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Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal

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I. INTRODUCTION

The first trial *in absentia* in an international court occurred at the International Military Tribunals of Nuremberg after World War II. The trial was held pursuant to the Nuremberg Charter, which permitted trials *in absentia* whenever the Tribunal found them necessary in the interests of justice.¹ International courts and tribunals, including the International Criminal Tribunal for the Former Yugoslavia, the Special Courts in

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¹ See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 12, Aug. 8, 1945, 82 U.N.T.S. 279.

Cambodia, and the International Criminal Court, have rejected the introduction of trials *in absentia*.² In certain circumstances however, hearings *in absentia* are allowed.³

For the first time since Martin Bormann's 1946 trial *in absentia* in the Nuremberg tribunals,⁴ the Special Tribunal for Lebanon ("STL") ruled in favor of initