challenge the conviction in absentia and have new judges who will decide the case.[277] Thus, the appeal might permit the Defence to contest the decision of first instance but

[269] See Abtahi, Ogwuma and Young (2013).
[270] See Rule 115 ICTY RPE.
[271] See Farrell (2009, p.359); Zappalà (2009b, pp.246-247).
[272] See Riachy (2010, p.1305).
[273] See Rule 107 STL RPE.
[274] See Pons (2010, p.1317); Riachy (2010, p.1305). On this point at national level, see Stamhuis (2001).
[275] In the same sense, see Jenks (2009, p.62).
[276] See the discussion on the effective remedies in in absentia proceedings in Chapter 1, Subsection 1.3.2.
[277] On the function of the appeal in international criminal proceedings, see Book (2011, pp.46-64).

also to have the case re-examined before a different chamber.[278] Moreover, the appeal might prevent the use of a retrial by the defendant, because it permits the Defence and the absent defendant to have a revision of the case before asking for a retrial. In this sense, it might even be considered a 'filter' for the proceeding between the trial phase (with the trial in absentia) and the post-trial phase (with a retrial).[279]

An additional question relates to the possibility for the defence counsel representing a defendant in absentia in the first instance of the proceeding, to file an appeal against a conviction derived from the trial in absentia.[280] Indeed, whereas for the commencement of the trial in absentia the Defence has no 'initiative' power (as the Prosecutor brings the case before the tribunal), for the appeal it is the Defence that can contest the conviction imposed by the Trial Chamber.[281] To this end, the Defence must file an appeal and initiate the proceeding. In this case, if the defendant is totally absent (e.g. at the STL), the defence counsel might face some ethical and strategic problems in filing an appeal.[282] For instance, ethical issues might arise because the defence counsel does not receive instructions from the defendant about the evidence, facts of the case, and Defence strategy.[283] Strategic issues, instead, might emerge because the defence counsel does not know about the view of the absent accused on the appeal, and therefore, the counsel does not know if the defendant agrees with this decision. These ethical and strategic issues will be further analysed in Chapter 4 when discussing the impact of in absentia proceedings on the defence counsel.[284]

3.4.2. Enforcement of a Sentence Issued In Absentia

In International Criminal Justice, the enforcement of a sentence follows specific criteria that are determined by the provisions of international criminal tribunals.[285] This is usually the last part of an international criminal proceeding and the last task that the tribunals must perform. However, it is not an easy procedure, and it can create various problems regarding its value, the modalities used, and the place where the convicted person needs to be transferred for the enforcement of the sentence.[286] These aspects are

[278] See Schabas (2006, p.439ff.).
[279] On the competences of the Appeals Chamber, see Book (2011, pp.246-255).
[280] On the role of the defence counsel in appeal, see Rohan and Ackerman (2017).
[281] See Zappalà (2009b, pp.246).
[282] See Chenivesse and Mundis (2014).
[283] See ibid., p.256.
[284] See Chapter 4, Subsection 4.2.2.
[285] On sentencing in International Criminal Justice, see D'Ascoli (2011).
[286] On enforcement in International Criminal Justice, see Penrose (1999).

relevant also in the case of an absent defendant (especially in total in absentia proceedings) because there are additional issues for the effective enforcement of the sentence.

When a defendant has been sentenced, and the decision is final, the tribunal must ensure that he/she is transferred to a State place where the sentence is enforced.[287] This can be done if the defendant is in the custody of the tribunal. However, if the person is absent (especially when fugitive), the tribunal needs to adopt a different strategy. Indeed, in many cases before international criminal tribunals, fugitives have been on the run for decades, and the possibility of arresting them and enforcing the sentence is undermined.[288] Moreover, the social, political, and legal context in which the accused is searched for the enforcement of the sentence can create similar problems to the ones discussed for the pre-trial phase.

The problem of the enforcement of a sentence in absentia is a controversial aspect of in absentia proceedings.[289] A legal practitioner interviewed for this thesis argues that a sentence issued in absentia does not carry any actual value and it is only symbolical.[290] This means that the sentence is just a recognition for the victims of the criminal responsibility of the defendant and the fact that certain crimes have been committed. If the defendant is absent, there is no immediate effect, but at least the sentence is issued and can be enforced whenever the convicted person is found.[291]

It is also argued that in in absentia proceedings there should be less emphasis put on the sentence and its enforcement, and more importance should be given to the function and value of the proceeding for the victims in light of the objectives of International Criminal Justice.[292] As discussed in Chapter 1, the conduct of in absentia proceedings permits victims' participation and to have a historical record of the facts of the case.[293] Therefore, the value of a sentence issued in absentia is not limited to convicting a person, but it brings other consequences for the parties of the case.

When analysing a sentence issued in absentia attention should be put also on: (a) its collateral effects (e.g. to exacerbate or prolong conflicts); (b) the political constraints to its enforcement;[294] and (c) its length. According to some scholars and a legal practitioner interviewed for this thesis, when a person is convicted in absentia, there

[287] On the aftermath of a final sentence, see Holá and van Wijk (2014).
[288] See Mulgrew (2009).
[289] See Schneider (2019, pp.620ff.).
[290] E.g. Interview 01.
[291] E.g. ibid.
[292] E.g. ibid.
[293] See Chapter 1, Subsection 1.3.1.
[294] On politics and in absentia proceedings, see Chapter 2, Subsection 2.3.2.

might be some collateral effects, especially if the case is linked to a long-lasting conflict in a country.[295] It is argued that if the convicted person is a former or actual military or political leader, the conviction might exacerbate the conflict in the country if this is still ongoing.[296] In this sense, 'trials in absentia would probably encourage the perpetrators of atrocity crimes to be more provocative as they would likely feel as they have nothing left to lose after being accused'.[297] However, it should be noted that this is not just a problem of in absentia proceedings, but it is a danger that all international criminal proceedings face when they deal with high-profile defendants. For instance, the scholarship has discussed this issue concerning the intervention of the ICC in certain contexts and the dangers for ongoing peace processes.[298]

Another interesting point is the political considerations that should be made when dealing with a sentence issued in absentia. In an interviewee's view, the fact that the sentence concerns a situation where there is political instability might have a different outcome for its enforcement (especially for fugitives).[299] For instance, if in the country of reference there is a threat for the fugitive convicted in absentia because the political scenario has changed and the person is not in power anymore, it is likely that he/she will decide to surrender to the tribunal.[300] In support of this hypothesis, it is argued that the same has happened in Uganda, where after being at large for many years, Ongwen has surrendered to the ICC for fear of being killed by his former comrades.[301]

Another important aspect is the length of the sentence issued in absentia.[302] A legal practitioner interviewed for this thesis argues that (especially in the case of fugitives) this element might influence the possibility to enforce the sentence.[303] Indeed, if the sentence is very long (e.g. a life sentence), it is less likely that an absent defendant will surrender to the tribunal.[304] On the contrary, if the sentence is not too long, the defendant might decide to surrender making some considerations of convenience of

[295] See Wheeler (2019, p.95); Kluwen (2017, p.32). Accord Interview 03.
[296] See Wheeler (2019, p.95); Kim and Sikkink (2010, p.958).
[297] Wheeler (2019, p.95).
[298] See Kersten (2016); Wegner (2015); Clark (2011).
[299] E.g. Interview 13.
[300] E.g. ibid.
[301] E.g. ibid.
[302] On the effects of sentences' length, see Ambos (2014, pp.267-307).
[303] E.g. Interview 13.
[304] E.g. ibid.

being at large (with the danger of being killed) against the possibility to remain in jail for some time more safely (or even to get a retrial in the case of the STL).[305]

From the foregoing considerations, three significant points concern the enforcement of a sentence in absentia: (i) its timing; (ii) its modalities; and (iii) its alternatives if the defendant cannot be apprehended.

When the tribunal has issued a final sentence, this is immediately executive.[306] The tribunal can put the convicted person in a detention centre and then, according to specific agreements with States, transfer him/her to a certain country.[307] In the enforcement of a sentence, the court must consider the time the defendant has already spent in detention, while in the custody of the tribunal and on trial.[308] However, for defendants totally absent, the court needs to adopt a different approach. Indeed, the court cannot deduce any time from the sentence if the defendant has never been in custody, while if the person has been arrested but then has fled, a part of the length of the sentence can be deduced.

In the case of fugitives, the main problem is that the arrest can take time and the enforcement is not immediate.[309] In this regard, a legal practitioner interviewed for this thesis argues that the issue of a sentence in absentia creates a paradoxical situation.[310] Indeed, in absentia proceedings (especially total in absentia) are due to a failure to bring the defendant to court. Therefore, the lack of arrest is one of the triggers of total in absentia proceedings. When a sentence in absentia is issued, it needs to be enforced, but this is not possible if there is no arrest. This creates a circular argument where the lack of an arrest is both the origin and end of the in absentia proceeding.[311] The international legislator and international criminal tribunals must consider this consequence carefully when regulating in absentia proceedings. Indeed, as will be discussed in Chapter 4, if a sentence is not enforced immediately this can have various effects on the victims, the political and social stability of the country where the crimes have been committed, and the legitimacy of the tribunal convicting the absent defendant.

Moreover, when the proceeding is concluded, national authorities have to enforce the sentence promptly. However, if the sentenced person is at large, there

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[305] On voluntary surrender, also in common international criminal proceedings, see Calvo-Goller (2006, pp.111ff.); Knoops (2002).
[306] See Stahn (2019, pp.246-249).
[307] See Boas, Bischoff and Reid (2011, pp.413ff.).
[308] See ibid.
[309] On the topic of sentencing and fugitives, see Sadoff (2016).
[310] E.g. Interview 13. On sentences and trials in absentia, see Wheeler (2019, pp.74-79).
[311] E.g. Interview 13.

should be additional efforts to arrest him/her.[312] At the STL, President Cassese stated that although the Lebanese authorities have not been able to arrest the accused so far, they have to continue to search for these people because they are obliged to cooperate with the Tribunal.[313] This is a duty 'that may outrun the lifespan of the Tribunal',[314] and given the unsuccessful attempts of the Lebanese authorities to arrest the defendants, Lebanon 'is indeed obliged even to intensify its efforts in this respect'.[315]

As for the modalities of the enforcement of the sentence, the tribunal must guarantee that proper efforts are made in the search for an absent defendant and that the enforcement will follow the highest human rights standards developed by international and regional human rights bodies.[316] In this sense, one of the challenges for an international criminal tribunal might be the financial constraints that would impede the court to put additional resources into the search of the person.[317] If the tribunal does not have sufficient funding for its work or it has already experienced issues concerning the resources available, it will be unlikely that it will find extra resources for the follow-up of the proceeding. Therefore, there might be a paradoxical situation in which the court has had enough funding for conducting the in absentia proceeding in the pre-trial and trial phases, but not enough money for the post-trial phase that completes the process.

In addition to the funding issue, the court needs to protect the human rights of the defendant (e.g. the right not to be tortured or subject to inhuman and degrading treatment) even when he has been convicted, and the sentence must be enforced.[318] In this regard, the tribunal can give a mandate to the national authorities of a certain country or to Interpol to apprehend the defendant, but the process must follow IHRL standards.[319] Otherwise, the legitimacy of the proceeding and the work of the tribunal might be affected, and it would create a dangerous precedent in International Criminal Justice, especially when dealing with the exceptional situation of the defendant's absence.[320] Therefore, national or international authorities need to respect the

[312] See Sadoff (2016).
[313] *The Prosecutor v. Ayyash et al.*, STL, Order Pursuant to Rule 76(E) (2011, para.19).
[314] Ibid.
[315] Ibid.
[316] On the enforcement of sentences in International Criminal Justice, see Abtahi and Arrigg Koh (2012); Calvo-Goller (2006, pp.128ff.).
[317] See Abtahi and Arrigg Koh (2012, pp.14 and 16-17).
[318] On the conditions for imprisonment, see Petrov and Radisavljević (2017, pp.355-358); Abels (2012, pp.134-168).
[319] This is similar to what happens for the arrest of absent defendants. See Chapter 1, Subsection 1.3.3.
[320] See Knoops (2013).

procedural safeguards required for the fairness of the proceeding in its post-trial phase.[321]

Another consideration relates to the country in which the defendant must be transferred for the enforcement of the sentence.[322] The question is whether a person convicted in absentia, who has been a fugitive for some time and then has been arrested, should be incarcerated in the country of origin or a different State. This is a relevant choice, as it can affect the stability of that country (e.g. when the person had committed crimes in that territory and was a military or political leader) and can create additional issues for the enforcement of the sentence.[323]

Finally, looking at the alternatives to the enforcement of the sentence in absentia, the question is which value a conviction in absentia has in International Criminal Justice and to what extent this is in line with the objectives of this legal system.[324] Indeed, if the only acceptable outcome of an international criminal proceeding is to convict a defendant and put him/her in prison, a conviction in absentia is not ideal.[325] Instead, in absentia proceedings would be more convincing if the prosecution of international crimes admitted that the main goal is to determine the criminal responsibility for what happened, to establish a judicial truth, and to give the victims the possibility to be heard in the proceeding and receive compensation for the damages suffered.[326] As one scholar puts it, 'the victims may be dissatisfied by a procedure during which the accused does not appear and that will likely not result in the accused being punished following a conviction, but it is certainly better than no trial at all'.[327] In this context, criticisms have been advanced about the additional challenges that a conviction in absentia would pose to an international criminal tribunal. In particular, it is said that 'the reliability and credibility of the record of proceedings will be significantly undermined by the accused's absence from the proceedings'[328] and 'the value of an international verdict reached in absentia will be, at best, minimal'.[329]

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[321] See Zappalà (2003).
[322] See Petrov and Radisavljević (2017, pp.349-354); Holá and van Wijk (2014); Abtahi and Arrigg Koh (2012, p.16).
[323] On the issues linked to the country of the enforcement, see Karstedt (2018).
[324] See Chapter 1, Subsection 1.3.1.
[325] See Wheeler (2019, p.77).
[326] See ibid., p.79.
[327] Ibid.
[328] *The Prosecutor v. Ayyash et al*., STL, Sabra Motion for Reconsideration (2012, para.47).
[329] Ibid.

3.4.3. Retrial

One of the procedural safeguards of in absentia proceedings is the right to have a retrial.[330] The retrial is an element of post-trial in absentia proceedings and, as discussed in Chapter 1, this right entails a 'fresh determination of the merits of the case', and the possibility to challenge a conviction in absentia.[331] The retrial is a crucial procedural element of in absentia proceedings, and its value and function are also discussed by the legal practitioners interviewed for this thesis. Two preliminary points emerge: (a) the importance of the right to have a retrial; and (b) the difference with the right to appeal. The retrial is considered a fundamental right,[332] 'one of the biggest safeguards'[333] that should always be guaranteed in in absentia proceedings.[334] Its function is to protect the defendant tried in absentia[335] and guarantee the legitimacy of in absentia proceedings.[336] However, not everybody agrees with the idea that there should be an automatic right to retrial for all absent defendants,[337] and the judges should instead adopt a case-by-case approach.[338] One interviewee says that this right should be granted only for 'genuine absences',[339] i.e. where the absence is involuntary, and the defendant is unaware of the proceeding.[340]

Despite its importance for the fairness of in absentia proceedings, some interviewees argue that it is 'not efficient'[341] and 'an imperfect remedy',[342] especially in its formulation at the STL.[343] Indeed, concerns are expressed about the effectiveness of this remedy for an absent defendant because it is not necessarily 'a real retrial',[344] and sometimes it becomes 'a farce'.[345] This might be true because the retrial obliges the Tribunal to restart the entire proceeding, with the danger of having some defendants that want it and others that oppose it 'and you've got five separate trials' (at the STL).[346]

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[330] See McDermott, Y. (2016, pp.113-116); Knoops (2013, pp.91ff.).
[331] See Chapter 1, Subsection 1.3.2.
[332] See *Thomann v. Switzerland*, ECtHR, Judgment (1996, paras.30-36); *Stoichkov v. Bulgaria*, ECtHR, Judgment (2005, para.56); *Sejdovic v. Italy*, ECtHR, Judgment (2006, para.84).
[333] Interview 14.
[334] E.g. Interviews 02; 07; 09; 11; 14.
[335] See *Sejdovic v. Italy*, ECtHR, Judgment (2006). Accord Interview 04.
[336] See Art. 22 STL St.; e.g. Interview 07.
[337] See Wheeler (2019, pp.140ff.); Gaeta (2014). Accord Interview 10.
[338] E.g. Interview 08.
[339] Interview 09.
[340] See Gaeta (2014).
[341] Interview 03.
[342] Interview 02.
[343] For an analysis, see Gaeta (2014, pp.246-249).
[344] Interview 02.
[345] Interview 09. See also Jenks (2009, p.96).
[346] Interview 03.

Moreover, some legal practitioners say that the problem is not only with the retrial, but generally with in absentia proceedings.[347] In this sense, the retrial is a waste of time and resources,[348] and it needs to be managed more 'efficiently and carefully'.[349]

In line with some scholars' view,[350] the majority of the legal practitioners interviewed for this thesis think that the retrial and the appeal have different functions. The retrial is conceived for cases of total in absentia where the defendant has been involuntary absent,[351] whereas the appeal is a remedy for errors in law, with no reconsideration of the facts of the case.[352] However, this assumption is incorrect. Indeed, looking at the provisions of international criminal tribunals and their interpretation, the appeal's scope is not limited to reconsider the law, but it also extends to the facts and evidence of the case.[353] Moreover, despite the possibility to order a retrial, the Appeals Chambers (e.g. at the ad hoc tribunals) have usually preferred to assess the criminal responsibility in the case at stake.[354]

The right to retrial is expressly provided in the STL Statute[355] and, as discussed in Chapter 1, it is also recalled by the jurisprudence of the ECtHR.[356] At the STL, the retrial has a broad scope to counterbalance the conduct of in absentia proceedings (especially trials in absentia) and provide a strong procedural safeguard to absent defendants.[357] So far, there has been no case of retrial for an absent defendant who has shown up after a conviction in absentia,[358] but this remedy has already raised various issues for its implementation.[359] Indeed, the retrial restarts the proceeding and necessitates a tribunal that conducts the new proceeding in the defendant's presence. This means that there should be: (a) a court competent to conduct the proceeding; (b) a set of rules for the use of evidence in the new trial; and (c) human rights standards as in an ordinary proceeding. In this regard, the focus of this Subsection is on three elements: (i) the tribunal competent to conduct a retrial; (ii) the use of evidence in the retrial; and

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[347] E.g. Interviews 08; 09; 13.
[348] E.g. Interviews 01; 13; 14.
[349] Interview 14.
[350] See Gardner (2011, pp.129ff.); Riachy (2010, p.1305).
[351] E.g. Interview 03.
[352] E.g. Interviews 05; 07.
[353] See Farrell (2009, p.359). Accord Interviews 06; 10.
[354] See Farrell (2009, p.359).
[355] See Art. 22(3) STL St.
[356] See Chapter 1, Subsection 1.3.2.
[357] See Wheeler (2019, pp.143ff.); Gaeta (2014, pp.242-247). Art. 22 STL St. states that the retrial can be invoked 'in case of conviction in absentia […] if he or she had not designated a defence counsel of his or her choosing'.
[358] 'In fact, in the approximately 50 appeals heard by the ICTY Appeals Chamber and the 30 heard by the ICTR Appeals Chamber to date, there has not been a retrial ordered': Farrell (2009, pp.359-360).
[359] See Gaeta (2014, pp.247-248).

(iii) the relationship between the retrial and the previous in absentia proceeding.

The only international criminal tribunal that allows trials in absentia and regulates the retrial is the STL.[360] The STL provisions are contested,[361] and many issues are left unanswered.[362] A first problem is to determine the court that would be in charge of the retrial,[363] i.e. which tribunal and which chamber of that tribunal. The STL provisions are silent on the point,[364] but a solution is necessary to avoid legal uncertainty.[365]

A first solution might be that the STL conducts the retrial.[366] This is the most straightforward choice as it permits the same tribunal that has conducted the in absentia proceeding to decide also the retrial. This would be a good choice also for the judges' acquaintance with the case and the use of in absentia proceedings. However, the STL is not a permanent international criminal tribunal but a temporary court.[367] The STL has been conceived to work for a limited period of three years[368] (its mandate has been subsequently extended every three years).[369] This means that at a certain point the tribunal will close its doors and it will not be possible to conduct any further proceeding before its judges.

To overcome this issue, the STL might be reopened with a Resolution of the UNSC. The problem is that there are no provisions (neither at the STL, nor other international criminal tribunals) that contemplate this possibility, and there is no certainty that the Security Council will issue a Resolution in this sense. However, the legal practitioners interviewed for this thesis are optimistic and consider this a concrete possibility.[370] It is said that it would not be difficult to 'resurrect' the STL for this particular purpose,[371] and the tribunal might be designed differently, with less personnel but specifically dedicated to the retrial.[372] In the end, the Tribunal 'will rise like a phoenix from the death'.[373]

Another solution might be to conduct the retrial before a national court in

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[360] See Art. 22(3) STL St. and Rules 108 and 109 STL RPE.
[361] E.g. Interview 05.
[362] E.g. ibid.
[363] See Gaeta (2014, p.249).
[364] Art. 22(3) STL St. affirms only that the accused 'shall have the right to be retried in his or her presence before the Special Tribunal'.
[365] E.g. Interview 03.
[366] This solution follows a literal interpretation of the provisions of the STL Statute.
[367] For criticisms in this sense, see Wheeler (2019, p.145); Jordash and Parker (2010, p.498).
[368] See UNSC, Res. 1757 (2007).
[369] For the last extension, see https://www.un.org/press/en/2017/sgsm18837.doc.htm.
[370] E.g. Interviews 02; 05; 15; 16.
[371] E.g. Interview 02.
[372] E.g. Interview 15.
[373] Ibid.

Lebanon.[374] This means that the case would be referred to the national authorities of the country in which the crimes have been committed, and the retrial would take place there. In recent years, in International Criminal Justice there has been a growing debate on the prosecution of international crimes in national jurisdictions, delegating the role of international criminal institutions to national judges.[375] In this context, the conduct of retrials at national level might be another form of delegation of prosecution of international crimes.[376] As a scholar points out, retrials before national courts might provide a better sense of proximity to the trial by the general public and the people of the country involved in the case at stake.[377] In this regard, 'holding such prosecutions in the victimised society increases the potential for effective community outreach programs'.[378] This might also strengthen the legitimacy of the prosecution of the international crimes considered because a national prosecution might have more positive effects (e.g. being more expeditious, less expensive, more close to the factual situation of the case).[379]

However, despite the advantage of conducting a retrial in the same territory in which the crimes have been committed with a strict collaboration between national and international authorities, this solution is not convincing. Indeed, there are two problems: (i) the lack of jurisdiction of national judges over the crimes prosecuted;[380] and (ii) the irreconcilable diversity of the rules applied by national and international criminal courts.[381] Allowing national judges to decide over the retrial would cause an undue differentiation between the proceeding conducted in absentia and the retrial.

The retrial might also be conducted by the ICC.[382] The ICC is the only permanent international criminal tribunal in International Criminal Justice, and it would be a good choice especially in the case of a retrial many years after the conclusion of the work of the STL. This solution would avoid a referral of the case to national authorities and a reopening of the STL. However, it is problematic. The first issue is the lack of jurisdiction of the ICC over the crimes prosecuted in the in absentia proceeding. The ICC does not have the same jurisdiction as the STL;[383] therefore it might be difficult to justify this choice, especially considering how the ICC's jurisdiction is usually

[374] E.g. Interview 01.
[375] See Islam (2019); Safferling (2012); Bassiouni (2008); Ferdinandusse (2006).
[376] See Stigen (2008, p.333).
[377] See Knoops (2013, p.91).
[378] Bassiouni (2008, p.298).
[379] See ibid.
[380] E.g. Interview 09.
[381] See Mackenzie, Romano, and Shany (2010, pp.224ff.).
[382] For analysis, see Schabas (2010, p.506ff.).
[383] E.g. Interviews 05; 09. On the relationship between the two courts, see Safferling (2012, p.98).

established (i.e. membership to the Statute; Security Council's referral; Prosecutor's *proprio motu*). The second problem is that the ICC would conduct the retrial of a total trial in absentia case, a legal concept that is extraneous to the Court's knowledge and experience (as discussed in Chapter 2).[384]

A final solution might be to rely on the work of residual mechanisms established by the UN. These will follow the examples of the mechanisms created for the ICTY and the ICTR (i.e. the MICTs), which deal with the proceedings that remain after the ad hoc tribunals have ceased their activities. This solution is preferred by many legal practitioners interviewed for this thesis.[385] Based on the experience of the MICTs, the residual mechanism for in absentia proceedings will be 'mature'[386] enough to conduct the retrial for the STL cases. However, there is an important caveat: the residual mechanism needs to be created for all international criminal tribunals that will deal with in absentia proceedings and their retrial. Otherwise, there will be a proliferation of mechanisms, and this might generate two problems: a fragmentation of the remedies available and an increase in the resources used by the tribunals (e.g. financial, logistical).[387]

In this thesis' analysis, another important element is which specific chamber of the chosen tribunal will adjudicate the case. This is a significant aspect of the retrial because it can affect the way in which the retrial is decided and the fairness of the entire proceeding.[388] In this sense, it is important to guarantee that the judges that will decide the retrial are not biased against the defendant, and they have not been involved in the previous judgment in absentia, both in the pre-trial and trial phases.[389] At the STL, there are no indications on the point.[390] Nevertheless, the need is that the chamber will be composed of judges who have no previous knowledge of the case and the evidence disclosed, to be *super partes* and not influenced by their past decisions. However, there might be some difficulties in finding these judges, as it would require additional personnel hired by the international criminal tribunal concerned. Moreover, the new panel of judges would need some time to familiarise itself with the case.[391]

Turning to the evidence of the retrial, the question is what evidence can be used in the new proceeding. Indeed, the Defence and Prosecution will know their reciprocal

[384] See Chapter 2, Subsection 2.2.2.
[385] E.g. Interviews 01; 06; 07; 10; 14.
[386] Interview 06.
[387] E.g. Interview 07.
[388] E.g. Interview 13.
[389] E.g. Interviews 01; 03.
[390] Art. 22(3) STL St. refers only to the possible involvement of the STL in general.
[391] E.g. Interview 13.

strategies, and they might have problems in finding new approaches to the case and new evidence to be presented. A legal practitioner interviewed for this thesis says that the retrial will be a 'dress-rehearsal'.[392] However, there are also advantages derived from this situation. For the Prosecutor, this might be a good situation because they will be prepared in advance in any case to what can be retried.[393] In this sense, the Prosecutor can assess which arguments work and tailor the retrial accordingly. To a certain extent, 'they have a first bite of the cherries'.[394]

As for the Defence, an interviewee says that 'it can be a little bit more difficult for the accused because it won't be a real retrial'.[395] Indeed, it might be 'that some of the evidence that came in in the first trial in his absence will be more easily admitted in the retrial in the event that some witnesses have died or disappeared'.[396] This is a problem also for the defence counsel because it creates an 'ethical dilemma'[397] about the procedural choices to be made: what is in the defendant's best interest today, might not be tomorrow in the retrial.[398] Others practitioners instead argue that the Defence has its advantages with the retrial[399] because it has a 'preview' of the Prosecutor's strategy,[400] the evidence submitted,[401] and to a certain extent it could even be an advantage 'to have the same Trial Chamber depending on the circumstances of the case'.[402]

Another significant aspect is the relationship between the retrial and the previous in absentia proceeding. Indeed, the retrial cannot be regulated without considering what has been done before it and what consequences this can have on the proceeding already conducted. In this sense, three points emerge: (i) the principle of *ne bis in idem* and its application to the retrial; (ii) the possible discrimination between defendants based on the right to have a retrial; and (iii) the relationship between a sentence issued in absentia and that of the retrial.

The respect of the principle of *ne bis in idem* or double jeopardy is a fundamental aspect of criminal proceedings, both at national and international level.[403] It avoids a double prosecution of the same person for the same crimes, and it prevents

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[392] Interview 02.
[393] E.g. Interviews 01; 02.
[394] Interview 02.
[395] Interview 01.
[396] Interview 03.
[397] Ibid.
[398] E.g. ibid.
[399] E.g. Interviews 02; 05; 16.
[400] E.g. Interview 03.
[401] E.g. Interview 16.
[402] Interview 04.
[403] See McDermott, Y. (2016, pp.99ff.); Safferling (2012, pp.106ff.).

abuses of the criminal system that might violate the defendant's rights.[404] In the context of a retrial, the principle of *ne bis in idem* becomes relevant not because the legal system imposes a new proceeding for the same facts and crimes on the defendant, but because the person asks for a retrial. Therefore, here the issue does not concern the 'system' but the 'individual', as there might a violation of the defendant's rights even when he/she decides to have a second trial. It seems difficult to argue that a retrial would not violate the double jeopardy standard when the crimes, facts and defendants are the same as in the previous in absentia proceeding. The scholarship confirms this point by underlying that some international criminal tribunals provide for a retrial only when the judgment is not final (therefore bypassing the double jeopardy prohibition).[405] Moreover, allowing the protection granted by the *ne bis in idem* principle only in the case of a retrial imposed by the legal system, and not when it is the defendant that chooses so, seems to create a contradiction difficult to be justified. Indeed, this fact might permit the absent defendant to trump the decision of the tribunal in absentia and to undermine the prosecution of the crimes concerned.

Another problem is that the right to have a retrial is recognised only to defendants who have been tried in absentia to allow them to challenge a conviction in absentia.[406] However, this does not prevent the possible misuse of the right by an absent defendant. Indeed, the person might know about the proceeding but decides to stay at large with no contact with the defence counsel. After the end of the proceeding in absentia, he/she shows up just to have the proceeding restarted. Therefore, the absent defendant would oblige the tribunal to conduct a retrial simply because he/she has this right. The same situation is not recognised to defendants that have always been present during the proceeding. They only have the appeal as a remedy for their conviction, and they cannot have a retrial, as they have not been tried in absentia.

It might be said that the difference in treatment is justified by the fact that the defendants present at their proceeding have control over it, and they are in a better position than those tried in absentia. However, as underlined in Chapter 1, there is no direct correlation between 'being present at trial' and 'having the control over the proceeding' or 'guaranteeing the fairness of the proceeding'.[407] On the contrary, recognising the right to have a retrial only to absent defendants would create an undue

[404] See Cassese, Baig, Fan, Gaeta, Gosnell and Whiting (2013, p.315); Conway (2003).
[405] See Wheeler (2019, p.147); Ambos (2013, pp.402-406).
[406] This is due to the fact that the retrial is a specific remedy for absent defendants. The defendants present in the proceeding have the right to file an appeal.
[407] See Chapter 1, Subsection 1.3.2.

discrimination and a detrimental situation for those persons who have been present in the proceeding and were not 'lucky' to be tried in absentia.

A final issue is how a sentence issued in absentia and that of the retrial relate to each other.[408] The defendant convicted in absentia can ask for a retrial when found guilty, but he/she cannot have a retrial if acquitted.[409] However, the person might have an interest in a retrial even when declared not guilty. Indeed, the defendant might want to have a retrial not because he/she is not satisfied with the decision of the tribunal, but because he/she wants to have the possibility to be tried in his/her presence. Therefore, in this case, the retrial would be a remedy not for the outcome of the proceeding (i.e. being found guilty or not guilty), but for the fact that the defendant has been tried in his/her absence. The scholarship confirms this point when underlines that the scope of a retrial in in absentia proceedings at the STL is broad and permits the absent defendant to exercise it also when there is no violation of the fairness of the proceeding (i.e. as a remedy against abuses and rights' infringement).[410] This situation might be unlikely; nonetheless, international criminal tribunals should take it into account and provide a solution.

Moreover, there might be a problem for the victims to receive compensation after the defendant has been convicted in absentia.[411] If the person shows up and asks for a retrial and he/she is found not guilty, the problem is to understand what happens to the compensation already paid or that needs to be paid to the victims for the damages suffered. Therefore, the retrial might affect not only the defendant's position but also the victims' claims for compensation. In this regard, once again, the retrial needs to be better regulated to be compatible with the various interests involved in the proceeding and to avoid any clash with the outcome of the previous in absentia proceeding.

In conclusion, the right to have a retrial is an essential element of in absentia proceedings (especially total in absentia proceedings), but it is problematic. Indeed, once this right is granted in International Criminal Justice, a sufficient amount of details should be provided because 'you cannot offer a right without offering the means for the right to be exercised'.[412] In this regard, the lack of specific provisions regulating the retrial at the STL is a sign of a 'limited' approach adopted by this institution. There is a need to answer the questions that might arise if one or more defendants tried in absentia

[408] On the topic, see Locke (2012, pp.810ff.).
[409] See art. 22(3) STL St.; Interview 02.
[410] See Gaeta (2014, pp.247-248).
[411] On the compensation of victims in international criminal proceedings, see McCarthy (2012).
[412] Interview 04.

at the STL will show up and ask for a retrial.[413] In the words of a legal practitioner interviewed for this thesis, 'we need to think about […] what is coming after in the future',[414] and a pivotal question is how the international community is going to guarantee an effective right to retrial in the future of International Criminal Justice.[415] This question will be addressed in Chapter 6 when analysing the future of in absentia proceedings.

3.5. Conclusion

This Chapter has examined in detail the practice of in absentia proceedings in International Criminal Justice, determining their most problematic procedural features and the approach taken by international criminal tribunals in the pre-trial, trial, and post-trial phases.

This study presents two findings. First of all, there is a gap between the theory and the practice of in absentia proceedings. Traditionally, the scholarship has studied the phenomenon without investigating the practical difficulties that the use of in absentia proceedings brings to international criminal tribunals. This method has produced an unbalanced, normative-driven analysis that has impeded any necessary consideration of the application of the provisions to real cases.

This Chapter has adopted a different approach, assessing the legal framework of in absentia proceedings against the practice of international criminal tribunals. In so doing, the study has found out that the provisions on in absentia proceedings cannot always be applied straightforwardly, but they need to be adapted to specific cases. Indeed, these provisions regulate only some aspects of in absentia proceedings (e.g. the cases in which these proceedings can be triggered), disregarding other key procedural elements (e.g. the details on the retrial). This fact creates a gap in the regulation of in absentia proceedings that international criminal tribunals have sought to fill with their practice, although not always successfully.

This finding is important because it shows that the study of in absentia proceedings requires a plurality of considerations, including those on the practical application of provisions to cases and the consequences thereof. This finding will be particularly significant when examining the future of in absentia proceedings in International Criminal Justice (i.e. in Chapter 6). Indeed, it will guide the analysis

[413] E.g. Interview 11.
[414] Interview 14.
[415] E.g. Interviews 15; 16.

towards a provision-oriented and a practice-oriented set of policy recommendations for a future use of in absentia proceedings.

Second, the practice of in absentia proceedings at international criminal tribunals shows the development of some criteria that can be used outside the specific cases concerned. So far, the literature has not analysed the creation of good practice standards in the use of in absentia proceedings and which aspects of these proceedings require a consistent approach by international criminal tribunals to avoid miscarriages of justice.

This Chapter has instead discussed the most problematic procedural aspects of in absentia proceedings, seeking to determine the 'good practices' of international criminal tribunals that might become guidelines for the future. In this regard, the analysis has shown the strengths (e.g. the use of pre-trial in absentia proceedings; the 'all reasonable steps test') and the limits (e.g. the problems with the retrial) of the practice of in absentia proceedings. It has also critically scrutinised the solutions adopted by the judges when dealing with the procedural challenges of in absentia proceedings, pointing out the positive outcomes achieved and the issues that remain.

This finding permits one to evaluate the use of in absentia proceedings better and understand what needs to be done in the future to improve their regulatory framework. Therefore, this finding will inform the study done in Chapter 6 on the future of in absentia proceedings, and it is also significant to identify the procedural issues that will be recalled when analysing the impact of in absentia proceedings on the parties in Chapter 4.

The study conducted in this Chapter completes the first part of the analysis of the *operation* of in absentia proceedings in International Criminal Justice, i.e. their *practice*. This is strictly connected with a second part, i.e. the *impact*, which will be the focus of Chapter 4. In particular, the analysis presented in Chapter 3 is helpful in understanding the practice-related framework of in absentia proceedings and what challenges the parties encounter when dealing with an absent defendant. In this regard, Chapter 3 identifies the procedural boundaries of the in absentia-environment in which these parties act. Chapter 4 will go further, providing an in-depth study of the impact of this procedural environment on these subjects.

Chapter 4. Impact of In Absentia Proceedings on the Parties of International Criminal Cases

4.1. Introduction

This Chapter focuses on the *impact* of in absentia proceedings on the parties of international criminal cases. In particular, it examines the negative and positive consequences that the conduct of in absentia proceedings has on the Defence, the Prosecutor, and the victims.

The use of any proceeding in International Criminal Justice requires a thorough assessment of its effects to reveal its shortcomings and strengths.[1] For a comprehensive analysis, this evaluation should also include the impact on the parties, especially in the case of controversial proceedings (e.g. in absentia proceedings).[2] Yet, when examining in absentia proceedings, the scholarship has mainly focused on their theoretical and normative features, overlooking their impact on the parties of international criminal cases.[3] Recently, the topic has been debated at the STL in *Ayyash et al.* and concerns have been expressed about the negative impact of in absentia proceedings on the parties, particularly the Defence.[4] It is said that the prejudice of these proceedings would be in their being 'unfair to the extent that the interests of the accused are not represented therein'[5] and in 'the disparities generated by the proceedings as a whole'.[6] Despite the relevance of the analysis of the impact of in absentia proceedings to identify their limits and prospects in International Criminal Justice, the scholarship has not carried out a comprehensive study on the topic.[7]

This Chapter seeks to fill this gap by assessing the impact of in absentia proceedings on the parties, considering both its substantive (i.e. on the right to fair trial) and procedural effects (i.e. on the parties' procedural strategies). To this end, the study combines a doctrinal analysis of the literature on the topic with a critical examination of

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[1] This is linked to the 'juris effectus in executione consistit' principle, i.e. the effect of the law consists in its execution: Safferling (2012, p.1).
[2] See *The Prosecutor v. Ayyash et al.*, STL, Hearing Pursuant to Rule 106 (2011, p.58). In this sense, Findlay and Henham (2011, p.348) perceive the international criminal trial as an 'integrated process' where all parties' views and interests should be considered.
[3] Attention has been given to the possible violation of IHRL standards and the expediency of in absentia proceedings. See Jordash and Parker (2010); Riachy (2010); Jenks (2009).
[4] See *The Prosecutor v. Ayyash et al*., STL, Sabra Motion for Reconsideration (2012, para.47). Accord Jordash and Parker (2010); Interview 05.
[5] *The Prosecutor v. Ayyash et al*., STL, Appeal Oneissi Defence (2012, para.38).
[6] Ibid.
[7] See Zakerhossein and de Brouwer (2015, p.199).

the opinions of the legal practitioners who have been involved in in absentia proceedings and have been interviewed for this thesis.

The study done in this Chapter is also important for other Chapters of the thesis. Indeed, it completes the analysis begun with Chapter 3 of the *operation* of in absentia proceedings, by examining the further practical challenges of these proceedings for the parties. Moreover, it provides novel insights into the needs of the parties of international criminal cases, which will be recalled when analysing the alternatives to in absentia proceedings (i.e. in Chapter 5 on the *alternatives*). It also indicates some advantages and disadvantages of in absentia proceedings to be addressed when discussing their future (i.e. in Chapter 6 on the *future*).

This Chapter is divided into three Sections in addition to an Introduction and a Conclusion. The first Section considers the impact of in absentia proceedings on the Defence (Section 4.2.). Here, the author examines the positive and negative effects of these proceedings on the absent defendant (Subsection 4.2.1.) and the defence counsel (Subsection 4.2.2.). The second Section analyses the impact of in absentia proceedings on the Prosecutor (Section 4.3.). The study focuses on the advantages and disadvantages of prosecuting an absent defendant, looking at the general impact of in absentia proceedings (Subsection 4.3.1.) and their procedural consequences (Subsection 4.3.2.). The last Section examines the positive and negative effects of in absentia proceedings on the victims and their legal representatives (Section 4.4.). Here, the author scrutinises the impact of in absentia proceedings in general (Subsection 4.4.1.) and on the procedural strategy of this party (Subsection 4.4.2.).

Ultimately, the author argues that, when deciding to conduct in absentia proceedings, international criminal tribunals need to perform a holistic evaluation of the consequences of these proceedings for the parties, especially about their right to fair trial and their procedural strategies. This evaluation ensures an assessment of the use of in absentia proceedings in light of some theoretical constraints identified in Chapter 1 (e.g. the objectives of International Criminal Justice) and driving factors examined in Chapter 2 (e.g. pragmatism). This exercise would protect the legitimacy of the tribunals' decision and redress the flaws of in absentia proceedings.

4.2. Defence

This Section analyses the impact of in absentia proceedings on the Defence. It provides a detailed examination of the topic, considering positive and negative consequences and distinguishing between two subjects, i.e. the absent defendant and the defence counsel.

4.2.1. The Absent Defendant

The analysis of the impact on the absent defendant requires a preliminary consideration of the distinct effects of partial and total in absentia proceedings. As discussed in Chapter 1, the extent of the defendant's participation in the process influences the scholarship's opinion on in absentia proceedings.[8] In this sense, preference is given to partial in absentia proceedings because they are considered to be more consistent with the right to fair trial.[9] On the contrary, it is said that 'to conduct a trial without the defendant is to stage Hamlet without the Prince; even with the finest actors in supporting roles (such as a defence counsel), it cannot be billed as an original or accurate narrative'.[10]

The impact of in absentia proceedings on the absent defendant (affecting both his/her right to fair trial and procedural strategy) similarly depends upon the level of participation of the person in the process.[11] As Elberling states, 'the connection to the position of the defendant in relation to her proceeding is clear',[12] and 'those provisions which allow her exclusion from the proceedings concern the question whether she has any role at all to play in these proceedings'.[13] Therefore, the involvement of an individual in the process (e.g. being present in court at least once; providing instructions to a defence counsel; following the hearings via video-link) influences the impact of in absentia on him/her. For instance, if the absent defendant has waived the right to be present and he/she is aware of the consequences of this decision, the in absentia proceeding will have different effects on him/her than a total in absentia proceeding where he/she is absent but unaware.[14] In the same sense, if the defendant is absent only from certain hearings but has instructed a defence counsel, he/she maintains control

[8] See Chapter 1, Subsection 1.3.2.
[9] See Zakerhossein and de Brouwer (2015, p.209).
[10] Jordash and Parker (2010, p.500). Accord Interview 05.
[11] The literature talks about an 'effective participation' of the defendant. See Bassiouni (2013, p.818); Boas, Bischoff and Reid (2011, p.276); Jordash and Parker (2010, pp.497, 501, and 506).
[12] Elberling (2012, p.36).
[13] Ibid., pp.36-37.
[14] E.g. Interview 02.

over the Defence strategy and the process, with a participation *de facto* and a more limited impact of the in absentia proceeding.[15]

Based on this argument, it is thought there is a correlation between the negative impact of in absentia proceedings and the limited participation of the defendant in the process.[16] It is argued that there is no negative impact if, for instance, 'the defendant has given a full account in an interview and has provided details of the Defence witnesses; and the Defence witnesses, for instance, have agreed to come to court and testify for the Defence; and a lawyer has full instructions from his client'.[17] Instead, if the defendant is totally absent and he/she is not in contact with a defence counsel, in absentia might have a negative effect on his/her right to fair trial and procedural strategy.[18] Indeed, total in absentia proceedings 'place the absent accused in a situation in which his effective defence cannot be ensured and his right to retrial is not guaranteed'.[19]

The idea that the *de facto* or *physical* participation of the defendant in the process (although partial) limits the impact of in absentia proceedings is supported by the legal practitioners interviewed for this thesis using two examples. The first scenario is when the defendant is absent but gives instructions to a defence counsel; the second scenario is when the defendant is present in court, but he/she is silent and refuses to cooperate with the defence counsel. In the first case, the individual is physically absent from court but participates *de facto* through a defence counsel. Here, it is argued that the nature of the process changes, and there is no proceeding in absentia if the defendant is in contact with a counsel.[20] Indeed, 'you can't have, well, technically it's a trial in absentia, but I'm still getting some instructions from my client'.[21] Therefore, the active role of the absent defendant would exclude an in absentia proceeding and limit the negative impact of this proceeding (e.g. the lack of control over the Defence strategy). In the second case, despite being silent, the defendant controls what happens in court and 'he is in a better position to change his or her mind as the evidence develops'.[22] Here, the *physical* participation of the individual would distinguish this case from a proper in absentia proceeding.[23]

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[15] E.g. ibid.
[16] According to Bassiouni (2013, p.818), a trial in absentia is 'inherently unfair because it does not allow a defendant to effectively participate in the trial and present an adequate defence'.
[17] Interview 02.
[18] See Zakerhossein and de Brouwer (2015, pp.202-205); Jordash and Parker (2010, p.501).
[19] *The Prosecutor v. Ayyash et al*., STL, Appeal Oneissi Defence (2012, para.22).
[20] E.g. Interview 15.
[21] Ibid.
[22] Interview 02.
[23] E.g. Interview 11.

From the foregoing considerations, the impact of in absentia proceedings on the absent defendant can be divided into two categories: (a) an impact on his/her right to fair trial; and (b) an impact on his/her procedural strategy.

4.2.1.1. Impact on the Right to Fair Trial

First of all, in absentia proceedings pose a critical problem for the identification of the defendant, especially in the case of a total absence.[24] For instance, a legal practitioner interviewed for this thesis says that at the STL in *Ayyash et al.* the identification of the accused is 'a matter of contest'[25] because the identity of the five defendants has never been verified in person, and the Tribunal has relied upon documentary evidence, e.g. photographs and telecommunications analysis.[26]

As will be discussed in Section 4.3., the lack of identification in person first and foremost is a challenge for the Prosecutor (i.e. there is no certainty over the identity of the individual charged). However, this is relevant also for the Defence because especially in total in absentia proceedings, the defendant cannot contest the identity referred to by the Prosecutor (e.g. during the interrogation of witnesses), and he/she cannot challenge the Prosecutor's argument that he/she is the person involved in the crimes.[27] As a result, this lack of certainty over his/her identity can directly affect the defendant's right to fair trial and produce a miscarriage of justice.[28] On the other hand, a vague identification might advantage an absent defendant because he/she can disguise his/her identity, changing his/her name or physical appearance during the absence from the proceeding. This is particularly true when the case is complex, and the Tribunal relies on pictures and documents that might be outdated and ineffective to identify an absent defendant. Therefore, the lack of identification would permit an absent defendant to make any attribution of criminal responsibility more difficult.

Second, in absentia proceedings might be the result of an erroneous consideration of the Court due to a lack of clarity over the fate of the defendant and the

[24] See Cohen (1973, p.156). In international criminal proceedings, see Knoops (2013, pp.61ff.).
[25] Interview 06.
[26] On the methods used to identify the absent defendants, see *The Prosecutor v. Ayyash et al.*, STL, Indictment (2011, paras.26-32).
[27] This happens also in ordinary criminal proceedings, see Knoops (2013, pp.66ff.).
[28] On miscarriages of justice before international criminal tribunals due to the use of unsafe identification evidence, see Knoops (2013, pp.61ff.).

reason for the absence.[29] In other words, a Tribunal might decide to conduct a proceeding in absentia based upon an incomplete or wrongful understanding of the circumstances of the absence. Especially in the case of total in absentia proceedings, the Tribunal cannot always be certain that the defendant is aware of the proceeding[30] and he/she is not prevented from attending trial by factors outside his/her control. For instance, he/she might not be present because of State's intervention[31] or because he/she is dead.[32] If the Tribunal allowed the conduct of an in absentia proceeding without sufficient knowledge of the circumstances of the defendant, the person would be affected in his/her free exercise of the right to be present in the proceeding.[33] As discussed in Chapter 1, this right is a component of the principle of fair trial;[34] therefore its illegitimate limitation would also unduly constrain the defendant's right to fair trial.[35]

Third, depending on the type of in absentia proceedings, the defendant might not have chosen a defence counsel. For instance, sometimes in total in absentia proceedings (e.g. at the STL) the tribunal appoints the defence counsel, and the absent defendant is not involved in this choice.[36] The appointment of a defence counsel is a fundamental element of fairness in criminal cases,[37] but it is problematic when done by the tribunal rather than the defendant.[38] Indeed, the choice of the counsel is an important step for the right to a defence; the person appointed must have not only the necessary legal skills and preparation but also the trust of the defendant.[39] This issue occurs already in ordinary criminal proceedings,[40] but it becomes even more relevant in total in absentia proceedings. Here, the Tribunal (e.g. the STL) can make the choice, and then the counsel works for the Defence for an extended period with no instructions and no contact with the absent defendant. As will be discussed in Subsection 4.2.2., this fact increases the challenges for the Defence, particularly for the counsel's ethical obligations and procedural strategy.

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[29] See *The Prosecutor v. Ayyash et al.*, STL, Request Defence Badreddine for Reconsideration (2012, paras.22-24); *The Prosecutor v. Ayyash et al.*, STL, Request Oneissi Defence for Reconsideration (2012, paras.48-51); *The Prosecutor v. Ayyash et al.*, STL, Sabra Motion for Reconsideration (2012, paras.3-17).
[30] E.g. Interview 04. The same happens with the notification of the charges. See Chapter 3, Subsection 3.2.1.
[31] E.g. Interview 03. See also Jordash and Parker (2010, p.497); Pons (2010).
[32] As in the case of Bormann at the IMT. See Chapter 2, Subsection 2.2.1.
[33] E.g. Interview 03.
[34] See Chapter 1, Subsection 1.3.2.
[35] See McDermott, Y. (2016, pp.68-72).
[36] See Art. 22(2)(c) STL St.
[37] See Ambos (2016, pp.141ff.); Beresford (2009a).
[38] See Scharf (2006).
[39] See Dieckmann and O'Leary (2017, pp.245-248); Temminck Tuinstra (2010, pp.472ff.).
[40] See Scharf (2006).

Fourth, the defendant's absence can affect the value of his/her physical presence in court and the influence that this might have on the judges and the public opinion.[41] According to a legal practitioner interviewed for this thesis, a partial or total in absentia proceeding represents an advantage for the defendant because it limits the risk to be put on the spot and the stigma of being on trial (i.e. being present in court facing the victims, the judges, and the public).[42] Indeed, if a person is charged with a crime and brought to trial, there is a presumption that he/she has done something wrong; 'the people usually think, well, you must have done something, or they would not have brought you to trial. You know, where there is smoke, there is fire'.[43]

Contrary to what happens in ordinary criminal proceedings where the defendant is in the spotlight, in in absentia proceedings (particularly total in absentia) the person can avoid this situation. In other words, in absentia proceedings would spare the defendant the risk of being physically exposed to the public in a courtroom as the 'alleged perpetrator' indicted for having committed heinous crimes.[44] The idea is that justice can be achieved even without a person physically present in the courtroom, prosecuting the crimes committed and protecting the defendant's right to fair trial.[45] Moreover, the defendant's absence might change the judges' perception of him/her if they cannot evaluate him/her in person. However, a legal practitioner interviewed for this thesis thinks that this does not happen with absentia proceedings. The defendant's absence does not have any influence on how he/she is perceived by the judges and the Prosecutor, and there is no change concerning the judgment.[46]

Finally, when the defendant is subject to a summons to appear rather than an arrest warrant, a partial absence from the process permits him/her to continue his/her personal life and work, without being forced to quit all his/her activities during the proceeding.[47] Based on the presumption of innocence, the defendant can be tried before an international criminal tribunal and continue to sustain his/her family or conduct his/her profession until the final verdict. A legal practitioner interviewed for this thesis strongly supports this position when saying 'you cannot force these people to appear at every stage of the proceeding, they have a life!',[48] and 'if someone is working and needs

[41] On the impact of the defendant's presence in court, see Bartol and Bartol (2014, pp.234-238).
[42] E.g. Interview 03.
[43] Ibid.
[44] On the stigma of international criminal proceedings, see Cronin-Furman and Taub (2016, pp.450ff.). The same happens to defendants who are later acquitted, see van Wijk and Holá (2017).
[45] See Elberling (2012, pp.197ff.).
[46] E.g. Interview 08.
[47] E.g. Interview 04.
[48] Ibid.

to provide financial needs to his family, you cannot stop his life just because you want to force him to appear for trial'.[49] This is a relevant aspect, particularly in light of Rules 134bis, ter, and quater ICC RPE that allow partial in absentia proceedings.[50]

4.2.1.2. Impact on the Procedural Strategy

When discussing the impact of in absentia proceedings on the procedural strategy of an absent defendant, a legal practitioners interviewed for this thesis argues that these proceedings would affect the personal nature of the right to a defence.[51] Other practitioners share this concern, especially when looking at the impact of in absentia proceedings on the procedural options that a defendant has at the beginning of the process. At this stage, the defendant can decide to enter a plea and later testify, based on the advice of a defence counsel and the evidence submitted by the Prosecutor.[52] Despite the importance of entering a plea for both the process and the verdict,[53] according to the interviewees in in absentia proceedings this choice might be undermined, particularly when the defendant is totally absent, and the defence counsel decides on the matter with no instructions.[54]

Another critical issue that has emerged at the STL is that the absent defendant cannot have any contact with the defence counsel while absent from the proceeding (this includes the exchange of confidential information).[55] A legal practitioner interviewed for this thesis justifies this provision stating that 'if you're not going to participate, then you're not going to participate. And that means that you shouldn't really be engaged in the process or shouldn't have any contact with the defence lawyers'.[56] This is a peculiar provision in International Criminal Justice,[57] and it seems in contrast with in absentia proceedings. Indeed, following this rule, there would be no

[49] Ibid.
[50] A defendant can ask 'to be allowed to be present through the use of video technology during part or parts of his or her trial' (Rule 134bis); under certain circumstances and when subject to a summons to appear he 'may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial' (Rule 134ter); the same request can be submitted when the defendant is subject to a summons to appear but he needs 'to fulfil extraordinary public duties at the highest national level' (Rule 134quater). For an analysis, see Chapter 3, Subsection 3.3.1.
[51] E.g. Interview 09.
[52] On the procedure for entering a plea, see Art. 20 ICTY St.; Art. 19(3) ICTR St.; Art. 64(8)(a) ICC St.; Art. 20 STL St.
[53] See Dixon and Demirdjian (2005).
[54] E.g. Interview 03. On the defence counsel's role in entering a plea, see Dixon and Demirdjian (2005).
[55] See Art. 8(E) STL Code of Conduct.
[56] Interview 15.
[57] For an analysis, see Chenivesse and Mundis (2014, pp.257-258).

possibility for the defendant to be absent (partially or, even more, totally) and maintain contact with the Defence team.

This intransigent position conflicts with the fundamental principle of the lawyer-client privilege.[58] Indeed, although the Statute of the STL recognises this privilege (especially for evidentiary purposes),[59] it limits it in in absentia proceedings because otherwise, the defendant would lose the right to a retrial.[60] This produces an undue discrimination among present and absent defendants for two reasons. First of all, absent defendants do not have the lawyer-client privilege granted because they are physically absent. Therefore, the defendant's absence becomes a ground for discrimination and limits the person's right to fair trial (that encompasses the lawyer-client privilege).[61] Second, the absent defendant, who should have his/her rights protected during the proceeding in the same way as a present defendant (or even more given the exceptional nature of the process) is instead less guaranteed. Indeed, the absent defendant has the right to a retrial only if he/she renounces to another fundamental right, i.e. the lawyer-client privilege. Therefore, the legal system obliges the defendant to make an undue choice between two fundamental rights that should not be opposed but equally guaranteed.[62]

The prohibition of any contact between the defence counsel and the absent defendant also does not encourage the latter to participate in the proceeding, even at a distance (e.g. via video-link).[63] On the contrary, this prohibition creates a procedural obstacle to the defendant and prevents him/her from deciding to be absent from the proceeding (as a corollary of the right to be present) and give instructions to a defence counsel. This means that the defendant is only encouraged to participate physically in the proceeding and any other form of participation seems to be 'punished' according to the above prohibition. The result is problematic for two reasons: (i) partial in absentia proceedings are ruled out, and the only type of in absentia proceeding permitted is total in absentia (disregarding the plurality of proceedings identified in Chapter 1);[64] and (ii) the right to be present at trial (and consequently to be absent) becomes an obligation

[58] See Rule 97 ICTY RPE; Rule 97 ICTR RPE; Rule 73 ICC RPE; Rule 163 STL RPE. For an analysis, see Safferling (2012, pp.506ff.).
[59] See Rule 163 STL RPE. For an analysis, see Chenivesse and Mundis (2014, pp.259-260).
[60] Art. 8(E) STL Code of Conduct states that 'if Defence Counsel is contacted, directly or indirectly, by the in absentia accused he shall, due to his awareness of the risk such contact may pose to the accused's right to a retrial, […] (i) refuse to discuss any element of the case with the in absentia accused; and, (ii) refer the accused to the Head of the Defence Office to receive independent legal advice'.
[61] On the right to fair trial and the attorney-client privilege, see Spronken and Fermon (2008, pp.444-447).
[62] On the balance between the two rights, see ibid.
[63] E.g. Interview 01.
[64] See Chapter 1, Subsection 1.2.3.

because the defendant cannot freely exercise it if, being absent, he/she would be constrained in his/her contacts with the defence counsel.

The legal practitioners interviewed for this thesis also argue that the absent defendant has a very limited or no participation in the procedural strategy of the Defence. The absent defendant cannot challenge the prosecutorial strategy and evidence[65] either for the entire proceeding or some parts of it, and most importantly, he/she cannot provide useful information on the case.[66] As the scholarships recognises, the defendant is a pivotal subject for the defence strategy because he/she guides the defence counsel through the facts of the case.[67] Some legal practitioners interviewed for this thesis say that the defendant 'acts a bit like an investigator because he is giving you factual background',[68] and he/she is 'the number one source of information'.[69] In total in absentia proceedings (e.g. at the STL) the defendant might be unable to provide his/her account of the facts. Therefore, 'the duty of potential information-providers is narrow and for the most part unenforceable. The absence of the accused will deprive the counsel of perhaps the most important source of information to prepare for trial: his client'.[70]

In absentia proceedings might permit to avoid a lack of objectivity by the absent defendant with respect to the Defence strategy.[71] A legal practitioner interviewed for this thesis argues that 'the advantage of not having your client present through the trial is that […] it will help you focus on what you believe are the most important issues. You will not insist on points you know very well will not make a difference'.[72] Moreover, in absentia proceedings would prevent possible conflicts between the defendant and the counsel about the procedural choices to be made and the strategy to be adopted.[73] In this regard, a legal practitioner interviewed for this thesis says the advantage would be that 'one doesn't have a client to argue with or disagree with or to give you bad instructions'.[74] Although innovative, this argument contradicts the concerns expressed on a problematic aspect of in absentia proceedings: the lack of instructions from the defendant.[75] Indeed, the advantage not to have a conflict between

[65] E.g. Interviews 06; 08.
[66] E.g. Interview 14.
[67] For a discussion of the decision-making process of the Defence, see Uphoff and Wood (1998).
[68] Interview 04.
[69] Interview 14.
[70] *The Prosecutor v. Ayyash et al.*, STL, Sabra Motion for Reconsideration (2012, para.47).
[71] E.g. Interview 04.
[72] Ibid.
[73] On the possible conflict between the two subjects, see Zeidman (2016).
[74] Interview 03.
[75] This point is discussed in detail in Subsection 4.2.2. of this Chapter.

the defence counsel and the defendant carries the burden of a lack of communication between the two and a fully informed Defence strategy.

Finally, in absentia proceedings would present an advantage for the defendant regarding the evidence. This is particularly relevant in the case of a retrial where the absent defendant would benefit from knowing the other parties' arguments and evidence in advance. In International Criminal Justice, there has not been a retrial request in an in absentia proceeding yet;[76] therefore this potential benefit might remain hypothetical. However, a legal practitioner interviewed for this thesis is quite assertive on this point, arguing that the right to retrial brings an undoubtable advantage for the defendant.[77] Indeed, 'the accused is capable to know all the evidence against him, waits for the decision, prepares himself, and comes again for a retrial. […] It is an advantage to know all the evidence that the Prosecutor has in his hands'.[78] Therefore, in absentia proceedings combined with the right to retrial would give the defendant a full picture of the evidence of the process, favouring him/her over the Prosecutor. However, in light of the principles of fair trial and equality of arms, this result cannot be accepted: if one party (in this case the defendant) is unduly advantaged, there is a violation of these principles. This point will be considered when assessing the future regulation of in absentia proceedings (e.g. in Chapter 6 on the *future*).

4.2.2. Defence Counsel

In the last decades, the scholarship has examined various challenges that the defence counsels encounter when involved in international criminal proceedings.[79] These challenges are linked to different aspects of the counsels' mandate and role: from the way in which they are appointed and need to demonstrate specific skills,[80] to their ethical obligations;[81] from the possible violation of equality of arms with the Prosecution,[82] to the procedural choices made in court and assistance provided to the defendant.[83]

Some of these issues also emerge in in absentia proceedings, and this demonstrates the impact that these proceedings have on the work of the defence

[76] See Chapter 3, Subsection 3.4.3.
[77] E.g. Interview 16.
[78] Ibid.
[79] See Newton (2011, pp.396-407); Ellis (2005); Katz Cogan (2002, pp.121-131).
[80] See Starr (2009); Buisman, Gumpert and Hallers (2005); Ellis (2003, pp.954-959).
[81] See Turner (2010); Ellis (2003, pp.966-968); Ntanda Nsereko (2001).
[82] See Wilson (2008); Ellis (2003, pp.963-966); Ellis (1997, pp.533-536).
[83] See Fedorova (2017, pp.235ff.).

counsels. The scholarship says that 'the defence counsels' daily practice has shown that the absence of the accused significantly affects their ability to conduct an effective defence'.[84] For instance, a counsel representing an absent defendant might face ethical dilemmas regarding his/her procedural strategy; the lack of information from the client might undermine his/her work; he/she might refuse to continue the defence when the accused is absent from trial.[85]

This Subsection analyses the impact of in absentia proceedings on the defence counsel looking at four elements: (i) the role of the defence counsel; (ii) the ethical obligations and issues emerging from the work of the counsel; (iii) the counsel's Defence strategy; and (iv) the relationship between the defence counsel and other parties of the proceeding.

4.2.2.1. Role of the Defence Counsel

The defence counsel has a complex role in international criminal proceedings,[86] and he/she is a pivotal actor of the criminal process, representing the defendant in court and advancing a positive case for his/her client.[87] He/she is 'a watchdog of the process, who provides the client with legal advice and should conduct a vigorous defence on the client's behalf in all stages of criminal proceedings'.[88] The scholarship has discussed his/her role,[89] and this is regulated by various codes of conduct of international criminal tribunals.[90] The scholarship highlights the importance of these elements by saying that 'the interpretation of the role of counsel has a direct influence on important legal principles involved in international criminal trials, such as equality of arms'.[91]

However, scarce attention has been given to the counsel's role in in absentia proceedings and how these proceedings can affect him/her. It is said that 'it is important that counsels from differing jurisdictions appearing before the same international criminal court are aware of their precise role and tasks in the court's *sui generis* mode of proceedings'.[92] This is particularly true when the defence counsel is involved in an in absentia proceeding where the defendant is totally absent and has no contact with

[84] Jones and Zgonec-Rožej (2014, pp.195-196).
[85] See Wilson (2008).
[86] See Temminck Tuinstra (2010).
[87] See Gallant (2000, pp.37-38).
[88] Temminck Tuinstra (2010, p.486). See also Gallant (2000, p.38).
[89] See Khan and Shah (2013); Temminck Tuinstra (2010); Gallant (2000).
[90] See for instance, ICTY Code of Conduct (1997); ICTR Code of Conduct (1998); ICC Code of Conduct (2005); STL Code of Conduct (2012).
[91] Temminck Tuinstra (2010, p.466).
[92] Ibid.

him/her. Here, questions arise on how the defence counsel can effectively represent an absent defendant's interests and what the boundaries of his/her role are.[93] In this sense, in absentia proceedings have a direct impact on the Defence strategy[94] and the lawyers appointed to represent the interests of absent defendants face more difficulties in carrying out their duties and accomplishing their mandate than in an ordinary proceeding.[95]

The provisions of international criminal tribunals provide little guidance on the point,[96] and this lack of clarity also emerges among the legal practitioners involved in in absentia proceedings and interviewed for this thesis. In particular, one argues that with an absent defendant (especially in total trials in absentia), there is no real Defence but only formal representation;[97] another says that we must be careful with the terminology used when referring to a 'client' in in absentia proceedings as in these cases there is no client, and the defence counsel does not represent the defendant as an individual, but only his legal interests.[98] Therefore, a first element to be considered when analysing the impact of in absentia proceedings on the defence counsel is his/her role and what a defence in absentia entails.

The legal practitioners interviewed for this thesis interestingly suggest that the lack of definition of the peculiar role of the defence counsel in in absentia proceedings can also have a psychological negative impact on the counsel. Indeed, he/she does not always have a clear understanding of his/her functions and, especially in trials totally in absentia, he/she might have a blurred perception of his/her work. A legal practitioner describes the psychological problem of the defence counsel as not feeling 'useful'[99] and feeling 'a bit lost without a client'.[100] Therefore, in absentia proceedings can affect a defence counsel in his/her work not only from a technical point of view but also from a personal/psychological perspective.

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[93] E.g. Interview 04.
[94] See Rohan and Zyberi (2017); Jalloh (2014); Khan and Shah (2013); Newton (2011); Jordash and Parker (2010); Turner (2010).
[95] On the challenges for defence counsels in international criminal proceedings, see Ellis (1997).
[96] Art. 6(C) of the STL Code of Conduct states that 'the provisions in this Code shall be applicable mutatis mutandis to Defence Counsel assigned by the Head of the Defence Office to an in absentia accused'. However, the Code includes only some obligations for the counsels in in absentia proceedings and there is a generic reference made to 'the best interests of the accused', with no detailed consideration of specific issues. See Art. 8(C), (D), and (E) STL Code of Conduct.
[97] E.g. Interview 04.
[98] E.g. Interview 06.
[99] Interview 12.
[100] Ibid.

4.2.2.2. Ethical Obligations and Issues

In in absentia proceedings, a defence counsel also faces important ethical issues.[101] These issues relate to both the ethical obligations imposed by an international criminal tribunal on the counsel and the general consequences of the defendant's absence. First of all, as already mentioned in Subsection 4.2.1., at the STL the defence counsels cannot have any contact with the absent defendant,[102] and they are obliged to report any information that they might have on the fugitives' location.[103] As discussed, Art. 8(E) STL Code of Conduct limits the attorney-client privilege and raises concerns for the lack of confidentiality between the defence counsel and the absent defendant. As a legal practitioners interviewed for this thesis denounces, 'I can't hide anything. I can't keep [anything] for myself'.[104] This means that the defence counsels cannot speak or get in touch freely with the defendants, but they have to report any contact to the Tribunal.

Although this provision might be justified in light of the necessity to locate a fugitive defendant, in fact, it creates an undue burden on the Defence and an illegitimate discrimination among the defendants. Indeed, if a defence counsel is obliged to report any contact with an absent defendant, the result is two-fold: (a) this fact discourages the defendant from participating in the proceeding because he/she has no procedural protection when he/she gets in touch with the defence lawyer; and (b) the obligation discriminates between present defendants (who can be in contact with their defence counsels) and those that are absent and cannot have any contact with their lawyers. It must also be underlined that in the case of a fugitive, Art. 8(E) STL Code of Conduct hinders the possibility to have the individual attending the proceeding in person or deciding to waive his/her right to be present. Indeed, if the defence counsel is obliged to report all contacts with his/her client, the defendant would be even more inclined to avoid any relationship with him/her and the proceeding.

Other ethical problems relate to the Defence strategy adopted and the procedural choices made by a defence counsel when the defendant is totally absent from the proceeding, and the counsel has not received any instructions. When the defendant is absent (especially in total in absentia proceedings), the defence counsel must prepare the case and take decisions based solely on his/her professional skills and knowledge. He/she follows the guidelines of the Code of conduct of the defence counsels of the

[101] On ethical issues in international criminal proceedings, see Jones and Zgonec-Rožej (2014, p.196); Turner (2010); Starr (2009); Ntanda Nsereko (2001).
[102] E.g. Interviews 01; 04.
[103] E.g. Interview 01. See also Art. 8(E) STL Code of Conduct.
[104] Interview 01.

tribunal and the standards governing good practice before international criminal tribunals. [105] Despite the professionalism of the defence counsels, in absentia proceedings raise questions for the effectiveness of the defence guaranteed to an absent defendant, and they create ethical issues for the counsels appointed.[106]

The lack of a direct relationship creates a 'vacuum' in the Defence strategy that must be filled by the counsel's legal skills.[107] Some legal practitioners interviewed for this thesis think that the defence counsels have 'a very limited mandate' in in absentia proceedings (especially total in absentia)[108] and this is mainly due to the lack of information from the defendant.[109] The receipt of instructions is considered a pivotal element of the proceeding: 'the client is a main source of information for us to build our case, to find witnesses, to contest the allegations from the Prosecutor'.[110] When this information is missing due to the defendant's absence, 'you are really deprived from this precious information, so you are really like working with your eyes closed. You are blind. You know, you are working blindly'.[111] This fact puts the defence counsels 'in an extremely difficult situation and a challenging environment when they don't have recourse to seeking instructions or getting the views of a client'.[112] The result is that 'it makes [it] much more difficult to advance a positive case in the absence of instructions',[113] and the counsels can only have certainty over some agreed facts[114] and not others.

In this context, many interviewees perceive the lack of instructions from the defendant as an alteration of the relationship between the defence counsel and the client[115] and as the bigger problem for the Defence in in absentia proceedings.[116] This situation creates a contrast between the two subjects, and it certainly does not help the Defence in building its strategy in an in absentia proceeding. Until the defendant appears in court, the defence counsel is not certain that the defendant would agree with his/her decisions.[117]

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[105] See Newton (2011).
[106] On the issue of the effectiveness of the defence in international criminal proceedings, see Buisman, Gumper and Hallers (2005); Tolbert (2003).
[107] On the role of the defence counsel, see Temminck Tuinstra (2010); Gallant (2000).
[108] E.g. Interviews 01; 04.
[109] E.g. Interview 12.
[110] Interview 01. See also Jones and Zgonec-Rožej (2014, p.196).
[111] Interview 14.
[112] Interview 15.
[113] Interview 02. Accord Interview 04.
[114] E.g. Interview 02.
[115] E.g. Interviews 01; 05; 09; 14; 15; 16.
[116] E.g. Interview 09.
[117] E.g. Interviews 01; 05.

In this regard, some legal practitioners interviewed for this thesis express concerns about the appropriateness of their choices as defence counsels and the compatibility of those choices with the interests of the defendant. The overarching question is whether, during an in absentia proceeding, they are acting in the defendant's best interests,[118] because an in absentia proceeding 'raises a lot of questions and concerns about the best way to defend him in his best interest'.[119] A similar situation might occur when the defendant does not cooperate with the counsel and does not provide instructions. Here, as in some in absentia proceedings, the defence counsel decides by himself/herself as the *dominus litis*,[120] doing what he/she thinks is best for the defendant.[121]

Linked to the above ethical issues is the problem of the lack of knowledge of the defence counsel about the defendant's procedural choices.[122] A legal practitioner interviewed stresses this point saying 'we have no idea what his defence is. We have no idea of what strategic decisions they might want us to take. And so, using our experience, using our best judgements I suppose, we are seeking to represent their interests as best as we can. But it is no substitute for actually having instructions'.[123] In this regard, one major concern for the practitioners is to work with no instructions and input from the defendant, and they constantly worry about their actions in the proceeding. As one says, 'you are kind of flying alone. And you are always asking yourself […] is my strategy in respect to this witness or that witness or this motion or that motion, is this the right thing to do?'.[124]

However, not all practitioners agree with the position above. Some argue that there are positive ethical consequences from this situation. First of all, despite the negative impact that in absentia proceedings can have in the preliminary phases of the Defence strategy, the scholarship and the practitioners argue that the defence counsel does not always have to follow the defendant's wishes.[125] Therefore, in in absentia proceedings, one advantage not to have a defendant present in the courtroom would be that the counsel is free to decide and he/she can be much more creative.[126]

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[118] E.g. Interview 04.
[119] Interview 01.
[120] See Temminck Tuinstra (2010, p.473).
[121] See ibid.
[122] E.g. Interviews 02; 09. See also Jones and Zgonec-Rožej (2014, p.196).
[123] Interview 02.
[124] Ibid.
[125] See Temminck Tuinstra (2010, p.472).
[126] E.g. Interview 11.

Moreover, from an ethical point of view, it is less difficult to pursue a defence strategy with no instructions, compared to the case in which a defendant has specifically instructed the defence counsel not to represent him/her. In this sense, 'it is much more difficult on a deontological perspective to work as a lawyer, I mean, if I look at my Code of conduct, to work to continue representing someone who specifically instructed you not to represent him'.[127] This is an interesting perspective that advances a different understanding of the relationship between the absent defendant and the defence counsel, stressing the prevalence of the lack of direct contact between the two subjects over the lack of instructions. In other words, according to this view, it is better to act with no instructions than to act against the willingness of the defendant.

At first sight, this position seems to guarantee respect for the defendant's procedural choices because it makes clear that the defence counsel will always follow the instructions of the client when these are provided. However, this view cannot be shared because it unduly overlooks the importance of receiving instructions from an absent defendant and it makes a distinction between two situations (i.e. the lack of instructions and contrary instructions) that cannot be discriminated. Indeed, in both cases, the defence counsel faces important ethical dilemmas that get to the core of his/her role in the criminal process and make very difficult for him/her to take any decision, whether openly rejected or not corroborated by the defendant.

4.2.2.3. Defence Strategy

Another important impact of in absentia proceedings relates to the specific Defence strategy adopted and the procedural approach chosen by a defence counsel.[128] Similarly to national jurisdictions, in international criminal proceedings, a defence counsel has to be zealous in his work, and this is 'an essential ingredient of a proper defence'.[129] This means that the defence counsel has to do whatever he/she can to protect the interests of the person he/she represents and to present a robust Defence strategy before the tribunal. However, as discussed, when involved in an in absentia proceeding the defence counsel is not sure about the Defence strategy,[130] 'because it is really, really difficult for defence lawyers to build this case and to have a very clear strategy when you can't have

[127] Interview 04.
[128] On the defence strategy in international criminal proceedings, see Khan and Shah (2013).
[129] Temminck Tuinstra (2010, p.472).
[130] E.g. Interview 01.

any contact with [the defendant]'.[131] Some says that the defence counsel is 'hamstrung' by the absence of the defendant[132] and for instance, this difficulty emerges when deciding which arguments to present to the judges,[133] what defences to advance,[134] and about the nullification of some of the defences.[135]

The uncertainty also concerns the alternative theories that the counsel can present to the Tribunal.[136] As a legal practitioner interviewed for this thesis say, 'how many alternative theories do I have the time and resources to advance? And that is the difficulty'.[137] The defence counsel finds himself/herself part of a 'guessing game'[138] on what defence strategy to use, and a legal practitioner attributes the responsibility for this situation to the fact that they do not have the same knowledge of the facts of the case as the absent defendants.[139] It is noteworthy that all these decisional issues have an impact also on the timing of the Defence because it takes more time for the defence counsel to decide which type of defence strategy to adopt.[140]

According to some legal practitioners and the scholarship, another issue for the procedural strategy of the defence counsels relates to the fact that they do not have the same amount and type of resources for their case as the Prosecutor.[141] For instance, they do not have enough money,[142] experts,[143] and investigators[144] that can help them to build up a Defence strategy in absentia. This imbalance in resources would also affect the effectiveness of their work because they will have less time for their strategy and a more 'compact' approach.[145]

Third, there is an important problem with the evidence submitted by the Prosecution and the Defence.[146] The issue of submitting evidence in favour of the defendant emerged at the IMT at Nuremberg, where the defence counsel of Bormann was affected by the absence of his/her client.[147] As the scholarship recalls, 'one cannot ignore the fact that the proceedings against Bormann proved difficult for the defence

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[131] Ibid.
[132] Jordash and Parker (2010, p.501).
[133] E.g. Interview 03.
[134] E.g. Interview 09.
[135] E.g. Interview 11.
[136] See Elberling (2012, pp.63-89).
[137] Interview 02.
[138] Interview 11.
[139] See Knoops (2017). Accord Interview 14.
[140] E.g. Interview 05.
[141] See Jordash and Parker (2010, p.506).
[142] E.g. Interview 02.
[143] E.g. Interview 05.
[144] E.g. Interview 01.
[145] This situation would violate the principle of equality of arms. See Eser (2011). Accord Interview 03.
[146] See Jordash and Parker (2010, p.500).
[147] See Ambos (2016, pp.21-22).

counsel, who was unable to find witnesses for the defence'.[148] The same problem occurs at the STL, where the defence counsels face various issues in contesting the Prosecution's evidence[149] and choosing the appropriate evidence for advancing a positive case. In particular, some legal practitioners argue that without the defendant's instructions, the defence counsels have a very limited range of evidence to use. In this sense, an in absentia proceeding 'deprives the defence of the accused's personal testimony and knowledge of the case and therefore it necessarily reduces the amount of evidence potentially available to the defence'.[150]

This problem also emerges for the contestation of the evidence submitted by the Prosecutor because the defence counsel finds it difficult to challenge it based solely on his/her understanding of the facts of the case. It is argued that 'whilst the Prosecution has disclosed a considerable number of documents, a large portion of which are redacted, the assigned attorneys have no way of effectively challenging their scope since, by definition, they do not have access to the accused, the defence of whom they should however ensure'.[151] This situation undermines the function of the defence counsel and makes the defence of the absent defendant very difficult. With harsh criticism, it is said that the Defence 'has the impossible task of reconstructing the chronology of the investigation and of attempting to "guess" what material might be missing'.[152]

Moreover, the evidence can change during the proceeding,[153] or the defence counsel can only collect technical evidence,[154] and again the absence of the defendant creates problems for the defence counsel. However, some legal practitioners interviewed for this thesis think that there might be positive effects in having technical evidence in an in absentia proceeding. Indeed, it might be easier to build up a defence strategy[155] (also from an ethical point of view)[156] than criminal proceedings with no defendant and other type of evidence. The defendant's absence might even not affect the work of the defence counsel, because when there is technical evidence, he/she would not add anything to the defence strategy anyway.[157] Other interviewees disagree,

[148] STL, Explanatory Memorandum (2009, para.36).
[149] E.g. Interview 02.
[150] Jones and Zgonec-Rožej (2014, p.196).
[151] *The Prosecutor v. Ayyash et al.*, STL, Request Defence Badreddine for Reconsideration (2012, para.51).
[152] *The Prosecutor v. Ayyash et al.*, STL, Appeal Oneissi Defence (2012, para.35).
[153] See Klamberg (2013, pp.148ff.). Accord Interview 02.
[154] See Appazov (2016). Accord Interviews 05; 11.
[155] E.g. Interviews 13; 14.
[156] E.g. Interview 13.
[157] See E.g. Interview 15.

and they say that not all evidence in a proceeding is technical, even in *Ayyash et al.* at the STL (where the evidence is mainly based on phone interceptions) in some parts of the proceeding there is the necessity to have the defendant providing the counsel with some insights into the facts of the case.[158]

An additional point made by the legal practitioners interviewed is that, especially in *Ayyash et al*., the amount of evidence is overwhelming[159] and this deeply affects the work of the defence counsels.[160] The absence of the defendant might be less problematic in 'simple' cases (i.e. where the evidence is straightforward), but when the cases are complex, it undermines the defence counsel's position.[161] It is said sarcastically that at the STL there is a procedural tool called 'legal workflow' to deal with the huge amount of evidence used, but this should actually be considered as a 'legal *workflood*'.[162]

Fourth, the defendant's absence requires the defence counsel to adopt a different strategy than in an ordinary criminal proceeding.[163] This means that the counsel prepares for the proceeding differently,[164] and the strategy is more focused on the Prosecution's case and file than normally would be.[165] The defendant's presence would bring a more precise line of questioning,[166] and 'he could be a main source of information which could help us to contest the Prosecution thesis'.[167] When the defendant is absent (especially in total in absentia proceedings) the defence counsel needs to use a different procedural approach, and it is said that 'it is more difficult; takes you quite a long time to decide what is relevant, what is not relevant, what is accurate, what is not accurate, what is reliable, what is not reliable. You know, if you had the input of your client it would be more effective'.[168]

Therefore, the defence counsel tests, challenges, and critically scrutinises the prosecutorial evidence.[169] In the words of some interviewees, 'you identify the prosecution's strategy; you identify the evidence against your client; you try to undermine and destroy the Prosecution case as best as you can',[170] and 'you can only try

[158] E.g. ibid.
[159] E.g. Interviews 01; 11. On evidence at the STL, see Jacobs (2014).
[160] E.g. Interview 11.
[161] See Wheeler (2019, p.89). Accord Interview 10.
[162] Interview 11.
[163] E.g. Interview 10.
[164] E.g. ibid.
[165] E.g. Interview 01.
[166] See Wheeler (2019, p.89). Accord Interviews 01; 08; 15.
[167] Interview 01.
[168] Interview 04.
[169] E.g. Interviews 05; 09; 11.
[170] Interview 10.

to undermine as best as you can the evidence that the Prosecutor offers'.[171] As an example, at the STL there are additional difficulties for the defence counsels due to the lack of resources to be used in Lebanon: 'we won't ever be able to build our case based on information we get from investigators in Lebanon. So, the only way we have is to work on the basis of the Prosecutor's evidence'.[172] However, the work of the defence counsels is limited, and some legal practitioners think that it does not have the same strength as in an ordinary criminal proceeding. It is argued that 'the capacity for the Defence to carry out its task to defend the interests of the accused is therefore contained in advance within the narrowest of spaces; this is incompatible with a full, complete, effective and enlightened defence'.[173]

In absentia proceedings also bring some advantages to the strategy of the defence counsels. For instance, as discussed in Subsection 4.2.1., a positive aspect is that the defendant might not be questioned and, therefore, damage the Defence case with his/her answers. Moreover, with in absentia, there is no lack of objectivity and the defence counsel can focus on what is important for the Defence. In this sense, there are fewer problems than having a defendant present: 'sometimes they are your worst enemies and very difficult persons to deal with'.[174] Despite all the challenges encountered with the evidence, a legal practitioner interviewed for this thesis thinks that the defence counsel can perform well and have positive outcomes. For instance, it is said that 'when cross-examining prosecutor's witnesses if you are good enough you can win although you have no instructions'.[175] Finally, in absentia proceedings would be good for the Defence because they allow the defence counsels to have numerous chances to get a favourable judgment. In this sense, 'you get like four bullets for Defences, like first trial, appeal, and then retrial, and then again appeal'.[176]

4.2.2.4. Relationship with Other Parties of the Proceeding

A last point to be discussed (also raised by the legal practitioners interviewed for this thesis) relates to the perception and understanding of the impact of in absentia proceedings on the Defence by other subjects, e.g. judges and defence counsels.[177]

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[171] Interview 11.
[172] Interview 01.
[173] *The Prosecutor v. Ayyash et al*., STL, Request Oneissi Defence for Reconsideration (2012, para.58).
[174] Interview 10. Accord Interviews 03; 11.
[175] Interview 10.
[176] Interview 13.
[177] See Jalloh (2014); Chethman (2010, p.166). On the general relationship among the parties, see Safferling (2002).

Indeed, it seems that there is a lack of sympathy and understanding for the challenges that the Defence experiences in in absentia proceedings. The idea is that other parties should consider more the difficulties of defence counsels in in absentia proceedings, and they should 'deserve a huge acknowledgement of the fact just how difficult it is under this kind of circumstances'.[178]

A major problem lies with the judges, who are not always keen to recognise the negative impact of the absence of the defendant (partial or total) on the work of the defence counsels.[179] An interviewee argues that the judges do not care that the proceeding is in absentia and 'sometimes it is hard not to feel under so much pressure to do things that you really cannot do in the absence of instructions'.[180] Another interviewee thinks that, due to the particular nature of the proceeding, the judges are more lenient towards certain defence strategies and actions. In particular, 'you can imagine situations where they might perhaps give a little bit more leeway to defence counsel than otherwise would be the case if there was a client'.[181] For instance, they are more tolerant when there are defence counsels' theories that are inconsistent.[182] This fact reflects two features of in absentia proceedings: (a) they are perceived as exceptional proceedings, therefore the judges have a different approach towards the Defence than in ordinary international criminal proceedings; and (b) they might bring the defence counsels to inconsistent theories, as they lack a full account of the facts of the case from the defendant.

An important reaction comes from other defence counsels that work before international criminal tribunals, but who are not involved in in absentia proceedings.[183] A legal practitioner interviewed for this thesis says that there is a general negative attitude towards in absentia proceedings and those involved in these cases. It is said that there is kind of 'negative vision on the work that the counsels are doing',[184] and 'in the counsels' world, it seems to be more accepted to represent an accused who doesn't want to communicate with you or does not want to be represented, than to represent an accused in absentia'.[185] Therefore, there is a strong bias against in absentia proceedings and the possibility to work as defence counsels in these cases. This fact has two

[178] Interview 15.
[179] This point seems to be in line with a general negative attitude towards the defendant's absence from the proceeding. See Chethman (2010, p.166).
[180] Interview 02.
[181] Interview 15.
[182] E.g. ibid. On the judges' attitude towards defence counsels, see Temminck Tuinstra (2010); Safferling (2002).
[183] On Defence perspectives on the STL and in absentia proceedings, see Jalloh (2014, pp.801-802).
[184] Interview 12.
[185] Ibid.

consequences for the Defence: (a) it might influence the work of the defence counsels (e.g. at the STL), who would feel under peer-pressure from their colleagues; and (b) it might detract other legal practitioners from getting involved in in absentia cases because of the 'bad reputation' that surrounds them, limiting the number and variety of defence counsels at the disposal of international criminal tribunals that conduct in absentia proceedings.

Finally, there is a constant scrutiny over the value and expediency of in absentia proceedings by the public opinion. In this regard, the scholarship argues that because at national level in absentia proceedings 'are often used by dictatorial regimes to try and condemn, and hence ostracise, political opponents exiled abroad […] are not popular in public opinion'.[186] On this point, the legal practitioners interviewed for this thesis say that they receive many questions by members of the public. In particular, confirming the scepticism surrounding in absentia proceedings, a recurrent question asked to the defence counsels involved in these proceedings is: 'why bother? What is the point in having in absentia trials?'.[187] And as a legal practitioner admits, 'sometimes it's a difficult question to answer'.[188]

4.3. Prosecutor

This Section analyses the impact of in absentia proceedings on the Prosecutor, considering the advantages and disadvantages of prosecuting an absent defendant. From the study of the literature on the topic and the opinion of the legal practitioners interviewed for this thesis, it can be said that in absentia proceedings have both a general and a more specific procedural impact on the work of the Prosecutor. The way in which this impact emerges is linked to the mostly adversarial nature of international criminal proceedings that opposes the Prosecutor to the Defence, with a specific role to play and procedural strategy to pursue.[189] In this sense, the defendant's absence alters the dynamics of the proceeding, also changing the Prosecutor's approach to the case.

[186] Fransen (2015, p.345).
[187] Interview 10.
[188] Ibid.
[189] On the role of the Prosecutor in international criminal proceedings and its challenges, see Sasan Shoamanesh (2018); Minow, True-Frost and Whiting (2015); Reydams, Wouters and Ryngaert (2012).

4.3.1. General Impact

The prosecution of international crimes presents many challenges for Prosecutors, especially in relation to the arrest of the suspects and the gathering of evidence.[190] This is particularly true when the cases at stake are politically sensitive (e.g. the suspects are high-profile individuals or heads of State),[191] and there is States' lack of cooperation,[192] or the country investigated is unstable.[193] In this sense, the scholarship argues that the OTP is 'an institution that confronts a global mandate, and varying levels of State cooperation must institute a diverse array of strategic approaches'.[194] This underlines the difficulties that a Prosecutor can encounter in ordinary international criminal proceedings, and it demonstrates the additional, peculiar challenges that the Prosecutors have to deal with at international level.

Similar challenges occur in in absentia proceedings. As for the general impact of in absentia proceedings, the opinion of the legal practitioners interviewed for this thesis is not consistent, and different views are expressed with regards to the positive, neutral, or negative consequences of the defendant's absence for the activity of the Prosecutor. Some argue that the defendant's absence would help the work of the Prosecutor, facilitating a conviction.[195] The Prosecutor would be free to conduct a case and present the evidence and arguments against the defendant. It is argued that 'it is easier for the Prosecution to have this kind of in absentia proceedings because they say whatever they want'.[196] Therefore, in absentia proceedings are seen as a less challenging proceeding for the Prosecutor, when there is no defendant opposing his/her case.

Others think that in absentia proceedings do not make any difference for the Prosecutor.[197] This is because the Prosecutor does not care if a proceeding is conducted in absentia,[198] and 'almost all of the Prosecutor's strategy and tactics are going to be pretty much the same whether the accused is in the courtroom or not'.[199] Therefore, according to this view, the defendant's absence is not a relevant element for the Prosecutor's actions, and this seems to be in contrast with the nature of adversarial

[190] See Jallow (2007); Harmon and Gaynor (2004).
[191] For instance, this has happened at the ICC in the *Kenyatta* and *Ruto* cases. See Foster (2016).
[192] See ibid., pp.471-473.
[193] See ibid., pp.481-484.
[194] Ibid., p.444.
[195] E.g. Interviews 01; 02; 05; 07; 09; 10.
[196] Interview 01.
[197] E.g. Interviews 01; 08; 10.
[198] E.g. ibid.
[199] Interview 08.

criminal proceedings where the absence of a party (e.g. the defendant) has important effects on the others (e.g. the Prosecutor).[200]

Other legal practitioners think that the defendant's absence makes the work of the Prosecutor more difficult. In this sense, 'for him [it] is very important for his case to have somebody who is present in front of him'.[201] In this sense, the defendant's presence would strengthen the case of the Prosecutor and the possibility to achieve a conviction. Indeed, as an interviewee says, 'many criminal practitioners would say that the Prosecution case is strongest immediately after the defendant has given evidence. Which is why very often in international cases you just do not call your client'.[202] Therefore, in absentia proceedings undermine the Prosecutor's strategy because he/she does not have any defendant to question.[203]

Despite the different views on the topic, the majority of the legal practitioners interviewed for this thesis think that in absentia proceedings are not ideal for the Prosecutor, and they represent a significant challenge. In particular, the defendant's absence affects the (mainly) adversarial character of an international criminal proceeding, and this creates not only difficulties for the Defence (as discussed in Section 4.2.), but also for the Prosecutor. It is argued that an in absentia proceeding (especially total in absentia) seems 'fake',[204] and 'it just makes me more alive, more involved if the real person is there, otherwise it seems sort of unreal. And this trial in absentia, I have to confess, sometimes feels unreal because it feels like this is the dress rehearsal'.[205] As in the case of the defence counsels, this sense of 'fiction' and 'unreality' is a common thread in the view of those that oppose in absentia proceedings, and it often characterises the depiction of these proceedings made by the legal practitioners interviewed for this thesis.[206] In this regard, this feeling towards in absentia proceedings might also affect the fairness of the process. Indeed, if the in absentia proceeding is unreal or 'fake', it cannot be considered fair because it lacks the necessary level of seriousness, commitment, and legitimacy proper of criminal proceedings.[207]

The defendant's absence also creates a vacuum in the actions of the Prosecutor and in his/her adversarial approach to the proceeding. As the scholarship underlines,

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[200] See Chapter 1, Subsection 1.3.2. On the possibility to have non-adversarial proceedings in International Criminal Justice and their limits, see Fairlie (2018).
[201] Interview 16.
[202] Interview 02.
[203] E.g. Interviews 02; 16.
[204] Interview 03.
[205] Interview 03.
[206] E.g. Interviews 02; 03; 13; 14.
[207] On the legitimacy debate for international criminal proceedings, see more recently de Hoon (2018); Dutton (2017); Hayashi and Bailliet (2017).

one of the features of adversarial criminal justice is the confrontation of the parties and the possibility to assess the defendant's behaviour in court.[208] In this context, the Prosecutor takes advantage from the defendant's presence because he/she has someone to refer to when addressing the crimes committed. In this sense, a legal practitioner interviewed for this thesis thinks that there is a need to have the defendant physically present in the courtroom, and he/she says 'I would like to see the witness in the room'.[209] This need is linked to the possibility to assess the defendant's behaviour and reaction when in court.[210] With a quite suggestive explanation, one says: 'I'd much rather have you in the room, and then I can see if you're squirming in the chair or leaning forward or leaning back'.[211] The same direct and personal impression of the defendant is lost with an in absentia proceeding, and it is argued that it cannot be replaced with the use of video-link.[212]

Although 'theatrically' effective and possibly advantageous for the Prosecutor, the defendant's presence in the courtroom might be problematic because the person could use this as a stage to turn the proceeding into a show.[213] However, this does not seem to be a concern to the legal practitioners interviewed for this thesis, as they would prefer to have the defendant present in court running the risk of a show trial, rather an empty chair. Therefore, they are not afraid of having a show from the defendant because this actually could tell the judges how the person is.[214]

There are three other aspects part of the general impact of in absentia proceedings on the Prosecutor. The first is the issue of the identification of the defendant.[215] This problem has already been discussed in Subsection 4.2.1., and it also re-emerges for the Prosecutor when it is said that 'what is more difficult for the Prosecution is to prove identification'[216] and 'how do they prove identification? He is not here'.[217] According to the scholarship, the absence of the defendant might present one of the few disadvantages in this regard.[218] Second, the OTP wants to find the truth,

[208] See Dammer and Albanese (2013, p.127); Neubauer and Meinhold (2012, p.28).
[209] Interview 03.
[210] E.g. Interviews 03; 08.
[211] Interview 03.
[212] E.g. ibid.
[213] As Koskenniemi (2002, p.25) argues, 'in order to attain "truth", and to avoid a show trial, the accused must be allowed to speak. But this creates the risk of the trial turning into a propaganda show'.
[214] E.g. Interview 03.
[215] E.g. Interview 04. In general, at international criminal tribunals, see Knoops (2013, 61ff.); Karnavas (2007, p.106).
[216] Interview 04.
[217] Ibid.
[218] See Gilligan and Imwinkelried (2005, p.523).

and with an absent defendant this is not possible or is more difficult.[219] Third, the Prosecutor does not see anybody put in prison after the conviction in an in absentia proceeding, at least in the short term.[220]

Finally, there is an issue with the efforts made by the Prosecutor and the national authorities to find the absent defendant. When the decision to hold a proceeding in absentia has been taken, some legal practitioners fear that the proceeding authorities (including the Prosecutor) would not continue to search for the defendant with the same attention and strength as when there is a proceeding not in absentia. In particular, they say that 'you cannot spend millions and millions, and you take about 15 years for the investigation and finally, you have no accused. It is not serious',[221] and 'what we also observe is the impotence and the intransigence of the authorities to execute the warrant to arrest them'.[222]

This is an important concern especially for proceedings totally in absentia, e.g. *Ayyash et al.* at the STL. Indeed, here the defendants have never been located and arrested, and the entire proceeding is held in absentia. The question prompt by the legal practitioners interviewed for this thesis is to what extent, once the proceeding in absentia has begun, the Prosecutor would continue to search for the absent defendants and will not 'relax' the searches. Despite the validity of this concern, the practice of international criminal tribunals (e.g. the STL) does not confirm it. On the contrary, this reveals a constant effort by the tribunals and the Prosecutor to search the absent defendants and seek to apprehend them.[223] As the scholarship underlines, 'even when trials in absentia are possible, these have very little authority and should not undermine efforts to obtain arrests'.[224]

4.3.2. Impact on the Procedural Strategy

Generally speaking, the Prosecutor's strategy is influenced by various factors that characterise international criminal proceedings.[225] For instance, the Prosecutor might prefer to use documentary evidence as oppose to witnesses because he/she cannot find

[219] E.g. Interview 08.
[220] E.g. Interview 16.
[221] Interview 05.
[222] Interview 06.
[223] For instance, at the STL the Tribunal has published annual reports in which it has indicated the progress of the cases and the efforts made to locate and arrest the fugitives. See more recently, STL, Annual Report (2015-2016, p.23); STL, Annual Report (2014-2015, p.35).
[224] de Meester, Pitcher, Rastan and Sluiter (2013, p.313).
[225] On prosecutorial strategy, see Foster (2016).

relevant witnesses that come and testify in court.[226] Moreover, it might be that the Prosecutor decides to advance a certain argument because this is more plausible in light of the evidence collected. It might also be that the Prosecutor decides to drop the charges against a defendant because there is not enough evidence to support a conviction beyond reasonable doubt and to continue a proceeding might be a waste of time and resources.

Similarly, in in absentia proceedings, the circumstances of the case (especially the defendant's absence) can deeply influence the Prosecutor procedural strategy. The legal practitioners interviewed for this thesis express opposing views on the topic, revealing a lack of consensus. When the Prosecutor needs to advance a case, some think that the absence of the defendant would constitute an advantage. It is argued that 'it is much easier for the Prosecution because they do not have a positive defence to counter. They just put their case forward. As best as they can'.[227] Moreover, from a technical point of view, the Prosecutor might benefit from the fact that the defence counsel might not be good in the cross-examination.[228] On the contrary, another legal practitioner thinks that it is not easier, because in any case the Prosecutor needs to prove a case beyond reasonable doubt; there is no different standard of proof for an in absentia proceeding and no reversal of this standard.[229] It is also more difficult because the Prosecutor needs to be prepared for more possible theories presented by the defence counsels and for the change of these theories depending on the progress of the case.[230]

Other two aspects to be considered are the challenges of the Defence's case and of the right to have a retrial. On the first aspect, the legal practitioners interviewed for this thesis express divergent opinions. One says that it might be easier for the Prosecutor to act without a defendant because 'they will have more leeway in adducing certain evidence'.[231] Another argues that it might also be difficult when the evidence is technical. [232] Although based on an important point, this discussion seems to misunderstand the impact of in absentia proceedings. Indeed, these proceedings present similar evidentiary challenges for the Prosecutor than ordinary proceedings. This is because, as the scholarship underlines, all international criminal proceedings can be difficult and technical, depending on the facts of the case and its circumstances.[233] Thus,

[226] See Foster (2016, p.454).
[227] Interview 02.
[228] E.g. Interview 08.
[229] E.g. Interview 14.
[230] E.g. Interview 15.
[231] Interview 07
[232] E.g. Interview 10.
[233] See Fry (2016); Ford (2015a, pp.152-153).

the easiness or complexity of a case for the Prosecutor does not necessarily depend on the defendant's absence, but rather it seems to be determined by the specifics of each case.

Second, the right to have a retrial can also have a negative impact on the Prosecutor's strategy because it obliges the tribunal to conduct a new trial, affecting the expeditiousness and efficacy of the proceeding. The retrial requires the presentation of evidence again before the judges and the repetition of the procedural actions already done during the proceeding conducted in absentia. This means that the Prosecutor will be in a position of disadvantage compared to the Defence because he/she cannot change the evidence gathered and create new documents or invent new witnesses, and the Defence would have already seen his/her 'best cards'. On the contrary, the Defence will benefit from the additional evidence that might be brought into the proceeding through the information given by the defendant. Therefore, the situation would be that of a game in which all the players have already made their moves, but one has some extra chances, knowing already the others' options. According to an interviewee, it is going to be more difficult for the Prosecutor because all his/her strategy has already been discovered and he/she will not be able to change his/her case too much with a retrial.[234]

A final consideration concerns the relationship between the Prosecutor and the Defence when the defendant is absent. On this point, the legal practitioners interviewed for this thesis express concerns in particular about the need to adopt a careful approach to the Defence's case. It is argued that 'they have to be careful that they are true to their role as ministers of justice and that they make allowances because of the difficult circumstances that a defence counsel might find'.[235] One particular problem relates to the lack of consideration by the Prosecutor for how the defendant's absence affects the work of the defence counsels. The legal practitioners have expressed strong opinions in this sense, with one stating that 'one thing I found regrettable at the STL is the fact that the attitude of the Prosecutor was not adapted to the fact that there were no accused. So, he was acting exactly like if there was an accused'.[236] The Prosecutor should acknowledge that the proceeding is different in that the defendant is absent and the defence counsels encounter more difficulties in their work.[237]

An interesting impact that in absentia might have on the Prosecutor's work concerns the cooperation between the OTP and the States parties to the Statute of a

[234] E.g. Interview 13.
[235] Interview 10.
[236] Interview 11.
[237] E.g. ibid.

tribunal.[238] Generally speaking, in international criminal proceedings the Prosecutor faces numerous issues of cooperation, especially for the gathering of evidence and the execution of arrest warrants.[239] As recalled in Chapter 1, States' lack of cooperation is a serious concern in International Criminal Justice, and the Prosecutors struggle to find appropriate strategies to cope with the problem.[240] In particular, significant issues emerge when a Prosecutor seeks to bring a case against a head of State, conducting proceedings that are not favoured by States.[241] For instance, this is has happened in the *Al-Bashir* case before the ICC[242] where the Prosecutor indictment of Al-Bashir and the subsequent States' lack of cooperation has had long-lasting repercussion on the entire system of International Criminal Justice.[243]

In the case of in absentia proceedings, on the one side, there is a negative impact if we consider the risk not to have States' cooperation due to the conduct of the process in absentia.[244] If a tribunal decides to hold a proceeding in absentia and this is perceived by the States that should work with the Prosecutor as an unlawful decision, the cooperation would be affected, and this situation might have detrimental consequences for the entire proceeding.[245] Indeed, to conduct effective and successful in absentia proceedings, especially when they target high-profile individuals, the Rules of Procedure must be extremely clear and precise, and they must regulate in detail the procedural safeguards for the absent defendant.[246] There must also be great consistency in the decisions of the court when applying the rules on in absentia proceedings to different cases; otherwise, there would be a risk of having an unequal treatment of the defendants.[247] In addition, there must be a certain amount of political support from States to the use of in absentia proceedings, for instance with a change of the rules of the tribunal or of the Statute. Moreover, the use of in absentia proceedings might discourage States from cooperating with a tribunal because these proceedings are already debated and contested.[248]

On the other side, the impact might be positive during or after the conduct of the proceeding. Indeed, during the proceeding, if the Prosecutor asks for a process to be

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[238] See Pons (2010).
[239] See Carey and Mitchell (2013); especially for the indictments, see Locke (2012).
[240] See Chapter 1, Subsection 1.3.3.
[241] On the topic, see Lutz and Reiger (2009).
[242] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, case no. ICC-02/05-01/09.
[243] For an analysis, see Sluiter (2016).
[244] See Novak (2015, p.64); Friman (2010, p.336).
[245] See Friman (2010, p.336).
[246] E.g. Interviews 01; 06.
[247] See Gardner (2011).
[248] The problem of cooperation among States concerning in absentia proceedings exists already at national level. See Friman (2010, p.336).

conducted in absentia and the tribunal agrees, despite the fact that the defendant is a head of State or a high-profile individual, States might be more inclined to cooperate because in any case, justice will do its course.[249] But the positive impact is even more feasible when the proceeding ends, and the defendant is found guilty. In this case, it is more likely that States will execute an arrest warrant based on a conviction than during an ongoing proceeding. An example in this sense is again *Al-Bashir* at the ICC.[250] Despite the widespread debate about the lack of cooperation by States like South Africa, the use of in absentia proceedings might be a good incentive for an effective prosecution of the defendant.[251] This is also the view of some legal practitioners interviewed for this thesis who underline that if the ICC were to conduct a trial in absentia, it would be a good development for the Prosecutor's strategy and the work of the tribunal.[252]

4.4. Victims and Their Legal Representatives

This Section analyses the impact of in absentia proceedings on the victims, considering both the victims and their legal representatives. The aim is to achieve a full understanding of the impact of in absentia proceedings not only on the expectations and needs of the victims but also on their procedural strategy through the action of their legal representatives.

4.4.1. General Impact

Generally speaking, victims' participation in a criminal proceeding is linked to the need to give them a voice and to recognise them not as 'passive' actors of the prosecution of international crimes, but 'active' subjects.[253] Attending the hearings and having a voice in the proceeding is part of the process of recognition of the victims, and this is one of the main duties that International Criminal Justice must carry out to address all the parties' interests and necessities properly.[254] The victims of heinous crimes are not forgotten and do not become mere numbers in a list, but they have a face and a name,

[249] On prosecuting heads of State with in absentia proceedings and its consequences, see Schwarz (2016).
[250] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC, case no. ICC-02/05-01/09.
[251] See Given (2014). Accord Interview 06.
[252] E.g. Interviews 01; 08; 13.
[253] They have 'participatory rights'. On this point, see Cohen (2009); Gillett (2009); Guhr (2008).
[254] On the victims' role in international criminal proceedings, see Keller (2007); Boyle (2006); Stahn, Olàsolo, and Gibson (2006).

and they can decide to engage actively with the proceeding where the wrongdoing they suffered is under scrutiny.[255]

At the same time, the legal representative's role is to promote the interests of the victims in the courtroom, advancing their case and seeking the conviction of the defendant as the person responsible for the crimes committed and the harm suffered by his/her clients.[256] In particular, the representative needs to strengthen the victims' position to get a conviction and, later on, to ask for reparations. In this sense, the legal representative is the person through which the victims can express their voice in the proceeding, and they advance a case and have a direct role in the process.[257]

In this context, and as anticipated in Chapter 1,[258] the general goals of the victims when participating in international criminal proceedings can be summarised as: (a) to be recognised as victims; (b) to have a voice in the proceeding and be heard; (c) to play an active role in the case; and (d) to seek reparations.[259] These goals are already debated and problematic in ordinary international criminal proceedings,[260] and it is argued that they might pose issues of compatibility with the defendant's interests in the process.[261] For instance, the victims might pose an additional burden on the Defence, by supporting the Prosecutor's arguments and advancing a case that the Defence needs to address alongside that of the Prosecutor.[262]

Moreover, one should also keep in mind that not all international criminal tribunals allow victims' participation in their proceedings. In this sense, there is no common approach by international criminal institutions, and they have made different choices. For instance, victims can participate in criminal proceedings as parties at the STL[263] and ICC[264] but they were prevented to do so at the IMT and at the ad hoc tribunals.[265] Therefore, this might be an issue also for in absentia proceedings when

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[255] According to McGonigle Leyh (2011, p.30), 'if it is accepted that fair procedures generally lead to equitable outcomes and if the notion of procedural justice is taken to mean both fairness of process and having a voice, then it becomes essential to address the inclusion of the victims in international criminal justice processes'. Accord Interviews 01; 15.
[256] See Hirst (2017).
[257] See ibid.
[258] See Chapter 1, Subsection 1.3.1.
[259] On the goals of the victims, see Tibori-Szabò and Hirst (2017); Morrison and Pountney (2014, pp.154ff.).
[260] See McGonigle Leyh (2011); Trumbull IV (2008).
[261] See Zappalà (2010).
[262] See Smith-van Lin (2016, pp.188-191).
[263] See Arts. 17 and 25 STL St.; Rules 86-87 STL RPE.
[264] See Art. 68 ICC St.; Rules 89-93 ICC RPE.
[265] For an analysis of the development of this concept in International Criminal Justice, see Tibori-Szabò and Hirst (2017).

victims might be parties to them only if the tribunal involved allow their participation in general terms.

Similar concerns emerge for in absentia proceedings. Indeed, when these proceedings are at stake, they can have an impact on the victims' goals because the defendant is not present in the courtroom and the victims participate in an 'exceptional' and 'controversial' proceeding where additional challenges emerge. On this point, the legal practitioners interviewed for this thesis recognise the above general goals of victims' participation, but they argue that in absentia proceedings would bring more advantages than disadvantages. Indeed, the prosecution of international crimes in absentia guarantees the victims a series of positive outcomes.

First of all, the victims are heard and have a voice in the proceeding, telling their side of the story.[266] This occurs already in ordinary criminal proceedings, where the victims can come to court and testify. However, given the traditional suspension of the proceeding, when the defendant is absent, the victims would not have this possibility. Therefore, in absentia proceedings grant the victims a similar level of participation as in ordinary criminal proceedings with a present defendant. Second, they are recognised as victims,[267] meaning that they are not only entitled to participate in the proceeding as witnesses, but they also have a specific role in it. Third, despite the absence of the defendant, the victims can have some form of relief with the proceeding.[268] This means that they see the international community addressing the crimes they suffered and, in this sense, in absentia proceedings are better than no proceeding at all.[269] Moreover, in absentia proceedings have an intrinsic historical value,[270] because they permit the international community to assess the facts of the case. Finally, victims can obtain reparations based upon a conviction in absentia, without waiting for the arrest or surrender of the absent defendant.[271] This last point will be further considered in Chapter 5 when analysing the alternatives to in absentia proceedings.[272] Here, it is worth noting that, according to a scholar, reparations in absentia are possible also in in absentia proceedings.[273]

The goals mentioned should be analysed in the context of International Criminal Justice cases, looking at two additional elements: (i) the general function of an

[266] E.g. Interviews 01; 03.
[267] E.g. Interview 07.
[268] E.g. Interview 04.
[269] E.g. Interview 01.
[270] E.g. Interview 06.
[271] E.g. Interviews 06; 07.
[272] See Chapter 5, Section 5.3.
[273] See Wheeler (2019, pp.100-101).

international criminal proceeding; and (ii) the nature of the in absentia proceeding where the victims participate. As for the general function of the proceeding, the defendant's absence can have a different impact on the victims depending on the final purpose of the proceeding.[274] Indeed, if we only consider the need to have someone physically present in the courtroom, convicted and put in prison, in absentia proceeding are not appropriate. Instead, if attention is given to the truth-telling function of the proceeding[275] and its capacity to prosecute heinous crimes and determine accountability without the necessity to have the defendant present before the judges, in absentia proceedings become a valid alternative to the suspension of the process.[276]

In the experience of some legal practitioners interviewed for this thesis, in absentia proceedings are not per se a problem, but what is relevant for the victims is the way in which the proceeding is conducted, how they are recognised, and what the outcome of the proceeding is, both concerning feasible reparations and the expeditiousness of the whole process.[277] Indeed, the fact that the defendant is absent does not necessarily affect the purposes of victims' participation.[278] If all efforts are made to bring the defendant to justice and arrest him/her, but there is no chance to do so, at least in a reasonable amount of time, holding a proceeding in absentia can be considered a good solution.[279]

Therefore, it is the outcome of the proceeding and its length that concerns the victims and their legal representatives the most. If the proceeding is too slow, ineffective, or it is transformed into a purely academic exercise, it might be perceived as a loss of time and a waste of public money.[280] For example, it is argued that at the STL, for six months the hearings have been focused on 'political' witnesses and the telling of the historical facts of the case. This has been perceived as a wrong and inefficient way of conducting the trial in absentia, losing the interest of the Lebanese population and the people directly or indirectly affected by the crimes.[281]

However, it should be noted that the issue of the length of the proceeding and a lack of expeditiousness does not affect only in absentia proceedings. Indeed, this is also a problem for ordinary proceedings, where a lengthy prosecution of crimes affects the

[274] For the impact of International Criminal Procedure on victims' participation, see Ohlin (2009).
[275] See Riachy (2010, p.1297). Accord Interview 06.
[276] E.g. Interviews 06; 07.
[277] E.g. Interviews 04; 06; 08; 12.
[278] E.g. Interview 12.
[279] E.g. Interviews 01; 02.
[280] E.g. Interview 11. See also Jenks (2009, pp.97 and 99).
[281] E.g. Interview 04.

effectiveness of the work of international criminal tribunals.[282] This point is confirmed by the scholarship when saying that for instance, the ICC has proceeded with 'glacial pace'[283] (at least at the beginning of its mandate). In this sense, ordinary proceedings and in absentia proceedings share a common concern: to avoid delays in the prosecution of crimes, permitting the victims to achieve justice promptly.

The other element that must be considered is the nature of an in absentia proceeding. Indeed, the fact that this is partially or totally in absentia can change its impact on the victims and their perception of the process. As discussed in Chapter 1, when there is a partial in absentia proceeding this means that the defendant has appeared at least once before the judges and the participating victims could see him/her in court.[284] This means that the goals of the proceeding remain the same as those in an ordinary process, with the only difference that the defendant is not always physically present in the courtroom.

In this regard, the opinions of the legal practitioners interviewed for this thesis vary. Those against the use of in absentia proceedings see the temporary or partial absence of the defendant from the courtroom as affecting the victims' rights and their need to face the person in court.[285] On the other side, the view is that the defendant's partial absence has no effect on the victims and there is no violation of their rights.[286] Moreover, additional criticisms are mounted when looking at the new Rules of Procedure of the ICC. With the introduction of Rule 134bis, ter and quater and the possibility of high-profile defendants to be excused from being continuously present at trial, the impact on the victims might be that they see the defendant participating in the proceeding in a limited way. According to a legal practitioner interviewed for this thesis, this fact affects the victims negatively because they perceive this exception as unjust and inappropriate, given the nature of the crimes prosecuted and the possibility for the defendant to come back freely to the country where these happened.[287]

In the case of total in absentia proceedings, the perception of the legal representatives of the victims is harsher. Indeed, the legal practitioners interviewed stress the importance of having a defendant physically present in the courtroom. The idea is that the defendant's absence can hinder not only the prosecution of the crimes

[282] See Galbraight (2009); Heinsch (2009). On the need for expeditious proceedings, see McDermott (2013); Higgings (2007); Robinson (2000).
[283] See Smith Cody and Stover (2017, p.334).
[284] See Chapter 1, Subsection 1.2.3.
[285] E.g. Interviews 05; 08.
[286] E.g. Interviews 01; 02; 16.
[287] E.g. Interview 08.

committed from a procedural point of view but also the perception of justice of the victims. Indeed, first of all, there is a negative impact on the victims when they do not see anyone in court,[288] and in this sense, one interviewee says 'you know, you would want the person that you consider to be the perpetrator of the crime to be present in court'.[289] The defendant's absence would also make the proceeding less 'real' in the eyes of the victims ('for them, it would make it seem a bit unreal'),[290] and the entire process 'becomes more abstract for them'.[291]

A second negative impact for the victims is that in total in absentia proceedings the defendant might not be in custody during and after the proceeding. The scholarship argues that having a defendant in custody during the proceeding and afterwards provides a sense of justice and attribution of responsibility for the crimes committed.[292] Indeed, provided the presumption of innocence, the arrest and custody of a defendant is a strong sign for the victims of the international community's commitment towards the fight of impunity.

A similar argument is advanced by the legal practitioners interviewed for this thesis. They say that the victims would like to see someone in jail during the trial[293] because 'they want to see somebody standing up and being told that they are guilty';[294] but also when the proceeding is concluded[295] and at sentencing.[296] This desire is mainly justified by the need to achieve justice for the harm suffered and the crimes committed.[297] Indeed, 'the point of following the proceeding for the victims is to making sure that the person responsible for the acts is arrested and convicted'.[298] If there is no arrest or effect for those responsible for the crimes, the truth-telling function of an in absentia proceeding is considered worthless. In the words of an interviewee, 'what is the price of the truth, if the truth has no consequences on anyone. I mean, it is a high price to pay'.[299]

Another significant element is the impact that a retrial might have on the victims after a total in absentia proceeding is concluded.[300] As already discussed, the right to

[288] E.g. Interviews 01; 02; 03; 08.
[289] Interview 02.
[290] Interview 03.
[291] Interview 04.
[292] See Zakerhossein and de Brouwer (2015, p.199).
[293] E.g. Interview 08.
[294] Interview 06.
[295] E.g. Interview 02.
[296] E.g. ibid.
[297] E.g. Interview 07.
[298] Interview 04.
[299] Ibid.
[300] See Stigen (2008, p.210).

retrial is recognised to the absent defendant to safeguard his/her position and balance the prosecution in absentia with his/her procedural rights.[301] However, the retrial creates several problems, including a possible negative effect on the victims, once they have been part of a total in absentia proceeding and then they are involved in a new trial on the same facts. In this regard, the scholarship argues that although the retrial is a just remedy for the defendant, it 'will represent an additional burden on victims and witnesses who have already been interviewed and testified'.[302]

In particular, the retrial would affect the expeditiousness of the case and the effectiveness of the prosecution of crimes. Indeed, if the defendant could have a new trial on the same facts, the time already passed in the meanwhile would not count, and the strategies and actions taken during the proceeding in absentia would not have any outcome. In this situation, there is a risk that the victims would be victimised twice, as they have to participate again in the proceeding and go through the entire process another time.[303] Moreover, they will need to wait additional time to receive a decision on the case and see justice done. The retrial might also end with a different verdict than in the precedent in absentia proceeding, and this might frustrate victims' expectations and trust in International Criminal Justice.[304]

The possibility to receive reparations is debated in international criminal proceedings,[305] and (as will be explained in Chapter 5, Section 5.3.) it becomes even more controversial when the defendant is absent.[306] The chance to claim damages for the crimes suffered by the victims can be affected by the defendant's absence concerning two aspects: (i) the source of the reparations, i.e. who is going to pay; and (ii) what is given as reparations, both in terms of quantity and quality.

Concerning the first aspect, it might be said that the defendant's absence is an obstacle to the payment of reparations to the victims because the defendant is not present in the proceeding and his/her assets cannot be directly seized for the claims.[307] This criticism is legitimate; however, it fails to consider the possibility to have (e.g. in national jurisdictions) civil proceedings in absentia for the payment of reparations and the creation of funds for victims of certain crimes.[308] This last option is already present

[301] See Chapter 3, Subsection 3.4.3.
[302] Stigen (2008, p.210).
[303] See ibid.
[304] On the expectations of the victims, see Hodžić (2010).
[305] See Zegveld (2010); Keller (2007).
[306] For a discussion, see Wheeler (2019, pp.98ff.).
[307] On the possibility to seize the defendant's assets at international criminal tribunals, see de Meester, Pitcher, Rastan and Sluiter (2013, pp.289ff.).
[308] These possibilities will be analysed in Chapter 5, Section 5.3.

at the ICC, where there is a dedicated fund for victims (i.e. the Trust Fund) used for paying reparations.[309]

Although it is true that in an in absentia proceeding the defendant is not in the courtroom, for reparations the situation is the same as in an ordinary criminal proceeding. Indeed, if the person does not have enough resources to pay the reparations, whether present or absent from the proceeding, these are paid by the fund for victims.[310] This is due to the fact that 'the establishment of accountability towards victims through reparation proceedings is an asset per se, even in cases where the defendant is indigent'.[311] In the case of absent defendants with sufficient economic means, a possibility would be to freeze the assets of the absentee and put them at the disposal of the court.[312] Therefore, the impact of the defendant's absence is only apparent, and it can be avoided using alternatives. The scholarship confirms this point by saying that 'the ability of the victims to receive reparations […] is not affected when a trial is conducted in absentia'.[313] Indeed, 'the award of reparations is unrelated to the presence of the accused because there are other entities that will be responsible for paying the necessary reparations to the victims'.[314]

As for the second aspect, the creation of a dedicated Trust Fund for victims and the seizing of the available assets of the absent defendant might solve the problem, and the defendant's absence seems not to have any relevant impact on the amount of money paid and/or the type of reparations given to the victims. This is true, especially because in the majority of cases, in International Criminal Justice reparations are paid collectively, with no specific damages paid to each victim.[315] On this point, the scholarship underlines that there is a tension between the individual right to receive reparations and collective measures, but the common approach of international criminal tribunals is to rely on the latter.[316]

The legal practitioners interviewed for this thesis raise similar concerns. In general terms, one says that 'in absentia trials only make sense for victims if you've got

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[309] For the details of the Trust Fund, see <https://www.trustfundforvictims.org/en/home>. See also McCarthy (2012, pp.225ff.); Dwertmann (2010, pp.285-294); Schabas (2010, pp.909-917).
[310] See Stahn (2019, p.400).
[311] Ibid.
[312] See de Meester, Pitcher, Rastan and Sluiter (2013, pp.289ff.).
[313] Wheeler (2019, p.100).
[314] Ibid.
[315] On the principles on reparations adopted at the ICC, see *Prosecutor v. Lubanga*, Decision establishing the principles (2012); *Prosecutor v. Lubanga*, Judgment on the Appeals (2015). See also Mégret (2014); Sperfeldt (2012); Rosenfeld (2010).
[316] See Odier-Contreras Garduno (2018).

a trust fund'.[317] The problem of having a Trust Fund emerges especially when looking at the procedure to obtain reparations in in absentia proceedings. The interviewee says that 'if this is an international tribunal then the conviction has to be recognised internationally and that's not just the fact of the conviction, it is the detail of the conviction';[318] and 'it's not just designed to work so that they can go to Beirut and say, please give me money, it's designed to work all over the world'.[319] But there might be logistical problems in obtaining reparations through an in absentia proceeding. Indeed, 'if these accused remain at large, they remain at large with a particular purpose in mind, and that also means that they will hide their assets, and that will make it even more difficult for victims to get reparations'.[320]

4.4.2. Impact on the Procedural Strategy

Alongside a general impact, it is worth asking whether in absentia proceedings have an impact also on the procedural strategy pursued by the victims' legal representatives. As already mentioned, a legal representative must present the position of the victims before the judges, protecting their rights and seeking the conviction of the defendant. When the defendant is absent from the proceeding, the legal representative's procedural strategy does not seem to be particularly affected. Indeed, he/she can advance a case and present the victims' position, with no limits on his/her actions as if the defendant was present in court.

It should be noted that, as it happens with the Prosecutor's strategy, the legal representative's work can be affected by various factors that also emerge in ordinary criminal proceedings and are not necessarily characteristic of in absentia proceedings.[321] For instance, the legal representatives might be contested in their legitimacy to represent the victims,[322] or he/she might not rely on robust arguments because of a lack of supporting evidence (either because the witnesses are too scared to come and testify or because the evidence has been destroyed).[323]

A legal practitioner interviewed for this thesis thinks that, in a certain sense, it is easier for the legal representative of the victims to advance a successful case for their

[317] Interview 06.
[318] Ibid.
[319] Ibid.
[320] Interview 07.
[321] On the challenges to the representative's procedural strategy, see Haynes (2017).
[322] See Hirst (2017, pp.145-150); Killean and Moffett (2017).
[323] As discussed in Subsection 4.3.2., this problem occurs also for the Prosecutor's procedural strategy.

clients.[324] For instance, when they can present evidence with only the defence counsel present to contest it. However, the practice of the proceeding also brings some difficulties when the victims' participation and the action of their representative is perceived as a danger, and it is opposed by the Defence. Therefore, what happens is that 'if you have an accused in a courtroom, the accused would not necessarily understand that particular evidence does not touch his or her defence case'[325] and 'the defence lawyer would be more active against the legal representative'.[326]

As for the procedural strategy that the legal representative use in an in absentia case, a compelling point is advanced about the position on the defendant's absence.[327] Indeed, it said that alongside other victims' arguments, the legal representative tries to undermine the possibility for the defendant to be allowed to be absent. In other words, the legal representative seeks to challenge in absentia from a theoretical perspective, and this activity includes 'to do some legal research, to find legal resources, to find in other countries in the world arguments in support of the existence of a legal duty on the accused to be present in the courtroom, rather than a legal right of the accused to be present in the courtroom'.[328]

Moreover, an interesting aspect concerns the impact of in absentia proceedings on the relationship between the legal representative of the victims and other parties. On this point, the legal practitioners interviewed for this thesis are divided. An interviewee thinks that there is a complete indifference by other parties involved in the case towards the impact of in absentia on the victims.[329] This means that little or no attention is given to the possible difficulties that the victims and their representatives encounter when involved in an in absentia proceeding. Another thinks that the perception is less negative, but it reveals a disconnection between the Defence and the victims. Indeed, it is argued that the defence counsels do not understand fully or at all the role of the victims in the proceeding, especially in absentia, and therefore they do not see any value in it.[330]

A final consideration is on the need to involve the victims in deciding whether to conduct a proceeding in absentia (in the pre-trial or trial phase) to gather their point of

[324] E.g. Interview 07.
[325] Ibid.
[326] Ibid.
[327] E.g. Interview 08.
[328] Ibid.
[329] E.g. Interview 02.
[330] E.g. Interview 05.

view.[331] This means that the victims might express their opinion on the necessity to prosecute crimes in the defendant's absence, providing additional elements to the discussion. A similar argument is advanced for ordinary international criminal proceedings when discussing sentencing.[332] In particular, the scholarship says that there is a need for more 'inclusivity' of other subjects (e.g. the victims) in the decision-making process of international criminal tribunals.[333]

A more substantial involvement of the victims in the decision whether to hold a proceeding in absentia might have two consequences. First of all, the decision of the court to hold a trial in absentia would be more 'complete' and 'documented'. More 'complete' because it will include the view of all parties participating the proceeding, including the victims. More 'documented' because it will consider the position of the victims and the information that they might have on the case. However, it is important to balance the active participation of the victims with the role of the absent defendant.[334]

Second, the involvement of the victims would render them real participants to the proceeding with a better understanding of the judges' decision to hold a trial in absentia.[335] This would have an important effect on the impact of in absentia for the victims because the proceeding conducted in absentia would be perceived differently as the victims would be more informed about the entire decision. Therefore, the impact of a total in absentia proceeding can vary depending on the awareness of the victims and their involvement in the decision to conduct it. The less involvement, the greater the possible negative impact on the victims.

4.5. Conclusion

This Chapter has scrutinised the impact of in absentia proceedings on the parties of international criminal cases, i.e. the Defence, the Prosecutor, and the victims. In particular, the analysis has articulated the effects that in absentia have on the parties' right to fair trial and their procedural strategies.

The study presents two findings. First of all, among the parties involved in in absentia proceedings, the Defence experiences a considerable impact. The scholarship has attempted advancing a similar argument, but the approach has been limited for two

[331] E.g. Interview 06. This possibility is considered by the scholarship as the 'decision-making' participation of victims in a criminal proceeding. See Edwards (2004).
[332] See Findlay and Henham (2011, pp.222-272).
[333] See ibid., pp.268-269.
[334] See Zappalà (2010); Jouet (2007).
[335] Findlay and Henham (2011) make the same argument regarding international criminal sentencing.

reasons. It has been based on theoretical assumptions, with no analysis of the opinion of the legal practitioners involved in in absentia proceedings. Moreover, the scholarship's focus has been on the disadvantages of in absentia proceedings for the Defence, with no attention to the advantages of these proceedings for the absent defendant and the defence counsel.

This Chapter has adopted a different approach, examining the view of the legal practitioners who work in in absentia proceedings and considering both positive and negative consequences of in absentia proceedings for the Defence and the other parties. In so doing, it has found that the impact on the Defence is equally split between the absent defendant and the defence counsel. The positive effects of in absentia proceedings are mainly linked to the possibility for the defendant to disguise his/her identity and avoid the stigma of being in court; for the defence counsel to prevent a conflict with the defendant on the procedural strategy to be adopted. The negative effects are reflected in the difficulties encountered in building up a Defence strategy, gathering useful information and evidence, and challenging the Prosecutor's case. In fact, the Defence is undermined in its capacity to advance a positive case, and the defendant and the counsel are constrained in their procedural strategy.

Moreover, in absentia proceedings also have a peculiar impact on the Prosecutor and the victims (and their legal representatives). Indeed, these proceedings change the internal dynamics of an adversarial criminal proceeding, bringing important alterations to the relationship among the parties and between the parties and the process. For instance, the Prosecutor would need to present a case based on a narrative where the defendant's presence has no influence, and this might have advantages (e.g. less Defence's challenges) and disadvantages (e.g. the defendant's behaviour in court cannot be scrutinised, and he/she seems to prosecute a 'phantom'). In the victims' case, there might be advantages because they can obtain a conviction and subsequent reparations; but also disadvantages because they do not face anyone in court and in total in absentia proceedings no one is in custody.

This finding is important because it shows that in absentia proceedings (especially total in absentia) have an impact on the parties of the process that goes beyond the traditional understanding of the literature on the topic. This means that sometimes their impact can be detected only through the *viva voce* of the protagonists of these proceedings. In this sense, this Chapter has demonstrated the relevance of the experience of the legal practitioners involved in in absentia cases for determining the

impact of these proceedings. This finding will be recalled in Chapter 6 when analysing the recommendations for a future use of in absentia proceedings.

Second, in absentia proceedings can affect (positively or negatively) the capacity of a party to act as it would in an ordinary international criminal proceeding. The scholarship has traditionally disregarded this aspect, examining in absentia proceedings through the lenses of the practice of ordinary international proceedings. This has resulted in a misleading interpretation of the impact of in absentia proceedings on the parties with no consideration of the specific 'reality' of these proceedings.

This Chapter has achieved a different outcome. It has found that in in absentia proceedings the parties need to rely on unconventional approaches to the criminal process to deal with the exceptional defendant's absence. This is not necessarily a negative effect and can lead to better procedural outcomes. However, this fact has two consequences. On the one side, in absentia proceedings alter the relationships between the parties and their traditional role in the process. For instance, the Defence (particularly the defence counsel) is much more linked and subordinate to the Prosecutor's procedural choices and actions regarding the evidence used in the proceeding than in ordinary criminal cases. On the other side, in absentia proceedings encumber greatly on the procedural actions of the parties, and this has a knock-on effect on the substantive rights of these subjects (e.g. the right to fair trial).

This finding is significant because it indicates the limits and prospects of in absentia proceedings as expressed by the legal practitioners interviewed for this thesis. These elements will be important to inform the analysis done in Part III of the thesis on the *future perspectives* of in absentia proceedings. In particular, they will be considered in Chapter 5, when discussing the alternatives to in absentia proceedings in International Criminal Justice; and in Chapter 6, when examining the aspects of in absentia proceedings that need to be improved or changed in the future.

Part III. Future Perspectives

This Part of the thesis examines the *future perspectives* on in absentia proceedings in International Criminal Justice. Traditionally, the scholarship has focused on the past and present experiences of these proceedings, without considering their future developments. In particular, no study has been carried out on the limits and prospects of a future use of in absentia proceedings in International Criminal Justice and what alternatives to their conduct exist. However, these two points emerge from the research done in the previous Parts of this thesis, and they need to be addressed to acquire a comprehensive understanding of in absentia proceedings.

This Part seeks to fill the gaps on the topic, and it advances two ideas. If in absentia proceedings are not used in the future, we will have to consider other valid solutions to ensure justice in international criminal cases with absent defendants. To this end, the author presents two alternatives to international criminal proceedings in absentia that seek to overcome the criticisms mounted against these proceedings. These alternatives are international civil proceedings in absentia and Transitional Justice mechanisms. On the contrary, if in absentia proceedings are used in the future, they will have to improve in response to the flaws highlighted in Parts I and II of this thesis. In this sense, the future regulatory framework of in absentia proceedings will need to include some changes and innovations as indicated in this Part.

This Part is divided into two Chapters. Chapter 5 discusses the alternatives to in absentia proceedings. Here, the author analyses their rationale and general features (Section 5.2.) and presents two examples, i.e. the conduct of international civil proceedings in absentia (Section 5.3.) and the use of Transitional Justice mechanisms (Section 5.4.). Chapter 6 focuses on the future of in absentia proceedings. The author engages in significant reflections on the value of in absentia proceedings in International Criminal Justice as useful, legally possible, but exceptional proceedings (Section 6.2.). Moreover, drawing upon the study done in the previous Parts of this thesis, the Chapter includes an analysis of some critical aspects of in absentia proceedings that need to change and improve for a legitimate use of these proceedings (Section 6.3.).

Chapter 5. Alternatives to In Absentia Proceedings

5.1. Introduction

This Chapter focuses on the *alternatives* to in absentia proceedings in International Criminal Justice. In particular, after having examined the rationale of the search for alternatives and their general features, the author proposes two solutions discussing them in detail and considering their advantages and disadvantages.

As seen in Chapter 1, when a defendant is absent in an international criminal case, the traditional choice is to suspend the proceeding and wait until the person is apprehended or appears in court. This decision is not ideal and raises concerns over the effectiveness of International Criminal Justice and the capacity of international criminal tribunals to prosecute crimes expeditiously.[1] In this regard, in absentia proceedings deviate from this approach, but their use is controversial and problematic.[2] However, a rejection of in absentia proceedings would bring back the situation to the initial issue (i.e. the suspension of the proceeding) with the limitations already discussed. Despite this deadlock, the scholarship has not proposed any alternatives to in absentia proceedings in International Criminal Justice, and this fact produces a questionable legal vacuum.

This Chapter seeks to fill this gap, critically discussing the options available if in absentia proceedings are rejected and proposing two feasible alternatives. To this end, the study combines a doctrinal analysis of the literature on the topic with a critical examination of the opinions of the legal practitioners interviewed for this thesis. This methodology permits the author to address the topic in a more informed way, including a practice-based evaluation, i.e. how the legal practitioners involved in in absentia proceedings understand and regard the proposed alternatives.

The study done in this Chapter is important also for other Chapters of the thesis. In particular, it assesses the two alternatives proposed referring to some theoretical constraints of in absentia proceedings (i.e. considered in Chapter 1 on the *theoretical framework*) and operational challenges arising from the defendant's absence (i.e. analysed in Chapter 3 on the *practice* and Chapter 4 on the *impact*). Moreover, it discusses the limits of the two alternatives and presents some reflections that will be relevant when examining the future of in absentia proceedings (i.e. in Chapter 6 on the

[1] See Chapter 1, Subsection 1.3.3.
[2] See Chapter 1, Subsection 1.3.2.

future).

The Chapter is divided into three Sections in addition to an Introduction and a Conclusion. The first Section investigates the rationale of the search for alternatives to in absentia proceedings and their main features (Section 5.2.). The second Section analyses the use of international civil proceedings in absentia to guarantee reparations to the victims independently from a criminal proceeding (Section 5.3.). This Section includes a critical discussion of four aspects: (i) the scope and goals of this alternative (Subsection 5.3.1.); (ii) its constitutive elements, advantages, and disadvantages (Subsection 5.3.2.); (iii) some problematic procedural features that might hinder its implementation in International Criminal Justice (e.g. issues for the payment of reparations to the victims) (Subsection 5.3.3.); and (iv) a critical analysis of the opinions on it of the legal practitioners interviewed for this thesis (Subsection 5.3.4.).

In the third Section, the author examines the use of Transitional Justice mechanisms as alternatives to 'purely criminal' in absentia proceedings (Section 5.4.). This means rethinking international criminal proceedings to facilitate reconciliation among the parties and encourage the defendant's presence without relying exclusively on retributive criminal justice. As in the case of the first alternative, the analysis considers four aspects of this solution: (i) its scope and goals (Subsection 5.4.1.); (ii) its constitutive elements, advantages, and disadvantages (Subsection 5.4.2.); (iii) some problematic procedural features that might hinder its implementation in International Criminal Justice (e.g. the role of victims) (Subsection 5.4.3.); and (iv) a critical analysis of the opinions on it of the legal practitioners interviewed for this thesis (Subsection 5.4.4.).

Ultimately, the author advances two ideas in this Chapter. First, the alternatives to in absentia proceedings present pros and cons and are not immune from criticism by the legal practitioners and the scholarship. As in the case of in absentia proceedings, they are exceptional proceedings that should only be used with specific procedural safeguards and when certain conditions are met. Second, the alternatives proposed fit certain cases better than others and they seem not to have a universal application in International Criminal Justice. This fact prompts questions about their effectiveness in a globalised system of criminal justice and the extent to which international criminal tribunals can use them instead of in absentia proceedings.

5.2. The Search for Alternatives to In Absentia Proceedings

To date, the traditional procedural answer to an international criminal case with an absent defendant has been either the suspension of the proceeding or the conduct of in absentia proceedings. In particular, with the latter, international criminal tribunals have sought to overcome the limitations emerging from the suspension of the proceeding, but the result has not always been satisfactory. As discussed in Chapter 1, in absentia proceedings have been the subject of much controversy and many criticisms have been mounted against them.[3] In particular, they are problematic for the fulfilment of the objectives of International Criminal Justice and may also violate the right to fair trial.[4] Likewise, the suspension of an international criminal proceeding is not ideal both from a theoretical and procedural point of view. Indeed, as discussed in Chapter 1, this solution raises concerns for the achievement of justice for victims and the prosecution of international crimes expeditiously.[5]

This situation creates a deadlock for international criminal cases with absent defendants. Indeed, the options of the legislator and the international criminal tribunals are limited to two controversial cases (i.e. in absentia proceedings and the suspension of the process), and no efforts have been made to identify alternative solutions to the use of in absentia proceedings. As a legal practitioner interviewed for this thesis underlines, 'it is really which is the lesser of two evils kind of choice',[6] and 'if it is a choice between trials in absentia […] versus suspension, I'm not really sure, to be honest, that this is the best use of scarce resources'.[7] Therefore, a problem exists for both the lack of options and the need to preserve the resources at the disposal of international criminal tribunals.

When discussing in absentia proceedings, the scholarship has not addressed two crucial questions that arise from this context. First, if there are other solutions available in International Criminal Justice, i.e. alternatives to in absentia proceedings; and second, what these solutions are. This Section introduces the topic of the alternatives to in absentia proceedings, discussing the rationale for the search of these solutions and identifying some of their features. To this end, the author refers to the relevant literature and the opinions of the legal practitioners interviewed for this thesis who are involved in in absentia proceedings.

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[3] See Chapter 1, Subsection 1.3.2.
[4] See Chapter 1, Subsection 1.3.1.
[5] See Chapter 1, Subsection 1.3.3.
[6] Interview 15.
[7] Ibid.

5.2.1. Preliminary Remarks

A preliminary consideration concerns the fact that the alternatives analysed in this Chapter are alternatives to the international criminal proceedings in absentia discussed in this thesis. This choice is due to the specific focus of this study. Indeed, as explained in the Introduction of this work, this research does not examine the phenomenon of absent defendants in International Criminal Justice and the feasible proceedings that can be used to regulate it. Rather, this study considers a particular group of proceedings directly, i.e. international criminal proceedings in absentia. Moreover, this means that the proposed options refer to the phenomenon of in absentia (i.e. the defendant's absence), but they do not rely on the conduct of ordinary criminal proceedings. For instance, one alternative is the conduct of civil proceedings in absentia that provide reparations to the victims of international crimes while the defendant is absent. Therefore, the alternatives are intended with respect to the specific category of *international criminal proceedings in absentia* and not as general alternative procedural answers to the phenomenon of absent defendants.

This is an important caveat that helps one to understand the function that these procedural alternatives would have in International Criminal Justice. They are not additional proceedings available to try an absent defendant, but they encompass other approaches to achieve justice at international level when in absentia proceedings cannot be conducted.[8] In other words, they are secondary proceedings that international criminal tribunals can rely upon when the use of criminal in absentia proceedings is barred. This means that they are possible options in International Criminal Justice, although they are not criminal in nature, as instead in the case of the suspension of the proceeding or in absentia proceedings. In this sense, the idea is that 'interests of justice is a broader concept than retributive justice alone and, thus, processes other than judicial criminal trials could be a factor in assessing it'.[9] Moreover, because they substitute in absentia proceedings, they still need to be operationalised in the context of international criminal tribunals, and this is why some theoretical constraints and operational challenges typical of criminal in absentia proceedings will be recalled in their analysis in this Chapter.

Another preliminary remark is about the relationship between the two proposed alternatives. The use of civil proceedings in absentia or Transitional Justice mechanism

[8] On alternative methods in International Criminal Justice, see Nouwen and Werner (2015); Findlay and Henham (2010).
[9] Carter, Ellis, and Jalloh (2016, p.207).

are not necessarily mutually exclusive. In this sense, these solutions are proposed as alternatives to international criminal proceedings in absentia but not as alternatives to each other. This means that international criminal tribunals can rely upon them without preferring one over the other but considering the exigencies of the case at stake. This is because not all cases of defendant's absence can be managed in the same way (i.e. using one or the other proposed alternatives), and in certain situations the needs of International Criminal Justice and the parties involved require to pursue reparations (i.e. through civil proceedings in absentia) and reconciliation (i.e. through Transitional Justice mechanisms) at the same time.

This is a necessary caveat because the coexistence of the two proposed alternatives is in line with the need for 'procedural flexibility' in International Criminal Justice. For instance, the scholarship has recalled this 'flexibility' when considering States' cooperation with international criminal tribunals[10] and the need for 'negotiated justice'[11] or the creation of rules of evidence.[12] Moreover, procedural flexibility might be relevant when coping with exceptional situations, like the defendant's absence from the proceedings. Indeed, as it happens for international criminal proceedings in absentia (and it has been discussed in Chapter 1),[13] the proceedings used by international criminal tribunals do not have to achieve all objectives of International Criminal Justice. This means that the objectives' pluralism that characterises this system of criminal justice also allows a certain selectivity, depending on the circumstances of a criminal case and its exigencies.[14] In this sense, the scholarship underlines that 'already at the adoption of a Statute or a set of statutes, regardless of the level of detail, the law- maker has made a choice of relevant objectives and balanced the objectives'.[15] Therefore, the two alternatives to international criminal proceedings in absentia proposed in this Chapter can either be adopted independently, or they can coexist, depending on the choice of objectives made by the international criminal tribunal involved.

5.2.2. Rationale and Features

As the scholarship underlines, the pluralism that exists in International Criminal Justice

[10] See Roach (2013).
[11] Ibid., pp.625-629.
[12] See Boas (2001).
[13] See Chapter 1, Subsection 1.3.1.
[14] See Klamberg (2010, p.294).
[15] Ibid.

also extends to the proceedings used in this legal context.[16] In this sense, justice can be pursued at international level in different ways, depending on the case at stake and the interests involved.[17] The question of the existence of a plurality of options to achieve International Criminal Justice also emerges from the opinions of the legal practitioners interviewed for this thesis. In particular, valuable points are made on the possibility to have alternatives and what these alternatives might look like.

Some legal practitioners think that there are no alternatives available, and the only solution is the suspension of the proceeding.[18] For instance, one says: 'I do not see any other alternatives than stopping the proceeding. You have an indictment, and you stop the procedure. I do not see any other alternative'.[19] Another practitioner rules out the alternatives and see them negatively as if they are all a 'bad' idea. In this sense, it is said that 'there are no viable alternatives, there are some bad alternatives'.[20] Other legal practitioners instead are open to the idea of alternatives to overcome the issues of in absentia proceedings (especially those emerging in the practice of the STL).[21] Therefore, they propose some procedural solutions as alternatives to in absentia proceedings, which deal with the defendant's absence but are not necessarily linked to the conduct of a criminal proceeding. In this regard, these interviewees advance some arguments that are particularly interesting for our analysis and are supported by a part of the scholarship.

Generally speaking, attention is given to the institutionalisation (i.e. the use by international criminal institutions) and the layout (i.e. the structural features) of the alternatives. They should fit within an efficient system of justice, both regarding the resources used and the objectives achieved.[22] This means that the proposed solutions should not put the objectives of International Criminal Justice at risk by introducing expensive or excessively time-consuming proceedings that seek to achieve unrealistic expectations. For instance, if a proposed alternative includes the creation of a new international criminal tribunal, this needs to be evaluated carefully to avoid a waste of money and time. Indeed, 'you cannot say I have to be realistic, and it is better than nothing. No, no. Either you have justice, or you do not have justice'.[23] In the same sense,

[16] See Turner (2019); Sluiter et al. (2013, p.7).
[17] See Alvarez (2009). Cryer, Friman, Robinson and Wilmshurst (2010, pp.561-578) talk about 'alternatives and complements to criminal prosecution'.
[18] E.g. Interviews 07; 09; 16.
[19] Interview 16.
[20] Interview 07.
[21] E.g. Interview 15.
[22] E.g. ibid.
[23] Interview 05.

the scholarship talks about 'non-judicial alternatives'[24] that might contribute more efficiently than traditional proceedings to 'an effective global justice system' and could be accepted in International Criminal Justice.[25]

In addition, the alternatives should also be goal-effective and interests-inclusive. This means that they should be used to enhance International Criminal Justice and the work of international criminal tribunals by allowing a more effective prosecution of crimes[26] and inclusion of all parties in the judiciary decision-making process.[27] In this sense, the scholarship argues that 'what seems to be most important is the need for a special procedure to preserve evidence and to perpetuate testimony. Special proceedings in this regard seem to be a fully acceptable alternative to a trial in absentia since they seek a balance between the public and the individual interests involved in a case'.[28] This would also be in line with the idea that an international criminal proceeding should be 'a search for truth contained within a principled, inclusive and accountable process',[29] and 'the overall justification for the trial will be argued as a forum for reflecting and reconciling competing perceptions of truth'.[30]

The legal practitioners interviewed for this thesis agree with the points above and think that the working strategy of international criminal tribunals should be reconsidered. This means that one should focus on 'rethinking the collection of evidence'[31] and provide better publicity of the cases at stake.[32] Concerning the latter point, a diverse approach should be adopted towards the concept of 'education',[33] understood as guaranteeing that the international community and the public gain a proper knowledge of specific cases and how international criminal tribunals operate. Thus, the proposed alternatives should be inclusive and transparent to overcome the gap between the work of international institutions and the international community's perception of it. This is a salient point because (as discussed in Chapter 1 of this thesis) one critical aspect of in absentia proceedings is the fact that they are not well-understood by the public or, better, many aspects of these proceedings are kept behind

[24] Carter, Ellis and Jalloh (2016, pp.205-208).
[25] Ibid., p.208. For instance, in Oette (2011) it is proposed to use non-judicial proceedings linked to Transitional Justice in the context of Sudan and the human rights violations occurred in the country.
[26] On enhancing effectiveness of International Criminal Justice through special proceedings, see Marauhn (1997).
[27] On inclusivity in judicial decisions, see Findlay and Henham (2011). These authors argue that 'trial dispositions including punishment should focus on measures where the most productive and inclusive outcomes for all parties can be forged': Findlay and Henham (2011, p.275).
[28] Marauhn (1997).
[29] Findlay and Henham (2011, p.274).
[30] Ibid.
[31] Interview 13.
[32] E.g. Interview 05.
[33] Ibid.

closed doors, and this produces misunderstanding and criticism.[34]

Turning to the specific alternatives proposed by the legal practitioners interviewed for this thesis, there is no consensus on the topic. First of all, some consider the use of international commissions of inquiry[35] or fact-finding missions[36] as possible options. These are investigative bodies created by the international community to investigate international crimes (e.g. genocide, war crimes) that might have occurred in a certain conflict in a State or region.[37] In an interviewee's opinion, they might be useful for collecting and preserving evidence during the defendant's absence.[38] Moreover, they permit one to determine the facts of the case and address the crimes committed without the determination of criminal responsibility.[39]

These arguments are compelling because they show how these investigative solutions available in International Criminal Justice might overcome the issues of the dispersal and destruction of evidence in international criminal proceedings, especially during the suspension of the process due to the defendant's absence. Moreover, these solutions might guarantee more cooperation from absent defendants or the authorities of the State concerned; a significant issue for International Criminal Justice in general and in absentia proceedings in particular (as discussed in Chapters 1 and 4 of this thesis).[40]

However, it should be noted that these solutions already exist not as alternatives to in absentia proceedings, but as preliminary activities carried out before and in support of an in absentia proceeding. For instance, the findings of the UN International Independent Investigation Commission established prior to the creation of the STL informed the initial work of the Tribunal.[41] Therefore, it seems that these commissions have a limited mandate and can be considered as 'support' proceedings, rather than primary proceedings conducted for determining the criminal responsibility of an absent defendant.[42] Consequently, they lack the depth typical of in absentia proceedings because that they do not pursue a plurality of objectives of International Criminal

[34] See Chapter 1, Subsections 1.2.1. and 1.3.2. Some authors confirm this by saying that 'trials in absentia are not popular in public opinion': Fransen (2015, p.345).
[35] E.g. Interviews 02; 05; 11.
[36] E.g. Interview 06.
[37] For an analysis, see Meierhenrich (2019); Henderson (2017); Ramcharan (2014).
[38] E.g. Interview 05.
[39] E.g. Interview 02.
[40] See Chapter 1, Subsection 1.3.3. and Chapter 4, Subsection 4.3.1.
[41] The Commission was established by the UNSC 'to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organisers and accomplices': UNSC, Res. 1595 (2005, para.1).
[42] See Schwöbel-Patel (2017).

Justice, but they only focus on providing a historical record of the case.[43]

Another solution proposed by the legal practitioners interviewed for this thesis is to grant more investigative powers to international criminal tribunals, presenting a *prima facie* case and undertaking a review of the case.[44] In this way, there will be a selection of crimes, and 'you can focus on one that is more symbolic for example, which for example carries a lot of evidence'[45] with a more efficient use of the resources available.[46] This solution entails the direct involvement of an international criminal tribunal that would not prosecute crimes in an ordinary way (i.e. through investigations and a subsequent proceeding), but it would rely upon the direct control of the judges and their direction of the investigations. Thus, to a certain extent, this solution would resemble an inquisitorial criminal proceeding, where judges have broad investigative powers.[47] Moreover, as in the case of the commissions of inquiry, with this solution, there would be no determination of guilt (i.e. criminal responsibility),[48] while the evidence is collected and preserved during the defendant's absence. This is a positive feature because it permits international criminal tribunals not to be subject to a typical criticism mounted against in absentia proceedings (especially trials in absentia): the determination of guilt in the defendant's absence.

This alternative fulfils more objectives of International Criminal Justice (e.g. historical record, victims' participation, determination of criminal responsibility (although *prima facie*)) than the proposal of commissions of inquiry/fact-finding inquiries previously recalled. However, it still presents some issues. Indeed, it cannot be considered as a true alternative to in absentia proceedings because it follows the same (or very similar) course of action. The only difference is that the proceeding is halted before the trial phase and the judges have more investigative powers. Therefore, this seems to be a quasi-in absentia proceeding, in many ways similar to the pre-trial in absentia proceedings regulated at the ad hoc tribunals under Rule 61 and already analysed in this thesis.[49]

Finally, the interviewees advance the idea to set up truth and reconciliation commissions, but with some caveats. They 'should always be on the table'[50] but

[43] Criticisms are mounted against these commissions for being too much subjected to the subsequent work of international criminal tribunals. See ibid.
[44] E.g. Interviews 06, 07, 11, 13.
[45] Interview 11.
[46] E.g. ibid.
[47] See Salas (2002, pp.506-508).
[48] E.g. Interview 06.
[49] See Chapter 3, Subsection 3.2.2.
[50] Interview 08.

keeping in mind that the standard of proof is different from criminal proceedings. Indeed, they rely on a balance of probabilities, whereas criminal proceedings refer to the 'beyond reasonable doubt' standard.[51] This fact might bring some advantages because it would permit one to establish the responsibility for the crimes with less evidentiary burden and constraints, especially for complex cases where the gathering of evidence might be difficult. However, the different standard of proof might create issues because the actions of those responsible for the crimes would be scrutinised based on a more contingent standard and, therefore, less protective of the rights of the person (e.g. the presumption of innocence). Moreover, truth and reconciliation commissions should be expeditious with no waste of resources,[52] and cannot be used in all cases but only for certain crimes, e.g. not for terrorism.[53] All these limitations restrict the use of this alternative only to specific proceedings with absent defendants, with the effect that it cannot be applied universally. Therefore, this solution does not seem to satisfy the need to find an alternative to in absentia proceedings that has a broad application in International Criminal Justice for the prosecution of different international crimes.

From the considerations made above, this author posits that it is possible to identify three elements that should characterise the alternatives to in absentia proceedings. These elements are: (i) the alternatives need to be efficient and effective; (ii) they need to be different from in absentia proceedings; and (iii) they need to have a wide application in International Criminal Justice. These elements are pivotal to enhance the validity of the alternatives proposed in this Chapter. They will be considered in the following Sections 5.3. and 5.4. when examining the two alternatives suggested in this thesis, and they will be used as guidelines to assess the validity of the solutions proposed.

First of all, the alternatives need to be efficient and effective. This means that they need to avoid disproportionate costs in terms of resources or time (*efficiency*), which could hinder their implementation.[54] Moreover, they should achieve a plurality of objectives, considering those relevant for ordinary international criminal proceedings and in absentia proceedings (*effectiveness*).[55] In particular, the alternatives have to be expeditious, and they should guarantee the involvement of various subjects (e.g. the Defence, the victims) and the protection of their interests.

Second, the alternatives need to sufficiently differ from in absentia proceedings

[51] E.g. ibid.
[52] Ibid.
[53] E.g. Interview 10.
[54] On efficiency in International Criminal Procedure, see Safferling (2012, p.63).
[55] On effectiveness in International Criminal Procedure, see Ryngaert (2009).

both in nature and in procedure. This means that either they do not have a criminal nature, or they do not have to resemble ordinary criminal proceedings, especially regarding the retributive nature of the process.[56] Moreover, they should not involve an entire criminal trial that ends with the issue of a sentence. Otherwise, the alternatives cannot be considered as true alternatives to in absentia proceedings, and they might simply be defined as 'support' proceedings, dependent from the main criminal proceeding (as in the case of commissions of inquiry).

Third, the alternatives need to apply to a variety of situations.[57] This means that they cannot be case-limited, and they should deal with the defendant's absence in different contexts. To this end, they should be able to guarantee the assessment of the facts of a case independently from the type of crimes committed (i.e. including the international crimes prosecuted by the ICC or other tribunals) and the individuals involved (i.e. high-ranking individuals vs. others). Otherwise, the result would be to have constrained alternatives that lack the universality required for in absentia proceedings.

As a final consideration concerning the choice of the alternatives proposed in this Chapter, the author has considered the possibility to include States' responsibility as a valid alternative to in absentia proceedings.[58] However, this choice has been discarded for two main reasons. First of all, as already explained, the alternatives proposed in this Chapter need to be 'true' alternatives to criminal in absentia proceedings. This means that they have to include some elements that form the foundations of in absentia proceedings and (more in general) of the activities of international criminal tribunals. Among these elements, individual criminal accountability plays a pivotal role.[59] Indeed, international criminal proceedings in absentia are first and foremost embedded in a traditional system of International Criminal Justice, where the responsibility for international crimes is assessed on an individual basis and crimes can be committed also by non-state actors.[60] It is argued that 'international practice shows a tendency to keep State and individual responsibility separate, and to apply the principle of individual criminal liability in a very rigorous manner'.[61] Therefore, States' responsibility would not be an option in this context as

[56] On alternative forms of justice at international level that do not entail a 'criminal nature', see Boas (2012, pp.1-24).
[57] On issues of jurisdiction in International Criminal Procedure, see Safferling (2012, pp.83-86).
[58] For an analysis of States' responsibility, see Jorgensen (2003).
[59] See van Sliedregt (2012b); Damgaard (2008).
[60] See Bonafè (2009, p.242).
[61] Ibid.

this relates to a different type of liability for international crimes.[62]

Second, States' responsibility is also not convincing because it would undermine the work of international criminal institutions when considering that a State and its officials might not be the ones responsible for the wrongdoing under scrutiny.[63] For instance, this has happened with the reparations proceedings brought by Italy against Germany for the crimes committed during the Second World War.[64] In this regard, this author argues that to bring a case against a State instead of individuals might result in an unjust judicial outcome. Indeed, those State's representatives involved in a proceeding might be the victims of the same crimes at stake, with the absurd result to be at the same time considered responsible and victims of those crimes.

5.3. International Civil Proceedings In Absentia

This Section investigates a first alternative to in absentia proceedings, i.e. international civil proceedings in absentia. In particular, the author analyses this alternative focusing on four aspects: (i) its scope and goals; (ii) its constitutive elements, advantages and disadvantages; (iii) some problematic procedural features that might hinder its implementation in International Criminal Justice; and (iv) the opinions on it of the legal practitioners interviewed for this thesis.

International civil proceedings in absentia have been chosen as one of the two alternatives to in absentia proceedings for a series of reasons. First of all, they meet the criteria indicated in the previous Section in order to be considered a 'true' alternative to in absentia proceedings. Indeed, for instance they are not criminal in nature and they are sufficiently different from in absentia proceedings to become autonomous proceedings and not dependant from these. Second, these alternatives already exist in national jurisdictions, where in cases with absent defendants it is possible to determine the civil liability for the wrongdoing occurred without a previous criminal conviction and in the absence of the person.[65] This means that, as it happens with other procedural issues, international criminal tribunals might be influenced by or take inspiration from these national examples.[66] Third, this solution has emerged from the analysis of the literature

[62] There might also be additional issues in relation to causation as indicated by McCarthy (2012, p.135); and reparations as indicated by Moffett (2015a).
[63] For a discussion, see Schabas (2010, pp.587ff.).
[64] See *Germany v. Italy*, ICJ, Judgment (2012).
[65] For instance, this occurs in Italy and France.
[66] For instance, this has happened with in absentia proceedings. On cross-fertilisation between national and international criminal justice, see Bassiouni (2008, pp.6ff.).

on in absentia proceedings and the issues of guaranteeing justice in the defendant's absence. Indeed, some scholars have considered the topic and this solution, even if sporadically.[67] Finally, as will be discussed in the following Subsections, international civil proceedings in absentia have also been mentioned by some legal practitioners when discussing alternatives to in absentia proceedings. This means that there is a recognition of the existence of such a possibility by those involved in cases with absent defendants, although the interviewees point out some limits and drawbacks of this alternative.

5.3.1. Scope and Goals

The main aim of international civil proceedings in absentia would be the possibility for the victims of international crimes to claim compensation for the wrongdoing suffered. Instead of determining the criminal accountability for certain crimes, the legal system would identify the person responsible for the wrongdoing from a civil law perspective.[104] This means that the defendant would be tried in a civil proceeding where there is a need to establish not his/her guilt and *criminal* responsibility, but his/her *civil* responsibility for the damages occurred. In this sense, as it will be analysed in the next Subsections, the person responsible from a civil point of view might be the same of a criminal proceeding, but it might also be that he/she will be a different one. Indeed, as it happens in national jurisdictions, even in international civil proceedings the individual held accountable for the damages might be a different person than the perpetrator of the crimes. This solution would answer the demand of justice coming from the victims, and it would protect the interests of justice.[105]

In this regard, some points must be considered. First, there is a difference between civil and criminal liability.[106] Indeed, a person can be prosecuted for the crimes committed but can also be sued for civil damages, with two distinct proceedings. As the scholarship underlines, civil liability means that a person is accountable for the damages according to his/her civil obligations.[107] Instead, criminal liability means that a person is accountable for criminal offences and responsible for violating the provisions of

[67] See Mills (2009); Murphy (1999).
[104] On the comparison between criminal and civil proceedings, see Sklansky and Yeazell (2006).
[105] On civil liability when a criminal trial is impossible, see Mills (2009, pp.1343ff.).
[106] See Oman (2014). On the meaning of criminal liability, in particular in International Criminal Law, see van Sliedregt (2012a).
[107] Conaghan (2008, p.137) says that 'civil law in this sense means the body of law concerned with delineating the individual "civil" obligations we owe to one another, as opposed to the obligations we owe to the state (e.g. to refrain from murder, etc.)'.

criminal law.[108]

Second, the outcomes of civil and criminal proceedings are not interdependent. In this sense, there can be a civil liability and not a criminal conviction and vice versa. Indeed, the evidence presented is different, and the determination of responsibility is based on different grounds. In civil proceedings, liability is proven on a 'balance of probabilities'.[109] Instead, in criminal proceedings, the accountability of a person is ascertained 'beyond reasonable doubt'.[110] Moreover, as discussed previously in this Section, there are precise rules that govern the use of evidence collected in civil proceedings into subsequent criminal proceedings and vice versa.[111] These points are linked to two arguments that will be recalled in Subsection 5.4.4. when analysing the legal practitioners' opinions on this alternative: (i) the possibility to have a civil proceeding without a previous criminal conviction; and (ii) the different standard of proof for criminal and civil proceedings.

Third, the defendant's absence in civil proceedings is considered differently from the one in criminal proceedings. Indeed, civil proceedings in absentia are often accepted at national level,[112] whereas criminal proceedings in absentia are highly debated and, in many instances, they are rejected. In this regard, as will be recalled in Subsection 5.4.4., the legal practitioners interviewed for this thesis rely on a similar argument when favouring civil proceedings in absentia as a valid alternative to criminal proceedings in absentia. The majority of interviewees sees this solution positively, and their concerns lie more with the practical implementation of these proceedings, rather than with their theoretical existence and availability. It might be said that the reason for this approach is the fact that the practitioners base their judgement on the legal background of reference, as it happens with their understanding and definition of in absentia proceedings discussed in Chapter 1.[113]

Fourth, the conduct of civil proceedings, both at national and international level, constitutes a separate way of making justice with civil claims advanced by the victims. Therefore, the victims play a pivotal role in these proceedings, and contrary to what happens in criminal proceedings, they need necessarily to participate in the process to advance their requests and put forward a case against the person responsible for the damages. The participation of victims in criminal proceedings as civil parties (to obtain

[108] See Fitzpatrick (2008, pp.141-142).
[109] Wright (2011, p.2).
[110] Ibid.
[111] See Choo (2018).
[112] For instance, see Arts. 290-294 of the Italian Civil Procedure Code.
[113] See Chapter 1, Subsection 1.2.1.

compensation for the damages suffered for criminal offences) is already part of the legal tradition of civil law countries.[114] Moreover, the use of civil remedies to deal with the commission of crimes is not new.[115] At international level, this phenomenon has been debated for many years,[116] and recently the ICC and other international criminal tribunals have permitted victims' participation in criminal proceedings.[117]

Turning to the aims of the alternative at stake, civil proceedings in absentia would pursue various goals. First of all, they would attain some of the goals of International Criminal Justice, despite the defendant's absence from the proceeding. This means that the victims would be able to advance their case, to be heard by the court, and to request compensation for the damages suffered as a consequence of the crimes committed. In this sense, this solution would permit the victims to have a proceeding and avoid any suspension or interruption of the process due to the absence of the defendant.

As already underlined in Chapter 1, this is an important objective of International Criminal Justice, especially when the defendants are absent because they are fugitives and avoid justice for many years.[118] Therefore, the fact that civil proceedings in absentia guarantee that the international community can act while the defendant is absent resembles one of the aims of criminal proceedings in absentia. In this sense, this is a favourable aspect of this solution.

A second goal is the need to bypass the issue of the defendant's absence with a valid procedural alternative that has a different nature than an ordinary international criminal proceeding. Civil proceedings in absentia are based on an international process conducted in the defendant's absence, but they do not determine the guilt of the person. Rather, they establish a different type of accountability, leaving aside the question of the criminal responsibility of the defendant. In particular, this accountability is different from a criminal one because if the absent person is found responsible, he/she will not have a restriction of his/her liberty (e.g. through an imprisonment), and there will be no stigma of being considered the perpetrator of certain crimes. Moreover, the consequences of a civil accountability will be linked to economic results (i.e. the payment of reparations) rather than penal results (i.e. incarceration). For this reason, civil proceedings in absentia would permit the tribunal to overcome the deadlock of a criminal proceeding when the defendant is absent and to provide an alternative option to

[114] See Buisman, Bouazdi and Costi (2010, pp.27ff.).
[115] Cheh (1991, p.1327).
[116] See de Brouwer and Heikkilä (2013, pp.1354ff.); Zegveld (2010).
[117] See Hoven (2014); Cryer, Friman, Robinson and Wilmshurst (2010, pp.484-490).
[118] See Chapter 1, Subsection 1.3.1.

an ordinary criminal process.

As discussed in Chapters 1 and 4, one of the concerns of those opposing in absentia proceedings relates to the unfairness that the proceedings would create when determining criminal responsibility in absentia.[119] Civil proceedings in absentia would overcome this problem, given their different focus (i.e. the civil damages of the crimes) and purpose (i.e. to obtain reparations for the victims).

The third goal is to provide the victims with compensation for the losses they encountered when the crimes have been committed.[120] This goal is restorative, as it focuses on the need to repair the wrongdoing committed and restore the *status quo* of the victims, at least from a material and financial point of view.[121] Indeed, in many cases, the victims have lost all their properties as a consequence of the crimes, and they are left without any means to support their families.

Perhaps the possibility to receive compensation does not have the same value as a criminal conviction, but it represents a first (and sometimes more important) step for the victims in the path of reconciliation and restoration of their lives. In this sense, it is important not to underestimate the function and role played by civil compensation for the victims, especially when the defendant's absence would prevent any prosecution and hinder justice. As it has been pointed out by the scholarship, 'the theory here may be that half a loaf really is better than none. That is, although an offender may not face the full force of the criminal law because a prosecution is too costly or guilt beyond a reasonable doubt cannot be proved, he/she will still be held accountable in some fashion'.[122]

Another important goal of civil proceedings in absentia is the creation of a historical record of what has happened during the crimes.[123] This aspect is usually left either to the work of commissions of inquiry or to the determination of the judges during a criminal proceeding.[124] However, these two mechanisms are not always ideal. Indeed, the commissions of inquiry might be a good solution, but they are limited in terms of judicial outcomes for the victims, as there is no attribution of responsibility, neither civil nor criminal.[125] Instead, the conduct of criminal proceedings would be impossible if the defendant is absent and in absentia is not accepted.

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[119] See Chapter 1, Subsection 1.3.2. and Chapter 4, Subsection 4.2.1.
[120] See King (2012).
[121] On the shift of focus, see Combs (2015, pp.227-228).
[122] Cheh (1991, p.1345).
[123] On civil claims and their role in creating historical records, see Bilsky (2012). The author analyses the contribution of civil claims to the historical research of the Holocaust and the crimes linked to it.
[124] On creating a historical record in international criminal proceedings, see Ashby Wilson (2011).
[125] On the problems of commissions of inquiry, see Henderson (2017).

Therefore, the use of civil proceedings in absentia permits the court to hear the victims and the witnesses and to determine a historical record of what happened. This is similar to the objective pursued by criminal proceedings in absentia and discussed in Chapter 1. However, there are some differences. Indeed, as the scholarship underlines, 'civil suits may be more effective than criminal prosecutions in establishing the full factual context in which the perpetrators committed their crimes and thereby in enhancing the prospects that the victims will have their suffering brought to the attention of the wider community and that a definitive, historically accurate account of the atrocities will be provided'.[126]

Finally, civil proceedings in absentia would better protect some of the defendant's substantive rights, such as the presumption of innocence and the right to a defence. Because they do not establish a criminal responsibility, they do not affect the defendant's right to be presumed innocent until proven guilty in a subsequent criminal proceeding. In this regard, the use of civil proceedings in absentia would safeguard the position of the defendant from a criminal point of view, avoiding the possible negative effects of criminal proceedings in absentia highlighted in Chapter 4 of this thesis, when discussing their impact on the Defence.[127]

5.3.2. Constitutive Elements, Advantages, and Disadvantages

The constitutive elements of the proposed international civil proceedings in absentia include: (i) the absence of the defendant from the proceeding; (ii) the conduct of a civil proceeding; and (iii) the enforcement of a sentence issued at the end of the civil proceeding.

The first element is the starting point for the use of this alternative and characterises the entire proceeding. Usually, civil proceedings require the presence of all parties (i.e. the plaintiff and the defendant), but sometimes they can also be conducted in the defendant's absence. The conduct of civil proceedings in absentia is not surprising because this practice is allowed in various national legal systems, and it is also accepted by human rights institutions (e.g. the ECtHR).[128]

The second element is the main difference between criminal proceedings in absentia and this solution. In civil proceedings in absentia, the process is 'civil', and it has nothing to do with an ordinary criminal process. The proceeding deals with three

[126] Murphy (1999, p.48).
[127] See Chapter 4, Subsections 4.2.1. and 4.2.2.
[128] On the acceptance of civil proceedings in absentia, see Rozakis (2004).

aspects: (i) the determination of the damages occurred after the crimes have been committed and their compensation; (ii) the identification of the individuals that can be considered as victims; and (iii) the determination of the person responsible for the damages.

Finally, the third element is essential for having a positive outcome of the proceeding. Indeed, if the civil process is conducted, but there is no enforcement of the sentence afterwards, the entire proceeding would lack a key aspect. Therefore, it is essential that after the tribunal has issued a sentence and there is a determination of the damages to be paid, the judges can effectively order to pay the sum to the victims. The issues of causation (i.e. determination of the civil responsibility of the absent person) and quantum (i.e. the amount of money to be paid as compensation) will be considered in the following Subsection 5.3.3. Here, it is worth noting that regarding the payment of damages, the scholarship affirms that in many cases it has been proved quite difficult to obtain any result and that, in any case, there is a need to distinguish 'between obtaining a judgment of liability for international crimes and seeking to collect on such a judgment. In suits against individuals and governments, plaintiffs have encountered extreme difficulties in collecting on their judgments'.[129]

Turning to the advantages and disadvantages of the conduct of international civil proceedings in absentia, these relate mainly to the outcome of the process and its procedural consequences. In particular, the advantages of this alternative are: (i) the victims obtain recognition for the wrongdoing; (ii) the proceeding is not completely halted because the suspect is at large; and (iii) the defendant does not face a criminal proceeding in absentia and he/she is not found guilty from a criminal point of view.

Concerning the above points, the scholarship highlights that **'**civil lawsuits, although not a substitute for criminal prosecution of human rights abusers, are an important and complementary action, offering redress to people who otherwise would be left with no alternatives'.[130] Moreover, 'a civil lawsuit offers one key advantage over criminal trials, in that it allows victims of human rights abuses to take action without depending on governments or international bodies to take action'.[131]

As discussed in the previous Subsection, given the different goals and outcomes of the criminal and civil proceedings, the use of civil claims in absentia seems to be compatible with the objectives of International Criminal Justice, and it does not clash with the traditional rejection of in absentia by the scholarship. In this regard, it has been

[129] Murphy (1999, p.28).
[130] Stephens (1994, p.144).
[131] Ibid.

pointed out that 'the wider use of civil remedies also may increase the incidence of punishment by increasing the likelihood that offenders will be pursued'.[132] In addition, 'civil remedies are easier to use, more efficient, and less costly than criminal prosecutions. When authorities can act with a greater potential for success and with less expense and use of resources, there is greater likelihood that they will act'.[133]

However, the disadvantages are that: (i) this solution has not yet found application in international proceedings; (ii) there must be an amendment of the Rules of Procedure of international criminal tribunals to permit it; and (iii) there is no determination of the defendant's criminal accountability and no crimes are prosecuted.

The first two points are linked to the need to re-determine the boundaries of International Criminal Procedure and change the Rules of Procedure governing international proceedings, especially when the defendant is absent. Here the challenge is twofold: (a) to provide positive examples of civil proceeding in absentia that have not breached the rights of the defendant (e.g. the right to a defence and the right to be considered innocent until proven guilty) and have fulfilled the objectives of International Criminal Justice; and (b) to promote a development that might take several years to complete. Indeed, the question is not only to regulate the situation in a different way, but also to provide precise provisions and principles for a legitimate conduct of civil proceedings in absentia.

The third point, instead, refers to the objectives of International Criminal Justice and the work of international criminal tribunals. Once again, the question is what outcome the international community wants to obtain from the conduct of international proceedings. If the aim is purely to punish criminals and prosecute crimes, civil proceedings in absentia might not be the best solution. Indeed, due to their non-criminal nature, they do not permit the international community to achieve neither of the two objectives. Instead, as previously discussed in this Section, if the need is to act and guarantee some form of justice, these are certainly a good option.

Regarding the defendant, the scholarship affirms that 'one distinction between criminal and civil sanctions […] lies in the criminal law's "judgment of community condemnation" on a transgressor',[134] and 'the ultimate difference between civil and criminal proceedings is that a criminal conviction, unlike civil judgment, carries with it the stigma, or brand, of societal condemnation'.[135] Therefore, with civil proceedings in

[132] Cheh (1991, p.1345).
[133] Ibid.
[134] Ibid., p.1352.
[135] Ibid.

absentia, the 'stigma' and condemnation of the actions of the perpetrator would not come at stake, and the focus would be more on the restorative function of the process.

5.3.3. Problematic Procedural Aspects

International civil proceedings in absentia seem to be a good alternative to criminal proceedings in absentia because they allow the victims to have a process and establish some form of responsibility. However, in addition to the advantages and disadvantages already recalled, they prompt some questions about their practical use and their relationship with the criminal proceeding affected by the defendant's absence (as will also be discussed in the next Subsection when referring to the opinions of the legal practitioners interviewed for this thesis).

First of all, civil proceedings in absentia require a different burden of proof than criminal proceedings.[136] Indeed, instead of relying upon the 'beyond a reasonable doubt' standard, the judges can use a 'balance of probabilities' to establish the civil responsibility of an individual.[137] Balance of probabilities is a lower standard than beyond reasonable doubt because it involves considerations of 'probability' (i.e. the occurrence of the event is more likely than not)[138] rather than 'certainty' (i.e. there is no other explanation for the crimes rather than the defendant committed them).[139] Therefore, the threshold is lower, and the tribunal can determine more easily the accountability for the wrongdoing committed. This fact has consequences also for the position of the defendant because although absent, he/she will not face the same procedural consequences as in a criminal proceeding in absentia. Indeed, the way in which the civil proceeding is conducted does not affect his/her interests in the same way as a traditional criminal prosecution.

Second, the focus of civil proceedings is to determine who is responsible for the damages, who can sue for civil damages, and how much the responsible person is going to pay to the victims. As for the first point, the determination of the person responsible might be based on the reconstruction of the facts of the case by the parties and the evidence submitted to the judges. As recalled above, the decision will be based on a balance of probabilities, and the link between the damages and the absent person's actions might be found, for instance, when considering contractual duties (e.g. if there is

[136] See Dyson (2015).
[137] On the burden of proof in civil proceedings, see Redmayne (1999).
[138] See Garner (2009j).
[139] See Garner (2009k).

a contractual responsibility towards the victims of the crimes) or institutional duties (e.g. if there is a responsibility to protect the citizens of a country and the population of a state from discrimination and the commission of international crimes).[140] For instance, this type of scenario (although not in absentia) has occurred when civil claims have been brought against Italy and Germany for serious human rights violations and war crimes committed during the Second World War,[141] or in Rwanda for genocide.[142]

The persons who will be able to sue for civil damages in absentia will need to apply to be recognised as victims of the crimes. In this sense, the procedure for applying to be a party to the civil proceeding in absentia will be similar to ordinary international criminal proceedings, and similar requirements will need to be met for the victims to ask for reparations. Indeed, independently from a subsequent prosecution of crimes, the victims can already be recognised as such and claim civil reparations.[143] The calculation of the reparations will then be based on their claims, and the assessment of these claims by the judges will be based on the evidence provided by the parties in the civil proceeding in absentia. The expenses of the proceeding will be paid in a similar way as it happens in ordinary international criminal proceedings. This means that: (a) the tribunal will pay the costs of its work through the funding that it receives from States; (b) the expenses of the victims will be paid through the Trust Fund for victims that will be available at the tribunal (e.g. at the ICC); and (c) the absent person's expenses will be paid by the Tribunal through a legal aid programme, as it happens in criminal proceedings for indigent defendants.[144]

Turning to the payment and funding of civil claims, this is not an easy task because the tribunal needs to find sufficient funds to achieve its purpose.[145] In the case of the commission of international crimes, the damages thereof are substantial, and the amount of money to be paid might be considerable. Therefore, the issue would be to find enough sources to be used for this purpose and determine whether the damages will be paid by the Trust Fund for Victims already established at the ICC[146] or by the personal assets of the absent defendant.[147] In recent years, given the growing importance of victims' participation in international criminal proceedings and the need for compensation, the ICC has created a dedicated system to answer this necessity. In

[140] On the topic, see Akande (2009).
[141] See De Santis di Nicola (2016); Schmid (2015, pp.293-295).
[142] See Thalmann (2009, p.505).
[143] On the criteria for bringing a civil claim and the concept of harm, see McCarthy (2012, p.94-128).
[144] On legal aid for defendants at international criminal tribunals, see Beresford (2009b).
[145] See McCarthy (2012).
[146] See ibid.
[147] For a critical analysis, see Galvis Martinez (2014).

particular, there is a Victims' Trust Fund from which the Court can take the money needed to pay the reparations recognised to the victims.[148] In the case of civil proceedings in absentia, the additional issue might be the possibility to use this Fund when the Tribunal issues a civil sentence against an absent defendant.[149] Indeed, to justify the payment of compensation against a present defendant is one thing; to justify it against an absent individual is another, especially in the eyes of the States that would be involved directly with their contribution towards the Trust Fund. In this sense, the defendant's absence would render a precarious situation more complicated.

A third aspect to be analysed is the relationship between the civil proceeding in absentia and the criminal proceeding that might be conducted against the same individual based on the same facts. Two points emerge: (i) the need to have a previous criminal conviction to determine the civil responsibility of a defendant; and (ii) the possible contrast of sentences between the criminal and the civil processes.

As for the first point, the criminal proceeding does not have necessarily to precede the civil one.[150] Indeed, they are based on different standard of proof, and they also have a different outcome and determination of responsibility. Therefore, it might well be that a civil proceeding is conducted before the criminal one or in parallel.[151] Although based on the same facts, the two proceedings are separate, and they follow different rules and principles. This independence guarantees that the civil proceeding can be conducted in absentia even if this is not possible in the criminal sphere. The fact that there is no need to wait for the conclusion of the criminal process is also a positive feature for the expeditiousness of the proceeding and for ensuring the victims reparations in a reasonable period, without being hostage of the behaviour of the absent defendant.

As for the second point, having two opposing sentences (criminal and civil) attributing a different responsibility for the wrongdoing seems an unacceptable inconsistency. However, it must be noted that the two sentences assess different responsibilities: one refers to the civil obligations of a person; the other focuses on his/her criminal accountability. Therefore, this is a false problem that can be easily overcome when looking at the different functions of the two proceedings.

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[148] See Art. 79 ICC St.

[149] On the source of funding, it is argued that 'funding could be obtained from non-culpable or culpable sources; if it is obtained from non-culpable sources, it could be obtained through voluntary contributions or assessments, and if it is obtained from culpable sources, it could be obtained from culpable individuals, culpable States, or both': Combs (2015, pp.243-244).

[150] See Combs (2015, pp.243-244); Murphy (1999).

[151] This happens in national legal systems. For instance, see Art. 75 of the Italian Criminal Procedural Code.

In conclusion, the possibility to conduct in absentia civil proceedings before international criminal tribunals certainly represents a valid alternative in International Criminal Justice. It would substitute criminal proceedings in absentia, and it would guarantee the determination of civil accountability for the crimes committed.[152] But its acceptance will be difficult and highly contested by States and other actors of International Law. Indeed, 'this melding of civil remedies and criminal penalties portends significant changes in both legal doctrine and the institutions which are charged with applying and enforcing criminal law'.[153]

Moreover, the success of civil proceedings in absentia depends also on the capacity of the tribunal to enforce the awards against the absent defendants and to guarantee the victims concrete compensation for the crimes suffered.[154] In this sense, it has been suggested that there might be a role for the Security Council, even if with its difficulties derived from the deadlocks occurring when the permanent members veto these decisions.[155] Another possibility might be to rely on the enforcement mechanisms of an international institution created with the purpose of dealing with civil proceedings in general and in absentia.[156] Or, finally, to use non-governmental actors to put pressure and convince national authorities to cooperate in this sense.[157]

To make this solution more effective (especially for enforcing a civil sentence in absentia and paying compensations) it would be important to rely upon an institutional framework that is able to fulfil the expectations linked to this type of proceeding. This means that the international tribunal conducting civil proceedings in absentia should have financial and logistical means at its disposal to enforce a civil sentence rendered in absentia. This might not be an easy task, given the financial constraints that already international criminal tribunals experience when dealing with criminal proceedings.[158] However, these issues might be overcome if States will be more incline to fund a tribunal that deals with civil responsibility for damages derived from crimes, rather than criminal responsibility (that might also affect their interests).[159]

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[152] On the implementation of the tools for victims' justice, see Moffett (2015b).
[153] Cheh (1991, p.1328).
[154] Combs (2015, p.257).
[155] Ibid.
[156] Ibid.
[157] Murphy (1999, p.56).
[158] For instance, see Ford (2015b).
[159] For instance, Levmore (2016, p.250) suggests that the ICC should 'use its pulpit to encourage cooperative governments to add to the fund. Some governments might do this as a kind of foreign aid'.

As underlined by the scholarship, 'the prosecution of international crimes will remain a difficult and, at best, an intermittently successful undertaking',[160] therefore, it might be better to use 'an approach that has received relatively little attention as compared to criminal prosecution: civil suits against those who commit international crimes and those who sponsor them'.[161]

5.3.4. Opinions of the Legal Practitioners

Having examined the points above, it is important to make some considerations on the understanding and evaluation of this alternative by the legal practitioners interviewed for this thesis. These opinions will help to inform the assessment of the proposed alternative, and they will be pivotal in putting the solution into a more practice-based perspective. In other words, the views of the legal practitioners will better contextualise the alternative into the reality of international criminal cases and the work of those involved as parties in them.

First of all, as discussed before, the idea of international civil proceedings in absentia as substitutes to criminal proceedings in absentia has been scarcely considered by the scholarship so far,[162] and it has sometimes been proposed directly by the interviewees. This means that on the one side, they have not been the focus of scholarly attention; and on the other side, some legal practitioners have evaluated them when they have felt the need to find an alternative to the use of in absentia proceedings and a solution to the deadlock of these cases. This is an important point because as explained in the previous Subsections, international civil proceedings in absentia are not a new phenomenon (especially in national jurisdictions) and the interviewees sometimes already have an experience or knowledge of them. The result is that this alternative might be better understood and accepted than others that are unknown to their users.

Second, there is no consensus on the topic among the legal practitioners interviewed for this thesis, with some favouring the idea of civil proceedings in absentia[163] and others being vehemently contrary to it.[164] Moreover, the opinions expressed vary depending on whether the interviewees' main focus is the function of

[160] Murphy (1999, p.2).
[161] Ibid.
[162] For instance, see Mills (2009).
[163] E.g. Interviews 03; 06; 07; 11; 13; 14; 15. The reactions include expressions such as: 'interesting'; 'nice option'; 'good idea'; 'the idea is good. It is just a question of how to implement it'; 'great idea'.
[164] E.g. Interviews 09; 16. The reactions include expressions such as: 'it's like counting the number of angels dancing on the head of a pin'; 'the next best idea in town [laughing]'.

civil proceedings in absentia in International Criminal Justice and their relationship with the criminal proceedings; or the goals that can be achieved with this solution. For instance, a legal practitioner thinks that civil claims in absentia are not possible because 'you need to have a connection between the criminal allegations and the injury which is alleged by the victims'.[165] In his/her view, this connection is so important that without a preceding criminal process, no civil claims are possible: 'you need to have a criminal sentencing ruling to have the opportunity, to have the right to go before civil jurisdictions and claim for reparations'.[166] Likewise, another interviewee argues that civil proceedings in absentia cannot be independent from a criminal proceeding and they are only a 'component' of the process, but 'ultimately you have to have a judicial process to establish the worst of what happened'.[167] Another interviewee focuses on the decisions of the two proceedings, and they argue that in national jurisdictions 'you have a criminal trial and then you have a civil trial, and they can be contradictory'.[168]

This point is relevant for our analysis because it demonstrates that for the majority of the legal practitioners interviewed for this thesis there is a need to have a precise procedural sequence, with a criminal proceeding followed by a civil proceeding. This means that civil proceedings are not considered independent from a previous criminal assessment of the responsibility of a defendant. This argument seems logical because it links a criminal conviction and ascertainment of criminal responsibility (i.e. the trigger) with the possibility to obtain civil reparations (i.e. the result). However, it presents two important flaws. Indeed, first of all, it disregards the scholarship's view that civil proceedings can be independent from criminal proceedings, with no pre-set procedural consequence (i.e. criminal proceedings followed by civil suits).[169] Second, it overlooks the important difference that exists conceptually and procedurally between a person responsible for the crimes and one responsible for civil damages.[170] Indeed, one person can be the perpetrator of a crime but not responsible from a civil point of view, and vice versa.

As for the goals to be met with this alternative, some interviewees think that civil proceedings in absentia would have a positive impact in achieving the objectives of International Criminal Justice. For instance, they say: 'I would certainly consider that

[165] Interview 01.
[166] Ibid.
[167] Interview 06.
[168] Interview 16.
[169] For instance, see Mills (2009).
[170] For a thorough analysis, see Sullivan (2014).

possibility because again to me that's better than doing nothing',[171] and 'I don't see why the international community should wait for a trial to say you'll get the money or you won't get the money. If you're sure that someone suffered'.[172] This idea of avoiding waiting and providing the victims with expeditious justice is also confirmed when the legal practitioners interviewed for this thesis say that civil proceedings in absentia would let the international legal system 'explore something akin to class actions for the victims',[173] and they 'would be a better alternative to have a lower burden but a lesser weight to the ultimate conclusion'.[174]

This point is significant because it underlines the need of the international community to provide justice to the victims of international crimes and to act to address the wrongdoing committed, although not with a criminal proceeding. This fact creates a reference to in absentia proceedings and qualifies civil proceedings in absentia as proper alternatives to these proceedings because they focus on similar goals. In the same sense, the arguments presented by the legal practitioners interviewed for this thesis also strictly link civil proceedings in absentia to the two objectives considered when analysing in absentia proceedings in Chapter 1, i.e. the fight of impunity and the need to bring justice to the victims promptly.[175] Thus, from an objectives-oriented point of view, there are parallels to be drawn between criminal and civil proceedings in absentia.

Third, when examining this alternative, the interviewees advance also other arguments that relate to specific procedural aspects of the proceedings. First of all, attention is given to the standard of proof used in civil proceedings in absentia and their impact on the evidential test of the process. The general understanding is that these proceedings should rely on a lower standard of proof than criminal proceedings, i.e. 'balance of probabilities' instead of 'beyond reasonable doubt'.[176] This is due to the different nature of the proceeding (i.e. civil vs criminal) and the need to differentiate the two proceedings from an evidential point of view. This point especially emerges when the legal practitioners worry about the Rules of Procedure: 'what rules of evidence would you have? What would you have, rules of procedure or is it just a sort of free for all?';[177] and when they mention the ordinary standard for civil proceedings: 'because a civil proceeding would have the victims as plaintiffs. The problem with that is that

[171] Interview 03.
[172] Interview 13.
[173] Interview 11.
[174] Ibid.
[175] See Chapter 1, Subsection 1.3.1.
[176] E.g. Interviews 02; 07; 13.
[177] Interview 06.

evidence would have to be adduced in that civil proceeding, which will be of course assessed on a balance of probabilities standard'.[178]

Moreover, when addressing the topic, the interviewees are also worried about the possible impact of the civil in absentia proceeding on the consequent criminal proceeding. In this sense, they say 'I hope whatever you're doing in a civil case isn't going to damage or undermine my possible evidence in a future criminal trial'.[179] Therefore, there is fear that the determination of responsibility from a civil point of view might be detrimental for an absent person when tried in a criminal proceeding subsequently. For instance, this might happen if evidence gathered for a civil proceeding is contrary to the Defence's case and it is used in a criminal proceeding.[180] The above concerns seem legitimate, but in practice, they lack substantiation when analysed in light of common evidential practices of international and national criminal tribunals.[181] Indeed, the use of evidence collected in a civil proceeding into a criminal process and vice versa is regulated strictly, and the tribunals must respect precise safeguards.[182] Therefore, this is not freely available between the two types of proceedings, but it has important constraints.

From the foregoing considerations, the standard of proof and the use of evidence in a civil proceeding in absentia are other crucial elements to consider when assessing the validity of this alternative in comparison to criminal proceedings in absentia. Indeed, the very nature of the process (i.e. civil) requires a different evidential standard, and this might create some concerns for the protection of the interests of the absent defendant and the Defence team.

Fourth, the legal practitioners interviewed for this thesis also point out some possible practical and operational difficulties with the use of civil proceedings in absentia. In particular, problematic aspects concern the potentially high number of victims involved;[183] the proper identification of these victims;[184] the amount and way in which reparations will be paid;[185] and the pragmatic issues associated with the organisation of these proceedings.[186] For instance, the interviewees say: 'I'm worried about some who volunteer and start showing up to get compensated, a compensation

[178] Interview 07.
[179] Interview 03.
[180] E.g. ibid.
[181] On the law of evidence in criminal and civil proceedings, see Choo (2018).
[182] For instance, this happens with a conviction used as evidence in a civil proceeding. See Choo (2018, 396ff.).
[183] E.g. Interview 02.
[184] E.g. Interviews 02; 03.
[185] E.g. Interviews 07; 08; 12.
[186] E.g. Interviews 09; 12.

that is not deserved';[187] or 'the problem in these trials here is that there is no money. And if you have no accused, who is going to pay for this?'.[188] Therefore, when confronted with the pragmatic aspects of civil proceedings in absentia, the legal practitioners seem quite sceptical although they recognise some value to these proceedings. In this sense, the arguments are that 'it does not work in practice',[189] 'it gets very difficult in terms of logic and efficacy',[190] and 'there are huge challenges to organise that'.[191] This is undoubtedly a key aspect of civil proceedings in absentia that needs to be properly weighted when assessing the feasibility of this alternative in International Criminal Justice.

Finally, a last remark of the legal practitioners interviewed for this thesis concerns the determination of jurisdiction over the civil proceedings in absentia, i.e. which tribunal and judges would be competent to conduct them. Once again, the interviewees show scepticism, and they argue that there might be problems with the type of court involved and with the role (or, better, lack of role) of the Prosecutor.[192] They say: 'I'm not sure how cooperation would work between the Prosecutor and a private lawyer doing civil damage';[193] 'who has the power to do that kind of investigation for the purpose of this trial?';[194] and 'there isn't an international civil jurisdiction as an international criminal jurisdiction. You would have to bring the civil proceedings in a national jurisdiction'.[195]

Jurisdiction is certainly a key aspect of all international criminal proceedings, and it is relevant also when discussing the use of civil proceedings at international level.[196] In the context of the study of alternatives to in absentia proceedings, jurisdiction is a fundamental element for two reasons. First of all, despite a robust and feasible configuration, with no jurisdiction of international criminal tribunals, civil proceedings in absentia would not be a valid alternative. Indeed, they would be theoretically appealing, but in practice, they would remain a dead letter with no implementation. Second, the issue of jurisdiction needs to be solved to have a coherent system of justice where alternatives to in absentia proceedings are indeed suitable, and they do not pose additional challenges to international criminal tribunals. In this sense, a

[187] Interview 03.
[188] Interview 12.
[189] Interview 07.
[190] Interview 09.
[191] Interview 12.
[192] E.g. Interviews 08; 09; 13; 16.
[193] Interview 03.
[194] Interview 07.
[195] Interview 09.
[196] On jurisdiction and civil proceedings, see Mills (2014); Kamminga (2005).

parallel could be drawn between the difficulties to find an appropriate basis for jurisdiction for civil proceedings in absentia and those highlighted in Chapter 3 when examining the retrial in in absentia proceedings.[197] In both cases, the existence of a valuable proceeding does not per se guarantee its success when there is no or not clear jurisdiction over it.

5.4. Transitional Justice and In Absentia Proceedings

This Section focuses on a second alternative to in absentia proceedings, i.e. the use of Transitional Justice mechanisms in the context of international criminal proceedings. In this regard, the author considers four relevant aspects as already seen for the previous alternative: (i) its scope and goals; (ii) its configuration, advantages and disadvantages; (iii) some additional aspects that characterise this solution and are relevant when evaluating its possible use in International Criminal Justice; and (iv) the opinions on it of the legal practitioners interviewed for this thesis.

Transitional Justice mechanisms have been selected as an alternative to in absentia proceedings for reasons similar to those recalled for international civil proceedings in absentia. Indeed, they fulfil the conditions analysed at the beginning of this Chapter on the requirements for alternatives to in absentia proceedings, and they have also been mentioned by the legal practitioners interviewed for this thesis. Moreover, they represent an interesting alternative due to their nature (they are non-traditional justice mechanisms) and the fact that they are used to fill the gaps and solve the issues emerging from a traditional prosecution of crimes.

These two points nicely link to the function and purpose of in absentia proceedings as discussed in Chapter of this thesis.[198] In this sense, Transitional Justice mechanisms seem to achieve similar objectives to in absentia proceedings (e.g. fight of impunity; historical record of the facts of the case; fulfil victims' interests), and they are underpinned by similar theoretical considerations. For instance, the idea is that when international criminal proceedings are not effective, and they cannot achieve International Criminal Justice's objectives due to the defendant's absence, a solution might be to implement them with strategies and principles derived from other forms of justice, like Transitional Justice. In this Section, the author argues that when the procedural tools at the disposal of international criminal tribunals do not work, it is

[197] See Chapter 3, Subsection 3.4.3.
[198] See Chapter 1, Section 1.3.

better to avoid injustice with a different type of justice.

As a final caveat, it should be briefly mentioned that among the various Transitional Justice mechanisms that exist,[199] the author considers only some of them as being part of the alternative proposed to in international criminal proceedings in absentia. In particular, the relevant mechanisms selected are those that pursue truth-seeking processes and reconciliation strategies through the actions of judicial bodies.[200] For instance, this might be the case of proceedings instituted before international criminal tribunals but with having a different nature from common proceedings, i.e. focused on reconciliation of the parties, establishing a judicial truth and obtaining compensations for the victims for the wrongdoing suffered. In this sense, amnesties and pure truth and reconciliation commissions are excluded because they do not fulfil the requirements for being recognised as alternatives to criminal in absentia proceedings as detailed in the previous Section (e.g. institutionalisation and pursue of similar objectives). Moreover, the selected mechanisms are considered in light of a new way of thinking Transitional Justice, i.e. as an expanding field that is open to innovative, practical solutions.[201] The details of the scope and goals, constitutive elements, advantages and disadvantages of the Transitional Justice mechanisms selected will be analysed in detail in the following Subsections.

5.4.1. Scope and Goals

International Criminal Law and Transitional Justice are usually seen as being independent from each other.[226] They are part of International Criminal Justice, but they differ in their objectives and structural elements.[227] Moreover, criticisms have been mounted for the incapacity of International Criminal Law to pursue peace and reconciliation in the cases in which investigations and criminal proceedings are ongoing.[228]

Nevertheless, the distinction between Transitional Justice and International Criminal Law does not create an unsolvable opposition between the two, and peace and justice can be pursued together. In this sense, the conflict between justice and peace is

[199] On the variety of Transitional Justice mechanisms, see Girelli (2017); Pham and Vinck (2007); Simic (2006, pp.4-7).
[200] Similarly to the GACACA Courts in Rwanda and the judicial mechanisms implemented in Colombia.
[201] See Bell (2009); Mani (2008). Some scholars talk of 'transformative' rather than 'transitional' justice. See Gready and Robins (2014).
[226] See Iverson (2013).
[227] Ibid.
[228] On the relationship between criminal proceedings and reconciliation, see Akhavan (2013).

only a 'false dichotomy',[229] and the international community 'can accept a peace deal while promoting some measure of justice'.[230] Moreover, the proposal of alternative forms of justice does not necessarily clash with the use of International Criminal Procedure and, on the contrary, it can create innovative and useful solutions.[231] In this regard, it is worth clarifying that in this thesis, the use of Transitional Justice mechanisms are intended as alternatives to the conduct of international criminal proceedings in absentia. This is because in this Chapter attention is given to the alternative solutions to in absentia proceedings if these will be rejected in the future. Therefore, although in theory Transitional Justice and international criminal proceedings are not mutually exclusive, in this study they are considered separately because of an underpinning hypothesis, i.e. international criminal proceedings might not be accepted in future International Criminal Justice.

Before going into the details of the goals, constitutive elements, advantages, and disadvantages of the proposed alternative, it is important to underline that this solution originates from a reflection on the effectiveness and convenience of a traditional prosecution of crimes always and anywhere. In other words, the question is whether the intervention of international criminal tribunals (e.g. the ICC) in highly conflictual situations where heinous crimes are committed is always the right answer.[232]

This is a relevant point to be considered not just for ordinary criminal proceedings, but also for proceedings affected by the defendant's absence. Indeed, given the socio-political context of the country, the crimes committed, the number of victims involved, and the defendant's absence (even more if at large), an 'ordinary' prosecution of crimes might be defective and not a proper answer. In this regard, the scholarship underlines that 'prosecution certainly has a place in post-conflict situations, but it may not be appropriate in all post-conflict situations'.[233]

In this context, the author presents a second alternative to international criminal proceedings in absentia that is a combination of criminal proceedings and Transitional

[229] Keller (2008).
[230] Ibid., p.13.
[231] On the rejection of a conflict between International Criminal Law and alternative methods of justice, see Nouwen and Werner (2015).
[232] See Villa-Vicencio (2000).
[233] Ludwin King (2013, p.90). Indeed, 'first, although prosecution serves many purposes in the quest for justice and peace in the wake of atrocity, it may not always be a country's best option. Second, requiring prosecution by the ICC or national governments in every situation in which it is possible is a very top-down approach that ignores the complexities of each conflict and prevents the exploration of new or underutilized alternative mechanisms of justice': ibid.

Justice mechanisms and permits to achieve the goals of justice and peace.[234] This alternative is based on three elements. First, the conduct of international proceedings 'reconsidered', ascertaining facts and responsibilities. Second, the necessity to reconcile the parties involved in a conflict and affected by the commission of crimes. Third, the need to overcome the deadlock that occurs with the defendant's absence. With the use of Transitional Justice mechanisms (e.g. commissions for peace and reconciliation, truth commissions, restorative justice), the criminal proceeding is reformed in light of a reconciliation process between the perpetrator and the victims, between the absent defendant and the persons that have suffered the crimes committed.[235] In this regard, the goals achieved are various.

First of all, this alternative would guarantee the creation of a proceeding where the parties (i.e. the absent defendant and the victims) come together and confront each other, on the one side without the pressure of a traditional prosecution, and on the other side without the frustration of a lack of determination of responsibility. In particular, the solution seeks to bring the two parties together and reconcile the different interests at stake, avoiding the unilateral and straightforward 'stigma' that usually characterises international criminal proceedings.

Second, the combination of Transitional Justice mechanisms and international criminal proceedings would permit the international legislator to reconsider the objectives of international prosecutions. In particular, it would follow a path towards restorative justice that does not focus on the punishment of the absent defendant but his/her reconciliation with the victims and at the same time includes a recognition of the wrongdoing done.[236]

Third, the proposed alternative would represent an incentive for the absent defendant (especially when fugitive) to stop hiding and participate in the proceeding, to present his/her perspective on the facts of the case, defend himself/herself, and face an 'alternative' criminal proceeding. This means that the solution would encourage the absentee to attend the proceeding without fear of being prosecuted in a 'traditional' way, and the proceeding will include some advantages for the defendant's cooperation (i.e. for being physically present in court).

Considering the above goals, it is evident that when the circumstances of a case and its procedural elements impede a traditional prosecution of crimes, international

[234] On the role of International Criminal Justice and the ICC for achieving justice and peace, see Clark (2011).
[235] On the relationship between the ICC and Transitional Justice mechanisms, see Flory (2015); Đukić (2007).
[236] See Clamp and Doak (2012, p.360).

criminal tribunal should seek another way to reconcile peace and justice. In this sense, as the scholarship underlines, 'though the ICC must focus on and favour prosecution among available mechanisms of accountability due to its mandate, it should not be "close[d]-minded toward alternative experiments in dealing with the past which are genuine democratic efforts advancing the goals of accountability"'.[237] Therefore, international criminal institutions should have a long-term approach to the prosecution of international crimes, looking at both present exigencies and future needs.

5.4.2. Constitutive Elements, Advantages, and Disadvantages

The alternative proposed in this Section can take different forms because it can involve various mechanisms of Transitional Justice combined with a criminal proceeding. Beside a common element, i.e. the defendant's absence, that represents the starting point and the reason for this alternative to be used, there are no pre-settled elements. This means that the constitutive elements can vary depending on different factors: (i) the circumstances of the case at stake; (ii) the interests of the parties involved; (iii) the capacity of the international criminal tribunal to guarantee the defendant's presence before the judges; (iv) the type of crimes committed and the number of victims involved; and (v) the socio-political situation of the country.

The possibility to have a plurality of structures permits this solution to be very flexible and adaptive to each case independently. This is a significant feature because it allows international criminal tribunals to use a proceeding that considers the specifics of the case at stake, the challenges encountered when the defendant is absent, and the complexities of the situation under scrutiny. This is also a distinctive characteristic in comparison to the other alternative discussed in this Chapter, i.e. civil proceedings in absentia.

Turning to the possibilities part of this alternative, for instance, there might be a reduction of sentencing for those who voluntarily surrender to international criminal tribunals after some time and under certain conditions.[238] This solution might bring obvious advantages to suspects that surrender (i.e. a favouring circumstance for sentencing), but it might also create an undue disparity with other persons: those who do not surrender will be treated less favourably. This does not seem to be in line with the need to guarantee equal treatment to all suspects, and allow them to exercise their

[237] Ludwin King (2013, p.93).
[238] On the combination of retributive and restorative justice, see Keller (2008, p.14).

rights freely, including the right not to participate in a proceeding by absconding. Therefore, it might be problematic when implemented in practice.

Another possibility might be the creation of specific chambers within international criminal tribunals that deal with cases of absent defendants, in which there are also procedural advantages for the fugitives who decide to appear at trial.[239] In this context, the scholarship underlines that much will depend on the interpretation that will be made of the statutory provisions (e.g. at the ICC) as allowing 'deferral to alternative justice mechanisms negotiated during a peace deal to end a conflict'.[240] This solution seems to be more respectful of equality among defendants, and it does not discriminate between those who surrender and those who do not. Therefore, it might bring advantages to both absent defendants and the tribunal because, on the one side, it facilitates reconciliation and accountability; on the other side, it treats the defendant's absence as an exceptional event that requires a dedicated group of judges who will deal with it. However, one disadvantage might be to overload the work of the tribunal, imposing the creation of specialised chambers that will deal with absent defendants. Moreover, it might raise concerns for putting an additional burden on the budget of the tribunal and for finding new judges who can focus on these cases and are not in a conflict of interests. As for the previous possibility, this option might be problematic when implemented in practice.

The use of Transitional Justice mechanisms in combination with international criminal proceedings might involve positive and negative outcomes.[241] In this sense, as a part of the scholarship underlines, that there is 'a broad spectrum across which truth commissions and prosecutorial institutions may coexist, with each situation likely to give rise to its own set of difficulties and challenges'.[242] Examples of attempts to make the two solutions coexist can be found in the Sierra Leone,[243] Rwanda,[244] and Cambodia situations.[245] Different opinions have been expressed on the success and failures of these attempts, and an interesting explanation of the problematic relationship between Transitional Justice and international criminal proceedings and how it might be solved is given by Findlay.[246] In his view, 'the contribution of international trial justice to transitional justice may be seen as one which includes many of the functions of other

[239] On the creation of special chambers at the ICC, see Hemptinne (2007).
[240] Keller (2008, p.15).
[241] See Bisset (2012); Đukić (2007).
[242] Bisset (2012, p.5).
[243] For an analysis, see Ainley, Friedman and Mahony (2015); Clark T.M. (2014).
[244] See Palmer (2015).
[245] See Stensrud (2009).
[246] See Findlay (2011).

practices and structures, such as truth-telling and reparation, which are currently treated as self-contained areas'.[247] Therefore, (and as it happened for instance in Sierra Leone)[248] there is a concrete possibility to make the coexistence work and produce positive outcomes for the society at stake.

As for the advantages of Transitional Justice, it is useful for seeking the punishment of perpetrators and the reconciliation of the opposing parties of a conflict.[249] This means that with Transitional Justice mechanisms attention is also given to the 'social' aspects of justice and its effects on the communities involved in a conflict and affected by the crimes.[250] In the case of international criminal proceedings with absent defendants, Transitional Justice mechanisms would positively impact the victims and the defendant, avoiding a harsh criminal proceeding and promoting reconciliation and restoration of society.[251] In particular, these methods would encourage the defendant to take part in the process for determining the facts of the case, without fear of a traditional retributive criminal proceeding.

As for the disadvantages, this alternative might face procedural and political obstacles due to the need to reform the legal system with States' consent and the opposition of the use of Transitional Justice mechanisms in a system considered 'purely' criminal law-oriented. In this regard, the disadvantage would be to create and implement a solution that does not fit (or at least was not originally intended for) a criminal justice system in which the main concern is the prosecution of crimes, to establish the criminal responsibility of a person, and end impunity.[252]

A second disadvantage relates to the procedural consequences of the different treatment received by an absent defendant in comparison to all other defendants present before the judges. In other words, the possibility to use an alternative form of criminal proceeding that includes Transitional Justice elements and permits the defendant to receive some advantages for being present in court would create a problem of unequal treatment with the defendants that instead cannot benefit from this opportunity. Indeed, this alternative would be available only when the defendant is absent from the process, and the tribunal seeks to find an alternative to the use of criminal proceedings in absentia and avoid a mere suspension of the process. However, despite the exceptional

[247] Ibid., p.247.
[248] See Horovitz (2006, pp.43-69).
[249] On the effects of Transitional Justice, see Hazan (2006).
[250] See Campbell (2014).
[251] On promoting peace and justice in these proceedings, see Clark (2011).
[252] See the objectives of International Criminal Justice recalled in Chapter 1, Subsection 1.3.1. and also indicated in Preamble ICC St.

nature of the situation that triggers the choice of the judges, the absent defendant would receive an undue advantage compared to other defendants. Moreover, this situation might represent an incentive for the defendant to continue to stay at large and avoid any prosecution (at least at the beginning of the process) to be entitled to a favourable procedural treatment at a later stage, i.e. when present in court and benefitting from the inclusion of Transitional Justice mechanisms in the criminal proceeding.

5.4.3. Problematic Procedural Aspects

The alternative proposed in this Section raises two additional questions for its effective implementation by international criminal tribunals. The first issue relates to the role the victims of international crimes should play in this proceeding. As already discussed in Chapters 1 and 4, the role of victims in International Criminal Justice traditionally has been quite limited. Only recently they have obtained some form of participation into the process and gained importance also at procedural level.

In this regard, when proposing a new way of conducting criminal proceedings, where many elements of Transitional Justice are included, it is necessary to understand whether the victims should be questioned directly on the possibility to rely on this alternative, or instead, whether they should be left aside and the decision is taken independently from their opinion. This is not a straightforward decision as it can have different consequences, affecting not only the outcome of the prosecution of crimes but also the peace process and the reconciliation of the parties.

Despite the freedom to choose to get the victims involved, it must be noted that this alternative seems not to work if the victims are not engaged. Indeed, without considering victims' willingness, there is no real understanding of their interests in having an alternative proceeding to international criminal proceedings in absentia. Moreover, the will of the victims must be carefully determined, considering their needs and different interests that might emerge among them. In this regard, the scholarship also affirms that 'in assessing the will of the people, the Prosecutor should appreciate that those affected by the conflict may be spread throughout the country and that he/she needs to listen to all sectors of society, not just the victims'.[253]

A second question relates to whether the proposed alternative needs to include some tools to establish the facts of the situation at stake. Indeed, in addition to the prosecution of crimes and the reconciliation of the parties, it might be necessary to

[253] Ludwin King (2013, p.111).

provide an answer to the victims also from a factual point of view. This means that besides ascertaining the responsibility for the wrongdoing committed, the combination of Transitional Justice mechanisms and criminal proceeding might also serve the purpose of establishing the factual circumstances of the case. In particular, 'in situations where people were abducted by government forces and never heard from again, family members frequently want information before any sort of retribution. Thus, in any post-conflict situation, a non-prosecutorial policy must include a complete and impartial inquiry into the facts'.[254] Obviously, in light of the existing challenges encountered by international criminal tribunals, it is necessary to make this inquiry in an impartial way to avoid a biased reconstruction of the facts.

In conclusion, this alternative might be a good option when the fugitives cannot be apprehended in the short term, and civil proceedings in absentia are not suitable for the case at stake. In particular, this alternative might be optimal when an international criminal tribunal does not want to limit its action to the prosecution of crimes, but it seeks to pursue additional goals in terms of peace and reconciliation.

The possibility to rethink international criminal proceedings and to pursue alternative forms of justice is not necessarily utopian. Examples of alternatives to international criminal proceedings already exist, and they involve other areas of International Law.[255] For instance, this is the case of proceedings with a criminal nature conducted by International Human Rights Law bodies (e.g. the Inter-American Court of Human Rights) to prosecute grave human rights violations.[256] Other interesting ideas have been advanced by some scholars when discussing the role of regional courts to prosecute international crimes.[257] Therefore, it would be necessary to continue the development of International Criminal Procedure and have the courage to question the traditional approaches taken in International Criminal Justice. This does not mean to reject international criminal proceedings but to understand the needs of justice in a specific case (e.g. when the defendant is absent). In this sense, those proposing alternatives to the ordinary prosecution of crimes 'oppose a practice of International Criminal Justice that does injustice to these alternative conceptions by prioritising International Criminal Law'.[258] In this author's opinion, the choice in favour of one or another proceeding, especially when considering the alternatives proposed in this Chapter, should be made in accordance to a principle also recalled by the scholarship:

[254] Ibid., pp.114-115.
[255] See Huneeus (2013).
[256] See ibid.
[257] See Sirleaf (2015); Tiba (2015).
[258] Nouwen and Werner (2015, p.173).

'the question of what is possible must follow the question of what is desirable'.[259]

It should be noted, however, that the use of Transitional Justice mechanisms might pose problems for their implementation in the practice of international criminal tribunals (as it happens for civil proceedings in absentia). In particular, they might prompt questions concerning their use in an institutional framework that is tailored for criminal proceedings and it not familiar with alternative forms of justice that do not include a traditional judicial resolution.[260] Moreover, they might be problematic when used by tribunals that do not necessarily have financial and logistical resources for this purpose, and they might lack personnel familiar with the peculiar dynamics of these mechanisms.[261]

5.4.4. Opinions of the Legal Practitioners

Some interesting considerations emerge from the opinions of the legal practitioners interviewed for this thesis when asked to consider and evaluate this solution. A first consideration relates to the general opinions of the legal practitioners on this alternative. As in the case of civil proceedings in absentia, and even more for criminal proceedings in absentia, the views vary greatly, and whereas some particularly favour this solution,[262] others are more sceptical and cynical.[263] In this sense, on the one side, it is argued that a combination of elements of criminal proceedings and Transitional Justice mechanisms in light of restorative justice are 'interesting'[264] and they will guarantee the possibility 'of having maybe proper trials'.[265]

On the other side, there is a fierce opposition to this alternative, and various concerns are expressed. For instance, an interesting point is made about the appropriateness of having reconciliation and restorative justice in a criminal proceeding and with no determination of guilt for the crimes committed. One practitioner says 'no, I'm not convinced by this proposal. No, I am not interested. When you want to make reconciliation, you have to have a decision and after you go for reconciliation'.[266] Therefore, the problem would be the lack of a previous determination of criminal liability and the fact that some legal practitioners understand reconciliation as following

[259] Aukerman (2002, p.92).
[260] See Bisset (2012, pp.189-191 and 191-195).
[261] On professionals and Transitional Justice, see Sharp (2018, pp.5ff.).
[262] E.g. Interviews 12; 14.
[263] E.g. Interviews 09; 15.
[264] Interview 12.
[265] Ibid.
[266] Interview 16.

the criminal litigation of a criminal case.[267] However, as the Truth and Reconciliation Commissions in South Africa and other States demonstrate, this is not always true, and there is no strict process to follow.[268] Indeed, in these cases, prevalence was given to reconciliation over a purely criminal approach to the commission of crimes (i.e. a traditional prosecution).[269] The result has been to favour Transitional Justice in the form of local, non-judiciary mechanisms that allowed for a different (and perhaps better) determination of responsibility for the wrongdoing occurred.[270]

Moreover, another point regards the qualification of the justice made by international criminal tribunals and their work. In other words, the problem would be to identify the intervention of international criminal institutions as Transitional Justice and encompassing reconciliation and restorative justice. For instance, the interviewees say: 'I don't think of the STL as being Transitional Justice',[271] and they do not recognise this alternative as part of the mandate of international criminal tribunals. This is a significant aspect when assessing this second alternative because it gets to the core of the existing debate on the function of international criminal tribunals and their role in reconciling disrupted societies and opposing parties.[272]

Finally, it is worth noting that some legal practitioners interviewed for this thesis express strong opinions on the topic and they identify it as non-important. For instance, they say: 'I am afraid, you know, that those people sitting around in seminar rooms, in conference rooms, thinking of the next best idea tend to start with the sentence "conviction"';[273] and 'I am not a big fan of tears'.[274] Despite the obvious personal nature of these statements, they signal an important aspect of the second alternative proposed in this Section that needs to be carefully considered: whether this solution is too much extravagant for being effectively implemented in International Criminal Justice, and it is just an 'academic exercise' behind closed doors, with no practical effects for international criminal cases and the parties involved in them.

A second consideration of the interviewees on Transitional Justice mechanisms and in absentia proceedings concerns the possible limited application of this alternative only to certain specific contexts and cases. This means that the solution could not be implemented in a variety of international criminal cases (as it happens with in absentia

[267] E.g. Interviews 09; 16.
[268] See Schabas and Darcy (2007).
[269] On the goals of these alternative forms of justice, see ibid.
[270] For a discussion, see Rotberg and Thompson (2000, pp.196-198).
[271] Interview 06.
[272] On this topic, see Isaacs (2016); Fischer and Simić (2015); Clark (2014); Hayden (2011).
[273] Interview 09.
[274] Interview 15.

proceedings), but it would be affected by an important limitation. In this regard, a legal practitioner interviewed for this thesis says that Transitional Justice and its mechanisms might work better in certain countries than others, and 'you have specific countries where it worked because of the context, because of the history'.[275]

Moreover, in certain conflictual cases, the use of Transitional Justice might not be very effective when combined with criminal proceedings (although in absentia) due to the difficulty to reconcile the various interests at stake. It is said that 'it is very difficult to reconcile, you know, court proceedings which inevitably pick one side against the other with national reconciliation'.[276] Therefore, a significant issue would be the different nature of the proceeding considered: confrontational, in the case of criminal proceedings; reconciliatory, in the case of Transitional Justice mechanisms. Although appealing, this view is not correct for two reasons. First of all, Transitional Justice mechanisms already include international criminal proceedings, and these concepts are not mutually exclusive.[277] Second, the reconciliation aspect of criminal proceedings cannot be excluded a priori, but there is an ongoing debate on the possibility to rethink these processes as a tool to reconcile victims and perpetrators.[278]

The interviewees are also afraid of the practical implementation of this alternative, and the possible negative consequences derived thereof. They argue: 'I do not think it would be appropriate in the Lebanese case';[279] and 'it has so much danger as well. Like, I am always thinking about the Gacaca when it happened like, you know, the experience that we had where the two sides were coming and the victims and the assailants were coming to talk and it was just a mess, and people were just, you know, accusing even though they were not sure'.[280] Therefore, a crucial aspect is the effect that this solution might have on post-conflict societies and what impact it might have on the parties involved. Indeed, there is a danger of exacerbating the conflict and making any attempt at addressing the wrongdoing committed more difficult. This is a very similar situation to the one that has emerged when discussing the cons of in absentia proceedings (i.e. in Chapter 1) and their impact on the parties of international criminal cases (i.e. in Chapter 4).

A last consideration pertains to some procedural elements of this alternative and its deterrent effect. The interviewees are clear in saying that there should be some form

[275] Interview 01.
[276] Interview 02.
[277] For an analysis of this intersection, see Kerr (2017, p.48).
[278] See Diggelmann (2016); Clark (2014).
[279] Interview 10.
[280] Interview 14.

of recognition of the effort made by the absent defendant to come to court and seek reconciliation with the victims, although with no determination of guilt. They say 'but what are the carrots that you are going to hold down for them? The only other carrot you can hold down for this is, if it goes wrong, you can have a lower sentencing. How else you are going to encourage defendants to come forward and put themselves at risk of a conviction?'.[281]

Therefore, the proposed alternative might work only if there is some advantage for the absent defendant. This is also because those specific advantages are already granted in ordinary criminal proceedings when the defendant cooperate with the tribunal or the Prosecutor.[282] To this end, the interviewees suggest to say that 'his [i.e. the defendant] having done that [i.e. appearing in court] would be a mitigating factor for any sentence imposed after any criminal judgment'.[283] The other advantage would be to name the proceeding differently, i.e. not to qualify it as a trial.[284] In this sense, a practitioner suggests to call this alternative 'a confirmation plus'.[285]

5.5. Conclusion

This Chapter has critically examined the possible alternatives to the conduct of in absentia proceedings in International Criminal Justice. In particular, the author has discussed in detail two options, i.e. international civil proceedings in absentia and Transitional Justice mechanisms.

The Chapter presents two findings. First of all, the alternatives analysed raise questions for their use in the practice of International Criminal Justice and their capacity to achieve the results expected by the international community. The first alternative permits to maintain an objective approach in international criminal cases, both for the victims and the defendants. In particular, it includes the possibility to provide some answers to the victims without undue delays. However, despite its potential benefits, challenges might arise when States will have to accept this solution, especially when changing the Rules of Procedure of international criminal tribunals. In particular, the scholarship affirms that 'reparations mechanisms are an under-utilized post-conflict mechanism additionally because the international community has chosen to prioritise international criminal justice and consequently has devoted the bulk of its economic,

[281] Interview 02.
[282] Ibid.
[283] Interview 03.
[284] E.g. Interview 11.
[285] Interview 15.

political, and diplomatic capital to prosecutions'.[286]

The second alternative seeks to reconcile International Criminal Law and Transitional Justice, to overcome the criticisms mounted against international criminal tribunals for their incapacity to guarantee an equilibrium between justice and peace. However, this alternative requires a rethinking of international criminal proceedings, allowing for the inclusion of novel judicial methods in a predominantly criminal law-based system and the combination of Transitional Justice and International Criminal Law.

This finding is significant because it permits to assess the solutions proposed considering their strengths and weaknesses and to evaluate their function regarding the theoretical constraints to in absentia proceedings discussed in Chapter 1.

Second, the possibility to adopt one of the two solutions recalled is: either (a) certain, but not appropriate for the compelling issues faced by international criminal tribunals (i.e. in the case of the suspension of the proceeding); or (b) uncertain, and it requires some work by the international legislator to redefine the borders and content of International Criminal Procedure (i.e. in the case of civil claims in absentia and Transitional Justice mechanisms combined with international criminal proceedings).

The suspension of the proceeding is familiar to international criminal courts, and it might be favoured over the two solutions presented in this Chapter. However, as pointed out, it does not tackle the temporal and procedural necessities of an international criminal proceeding with an absent defendant properly. On the other side, advancing civil claims in absentia and including Transitional Justice elements in an international process are quite different options from the traditional approach adopted in International Criminal Justice so far. Therefore, there might be more difficulties for their implementation. However, their value is in their being innovative and able to address the issue of in absentia pragmatically, rethinking the prosecution of international crimes.

This finding is important because it determines the value of the two alternatives examined in light of some driving factors considered in Chapter 2 and the practical needs of in absentia proceedings analysed in Chapters 3 and 4. In particular, when confronted with the pragmatic necessities of international criminal cases, the two solutions present advantages and disadvantages and they are not completely satisfactory.

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[286] Combs (2015, p.242).

Whether the two proposed alternatives will be used in future international criminal proceedings with absent defendants is disputable. This will depend on the willingness of States to change the rules of international criminal tribunals and the capacity of the international legal system to rethink its strategy in international criminal prosecutions.[287] In this sense, '[the] presence of all accused before the trial is an ideal situation for conducting an effective International Criminal Justice. We cannot, however, avert our eyes from the reality of the present international community in which this is not always so easy to be realised'.[288]

This Chapter has concluded the first part of the study of the *future perspectives* on in absentia proceedings in International Criminal Justice. Its findings will be relevant also for the analysis of the future of in absentia proceedings (i.e. in Chapter 6). In particular, Chapter 6 will examine the extent to which in absentia proceedings can be used for future prosecution of international crimes in International Criminal Justice. Specifically, it will discuss in absentia proceedings as useful, legally possible, but exceptional proceedings; and it will present a series of policy recommendations for the various phases of these proceedings (i.e. pre-trial, trial, and post-trial) that will promote a future legitimate use of these proceedings.

[287] On the topic, see Findlay and Henham (2013).
[288] Furuya (1999, p.668).

Chapter 6. The Future of In Absentia Proceedings

6.1. Introduction

This Chapter focuses on the *future* of in absentia proceedings in International Criminal Justice. In particular, it discusses the prospects of the conduct of in absentia proceedings for the future prosecution of international crimes, and it presents a series of policy recommendations for a more legitimate use of these proceedings.

To date, the debate on in absentia proceedings has mainly involved considerations on past and present experiences of these proceedings.[1] The scholarship has devoted little attention to the future of in absentia proceedings in international criminal cases, dismissing them as an inconvenient, incidental phenomenon.[2] However, as discussed in Chapter 1 of this thesis, these proceedings have had a long-lasting relevance in the history of International Criminal Justice; therefore, it is crucial also to consider their future development. In this sense, the discourse on in absentia proceedings needs to examine the future approach that International Criminal Justice should adopt towards them and what their legal and practical contours will be. This critical evaluation will help the scholarship and international legislators to assess in absentia proceedings in a more informed way, with the purpose of improving their regulatory framework and promoting their legitimate use.

This Chapter examines the topic seeking to provide a broader perspective to the study of in absentia proceedings. To this end, the Chapter includes a critical examination of two key aspects: (i) the identification of in absentia proceedings as useful, legally possible, but exceptional proceedings in International Criminal Justice; and (ii) the proposal of a series of policy recommendations that will enhance their regulatory framework. The analysis draws upon the findings obtained in the previous Chapters of the thesis and the opinion of the legal practitioners interviewed for this study. In so doing, the author seeks to present some innovative perspectives that will enrich the analysis of the Chapter with a combination of theoretical, legal, and practice-led considerations.

The study done in this Chapter is also relevant for other Chapters of the thesis. It identifies in absentia proceedings as useful, legally possible, but exceptional proceedings, recalling the objectives of International Criminal Justice (i.e. discussed in

[1] For instance, see Zakerhossein and de Brouwer (2015); Shaw (2012); Safferling (2009a); Schabas (2009a).
[2] See Jordash and Parker (2010, p.509).

Chapter 1 on the *theoretical framework*) and the impact of these proceedings on the parties of international criminal cases (i.e. considered in Chapter 4 on the *impact*). Moreover, the analysis presents a series of policy recommendations concerning relevant provisions (i.e. scrutinised in Chapter 2 on the *legal foundations*) and issues that emerge in the practice of in absentia proceedings (i.e. examined in Chapter 3 on the *practice*). Finally, in direct contrast to the focus of the previous Chapter, Chapter 6 evaluates the issues of the acceptance of in absentia proceeding in the future of International Criminal Justice.

This Chapter is divided into two Sections in addition to an Introduction and a Conclusion. The first Section critically discusses the future of in absentia proceedings from a conceptual point of view, i.e. how these proceedings should be conceived in International Criminal Justice (Section 6.2.). In this regard, the author focuses on three points: (i) they are useful (Subsection 6.2.1.); (ii) legally possible (Subsection 6.2.2.); (iii) but exceptional (Subsection 6.2.3.). The second Section of the Chapter presents some policy recommendations for improving the regulatory framework of in absentia proceedings (Section 6.3.). First, the author includes a detailed examination of the proposed recommendations following the three phases of an international criminal proceeding (i.e. pre-trial, trial, and post-trial) (Subsection 6.3.1.). Then the study addresses the issue of the implementation of these recommendations, looking at the challenges that might be encountered in the process and the strategies to be adopted to overcome them (Subsection 6.3.2.).

In concluding the study conducted in Part 3 of this thesis, this Chapter seeks to provide some innovative considerations on the prospects of in absentia proceedings in International Criminal Justice. Ultimately, the author argues that the future of these proceedings depends on the capacity of the international legal system to be self-reflective. This means that one should assess in absentia proceedings objectively, rethinking the rules and policies underpinning them and looking at the research findings obtained in the previous Chapters of this thesis: their theoretical framework (i.e. Chapter 1), legal foundations (i.e. Chapter 2), practice (i.e. Chapter 3), and impact on the parties of international criminal cases (i.e. Chapter 4).

6.2. Rethinking International Criminal Proceedings In Absentia

This Section examines the future of in absentia proceedings referring to three characteristics of these proceedings: (i) they are *useful*; (ii) *legally possible*; but (iii)

exceptional. These aspects have emerged from the study conducted in the previous Chapters of this thesis, and they will be used in this Chapter to define the identity of in absentia proceedings in the future of International Criminal Justice.

6.2.1. Useful

Any proceeding in International Criminal Procedure should be assessed for its usefulness and function within the legal system of reference. In this regard, usefulness plays a pivotal role in International Criminal Justice, especially when issues arise from the application of provisions or rules of procedure in concrete cases.[3] Moreover, as discussed in Chapter 2,[4] when international criminal tribunals face critical challenges in their work they need to rely upon practical and useful solutions.[5]

Without assessing the usefulness of a proceeding, there might be two risks. On the one side, although feasible, the proceeding is not implemented in practice because it is not recognised as necessary and valuable. Therefore, it remains a dead letter and is not used in international criminal cases. On the other side, when used in the practice of international criminal tribunals the proceeding considered does not support them in prosecuting international crimes and, on the contrary, it becomes a procedural burden. Therefore, the proceeding does not help the tribunals to fulfil the objectives of International Criminal Justice, and it hinders their work.

In the same sense, in absentia proceedings need to prove to be useful for the prosecution of international crimes and the activities of international criminal tribunals. The analysis of the usefulness of these proceedings encompasses both the objectives of International Criminal Justice recalled in Chapter 1 of this thesis[6] and the opinions of the scholarship and the legal practitioners who have been involved in in absentia proceedings. In this way, it would be possible to evaluate the usefulness of in absentia proceedings from both a theoretical and practice-oriented perspective.

Drawing upon the findings of Chapter 1, it is posited that in absentia proceedings are useful because they permit international criminal tribunals to achieve a series of objectives that are part of the mandate of these courts. Despite the harsh criticisms mounted against in absentia proceedings, they cannot be rejected a priori. As it has been put, ‘these grounds militating against trials in absentia do not apply to

[3] See Snyder and Vinjamuri (2003); Schieder (2000).
[4] See Chapter 2, Subsection 2.3.2. referring to pragmatism as a driving factor for international criminal proceedings, particularly in absentia proceedings.
[5] See Pichou (2017).
[6] See Chapter 1, Subsection 1.3.1.

international criminal trials, particularly when they are not based on full acceptance of the adversarial model',[7] and 'international trials are conducted under a spotlight - the close scrutiny of the whole international community - which would not tolerate any abuse, bias or unfair treatment'.[8]

First of all, in absentia proceedings guarantee the prosecution of international crimes when international criminal courts face the serious challenge of the defendant's absence. Allowing the process to start (e.g. with pre-trial in absentia proceedings), to continue (e.g. with trials in absentia), and to conclude (i.e. with post-trial in absentia proceedings), these proceedings pursue the fight of impunity in different phases of the process. This happens even when the defendant's absence does not occur since the beginning of the process, and it is intermittent (e.g. in the case of partial in absentia proceedings).

A scholar supports this argument and says that in absentia proceedings are 'the ultimate solution to the problem of the non-appearance of the defendant and the non-cooperation of States in handing over indicted figures, as well as a measure to avoid delays in the proceedings'.[9] Others highlight the usefulness of in absentia proceedings especially in their configuration at the STL. As explained by the former President of the STL Antonio Cassese, the RPE of the Tribunal try to combine adversarial and inquisitorial models of criminal justice 'to the maximum extent feasible by opting […] for the procedure that best fulfils the demands of international justice'.[10] In the same sense, in *Ayyash et al*. the Prosecutor has recognised the value of in absentia proceedings by saying that 'a decision to proceed with a trial in absentia must also consider the need to preserve the *good administration of justice*'.[11]

Second, in absentia proceedings can guarantee punishment and deterrence. It might be argued that with no defendant present, in absentia proceedings would not be able to achieve any punishment. In particular, 'as the law should in principle be administrated, it can be held that a conviction without administration is on its face valueless'.[12] This is a valid criticism, but it is flawed for two reasons.

On the one side, it lacks any reference to the complexity of the concept of punishment in International Criminal Justice as discussed in Chapter 1.[13] Punishment

[7] STL, Explanatory Memorandum (2009, para.36).
[8] Ibid.
[9] Trad (2016, p.46).
[10] STL, Explanatory Memorandum (2009, para.4).
[11] *The Prosecutor v. Ayyash et al.*, STL, Prosecution's Submissions Rule 106 (2011, para.1, ftn.) (emphasis added).
[12] Zakerhossein and de Brouwer (2015, p.199).
[13] See Chapter 1, Subsection 1.3.1.

does not mean only the physical limitation of the convicted person into a defined space (i.e. a prison), but it entails a plurality of other consequences that have the same (or even more) value than the mere physical constriction of the individual.[14] In this sense, in absentia proceedings would guarantee a punishment that goes beyond the incarceration of the perpetrator, including the determination of guilt, the payment of compensations to the victims, and the attribution of moral culpability to an absent defendant.

On the other side, it is not entirely true that in absentia proceedings do not permit any incarceration of the convicted person. On the contrary, they accelerate the process, guaranteeing that no time is wasted in waiting for the defendant to be apprehended or surrender before starting the prosecution of crimes. In other words, with in absentia proceedings, international criminal tribunals begin immediately to work, and when a sentence is issued, and all procedural safeguards are respected, this can be enforced directly when the defendant is apprehended. In this sense, in absentia proceedings are a supportive proceeding for the work of international criminal tribunals when the defendant's absence threatens them.

Third, in absentia proceedings would permit the victims to participate actively in the process by providing their recollection of the facts of the case and being heard as victims of the crimes prosecuted. Moreover, the victims can have a voice also through their legal representative who acts on their behalf and protects their interests (e.g. to have a conviction and ask for reparations).

According to some scholars, in absentia proceedings block any attempt by an absent defendant to disrupt the course of justice and frustrate the victims' expectations on the proceeding.[15] They say that the defendant's refusal to participate in the proceeding, 'will not halt the (admittedly, sometimes slow but) always inexorable pursuit of justice'.[16] Moreover, it is argued that 'such proceedings would provide the victims of war crimes and genocide with an official determination of guilt and ensure that the most complete and accurate record of these crimes is maintained'.[17] On the other side, in absentia proceedings have been criticised because (especially when totally in absentia) they are not useful and do not have 'significant practical results'.[18]

At the STL, the conduct of in absentia proceedings has been justified to guarantee that the international community, in cooperation with the Lebanese

[14] See Findlay and Henham (2010; 2011).
[15] For instance, Trad (2016, pp.49-50); Gardner (2011, p.134).
[16] *The Prosecutor v. Ayyash et al.,* STL, Order Pursuant to Rule 76(E) (2011, para.22).
[17] Shaw (2012, p.109).
[18] Zakerhossein and de Brouwer (2015, p.198).

Government, could address crimes that affected the political stability and peace of the country. It is said that 'a trial – even one conducted in the absence of the defendant – is a requisite step towards restoring, in the long run, the social peace disturbed by these crimes, with their persistent adverse consequences for the whole fabric of Lebanese society'.[19] Moreover, as indicated by the Legal Representative of the victims at the STL, many years have passed from the commission of the crimes in Lebanon, and the victims have waited for all this time 'for justice to hold out their hand of justice to them'[20] and 'for justice to be done and to recognise their being victims of this attack'.[21]

Fourth, in absentia proceedings allow the tribunals to make a historical record of the facts of the case and the crimes committed. Through investigation and prosecution, the proceeding preserves evidence and seeks to reconstruct what happened in the case concerned. This would only be partially possible if the proceeding were suspended because the investigations would provide scarce details on the case and the evidential value of the trial phase would be missing.

The legal practitioners interviewed for this thesis have made similar considerations to the scholarship. Generally speaking, they refer to the objectives of International Criminal Justice recalled by the scholars but add an interesting practice-based perspective. In this sense, with their expert opinions, they enrich the analysis on the usefulness of in absentia proceedings and provide valuable insights into the practical implications of in absentia proceedings as useful proceedings.

First of all, attention is given to the consequences of in absentia proceedings for the prosecution of crimes. The interviewees perceive the fight of impunity as a crucial element of the work of international criminal tribunals and, consequently, of the conduct of in absentia proceedings.[22] However, it is argued that in absentia proceedings entail a further element of usefulness: to address the negative impact of the crimes on a specific society and the relationship between States and international criminal tribunals.[23] For instance, an interviewee says that in absentia proceedings might 'soften the relationship between the tribunal (e.g. the ICC) and States',[24] and they might 'take some of the pressure off'[25] from the society affected by the crimes. In other words, these

[19] *The Prosecutor v. Ayyash et al.,* STL, Order Pursuant to Rule 76(E) (2011, para.22).
[20] *The Prosecutor v. Ayyash et al.,* STL, Hearing Pursuant to Rule 106 (2011, p.91).
[21] Ibid.
[22] E.g. Interviews 03; 07; 14; 16. For instance, some interviewees think that in absentia proceedings might prove useful when there are high-profile defendants who abscond and avoid justice, like Al-Bashir: e.g. Interviews 06; 08.
[23] E.g. Interviews 02; 03; 07; 15.
[24] Interview 03.
[25] Ibid.

proceedings would help the international community to address the crimes and let the world see that action is taken and justice is pursued.[26] Therefore, the usefulness of in absentia proceedings might be assessed considering the direct effects on the case at stake and the impact on the international community as a by-product of the prosecution of crimes in absentia.

This idea seems to support the argument that, being part of the framework of International Criminal Procedure, in absentia proceedings can have a broader impact, beyond the boundaries of a specific case. However, this point finds a strong counter-argument when looking at the controversial nature of these proceedings and the debate surrounding them. Indeed, the conduct of in absentia proceedings in the future of International Criminal Justice might create 'even more problems'[27] because 'it is a difficult debate, it is a contested issue',[28] especially when considering the prosecution of heads of State.[29] So, this fact might have an impact on the work of the tribunal because States might decide to withdraw their support to the court and their funding.[30]

The legal practitioners interviewed for this thesis also recall the objective of victims' participation and they link it with the possibility to preserve evidence. In particular, the interviewees recognise the importance of in absentia proceedings for allowing the victims to heal and being properly considered by the legal system.[31] In this sense, one interviewee says that 'it could be a good way to close the gap',[32] and another adds 'it's cathartic for them, it's amazing'.[33] Moreover, a compelling argument is advanced when saying that in absentia proceedings are useful because they give the victims a sense of the pursuit of accountability that in national jurisdictions might be missing.[34]

This idea confirms the usefulness of in absentia proceedings from a victims' perspective, but it does so by overlooking the practical issues already discussed in Chapters 1, 4, and 5 of this thesis,[35] that might emerge, for instance, when considering reparations for the victims. This concern is also shared by an interviewee who says that problems might arise (e.g. at the STL) when the victims 'realise that after this trial has ended, with all the truth-telling and all the recognition that they can get, they are going

[26] E.g. Interview 14.
[27] Interview 04.
[28] Ibid.
[29] E.g. ibid.
[30] E.g. Interviews 05; 09.
[31] E.g. Interviews 01; 02; 03; 15.
[32] Interview 01. Accord Interview 03.
[33] Interview 03. Accord Interview 07.
[34] Interview 07. Accord Interview 02.
[35] See Chapter 1, Subsection 1.3.1.; Chapter 4, Subsection 4.4.1.; Chapter 5, Subsection 5.3.3.

to be stuck with a certified copy of the judgement that is going to have a great theoretical value in Lebanon, but is not going to get them too far'.[36]

A final relevant idea of the legal practitioners interviewed for this thesis relates to the value of in absentia proceedings from a historical and evidential point of view.[37] These proceedings would be useful for the factual content of an international criminal case because they would preserve evidence and record the facts as reconstructed in court. An interviewee argues that 'the importance of these trials […] is to make sure that history is written correctly'.[38] To this end, evidence needs to be collected and preserved, and through in absentia proceedings, it can be used for assessing the responsibility for the crimes committed.[39]

However, there is a counter-argument that needs to be considered. As discussed in Chapter 1, the value of the historical record achieved by international criminal tribunals is debated, and it is even more controversial when done through proceedings such as in absentia proceedings.[40] Therefore, there should be a careful evaluation of this element to avoid harsh criticisms like the following: 'get a journalist to write a book, then, if that is what your point is. Do not confuse it with the justice system. And that is the problem when you get those kinds of arguments: they confuse a justice system with a narrative. They are utterly different, utterly different. One belongs to the bookshelves or museums; the other is a living, breathing system of justice. They are not the same'.[41]

As discussed in Chapter 1,[42] these criticisms are not convincing because criminal proceedings (both national and international) are not incompatible with a record of the facts of the case.[43] This is confirmed when looking at the objectives of International Criminal Justice (that include the creation of a historical record).[44] With in absentia proceedings, international criminal tribunals collect and preserve evidence, and they are able 'to create a historical record of atrocity'.[45] Despite the defendant's absence, the tribunal would determine what has happened when international crimes have been committed, and it would help to prevent future atrocities. In this sense, 'by preserving a record of atrocities, one hopes to use International Criminal Law as a

[36] Interview 07.
[37] E.g. Interviews 06; 10.
[38] Interview 06.
[39] E.g. Interviews 03; 06; 15; 16.
[40] E.g. Interview 14. Accord Interview 11.
[41] Interview 09.
[42] See Chapter 1, Subsection 1.3.1.
[43] See Ashby Wilson (2011).
[44] See Ohlin (2013, pp.60ff.).
[45] Ibid., p.60.

pedagogical tool for revising future conduct'.[46]

6.2.2. Legally Possible

When assessing future in absentia proceedings another aspect to be considered is the legal possibility to conduct in absentia proceedings in the future of International Criminal Justice. This aspect is crucial because it determines the actual, concrete existence and conduct of these proceedings within the international legal system. In other words, the concept of 'legal possibility' establishes the recognition that a proceeding has in the legal order in which it is going to be applied and the fact that it is based on the rule of law.[47] This means that the proceeding finds its place in the group of proceedings that international criminal institutions can conduct, and it can be identified as one of the constitutive elements of International Criminal Procedure.[48]

This passage is crucial in assessing in absentia proceedings because they have been (and are) conducted within an area of law (i.e. International Criminal Procedure) that in the past has encountered criticism and challenges for its existence and recognition in International Criminal Justice.[49] In this sense, on the one side, it is vital for the legal system of reference to be recognised as legitimate and having an identity within the general context of International Criminal Justice.[50] This approach advances the case for the 'legal possibility' of a specific proceeding because it identifies a robust legal framework within which the proceeding will exist. The result would be an indirect support to the proceeding considered (e.g. in absentia proceedings) through the direct legitimisation of the procedural legal context in which it operates.

On the other side, and based upon the identification of a defined International Criminal Procedure, the proceeding at stake (e.g. in absentia proceedings) finds its existence also at international level, besides its use in national jurisdictions. For in absentia proceedings this means to be elevated from the position of proceedings accepted and used in specific national legal systems, to that of proceedings that are also part of an international legal system. The consequence of this conceptual development would be to change the perspective and understanding of these proceedings, identifying them not only as a national phenomenon but also as a fully-recognised international

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[46] Ibid.
[47] See Ohlin (2009, pp.100ff.).
[48] This is in line with the 'fragmentation' of International Criminal Procedure as discussed by Klamberg (2012, pp.593-632).
[49] For a discussion, see Sluiter et al. (2013, pp.3-7).
[50] See Ohlin (2009, p.88).

concept.

From these preliminary considerations, it is posited that the notion of 'possibility' can have two meanings. First of all, a proceeding is possible when it is part of the legal framework of international criminal institutions. This occurs when a proceeding is regulated directly in the Statute or Rules of Procedure of international criminal tribunals. As an example, international criminal courts provide for specific provisions on detention and provisional release of defendants,[51] trial proceedings,[52] appeals,[53] enforcement of sentences.[54]

As discussed in Chapter 3 of this thesis, in absentia proceedings are possible because international criminal tribunals implement them, and they do not just have a theoretical connotation. The history and regulation of in absentia proceedings[55] and their practice[56] demonstrate the long-lasting existence of these proceedings since the beginning of modern International Criminal Justice. For instance, trials in absentia were admitted at the IMT at Nuremberg, and this indicates that 'at the international level, trials in absentia were, at least in the post-World War II period, held to be acceptable'.[57] Therefore, in absentia proceedings have found their actual use for the prosecution of international crimes, and they have been part of the development of International Criminal Justice, from the experience of the IMT at Nuremberg until the STL and the ICC.

Second, a proceeding is 'possible' when it is applied in specific cases that need to be decided by international criminal tribunals.[58] This means that the proceeding is not a dead letter, enshrined into the Statute or Rules of Procedure of an international criminal tribunal but it is concretely applied in cases brought before a court. Regarding in absentia proceedings, this has happened with total trials in absentia at the IMT at Nuremberg and the STL;[59] and partial in absentia proceedings at the ICTY and the

[51] See Rules 64-65 ICTY RPE; Rules 64-65 ICTR RPE; Rules 117-119 ICC RPE; Rules 101-102 STL RPE.
[52] See Rules 74-106 ICTY RPE; Rules 73-106 ICTY RPE; Rules 131-144 ICC RPE; Rules 130-175 STL RPE.
[53] See Rules 107-118 ICTY RPE; Rules 107-119 ICTR RPE; Rules 149-158 ICC RPE; Rules 176-189 STL RPE.
[54] See Rules 198-225 ICC RPE.
[55] See Chapter 2, Section 2.2.
[56] See Chapter 3, Sections 3.2., 3.3., 3.4.
[57] STL, Explanatory Memorandum (2009, para.36).
[58] This is linked to the 'practice' of International Criminal Procedure. On the topic, see Bellelli (2016); Stahn (2015).
[59] See *Bormann* at the IMT and *Ayyash et al.* at the STL. They are analysed in Chapter 2, Subsections 2.2.1. and 2.2.3. respectively.

ICC.[60] This fact demonstrates that international criminal proceedings in absentia are one of the procedural realities of International Criminal Justice.

The question of the possibility of in absentia proceedings in International Criminal Justice has also been evaluated by the legal practitioners interviewed for this thesis. Generally speaking, in absentia proceedings are perceived as a procedural part of the framework of International Criminal Procedure.[61] The consensus that exists among the interviewees might be due to the fact that they are involved in in absentia proceedings, and they practice within the context of these proceedings. Therefore, through their direct experience with in absentia proceedings they can adequately assess the possibility of these proceedings, both concerning their regulation and use at international criminal tribunals.

However, the confirmation of the possibility of in absentia proceedings does not necessarily involve a favourable judgement of in absentia proceedings. Indeed, some interviewees agree with the idea of in absentia proceedings as possible proceedings, recognising their existence and possibility as one of the procedural tools at the disposal of international criminal tribunals.[62] Others, express concerns on the future use of these proceedings for the adverse effects that these might have on the fairness of the proceeding and the defendant's rights (e.g. the right to an adequate defence).[63] Using a wording climax it is argued that these proceedings might be 'very suspicious',[64] 'very dangerous',[65] and 'they should be back in the bin from which they have been taken out'.[66]

These experts' opinions are similar to those expressed when making some general considerations on in absentia proceedings (and examined in Chapter 1, Subsection 1.3.2.). However, when discussing the possibility of in absentia proceedings, other ideas are shared. First of all, some interviewees think that in absentia proceedings will have a future in International Criminal Justice.[67] In their view, despite the rejection of these proceedings by some tribunals, things will change in the future because 'only fools never change their mind'.[68] However, they think that 'there should be a

[60] See the cases at the ICTY and *Kenyatta* and *Ruto* at the ICC. All these cases are analysed in Chapter 2, Subsection 2.2.2.
[61] E.g. Interviews 02; 03; 08; 09; 11; 12; 15.
[62] E.g. Interviews 10; 15; 16.
[63] E.g. Interviews 05; 09.
[64] Interview 09.
[65] Ibid.
[66] Ibid.
[67] E.g. Interviews 03; 11; 12; 16.
[68] Interview 11.

meaningful exploration of how to do it and how to do it better',[69] and this should not be limited to a purely academic debate on the best approach to take.[70] In this regard, an interviewee uses strong words when saying that 'whether trials should take place in absentia, I think should rest not with a group of academics […]. Frankly, I think we should kind of ignore the academics and focus on the people'.[71]

This first argument shows a certain goodwill of the legal practitioners involved in in absentia proceedings towards a future prosecution of international crimes using these proceedings. However, this openness is based on the need to rethink in absentia proceedings and a careful assessment of their use in International Criminal Justice, especially considering the controversial experience of the STL that might affect the legitimacy of future in absentia proceedings.[72] This point confirms the need to reform in absentia proceedings, both from a regulatory and a policy point of view and in this sense it supports one of the arguments advanced in this Chapter, i.e. the need to change and improve in absentia proceedings.

Second, because in absentia proceedings are already used in different legal systems (national and international) there is nothing that prevents them from being conducted before various tribunals. In this sense, an interviewee justifies in absentia proceedings in International Criminal Justice based on the fact that these proceedings already exist at national level, and they have been scrutinised by IHRL bodies, such as the ECtHR.[73] For instance, they are accepted in the Lebanese criminal justice system, and therefore they could also be used in other contexts.[74] Other interviewees argue that because they are conducted at the STL, this would open the path to their use by other international criminal tribunals, such as ad hoc tribunals or the ICC.[75] They say: 'I do not see any reason why you couldn't have that at the ICC or ICTY if it makes sense. Although it is not ideal at all',[76] and 'I think the ICC should have in absentia trials'.[77]

Following this idea, once a tribunal (national or international) adopts a proceeding, then this should be recognised automatically as a feasible proceeding for other courts. This is an interesting point, but it is naïve in its formulation. Indeed, it presumes that the acceptance of a proceeding by a tribunal guarantees its legitimacy and

[69] Ibid. Accord Interview 15.
[70] E.g. Interview 08.
[71] Ibid.
[72] E.g. Interviews 11; 15.
[73] E.g. Interview 01.
[74] E.g. ibid.
[75] E.g. Interview 10.
[76] Ibid.
[77] Ibid.

possibility before other courts. However, this is not necessarily the case, and what is missing from this perspective is the sense of a shared approach to the proceeding considered. In other words, rather than relying upon a single example, it would be better to justify the possibility of a proceeding looking at its broader use in a variety of cases. For instance, in absentia proceedings would be feasible in International Criminal Justice because their history and legal framework show widespread recognition of their existence and use (as demonstrated in Chapters 2 and 3 of this thesis).

Third, in absentia proceedings should be available as a possibility for all international criminal tribunals to maintain consistency in International Criminal Justice.[78] One of the legal practitioners interviewed for this thesis argues that 'there's no reason why you cannot have in absentia trials and then they shouldn't apply across the board. There is a lack of consistency if you have one court doing it, another not'.[79] Therefore, the importance of guaranteeing a homogeneous and consistent system of criminal justice should guide the decision on whether to hold in absentia proceedings and interpret them as legally possible.

This argument seems stronger than the previous one, but it implies that: (a) a procedural consistency exists in International Criminal Justice; and (b) procedural consistency should be maintained even for controversial proceedings (e.g. in absentia proceedings). However, both points are not necessarily correct because it is debatable whether they are part of the scope of International Criminal Procedure.[80] Regarding in absentia proceedings, the argument should be better phrased by specifying that consistency is not a goal per se in International Criminal Procedure, but it needs to be linked to common needs of international criminal tribunals. In other words, consistency might be a goal when different tribunals face similar cases, crimes, or procedural issues that would benefit from the conduct of in absentia proceedings.[81]

6.2.3. Exceptional

Despite the usefulness and legal possibility of international criminal proceedings in absentia, these proceedings must be understood as *exceptional*. This means that they cannot be used as the ordinary way of prosecuting international crimes and they cannot substitute traditional criminal proceedings. This aspect is fundamental for guaranteeing

[78] E.g. Interviews 10; 13.
[79] Interview 10.
[80] See Holá (2014, pp.187-207).
[81] E.g. Interview 10.

that they will have a future in International Criminal Justice as legitimate proceedings at the disposal of international criminal tribunals. Both the scholarship and the jurisprudence have recalled the exceptional nature of in absentia proceedings, and the general idea is that in absentia proceedings can be used when there are exceptional circumstances that occur in a specific case. For instance, it is argued that 'a trial in absentia is a procedure of exceptional nature considering the manner in which it interferes with the rights of the accused'.[82]

In *Ayyash et al.*, recalling the words of the former President Antonio Cassese,[83] the Trial Chamber said that 'a trial in an accused's presence is preferable',[84] and this is in the best interest of the defendant and the Tribunal.[85] Moreover, the Prosecutor noted that 'a trial in absentia is a discretionary proceeding of last resort'.[86] 'Discretionary' means that it is in the power of the Tribunal to decide whether to conduct a proceeding in absentia and 'it still lies within the discretion of the Trial Chamber to weigh and assess whether the test for trial in absentia has been satisfied'.[87] This element also emerges by looking at the linguistic discrepancy that exists between the English and French version of the Statute, whereas the former refers to a mandatory power and the latter to a discretionary one.[88] 'Measure of last resort' means instead to have the defendant present before the judges using all means at the disposal of the Tribunal, and only when all attempts have failed, it would be possible to rely on an in absentia proceeding. In the words of the Prosecutor at the STL, 'reasonable time should be afforded to complete all reasonable or necessary steps to effectuate the arrest and transfer of the accused'.[89] This careful consideration would prevent the judges to use the resources available to the Tribunal in a proceeding that is not worth the effort. This is illustrated by the Prosecutor when saying that 'before we embark upon that expensive process in the absence of defendants […] we have got to be clear and evidentially founded that we have reached a last resort'.[90]

As in the case of the 'possibility' of in absentia, the 'exceptional' nature of these proceedings refers to: (a) the criminal law theory that underpins these proceedings; and

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[82] *The Prosecutor v. Ayyash et al.,* STL, Request Oneissi Defence for Reconsideration (2012, para.5).
[83] *The Prosecutor v. Ayyash et al.,* STL, Order Pursuant to Rule 76(E) (2011, para.15).
[84] *The Prosecutor v. Ayyash et al.,* STL, Decision to Hold Trial In Absentia (2012, para.20).
[85] See ibid.
[86] *The Prosecutor v. Ayyash et al.,* STL, Prosecution's Submissions Rule 106 (2011, para.1). See also, *The Prosecutor v. Ayyash et al.,* STL, Hearing Pursuant to Rule 106 (2011, p.11).
[87] *The Prosecutor v. Ayyash et al.,* STL, Prosecution's Submissions Rule 106 (2011, para.6).
[88] Ibid.
[89] Ibid., para.7.
[90] Ibid., para.1. See also *The Prosecutor v. Ayyash et al.,* STL, Hearing Pursuant to Rule 106 (2011, pp.12-13).

(b) the rules that should govern them. The former aspect entails a reflection on the relationship between in absentia proceedings and International Criminal Justice in, and between in absentia proceedings and other international criminal proceedings. When confronted with International Criminal Justice, in absentia proceedings appear to have a secondary, subordinate role. Indeed, they are used only when the defendants are absent from the proceeding, and there is no other possibility to prosecute the crimes committed. They are subordinate because, as already discussed in Chapter 1, the conditions under which in absentia proceedings can be used are quite specific, and precise requirements must be met before holding an in absentia proceeding.[91] As argued in *Ayyash et al*., 'while it is acknowledged that the Statute and Rules do provide for trials in absentia, these must be as a last resort only and with due regard paid to all fair trial rights guaranteed to an accused'.[92]

Looking at the relationship with other types of international criminal proceedings, in absentia proceedings play a secondary role because the general rule is that the defendant should be present. This means that when an international criminal tribunal prosecutes international crimes, first of all, it uses an ordinary criminal process with a present defendant, and only when this is not possible, it might consider an in absentia proceeding. Therefore, in absentia proceedings are not the 'first choice' of international criminal tribunals, and they should never be.

Doing otherwise would have two negative effects: (i) it would undermine the legitimacy of international criminal courts; and (ii) it would create a discrepancy between the general principle of the defendant's presence in the proceeding and the practice of the tribunals. The legitimacy of international criminal tribunals would be affected because the international community would perceive them as incapable of guaranteeing the defendant's presence at trial and able to transform exceptional proceedings into ordinary practices for the prosecution of international crimes. International criminal tribunals that conduct in absentia proceedings (e.g. the STL) already suffer a diminished trust by the public opinion, and they have been subject to numerous criticisms for supposedly lacking legitimacy in their mandate and work.[93] An indiscriminate use of in absentia proceedings would make this situation worse, by confirming the negative opinion about these courts and jeopardising the possible future support for these proceedings.

The exceptionality of in absentia proceedings requires the creation of specific

[91] See Chapter 1, Subsections 1.3.1. and 1.3.2.
[92] *The Prosecutor v. Ayyash et al.,* STL, Ayyash Motion Joining Sabra Motion (2012, para.5).
[93] See Jordash and Parker (2010, p.489); Jenks (2009, p.62).

rules of procedure and statutory provisions that improve the conduct of proceedings in the defendant's absence. Moreover, it means that additional procedural safeguards should be put in place to strengthen the protection of the absent defendant and the legitimacy of the work of the tribunal. This is also one of the aims of the RPE of the STL, i.e. 'making resort to in absentia trials exceptional only'.[94]

The exceptional nature of in absentia proceedings is also confirmed by the legal practitioners interviewed for this thesis.[95] In their view, these proceedings should be available to international criminal tribunals but only as proceedings of 'last resort'[96] to be used 'sparingly'[97] and under specific circumstances.[98] Therefore, in absentia proceedings should not be put at the same level as ordinary proceedings, and as a consequence, they should follow precise rules that would permit international criminal tribunals to deal with this exceptional case.

Two interesting points emerge from the approach adopted on the topic and the justifications advanced by the interviewees. First of all, there is a general feeling of caution that surrounds the interviewees' opinions. This means that even those who favour in absentia proceedings are prompt in identifying these proceedings as exceptional choices triggered by an exceptional event. In this sense, they argue that 'the concept of trials in absentia should be viewed as an exception to the normal criminal process, which is with the accused in detention and the accused in custody'.[99] Therefore, in absentia proceedings are seen as proceedings 'out of the ordinary', conducted by international criminal tribunals as an unusual element in International Criminal Procedure. However, this is just one of the two meanings attached to the exceptional nature of in absentia proceedings. Indeed, other interviewees say that through in absentia proceedings there would be a solution to the problem of the lack of an arrest or the incapacity of the tribunal to bring an absent defendant to court.[100] As discussed in Chapter 1, in absentia proceedings would be an alternative solution to the question of the prosecution of an absent defendant.[101]

Second, an interviewee emphasises that the exceptional nature of in absentia proceedings should not hinder the possibility to reverse the process to an ordinary one,

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[94] STL, Explanatory Memorandum (2009, para.39).
[95] E.g. Interviews 03; 07; 10; 12; 14; 15.
[96] Interview 15.
[97] Interview 07.
[98] E.g. Interview 10.
[99] Interview 07.
[100] E.g. Interview 15.
[101] See Chapter 1, Subsection 1.3.3.

once the circumstances of the case have changed.[102] In other words, 'the fact that the trial starts in absentia does not necessarily mean that a search for the accused has to relax after a while'.[103] Linked to the need for continuous efforts to locate the absent defendant (especially when fugitive), other legal practitioners express concerns regarding the use of in absentia proceedings, even if as exceptional proceedings. For instance, one argues that this would be the proof of 'giving up on something that should be the norm',[104] i.e. the arrest of the defendant. Another is even stricter in his/her approach and says: 'I do not like this game. You know why? You have the principle, and you have the exceptions. Sometimes the exception becomes the principle, like here at the STL. You have five accused, so you have five exceptions. And you forget about the principles'.[105]

In conclusion, the interviewees' opinions refer to two meanings of being 'exceptional' for in absentia proceedings. One is the fact that they are unusual proceedings that need to be used only under specific circumstances. This means that they will always have to be understood as a 'last resort' of international criminal tribunals. The other meaning refers to the use of in absentia proceedings as solutions to a procedural problem (i.e. the defendant's absence) that otherwise would create a deadlock in the work of international criminal tribunals. Here, the exceptional nature of in absentia proceedings would guarantee that these proceedings can operate temporarily to address the issue, but then the situation should return to its ordinary course of events (i.e. having an ordinary proceeding with a present defendant).

6.3. Policy Recommendations

As discussed in Chapters 2, 3, and 4 of this thesis, international criminal courts need to overcome numerous issues that emerge from the theory and practice of in absentia proceedings. However, the result of these efforts has not always been satisfactory, and many questions have been left unanswered. Although international criminal judges can propose an innovative interpretation of the existing rules, there is a need for a structured set of policies that the courts can use when the rules are not sufficient or when they have to decide a particular procedural issue.[106] As the scholarship underlines, 'those countries

[102] E.g. Interview 07.
[103] Ibid.
[104] Interview 13.
[105] Interview 05.
[106] See Mundis (2000).

which accommodate trials in absentia, impose positive obligations on the State to exercise diligence and care during such trials'.[107]

The policy recommendations presented in this Section follow the structure of an international criminal proceeding, and they seek to tackle the main issues emerging from the practice of in absentia proceedings. Therefore, the recommendations are divided among the pre-trial, trial, and post-trial phases, and they cover various procedural elements that characterise international criminal proceedings in absentia. The proposed recommendations derive from the combination of the study of the literature and jurisprudence done in the previous Chapters of this work and the analysis of the opinions of the legal practitioners interviewed for this thesis. In particular, three preliminary points emerge from the interviews that will also guide the analysis of the following Subsections.

Future in absentia proceedings 'should be part of the general process of justice'.[108] Therefore, they should be available to international criminal tribunals that will decide to tackle the issue of the defendant's absence by relying upon a proceeding in absentia. This argument confirms the positive understanding of in absentia proceedings by some interviewees. Moreover, it also reinforces one of the arguments advanced in this Chapter, i.e. that in absentia proceedings are legally possible in International Criminal Justice.

The employment of in absentia proceedings by international criminal tribunals can be a good starting point for a future regulation of the phenomenon.[109] The experience of these tribunals shows how in absentia proceedings can be tailored to the specific needs of the case at stake. For an interviewee, even if in absentia proceedings might still be contested in the future, 'they would be increasingly used',[110] and 'this is the tip of an iceberg'[111] because 'the international community will see that, broadly speaking, it worked relatively well'.[112] Not all legal practitioners agree with this position; nonetheless, they argue that in absentia proceedings will still have a future based upon the models developed by international criminal tribunals in the past.[113] But this model needs to be 'more closely defined',[114] for instance looking 'at what the rules

[107] Cassim (2005, p.303).
[108] Interview 01.
[109] E.g. Interviews 01; 02; 06.
[110] Interview 02.
[111] Ibid.
[112] Ibid.
[113] E.g. Interviews 06; 16.
[114] Ibid. Accord Interview 14.

are in national jurisdictions. It needs to look at how and when the ad hoc tribunals have permitted it. And it needs either judicial or statutory regulation'.[115]

This argument indicates the willingness to build upon past experiences, keeping the good practices developed by international criminal tribunals when dealing with in absentia proceedings.[116] This argument also supports the idea advanced in Chapter 2 of this thesis that international criminal courts have created good practices to overcome the procedural issues emerging from the implementation of the rules on in absentia proceedings.[117]

However, past models and experiences might not suffice to legitimise a future use of in absentia proceedings. In this sense, an interviewee highlights the gaps and errors that have emerged from past cases, particularly at the STL.[118] For instance, the STL is identified as a 'major failure'[119] due to its lengthy proceedings and debated legitimacy.[120] Therefore, the examples set by international criminal tribunals should be assessed carefully, and efforts should be made to improve the use of in absentia proceedings by reforming their regulatory framework.[121] In particular, important suggestions are made about reviewing in absentia proceedings to improve their expeditiousness and how evidence is discussed in court.[122] Indeed, these are some of the crucial criticisms mounted against the STL experience, and in this sense, 'the more expensive and the slower we are, the less effective and the less credible we are'.[123]

6.3.1. Proposals for the Future

This Subsection explores the content of the policy recommendations proposed in this thesis. In particular, it presents the recommendations divided per phase of the proceeding (i.e. pre-trial, trial, and post-trial), focusing on some relevant procedural aspects highlighted in Chapters 3 and 4 of this thesis.

The legal practitioners interviewed for this thesis have advanced some ideas on how these policy recommendations should look like and what their content should be.

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[115] Ibid.
[116] For instance, in Interview 02, it is argued that 'in general it will be considered a positive development, a useful development in the context of mass crimes'. In interviewe16 it is added that 'the question is: we must apply those rules. And they exist. All these rules exist. We just have to apply them'.
[117] See Chapter 2, Subsections 2.2.1., 2.2.2., 2.2.3.
[118] E.g. Interview 14.
[119] Interview 04. Accord Interviews 05; 13.
[120] E.g. Interview 04.
[121] E.g. Interviews 06; 07; 13; 14.
[122] E.g. Interview 14.
[123] Interview 13.

In particular, interesting points emerge about the conceptual understanding of these recommendations (i.e. their qualification) and their specifics (i.e. their characteristics in each phase of the process). As already mentioned, when discussing the need for a reform of the regulatory framework of in absentia proceedings, an interviewee argues that in absentia proceedings should be 'more broadly available to all international courts'.[124] However, their rules need to change and 'need to be much stricter, much more detailed',[125] and also they should provide for 'solid safeguards'[126] perhaps following 'protocols of best practice'.[127] Therefore, the subsequent question is what type of rules international criminal tribunals should adopt or how these courts should reform the existing provisions on in absentia proceedings to improve their regulatory framework.

A first idea is that the future rules should make clear the distinction between in absentia proceedings and ordinary proceedings.[128] Because the former are exceptional proceedings triggered by specific circumstances, their rules should reflect this peculiarity and promote a proceeding that distinguishes itself from others. For instance, the interviewees refer to the need to create rules that speed up the process,[129] acknowledging that the proceeding might be subject to a retrial.[130] Moreover, future rules should allow international criminal tribunals to continue their search for the absent defendant, without providing the courts with an excuse not to do it.[131]

This argument seems to be valid, especially if one considers the criticisms mounted against in absentia proceedings, their qualification as exceptional proceedings, and the need to overcome the deadlock of an international criminal case through the use of these proceedings. Therefore, the change and improvement of the rules on in absentia proceedings would guarantee that they achieve the effectiveness that the ordinary proceedings lack when the defendant is absent. However, especially when referring to a 'shorter' and 'quicker' process, some concerns might arise about the legitimacy of these proceedings and their compatibility with the IHRL standards discussed in Chapter 1 of this thesis.[132] For instance, issues might emerge for the possible violation of the defendant's right to a proper defence and the creation of unequal treatment between

[124] Interview 10.
[125] Interview 10. Accord Interviews 01; 03; 04; 05; 07.
[126] Interview 14.
[127] Interview 10.
[128] E.g. Interview 04.
[129] E.g. Interviews 04; 06; 12; 13; 14; 16.
[130] E.g. Interview 14.
[131] E.g. Interviews 05; 08.
[132] See Chapter 1, Subsection 1.3.2.

defendants tried in absentia (where there is a summary process) and those tried in ordinary proceedings (where the process is complete). Thus, the request for a more expeditious proceeding should be balanced carefully with other important principles.

Another significant point is that the proposed recommendations should consider the debated legitimacy of in absentia proceedings and the fact that these proceedings are highly controversial.[133] A legal practitioner interviewed for this thesis feels that the use of in absentia proceedings has so far overlooked the fact that there they are entirely different types of proceedings. For instance, little or no attention has been given to the impact that in absentia proceedings have on the absent defendant,[134] and the fact that the process dynamics are different is one essential party is missing. Therefore, 'these procedures need to be streamlined and focused, and there should be an acknowledgement that the absence of the accused must bring about changes both in the way the Prosecutor approaches this case and in the way you are seeking the results and the way you are reaching them'.[135]

As analysed in Chapter 4, this is a crucial aspect of in absentia proceedings, which requires a thorough review.[136] Indeed, it relates to the problematic legitimacy of in absentia proceedings and how the scholarship sometimes perceives these proceedings negatively because of the disregard that exists in their practice for the consequences of the defendant's absence for the rights of the Defence. Therefore, the future regulatory framework of in absentia proceedings should consider this element carefully and include safeguards that guarantee adequate protection to the Defence's interests.

6.3.1.1. Pre-Trial Phase

In the pre-trial phase, an international criminal proceeding in absentia is still in its embryonic phase, and as discussed in Chapter 3, here it is important to consider how the tribunal notifies the suspect, allows a proper defence, and confirms the charges against the person.[137] Therefore, the focus of the policy recommendations included in this Subsection is on: (a) the notification to an absent suspect; (b) the protection of the rights of the Defence; and (c) the modalities of the hearing for the confirmation of the charges.

[133] E.g. Interviews 05; 11.
[134] E.g. Interview 12.
[135] Interview 11.
[136] See Chapter 4, Subsection 4.2.2.
[137] See Chapter 3, Subsection 3.2.1.

The issue of the notification is one of the most complex aspects of international criminal proceedings in absentia.[138] There is an intense debate over the standard that international criminal tribunals should follow and the test that needs to be met for confirming the lawfulness of the notification. For instance, some think that in *Ayyash et al.* the absent suspects are aware of the proceeding and the charges and that it is impossible that they do not know.[139] It might be true that, in a globalised world, fugitives know about a proceeding conducted against themselves. However, the use of in absentia proceedings imposes a careful application of criminal procedural rules. A tribunal needs to determine with a high level of certainty that the absent suspect is aware of the process and the charges. This means that the Tribunal cannot rely upon presumptions on the awareness of the person, but it must follow precise criteria to satisfy this condition of the process and permit a subsequent conduct of a trial in absentia.

The need for a precise set of rules governing the notification to an absent suspect is also confirmed by the legal practitioners interviewed for this thesis.[140] They posit that the creation of new provisions or improvement of the existing rules 'would be a kind of improvement in the future',[141] permitting international criminal tribunals 'to specify very, very clearly what was really made to notify to the accused just in person the indictment and the charges against him'.[142] This exercise would require precision and completeness, 'specifying absolutely every step of the notification, and what was made or not made to get the accused'.[143] As for the details of these rules, there is no consensus among the interviewees, but they advance some interesting ideas that support the arguments analysed in Chapter 3, Subsection 3.2.1. In particular, attention is given to the threshold that should be met for the notification and its modalities (i.e. whether personal or public). For instance, an interviewee argues that 'only personal notification of the proceedings against the accused is enough to allow for in absentia proceeding'.[144] Another thinks that 'you have to make sure that you use all possible ways of communication to inform the accused that there was an arrest warrant, that there are charges brought against him, and that he is going to face a trial in absentia'.[145] Therefore, the cornerstone of the notification to absent suspect would be to guarantee

[138] See ibid.
[139] See the expert opinions analysed in Chapter 3, Subsection 3.2.1.
[140] E.g. Interviews 01; 02; 04.
[141] Interview 01.
[142] Ibid.
[143] Ibid.
[144] Interview 02.
[145] Interview 04.

that an international criminal tribunal has exhausted 'all the ways of informing the accused before proceeding to trial'.[146]

Drawing upon the analysis conducted in Chapters 2, 3, and 4 of this thesis and the expert opinions of the legal practitioners interviewed for this work, this author argues that international criminal tribunals should apply a two-phase procedure for the notification to an absent suspect. One phase would deal with the content of the notification; the other would relate to the modalities of the notification. This action would resemble the test applied at the STL, i.e. the 'all reasonable steps' test.[147] With this test, the judges evaluate the circumstances of the case and the efforts of the Prosecutor to notify the absent suspect, and they subsequently decide whether the required conditions for a trial in absentia are met. This is considered a valid test because, as discussed in Chapter 3, it permits the tribunal to assess the attempts for the notification scrupulously, setting a high threshold for the Prosecutor (i.e. to make all reasonable steps).

First of all, the Tribunal needs to verify that the notification is valid. This means that the notification includes all the necessary information as prescribed in the provisions of the court. Indeed, only a complete document can form the basis for a valid notification. If the document for the notification lacks crucial information (e.g. details of the charges, reference to the evidence supporting the charges, date of the first hearing of the proceeding), the notification itself cannot be considered done appropriately. Indeed, the absent person needs to have full knowledge of the charges and the consequences of the absence from the proceeding. In this sense, the charges must be detailed, and the person needs to be informed about the timeline of the proceeding and the following procedural steps (e.g. the fact that after the pre-trial phase concludes, the trial begins). Moreover, the suspect needs to be aware of the possibility to be tried in absentia if the absence persists after holding the hearing for the confirmation of charges. This is a crucial point for the notification as the Tribunal needs to verify that the absent suspect is indeed aware not only of the existence of a proceeding but also of the procedural consequences derived from the absence.

Therefore, the notification needs to provide the suspect with sufficient information about: (a) the charges, the process, and the tribunal proceeding; (b) the right to be present at trial; (c) the possibility to be represented by a defence counsel of the person's choice; (d) the possibility to waive the right to be present; (e) the fact that if the

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[146] Ibid.
[147] For an analysis, see Chapter 3, Subsection 3.2.1.

absence continues, the suspect might be tried in absentia; and (f) the right to participate in the proceeding at a later stage, despite the fact that the process has already started in absentia. The right to a retrial should not be indicated in the notification because, as it will be explained in Subsection 6.3.2.3., this right should be granted only to an absent defendant who demonstrates a lack of proper notification or awareness about the charges and the proceeding.

Once the document of the notification is ready, it should be duly notified. At this stage, the judges need to evaluate the attempts made by the Prosecutor and the modalities of the notification.[148] These must be concrete, and they cannot leave room for doubts about the exhaustion of all possibilities to notify the suspect properly. The Prosecution can use two methods of notification: (i) personal notification; and (ii) notification through public announcements. The first type of notification should be served in all the relevant places in which the suspect is known to have lived, have had a family, have worked, have resided or had personal connections. This means that the personal notification needs to be served not only in the territory where the crimes have been committed or of which the person is a citizen. The notification must be carried out also in other countries where there are reasons to believe that the suspect can be located (especially if he/she is a fugitive). To this end, national authorities can help the Tribunal, but cooperation can also come from international institutions and agencies such as Interpol. In this way, the Tribunal can try to notify the charges and the indictment in more than one country, without excluding any State.

The notification through public announcements needs to be done using various media and throughout an extended period. In particular, it should include announcements done through television, radio, newspapers, social media, and the Internet. Moreover, the announcements should be repeated regularly within a certain period of time (e.g. 6 months) to satisfy the Tribunal that the indictment and the charges have been publicised adequately. This would guarantee the effectiveness of the process and a widespread knowledge of the charges among the public, increasing the possibility for the absent suspect to be informed and, in the case of fugitives, to be arrested thanks to the information that might be gathered from the general public.

Two important aspects must be considered for notifications:[149] (i) the need to guarantee that all efforts have been made to notify the charges to the suspect;[150] and (ii) the necessity to continue to search for the person, especially when at large, and the

[148] See Chapter 3, Subsection 3.2.1.
[149] As discussed in Chapter 3, Subsection 3.2.1.
[150] This would happen with the application of the ‘all reasonable steps’ test recalled above.

Prosecution should not stop its attempts after the 'all reasonable steps' test has been satisfied.[151] Even if the Prosecution has been able to notify the charges and the indictment according to the provisions of the Tribunal, it has to continue to try to arrest the defendant and bring him/her in court. This is a pivotal element that should always be present in the policy of international criminal tribunals. To check this follow-up action, the Prosecution should report to the Tribunal on a regular basis about the attempts made to arrest the defendant. For instance, this is partially done during the status conferences held for *Ayyash et al.* at the STL.[152] In this way, the Tribunal can guarantee the effectiveness of its action and can use in absentia proceedings as exceptional proceedings, avoiding possible criticisms about the legitimacy of its work and the lack of willingness to bring perpetrators to justice.

Additional precaution must be taken when national authorities attempt to locate fugitives, but they lack the resources and capacity to carry out this task. Precaution should also be exercised when the location of a suspect becomes difficult due to the political and social instability of a country or for the resistance of a certain part of the population or national authorities. Before deciding to conduct a proceeding in absentia, the Tribunal must verify that reasonable time has been afforded to national authorities to search the suspect and arrest him/her. The Prosecutor at the STL has also highlighted this aspect when saying that 'given that a trial in absentia is a measure of last resort and in order to protect the rights of the accused, reasonable time should be afforded to complete all reasonable or necessary steps to effectuate the arrest and transfer of the accused'.[153]

As for the protection of the rights of the Defence, if the suspect is absent during the pre-trial phase, the Tribunal needs to appoint a Defence team that will represent the interests of the person and will act on his/her behalf. In this regard, either through the help of a Defence Office (if it exists at that tribunal) or the evaluation of the pre-trial judge, the Tribunal needs to choose the counsels before the hearing for the confirmation of the charges and for deciding to hold the trial in absentia. Indeed, it is important that the suspect, although absent in this first phase of the proceeding, is fully represented and a competent counsel protects his/her interests.

The legal practitioners interviewed for this thesis make similar considerations. In particular, they argue that for in absentia proceedings there is a presumption (they called

[151] This supports the idea that in absentia proceedings are exceptional, and the Tribunal should guarantee the defendant's presence in the proceeding.
[152] See Rule 94 STL RPE.
[153] *The Prosecutor v. Ayyash et al.*, STL, Prosecution's Submissions Rule 106 (2011, para.7).

it ‘propaganda’) according to which the Defence has full access to all the facilities and the resources needed; but ‘that is not true’.[154] For instance, at the STL the absent suspect has no defence counsel in the pre-trial phase and, once appointed in the later phases, the counsel cannot contact the defendant.[155] In this sense, some interviewees posit that the defence counsel should be appointed since the beginning of the proceeding (i.e. in the pre-trial phase)[156] to guarantee full equality of arms to the parties, both concerning an effective representation and the submission of evidence.[157] The defence counsel should also be able to freely contact the absent person (even when this is a fugitive) to build up the Defence strategy already in the pre-trial phase.[158]

The right to a defence would also be guaranteed by the involvement of the Defence Office (as it has happened at the STL). This is considered an essential element of the pre-trial phase.[159] However, and quite interestingly, it is argued that this fact would be true not only for in absentia proceedings but for all international criminal proceedings,[160] although some scepticism accompanies the future creation of a Defence Office in all international criminal tribunals[161] and the potential effectiveness of the action of this organ.[162]

Another important point is that the defence counsel appointed to the absent defendant should be able to guarantee a high-quality representation.[163] As one interviewee puts it, this means that ‘because the clients are not present, someone has to be watching, supervising, controlling, and reacting. And I think this is the biggest problem’.[164]

Therefore, two elements emerge from the considerations outlined above and in Chapters 3 and 4 of this thesis. The first is the need to appoint a defence counsel irrespective of the presence in the courtroom of the representatives of a Defence Office. Although innovative in its functions and role, the Defence Office cannot be considered as a valid substitute of a defence counsel for the absent defendant. The person needs always to be represented by one or more defence counsels that act in his/her specific

[154] Interview 05.
[155] These issues have been analysed in Chapter 4, Subsections 4.2.1. and 4.2.2.
[156] E.g. Interviews 01; 02.
[157] E.g. Interview 01.
[158] E.g. Interviews 01; 16.
[159] See Chapter 3, Section 3.2.
[160] E.g. Interview 05.
[161] E.g. ibid.
[162] E.g. Interview 15.
[163] E.g. Interview 04.
[164] Ibid.

interests and not in the 'collective' interests of all defendants, especially when these are tried in a joint proceeding.

A second element is that through the appointment of one or more defence counsels, the defendants should receive a proper Defence, including the possibility to contest the decision to hold the trial in absentia. In other words, the function of the chosen defence counsels would be: (a) to start building up the Defence case since the pre-trial phase; and (b) to challenge the opportunity to hold a trial in absentia. Only an appointed defence counsel can perform this second function fully. The Defence Office cannot substitute this professional, and it can only be considered as an organ that works in support of the single counsels appointed.

Finally, turning to the conduct of the hearing for the confirmation of charges, the model derived from the experience of the ad hoc tribunals and based upon the provision of Rule 61 ICTY and ICTR RPE, seems to be the most satisfactory. When the suspect is absent from the proceeding before the charges have been confirmed, international criminal courts can hold a hearing in absentia where the Prosecutor discusses the charges and the judges decide whether to confirm them and refer the case to the Trial Chamber. At this hearing, the defence counsel must be present, and he/she must be able to present his/her case against the Prosecution. Moreover, the tribunal must pay particular attention to the procedural actions that have been taken previously, and the judges need to verify the validity of the notification of the charges to the absent suspect and the fact that it can be inferred that the person is fully aware of the proceeding. This verification should be done by controlling the content of the notice served on the suspect (or done publicly) and checking that the requirements for a lawful notification are met (e.g. correct wording and language/translation, complete indication of the charges, complete information on the proceeding, full acknowledgment of the consequences for non-appearance in court).

The hearing for the confirmation of the charges in absentia does not have the same function as a trial in absentia, and it does not determine the guilt of the absent person.[165] It is a hearing held in the interest of justice to guarantee that the suspect's absence does not hinder the beginning of the prosecution of crimes.[166] The legal practitioners interviewed for this thesis propose that in this hearing (and in the entire pre-trial phase) there should be a judge with strong investigative powers, who helps the

[165] For an analysis, see Chapter 3, Subsection 3.2.2.
[166] See Friman (2009a, p.494); Nagan (1995, p.161).

Prosecutor in findings the relevant evidence for the case.[167] This is an element that is already present at the STL, but that has not been well used so far. In the view of a legal practitioner, 'unless you're going to have more of an investigative magistrate model, much more than an adversarial model, I don't see trials in absentia as being something that would be particularly looked upon very favourably'.[168] Therefore, the presence of an investigative judge in the pre-trial phase might guarantee more legitimacy and support for the entire process.

However, this judiciary activism would not only be beneficial for the pre-trial phase (and the confirmation of the charges in absentia) but also for the other phases, especially the trial. In this sense, some interviewees think that a more proactive judge might be helpful in selecting the relevant evidence and having a more expeditious proceeding.[169] The presence of an investigative judge would speed-up the process, and therefore, would be in line with the general need to reform the expediency of in absentia proceedings recalled in Subsection 6.3.2. of this Chapter.

6.3.1.2. Trial Phase

In the trial phase, the relevant recommendations pertain to: (a) the general conduct of a trial in absentia; (b) the possibility for the defendant to be excused from being present at trial for some hearings; and (c) the alleged death of a defendant.

As for the general way in which trials in absentia should be conducted, a preliminary recommendation concerns the need to establish a time limit for the suspension of the proceeding between the confirmation of the charges (even in absentia) and the beginning of a trial in absentia. This idea is supported by a legal practitioner interviewed for this thesis who says: 'I like your idea about setting a time limit'.[170] This limit would permit the Prosecutor to have enough time to conduct thorough researches of the absent defendant (if fugitive) but at the same time would not let the absence hinder the proceeding for long as it has happened in the past (e.g. at the ICTY and ICC).[171]

There are no indications in the literature and case law on the length of this limit, and this author has suggested a timeframe of five years because this seems a reasonable period to allow the Tribunal to conduct its searches and checks before starting a trial in

[167] E.g. Interviews 01; 07; 15; 16.
[168] Interview 15.
[169] E.g. Interviews 10; 15.
[170] Interview 03.
[171] E.g. ibid.

absentia. The interviewees have had different reactions on this point, and one says that five years 'seems reasonable',[172] especially in the context of mass crimes like the ones at the ICTY and ICC;[173] another thinks that it is 'quite long',[174] because some evidence might be lost in the meanwhile;[175] but he/she refrains from indicating a precise duration, because 'it depends on the circumstances',[176] and 'you are always going to have a case by case basis analysis to conduct'.[177]

Another recommendation would be to rely upon the examples of good practice that come from the experience of the STL and the standards developed by the ECtHR. In particular, a good rationale for holding a trial in absentia can be found in art. 22 STL St.; this can be used as a starting point for the future development of the legislation of international criminal tribunals on the topic. For the entire duration of the trial in absentia, the tribunal must guarantee that the fairness of the proceeding is upheld and the absent defendant's rights are protected. This means that a defence counsel should represent the person, the Defence needs to have access to all evidence, and it needs to have the same resources for investigation as the Prosecution. In particular, this last issue is the one that the legal practitioners interviewed for this thesis have underlined the most. Indeed, in their opinion, the conduct of in absentia proceedings (as it has been done at the STL) is flawed when the defence counsel has not been able to get access to the same amount of investigative resources as the Prosecutor, and they have experienced many challenges in building a positive case for their clients.[178]

The existence of a Defence Office seems to have facilitated the work of the Defence teams and their strategies, and therefore, it is a welcome innovation for international criminal proceedings. However, the lack of any contact and exchange of information between the counsels and the absent defendant has further complicated their capacity to advance a positive case and access to the same amount of information as the Prosecutor.

Strictly related to this point is also the problem of the prohibition that exists at the STL for the defence counsels to have any contact with the absent defendant. Although justified for enhancing the work of the Tribunal and the chances to apprehend fugitives, the provision of art. 8(E) STL Code of Conduct is a critical issue for

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[172] Ibid.
[173] E.g. ibid.
[174] Interview 04.
[175] E.g. ibid.
[176] Interview 04.
[177] Ibid.
[178] See Chapter 4, Subsection 4.2.2.

permitting a proper, full defence to the absent defendant.[179] Indeed, if the defence counsels are under an obligation to report to the Tribunal any contact they have with the defendants, there will be no incentive for the fugitives to participate in the proceedings even at a distance. Moreover, this fact would create additional lack of information for the defence counsels as, for fear of being located, the defendants will not contact them with relevant evidence for the case. For these reasons, the policy recommendation for the trial phase is that the defence counsel should be free to have all necessary contact with the individuals they assist and represent, and no bar should be imposed by the tribunal.

Turning to the cases of partial in absentia, the approach taken by international criminal tribunals for defendants who are sick, disruptive, or unwilling to be present seems to be correct. Indeed, the very nature of the right to be present at trial permits the defendant and the tribunal to limit this right and allow a partial absence.[180] This happens already in the pre-trial phase, with the hearing for the confirmation of the charges in absentia. Therefore, partial in absentia should also be allowed during the trial phase.

However, it is important to draw some distinctions between the defendant's partial absence due to health conditions or disruptive behaviour, and the absence due to absconding or waiver of the right to be present. In the first two cases, the tribunal should continue the trial based upon a decision of the judges on the defendant's circumstances. In the other two cases, instead, the tribunal needs to verify that the defendant is fully aware of the consequences of the waiver of the right to be present at trial, and there is no unequal treatment among the defendants. In this sense, the tribunal should assess that the waiver of the defendant is explicit, free, and voluntary and the person is fully informed of the fact that the trial will proceed in absentia.

Moreover, the judges should allow the defendant's partial absence based on the request to be excused from being present at trial always and with no distinction concerning the duties that the defendant has to perform. As discussed in Chapter 3, it would not be legitimate to give the possibility to be partially absent only to some defendants because they have certain duties due to their public role as heads of State or high officials of a government.[181] If the tribunal permits partial trials in absentia based on the defendant's request, these should be granted to all defendants.

Finally, when in a trial in absentia there is the news of the death of an absent defendant, the tribunal should rely upon specific and clear criteria to assess it. In

[179] See Chapter 4, Subsections 4.2.1. and 4.2.2.
[180] See Chapter 1, Subsection 1.3.2.
[181] See Chapter 3, Subsection 3.3.1.

particular, the judges need to establish: the standard of proof; the burden of proof; the content of the evidence and its sources; and the consequences of the declaration of the death of the person. The standard of proof should be the 'beyond a reasonable doubt'. The 'balance of probabilities' as referred to by the STL in its decisions is not satisfactory, and it does not represent the 'high standard' required. The burden of proof then needs to be established and put on the Defence. This fact would guarantee that the Prosecutor is not under an aggravated burden to prove the death of the defendant, and the Defence needs to prove a fact that is in its interests for achieving the termination of the proceeding. The decision on the death must be taken considering the evidence brought by the parties (especially the one that has the burden of proof) with a holistic approach. The judges will evaluate it not only looking at written official documents but also at other types of evidence when these are not available. In this way, the issue of a death certificate is important but not essential. The decision can be based on additional evidence in the form of DNA tests, coroners' reports, and other official documents.

Finally, if the death of the defendant is verified, the tribunal must terminate the proceeding due to the ratione personae jurisdiction principle, and the indictment needs to be modified accordingly. However, the termination of the proceeding cannot be 'without prejudice', i.e. with a possibility for the tribunal to reopen the case if future evidence is submitted that proves that the defendant is still alive. The termination must always be final and absolute, and no reopening is possible. Indeed, because the Tribunal has decided on the defendant's death relying upon a 'beyond reasonable doubt' test, this indicates that the decision has been taken on a strong determination over the facts of the case, and this would be undermined if not final.

6.3.1.3. Post-Trial Phase

The policy recommendations for the post-trial phase concern: (a) the way of conducting the appeal; (b) the execution of the sentence; and (c) the way of conducting a retrial.

The appeal in in absentia proceedings should follow the same standards as in the previous phases. In particular, the absent defendant should be protected under the principle of fair trial, being represented by a defence counsel and having access to the evidence of the Prosecutor. Therefore, the existing provisions of international criminal tribunals that refer to the application of the same rules and standards in appeal as in the trial phase are correct. Indeed, it seems appropriate to have a symmetric conduct of the

proceeding in the appeal phase than in the trial phase because, although the appeal plays a different function than the trial, fairness must always be guaranteed.[182]

Once the proceeding has been concluded, the additional problem is the enforcement of a sentence, especially if the defendant is still at large is not in the custody of an international criminal tribunal. On this point, two observations can be made. The first relates to the civil consequences of a criminal conviction in absentia. If the absent defendant is found guilty, the victims can use this judgment to start a civil proceeding for receiving compensation for the damages suffered. This would have a double effect. On the one side, it would guarantee that the victims receive reparations despite the defendant's absence. On the other side, it would permit the victims to have some form of justice, not only with a conviction of the defendant but also with reparations.

A second observation regards the enforcement of the sentence once national authorities find the defendant. In this sense, the policy recommendation is that, under the general States' obligation to cooperate with international criminal tribunals, States should enforce the sentence issued in absentia. This means that they cannot refuse to give execution to a final judgment, even if in their legal systems in absentia proceedings are not permitted. Therefore, the enforcement of a sentence in absentia would come under the umbrella of States' obligations towards a tribunal. If they have signed and ratified a Statute, and in absentia proceedings are part of it, they have also agreed upon the enforcement of a sentence issued in absentia. Any refusal to do so should be censored. For instance, at the ICC the refusal to cooperate opens a procedure where the State is reported to the Assembly of States Parties (ASP), and subsequently, it can be reported to the UN Security Council.[183]

As discussed in Chapter 3, the retrial is one of the most complex issues of in absentia proceedings.[184] It is a fundamental element for the legitimacy of these proceedings, and therefore, the retrial will have to be included in future in absentia proceedings. However, the modalities of conducting the retrial and its content need to change.

In this regard, the legal practitioners interviewed for this thesis argue that the retrial should be regulated in the future following the same (or better) safeguards that

[182] The right to fair trial applies to the whole criminal proceeding and not just to some parts. See Ambos (2016, p.67).
[183] See Art. 87(5) and (7) ICC St.
[184] See Chapter 3, Subsection 3.4.3.

exist for instance at the STL.[185] This means that it is an essential procedural aspect of in absentia proceedings, and it cannot be excluded from the future regulatory framework of these proceedings. Moreover, there should be a review of the modalities for the submission of evidence in the retrial.[186] The legal practitioners say that future retrials in in absentia proceedings should allow the parties to decide which evidence is relevant in the retrial.[187] This is because the interviewees fear that the retrial, as it is currently conceived, might give too much decisional power in the hands of the judges that have to conduct it.[188] Finally, the retrial should be time-efficient.[189] This idea recalls the need for expeditiousness already discussed in this Chapter for future in absentia proceedings. Once again, the interviewees underline the need for a procedural measure that will guarantee an efficient proceeding, and that will make a clear distinction between in absentia proceedings (and the corollary of the retrial) and other ordinary proceedings in International Criminal Justice.

From the foregoing, this author's first recommendation concerns the need to rethink the function of the retrial. As it has been conceived at the STL, the retrial has the function of a new trial that can be asked by the defendant when present before the judges. In this sense, the criticisms on the opportunity to grant this right to an absent defendant expressed by the legal practitioners interviewed for this thesis seem to be correct. Indeed, if understood only as a re-proposition of the trial already conducted, the retrial fails to address the needs of both the system of International Criminal Justice and the tribunal that is conducting the in absentia proceeding. The retrial should be more than a simple copy of the trial, and it needs to carry the value that the ECtHR has acknowledged it in its jurisprudence. It has to become a real 'new and fresh determination of the merits of the case' because the defendant was not aware of the proceeding. Therefore, to fulfil the objectives of International Criminal Justice, the retrial should be allowed only when it is ascertained that the decision to hold a trial in absentia was affected by errors in the evaluation of the case.

The judges need to consider some elements: (a) whether the defendant was aware of the charges and the proceeding; (b) whether the procedural safeguards of the pre-trial phase have been respected (e.g. a proper notification to the absentee); (c) whether the in absentia proceeding has been legitimate and lawful (e.g. there have been no errors in the application of the procedural safeguards for the defendant); and (d)

[185] E.g. Interview 13.
[186] E.g. ibid.
[187] E.g. Interview 01.
[188] E.g. ibid.
[189] E.g. Interviews 14; 16.

whether the defendant has accepted the consequences of the absence voluntarily, i.e. the possibility to be tried in absentia.

A second recommendation concerns the conduct of the retrial itself. At present, there is no provision of an international criminal tribunal that clearly states the modalities to conduct a retrial. There is only a general indication in Art.22(3) STL St. where it is said that the defendant is entitled to this right if certain conditions are met.[190] However, no details are provided about the tribunal that needs to carry out the retrial (especially in the case of temporary courts such as the STL) and the specific chamber that will deal with it. This is an important gap in the existing legal framework on in absentia proceedings, and it risks to undermine the work of the STL and other tribunals that will use in absentia proceedings in the future. Indeed, the lack of clarity on such an important procedural element is worrying and reflects the many uncertainties present in International Criminal Justice about in absentia proceedings. In this regard, a general recommendation is that, when establishing a right to a retrial, international criminal tribunals have specific provisions that indicate how to conduct it and the subjects that will be involved (i.e. which tribunal and which chamber of that tribunal).

Going into the details of the retrial, it is posited that it is necessary to distinguish between temporary and permanent courts. If the tribunal is temporary, two different situations can occur. One is that the same tribunal conducts the retrial; and the other is that, after the tribunal has closed down, the retrial should be done by a residual mechanism that will be created by the UN. This seems to be the most appropriate solution, as the temporary nature of the tribunal would otherwise impede an effective exercise of the right to a retrial.

If the court is permanent (e.g. the ICC) the retrial can be conducted before the same court as its work has no temporal limit and it is not restricted. The retrial should be conducted before a different chamber than the one in charge of the previous proceeding. This would guarantee the impartiality of the judges towards the case and avoid a biased judgement.

[190] The provision states that 'in case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement'.

6.3.2. Implementation

One of the major difficulties that the advocated policy recommendations will encounter in the future is represented by their implementation.[191] In particular, besides the challenges for its formulation, the proposal of policies related to legal matters always presents the additional problem of the concrete application and acceptance by the targeted recipients. The scholarship has noted that when criminal law policies are to be implemented, there is a tension that emerges between the necessities of the legal system of reference and the external factors that run contrary to them.[192]

This is particularly true in International Criminal Law, where the implementation of policies and the changes to the legal framework are often subject to the decisions of States.[193] In many cases in the past, a good policy or practice has not been implemented because the States in charge of its approval have been contrary due to their opposing political or legal interests.[194] Therefore, when advancing policy recommendations for future in absentia proceedings, it is important to evaluate the real possibilities of their implementation.

As a preliminary consideration, the discourse on the implementation of the proposed policy recommendations should also include the view of the legal practitioners involved in in absentia proceedings. Their expert opinions would help to inform the discussion with a more insightful perspective, driven by the practice of in absentia proceedings. Moreover, this would guarantee a more comprehensive approach of the proposal for reform advanced in this Chapter because the ideas advanced on the implementation will reflect some of the perspectives of the legal practitioners interviewed for this thesis.

The interviewees focus their attention on: (a) the feasibility of the implementation of the policy recommendations by international criminal tribunals (e.g. the ICC); and (b) how these courts should adapt their legal frameworks for this implementation. There is no consensus on the idea that in absentia proceedings (even when improved through policy recommendations) will be accepted by international criminal courts. Some legal practitioners argue that the policy recommendations will be gradually implemented because there is already an opening towards in absentia

[191] See O'Toole (1986).
[192] See Barton and Johns (2012, p.80).
[193] See Imoedemhe (2016, p.208).
[194] On States' interests and policy making, see Barton and Johns (2012, pp.38-53).

proceedings at the ICC (alongside the STL).[195] However, this would happen only with a type of in absentia proceedings (i.e. partial or total in absentia proceedings due to absconding), and in any case, they will not call it 'trial in absentia'.[196] Therefore, the implementation of the policy recommendations might be possible but with some caveats. On the other side, some think that the implementation of the policy recommendations might be particularly difficult for a series of reasons. These go from the general diffidence that exists towards in absentia proceedings,[197] to States' opposition due to political unwillingness.[198]

These positions demonstrate that the implementation of policy recommendations for a future use of in absentia proceedings might be problematic. Indeed, despite some openings, there might not be enough support to make it happen concretely. However, it is not possible to exclude this because States might still decide to act in this regard.[199] For instance, this might happen given the recent developments in International Criminal Justice with the first total trial in absentia in modern history at the STL, the change of Rules of Procedure at the ICC that allow partial in absentia proceedings, and the continuous difficulties of international criminal tribunals (e.g. the ICC) to guarantee the defendant's presence in court.

Another relevant element is how international criminal tribunals will implement the policy recommendations. This question prompts some considerations on the adaptation of civil law/inquisitorial justice proceedings (i.e. in absentia proceedings) into mainly adversarial courts. For instance, some interviewees argue that at the ICC 'you will have a collision of cultures',[200] and therefore, 'any opportunity to amend the Treaty of Rome on that matter, I think it would be highly unlikely'.[201] Moreover, as discussed in Chapter 1, the concept of in absentia proceedings itself is varyingly defined, and this might bring additional issues.[202]

Therefore, there might be a major difficulty in implementing the policy recommendations due to a 'clash' of legal traditions and understandings of criminal justice. However, a part of the scholarship contests the existence of a rigid dichotomy adversarial/inquisitorial criminal justice for International Criminal Procedure, proposing

[195] E.g. Interviews 07; 12.
[196] E.g. Interview 07.
[197] E.g. Interviews 05.
[198] E.g. Interview 08.
[199] E.g. Interview 14.
[200] Interview 09. Accord Interview 15.
[201] Interview 09.
[202] E.g. Interview 14.

a vision in which both systems coexist.[203] In the same sense, a legal practitioner interviewed for this thesis argues that 'the international system cannot continue with this kind of antagonism',[204] and when one system (i.e. civil law) provides a solution to the defendant's absence, whereas the other does not, international criminal tribunals should consider it.[205]

Based on these initial reflections, other considerations emerge. A first point relates to the identification of who might implement the recommendations. The primary subjects will be States because when looking at the functioning of international criminal tribunals, usually States have control over the applicable rules and the proceedings that can be conducted.[206] Moreover, if we consider the ICC as the court of the future, States play an important role during the discussions that take place at the ASP.[207] In this context, States meet and decide on various issues, from budgetary matters to concerns on cooperation and the work of the Court.[208] As part of their meetings, they often debate on changes to the RPE or the Statute, and they approve or reject the proposals in this sense. For instance, this has been the case for the approval of Rules 134bis, ter, and quater ICC RPE on partial in absentia proceedings.[209] Beside States, other actors (e.g. NGOs) attend the ASP, and they can express their opinion on specific topics.[210]

This lively discussion would be an excellent venue for the implementation of the policies on in absentia proceedings because, despite the risks coming from the opposition of certain States to conducting these proceedings, there are also advantages derived from an open, pluralistic debate on the topic. For instance, this might happen when presenting policies on in absentia proceedings at the ASP as part of a specific State's proposal or as a general matter of concern for the Tribunal. Moreover, this would guarantee to clarify States' position on the topic and assess their support to future in absentia proceedings. Having said this, one should keep in mind that the ASP of the ICC is not always effective in its work[211] and, as the scholarship points out, its meetings can be politically-driven and they can exacerbate the debate on a problematic aspect or procedural mechanism of the Court without achieving a positive outcome.[212] Therefore,

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[203] See Ambos (2007).
[204] Interview 16.
[205] E.g. ibid.
[206] See Pocar and Carter (2013, pp.9ff.).
[207] On the relationship between States and the ASP, see O'Donohue (2015, pp.105-140); Schabas (2010, pp.1431-1456).
[208] See Art. 112 ICC St. For an analysis, see Schabas (2010, pp.1431-1456).
[209] See ICC ASP, Res. 7 (2013).
[210] See Struett (2008); Glasius (2002); Pace and Thieroff (1999).
[211] See O'Donohue (2015, pp. 109-114); Schiff (2008, pp.165-193).
[212] See Roach (2006, pp.12ff.).

the role of the ASP should not be overestimated, and it should be always be considered in light of the political (i.e. States' political interests) and legal (i.e. the Court's legal culture and framework of reference) features of the international criminal tribunal at stake.

Additional subjects that might be involved in the implementation of the policies are the judges and the parties that will participate in in absentia proceedings.[213] Indeed, the implementation of policy recommendations should also include those that will be directly affected by them. In this sense, it is important to remember that the effective implementation of policies passes through the actions of the parties that will have to use them in concrete cases.[214] This means that besides the change of provisions that might occur through the intervention of States, there is also a need to have a correct use of the policies in practice.[215] This will be possible only if the parties to in absentia proceedings are fully aware of the policies and their content and use them appropriately.

To this end, international criminal tribunals have to create detailed codes of conduct in which the policy recommendations along with other provisions on in absentia proceedings are enshrined.[216] These codes of conduct will represent another way of implementing the policies in practice. Indeed, they will help the parties in applying the new policies and finding a balance between their strategies and interests and the need to respect IHRL standards for in absentia proceedings. These codes of conduct would also permit the tribunals to supervise in absentia proceedings looking at the parties' perspective, sanctioning possible abuses. However, as it happens with the ASP, one should not overestimate the effects of codes of conduct and their weight in the work of international criminal tribunals.[217] Indeed, despite being part of the institutional framework of international criminal courts, these instruments so far have had little weight in the work of these tribunals [218] and they are considered 'subordinate legislation'.[219] This means that they can impose practices on some subjects and they provide for disciplinary sanctions if these practices are violated, but they are not adopted by all tribunals always.[220]

A second point relates to the place for the implementation of the recommendations, i.e. the tribunal that will be more likely to use in absentia

[213] This resembles the principle of inclusivity discussed by Findlay and Henham (2011).
[214] On the relationship between implementation and practice, see Betts and Orchard (2014).
[215] For instance, this has been the case with the disclosure of evidence at the ICC, see Caianiello (2010).
[216] On codes of conduct at international criminal tribunals, see Rohan (2017).
[217] See Bohlander (2000).
[218] See Rohan (2017, pp.42-43).
[219] Schabas (2006, p.89).
[220] See Rohan (2017, p.42).

proceedings in the future and to include the policies as part of its provisions. At first, one should consider all categories of international criminal tribunals, either permanent or ad hoc/special. In this sense, the implementation of the policies can take place in any international criminal tribunal that will use in absentia proceedings. Indeed, there is no difference for the necessity to use the recommendations and improve the system of in absentia proceedings, because, as already underlined, this is a common requirement of all international criminal courts.

However, an element that must be scrutinised is the effective capacity of different tribunals to implement the policies and the outcomes thereof. In this regard, it is posited that a permanent court, such as the ICC, will have more success in implementing the policy recommendations not for the existence of a more efficient process of law-making but because of the long-lasting nature of the tribunal. Indeed, a permanent court will have more time at its disposal to implement the policy recommendations, and it will also give more time to the legal practitioners working at the Court to familiarise themselves with the policies. In this sense, the temporal element of the nature of an international criminal tribunal is pivotal for guaranteeing better results and a proper implementation of the policy recommendations.

A third point for discussion is the timing of the implementation. The policy recommendations need to find a good timeframe within which States, international criminal tribunals, or specific parties implement them. This timeframe should be: (i) prior to the conduct of new in absentia proceedings (if they are not already ongoing); or (ii) as soon as possible while the proceedings are already conducted (as in *Ayyash et al*.). The closer the implementation of the recommendations, the better for in absentia proceedings. Indeed, this would avoid abuses and further criticisms.

The implementation can take place in the short or long term. This depends on the willingness of the subjects involved to apply the policies at relevant tribunals. For instance, based on the experience of the ICC, it is likely that this will take some time. Indeed, the general opposition to in absentia proceedings would create a debate on the topic that cannot be completed in one meeting of the ASP. The complexity of the topic and the procedural consequences for the work of international criminal tribunals are so important that States need time to discuss and ‘digest’ the possible changes to the system of international criminal proceedings. For instance, this has happened at the ICC for introducing the crime of aggression in the Statute.[221] Moreover, the implementation of policy recommendations on in absentia will take time also for the practical use of the

[221] See Kress (2018).

policies in concrete cases. In other words, one thing is the implementation of the recommendations in official documents and provisions; another thing is their use in the practice of international criminal proceedings. In this sense, it is argued that some time will be necessary for legal practitioners to 'adapt' their practice to the recommendations and change their approach to international criminal proceedings in absentia.

6.4. Conclusion

This Chapter has discussed the future of in absentia proceedings in International Criminal Justice, focusing on: (a) the qualification of in absentia proceedings as useful, legally possible, but exceptional proceedings; and (b) the proposal of some policy recommendations for a more legitimate use of in absentia proceedings in the future.

This Chapter presents two findings. First of all, in absentia proceedings can have a future in International Criminal Justice if they are qualified as useful, legally possible, but exceptional proceedings. To date, the debate on in absentia proceedings has seen the emergence of opposing views that have left little room to an objective evaluation of these proceedings. In particular, the literature on the topic has not considered the possibility of reforming the interpretation of the phenomenon, advancing a diverse understanding of in absentia proceedings.

This Chapter has adopted a different approach, and it has argued for a new evaluation of in absentia proceedings in light of both the findings of the previous chapters of the thesis and the considerations included in this Chapter. The author has demonstrated that in absentia proceedings should be assessed based on three elements. First, they need to be evaluated from their usefulness in supporting international criminal tribunals to achieve their mandate and objectives. Second, they are one of the possible procedural choices that international criminal tribunals have at their disposal, especially when dealing with the defendant's absence. Third, they are not the ordinary way of conducting international criminal proceedings, but they are exceptional. This means that they can only be used when certain conditions are met, and the exigencies of a case so require.

This finding is significant because it sheds new light on in absentia proceedings by rethinking the approach that International Criminal Justice should adopt towards them. Moreover, it provides insightful perspectives on the future of this phenomenon by drawing upon a critical analysis of the existing literature on the topic and the opinions of the legal practitioners involved in in absentia proceedings. This finding also shows

the importance of the analysis done in the previous two Parts of the thesis (i.e. Part I on the *Foundations* and Part II on the *Operation*) by advancing innovative ideas also derived from this study.

A second finding of the Chapter is that the regulatory framework of in absentia proceedings should be reformed for a future legitimate use of these proceedings. Chapters 3 and 4 of this thesis have demonstrated that in absentia proceedings are affected by many flaws, and they experience issues for their practice and impact on the parties. The scholarship has provided some analysis of specific problems but this has been incomplete and, more importantly, it has not included any proposal for reform. However, a rigorous debate of the phenomenon cannot be limited to mere criticisms, but it should encompass a vision for the future, including any possible review.

This Chapter has proposed a model for reforming in absentia proceedings and their regulatory framework, by presenting some policy recommendations. These recommendations encompass the three phases of an international criminal proceeding (i.e. pre-trial, trial, and post-trial), and they specifically tackle the issues that emerge from the conduct of in absentia proceedings. Moreover, the Chapter has identified the subjects that will be the target of these recommendations, and it has critically analysed the challenge of their implementation in International Criminal Justice.

This finding is significant because it advances an original perspective on in absentia proceedings that might have relevant consequences for their future. Indeed, the policy recommendations presented are not intended to be conclusive on the way in which international criminal proceedings in absentia should be conducted and improved. However, they are a first attempt in academic literature to propose theoretical and procedural changes in International Criminal Justice for in absentia proceedings, which will allow these proceedings to be used more legitimately in ongoing and future cases.

Conclusion

In addressing the question on the limits and prospects of in absentia proceedings in International Criminal Justice, this study has demonstrated the existence of a plurality of types of in absentia proceedings, and it has also shown the theoretical and practical boundaries to the conduct of these proceedings for the prosecution of international crimes. In this sense, this thesis has argued that all in absentia proceedings are constrained by seminal principles of International Criminal Justice and International Human Rights Law. Moreover, they need to be evaluated through the lens of the practice of international criminal cases, including a thorough examination of the expert opinions of the legal practitioners involved in these proceedings. In so doing, this innovative and pioneering research has established the need for a reconsideration of in absentia proceedings with a more objective and comprehensive approach, qualifying them as useful, legally possible, but exceptional proceedings in International Criminal Justice.

This Conclusion presents a summary of the findings of the research conducted in this thesis. In particular, it recalls the arguments advanced in each Chapter of the thesis and the outcome of the analysis undertaken therein. The purpose of this Conclusion is two-fold: (i) to clarify the results of the study done in each Part of this work, presenting the findings in a clear, systematic way; and (ii) to present the answer to the overarching research question of the thesis, by considering the respective answers to the sub-research questions addressed in each Chapter of the work.

1.1. Specific Findings of the Research

The specific findings of the research will be divided following the three Parts of the study, i.e. Part I on the *Foundations*; Part II on the *Operation*; and Part III on the *Future Perspectives*.

Part I of the thesis presents four findings: (i) a comprehensive definition of in absentia proceedings in International Criminal Justice; (ii) the identification of three principled constraints upon the use of in absentia proceedings; (iii) the determination of some patterns in the development of the legal framework of these proceedings; and (iv) the identification of the factors that have influenced the regulation of in absentia proceedings in International Criminal Justice.

In particular, Chapter 1 has clarified the distinction between different types of in absentia proceedings and has overcome the mistaken overlap made by the scholarship between trials in absentia and in absentia proceedings. Moreover, the Chapter has identified a definition that includes all types of in absentia proceedings: *international criminal proceedings conducted in the total or partial absence of the defendant*. Through a systematic classification, the Chapter has also identified 36 types of in absentia proceedings that can be distinguished on the basis of: (i) the qualification of the defendant's absence; (ii) the phase of the proceeding in which the absence occurs; and (iii) the reasons for the absence. Finally, the Chapter has revealed the existence of three main theoretical constraints upon the use of in absentia proceedings in International Criminal Justice, i.e. the fulfilment of the objectives of International Criminal Justice; the common law/civil law divide; and the traditional suspension of the proceeding. Overall, the Chapter has been able to determine that in absentia proceedings cannot be accepted or rejected a priori, but thorough research, rigorous analysis, and an in-depth study are essential for their full understanding.

Chapter 2 has identified some common regulatory patterns in the legislative and jurisprudential approaches of international criminal tribunals towards in absentia proceedings. In particular, the author has shown that depending on the type of in absentia proceedings considered (e.g. total in absentia or partial in absentia), international criminal courts have closely followed the precedents existing in the history of International Criminal Justice and they have also sought to improve the regulatory framework. This means that these institutions have adopted a constructive approach towards in absentia proceedings, by looking at previous experiences and learning important procedural lessons. Moreover, while regulating in absentia proceedings independently, they have created shared standards, e.g. for the notification to an absent suspect; the distinction among different types of in absentia, i.e. due to health conditions or absconding; the regulation of confirmation of charges in absentia; and the conduct of total trials in absentia.

The Chapter has also established that the shared standards for in absentia proceedings find an explanation in the existence of three groups of driving factors that have influenced the legal development of these proceedings. These factors are linked to the process (i.e. courts, crimes, and defendants); and the pragmatic and political exigencies of international criminal proceedings (i.e. pragmatism and politics). Overall, the Chapter has demonstrated that the legal development of in absentia proceedings is not scattered as argued by many, but it has followed a precise, structured path.

Part II of the thesis presents four findings: (i) the existence of a discrepancy between the theory and the practice of in absentia proceedings; (ii) the development of 'good practice' standards by international criminal tribunals; (iii) the emergence of a considerable impact of in absentia proceedings on the parties, especially the Defence; and (iv) the existence of both a positive and a negative influence that in absentia proceedings can exercise on the parties, affecting their capacity to act in the process.

Through a detailed examination of the practices of international criminal tribunals, Chapter 3 has first identified a gap between the theory and practice of in absentia proceedings. In particular, it has demonstrated that although being well-written and well-thought, the rules on in absentia proceedings need to be tested in the reality of international criminal cases. This means to find a concrete application and be assessed on the outcome obtained in this exercise by the court. Moreover, the Chapter has demonstrated the creation of good practices by international criminal tribunals that guarantee a response to the problems emerging from the implementation of the rules on in absentia proceedings in concrete cases. Therefore, there has been a first attempt at filling the gap identified above and providing some form of consistency across international criminal tribunals.

Chapter 4 has identified the impact that in absentia proceedings have on the parties of international criminal cases. Through a rigorous analysis of the literature on the topic and the expert opinions of the legal practitioners interviewed for this thesis, the author has demonstrated that in absentia proceedings have a substantial impact on all parties. This impact can be positive and negative, and in this sense, the use of in absentia proceedings brings both advantages and disadvantages to all parties. The study has shown these effects in detail, addressing a series of practical consequences of in absentia proceedings that the scholarship has disregarded so far. In this sense, the analysis has demonstrated that the Defence is particularly affected by the conduct of in absentia proceedings, as suggested by the scholarship. However, the Chapter has obtained this result not just by relying on theoretical assumptions, but by corroborating the hypothesis with empirical data, i.e. the opinions of the legal practitioners who have been involved in in absentia proceedings.

The Chapter has also established that, due to their complex procedural nature and practice, in absentia proceedings substantially influence the action of the parties in the process. In other words, they determine the procedural choices of the parties and guide their action in court. At first sight, this might be an obvious result; however, this effect brings some further important implications. Indeed, the influence that in absentia

proceedings exercise on the parties extends to their procedural strategies and exercise of their rights (e.g. the right to a defence). Therefore, in absentia proceedings can guide the parties' actions, and to a certain extent, constrain their procedural freedom. It might be said that, compared to ordinary international criminal proceedings, in absentia proceedings influence (if not limit) the actions of the parties, affecting their right to a fair trial.

Part III of the thesis submits four findings: (i) the alternatives proposed to in absentia proceedings present issues regarding their effectiveness in International Criminal Justice; (ii) it is debatable whether the two alternatives analysed will be adopted in International Criminal Justice; (iii) the future of in absentia proceedings requires them to be reconsidered as useful, legally possible, but exceptional proceedings; and (iv) the regulatory framework of in absentia proceedings should be reformed following a series of policy recommendations described by the author.

In particular, Chapter 5 has advanced the idea that the two alternatives to in absentia proceedings proposed (i.e. international civil proceedings in absentia and Transitional Justice mechanisms) are affected by some problems that might hinder their adoption in International Criminal Justice as valid substitutes. Despite being appraised by the legal practitioners interviewed for this thesis, these alternatives are not ideal in many respects, especially when considering their implementation and the practical results obtained. They present positive aspects and advantages, but they also raise concerns for their effectiveness in achieving the objectives of International Criminal Justice already discussed for in absentia proceedings. Moreover, based on this finding, the Chapter has also concluded that it is uncertain whether the two alternatives proposed will be adopted by international criminal tribunals in the future. This result of the study is significant because it shows on the one side, the difficulty in finding suitable alternatives to in absentia proceedings that do not suffer from the legitimacy concerns affecting those proceedings; and on the other side, the difficulty in accepting new proceedings in International Criminal Justice, even when they aim at substituting controversial ones like in absentia proceedings.

Finally, Chapter 6 has advanced a new understanding of in absentia proceedings based upon two series of considerations. First of all, these proceedings can be qualified as useful, legally possible, but exceptional. This result is obtained through the analysis done in the previous Chapters of the thesis and the additional examination of the opinions of the legal practitioners interviewed for this thesis. Therefore, the Chapter has

demonstrated that in absentia proceedings can have a future in International Criminal Justice if they are duly assessed and rethought, with a more objective approach.

Recalling the analysis done especially in Chapters 3 and 4 of this thesis, Chapter 6 has indicated the new physiognomy of future in absentia proceedings. In this sense, the author has advanced policy recommendations that should be implemented in the three phases of an international criminal proceeding, and that would improve the use of in absentia proceedings significantly. In particular, the Chapter has determined the areas of improvement that would need to be considered by the international legislator in the future for a more legitimate use of in absentia proceedings and for seeking further support for these proceedings. It has also established the principles that should inform the future regulation of in absentia proceedings and guide the work of international criminal tribunals when dealing with the defendant's absence.

1.2. Overall Result of the Research

Through the detailed analysis conducted in its three Parts, this thesis has sought to answer the following overarching research question: *what are the limits and prospects of the use of in absentia proceedings for the prosecution of international crimes in International Criminal Justice?* The thesis has responded to this question with a thorough examination of different aspects of in absentia proceedings, considering both their theory and practice.

As a preliminary consideration, in absentia proceedings are a feasible procedural tool for international criminal tribunals when they deal with the defendant's absence. These proceedings can be used in different scenarios, and they permit international criminal courts to prosecute international crimes despite the defendant's total or partial absence. Given the existence of a plurality of in absentia proceedings, the evaluation of these proceedings needs to consider the specific features of each of them, and it also requires a careful assessment of the purpose that each type of in absentia proceeding fulfils. For instance, in the case of pre-trial in absentia proceedings (e.g. confirmation of charges in absentia) the analysis should consider: (a) the fact that this is the initial phase of the proceeding and the defendant's absence might hinder the entire process also in other phases; and (b) the fact that there might be some procedural issues that impede the defendant to be present in court (e.g. the lack of a proper notification). Therefore, in absentia proceedings can be considered as a possible proceeding for international criminal tribunals, but first of all, they need to be assessed carefully for the legitimacy

of their procedural elements and the consequences derived from their conduct. This would guarantee a holistic evaluation of each type of in absentia proceedings, not just considering their theoretical and legal framework, but also their practical consequences for the prosecution of international crimes.

A first important point of the answer to the research question of this thesis concerns the qualification of in absentia proceedings and their interpretation. To evaluate their limits and prospects, in absentia proceedings need to be distinguished and examined based on their characteristics and peculiarities. As demonstrated in this thesis, the classification of in absentia proceedings plays a crucial role in their evaluation, and these proceedings cannot be rejected or accepted a priori as a whole; otherwise, there will be the risk of an imperfect, limited understanding of the phenomenon. The classification of in absentia proceedings would also help in identifying the more controversial types, with the possibility to tackle these proceedings in a better, tailored way. Ultimately, it is posited that the classification and definition of in absentia proceedings would permit one to identify the phenomenon in its variations and to determine the object of the study precisely. In so doing, the author has answered the first part of the research question of this thesis: what are the *in absentia proceedings* that we are referring to in this study?

Second, the limits and prospects of in absentia proceedings in International Criminal Justice can be fully understood only when considering their development and the factors that have contributed to their evolution. In particular, attention should be given to a series of factors that have influenced and shaped their regulation before international criminal tribunals and to the common approaches that these courts have adopted to overcome the challenges posed by the practice of in absentia proceedings. As indicated in the previous Section, this thesis has examined in detail these factors, and the author has demonstrated their influence on the development of in absentia proceedings. This result of the research is pivotal for an assessment of the *limits* of in absentia proceedings from a first point of view: the boundaries that exist in their theoretical framework of reference.

Third, the examination of the limits and prospects of in absentia proceedings should also encompass the practice of these proceedings in concrete cases. This means to assess the issues and positive aspects of in absentia proceedings in the reality of international criminal cases, where some additional features might emerge. Through this exercise, it is possible to understand these proceedings in all their details, with a complete vision of their implementation. This also means to consider the impact of in

absentia proceedings on the parties of international criminal cases and the effects that these proceedings have on the procedural choices made in the process. The study of the practice and impact of in absentia proceedings has added another essential part to the answer of the overarching research question of this thesis: what are the *practical limits and prospects* of in absentia proceedings in International Criminal Justice?

Finally, the question on the limits and prospects of in absentia proceedings requires an evaluation of their future, considering both their possible rejection and acceptance. Therefore, on the one side, the assessment should address the existence of alternatives to their use and the legitimacy of these solutions. On the other side, the analysis should determine the improvements and changes necessary to the regulation of in absentia proceedings for a more legitimate use in the future of International Criminal Justice. In so doing, the author has assessed the future approaches that might be taken in International Criminal Justice concerning in absentia proceedings. This exercise allowed the author to address the last part of the research question: what are the *prospects* of in absentia proceedings in International Criminal Justice?

1.3. Broader Implications of the Research

The study conducted in this thesis is not only relevant for the specific research question considered, but it has further implications for both the phenomenon of in absentia proceedings and the framework of International Criminal Procedure. In particular, the findings of this thesis will be relevant for two reasons: (i) they help to contribute to creating a new understanding of international criminal proceedings in absentia, influencing the existing literature and advancing the knowledge of the scholarship on the topic; and (ii) they contribute to the promotion of a critical discussion on the identity of International Criminal Procedure and the concept of procedural pluralism that exists in this area of law.

This thesis is an essential contribution to the debate on in absentia proceedings in International Criminal Justice because it adds a comprehensive study of this complex phenomenon to the existing scholarship. The author has proposed the first complete study of in absentia proceedings in academic literature, and this fact permits one to identify this thesis as a pioneering examination of the topic. As discussed in the Introduction, first of all, the originality of this thesis is found in its focus and approach to the analysis of international criminal proceedings in absentia. Moreover, the

innovation of the study is also determined by the methodology used, which includes qualitative empirical research with interviews with relevant stakeholders.

The implications of these two elements are numerous. For instance, they permit the author to obtain a fresh understanding of in absentia proceedings and to advance a different examination of the phenomenon, compared to the traditional approach of the scholarship. Moreover, they broaden the scholarship's approach to in absentia proceedings, by providing new data on the topic that can be used in the future by other scholars to conduct additional research. Finally, they ensure that one treats in absentia proceedings with an adequate level of analysis and detail, with no 'rushed' evaluations and, more importantly, with no biased, disregarding approach.

While analysing in absentia proceedings, this thesis has also contributed to the scholarship's knowledge on the general topics of identity and pluralism of International Criminal Procedure.[1] Indeed, the study has examined the question of the role played by in absentia proceedings in International Criminal Justice, and in so doing, it has also discussed the existence and legitimacy of the area of law called International Criminal Procedure. In particular, it has examined critically the objectives part of the mandate of international criminal tribunals, which can be relevant also for international criminal proceedings, like in absentia proceedings.

Moreover, through the analysis of the limits and prospects of in absentia proceedings, the author has highlighted the procedural pluralism that exists in International Criminal Procedure. This is intended: (a) for the use of different proceedings; and (b) for the integration of principles that pertain to national proceedings and jurisdictions. For instance, the first case occurs with the different procedural approaches to deal with the defendant's absence (e.g. suspension of the proceeding vs. in absentia proceedings) and the possible alternatives to in absentia proceedings (e.g. civil proceedings in absentia and Transitional Justice mechanisms). In this regard, the thesis has also made significant considerations on the diverse procedural choices that can be made in International Criminal Justice. Furthermore, another example can be when the author has identified in absentia proceedings as useful, legally possible, but exceptional proceedings in International Criminal Justice. Here, pluralism emerges especially when considering the future of in absentia proceedings and the fact that, although being highly controversial and debated, these proceedings can find their use in International Criminal Procedure alongside other proceedings.

[1] For instance, on pluralism in International Criminal Justice, see the interesting work of van Sliedregt and Vasiliev (2014a; 2014b).

As for the second case of pluralism recalled above, this has been considered in the thesis especially when discussing the civil law/common law divide on in absentia proceedings, and also when analysing the opinions on in absentia proceedings expressed by the legal practitioners interviewed for this thesis. Indeed, in both cases, the author has made significant considerations on the application of principles and proceedings that are traditionally used in national criminal justice systems to an international context. For instance, this relates to the nature of International Criminal Procedure as a mixed system of criminal justice, neither fully inquisitorial nor adversarial. This is also proven by the conduct of in absentia proceedings by some international criminal tribunals, although their origins are traditionally associated with a civil law/inquisitorial system of criminal justice.

Overall, this thesis has been able to examine in absentia proceedings critically and at the same time to advance important ideas on the scholarship's approach to this phenomenon and their broader context of reference. In so doing, this thesis demonstrates its relevance not only as a rigorous examination of a specific proceeding but also as a study that has an impact that goes beyond the boundaries of in absentia proceedings. As the scholarship underlines, this is an important outcome of any legal research, and it is particularly significant for International Criminal Justice because 'international criminal law is a system like any other, and a degree of vigilance and self-reflection, both internally and from the wider epistemic community, remains a necessity to minimise or avoid institutional and theoretical dysfunction'.[2]

[2] Schabas, McDermott, and Hayes (2016, p.3).

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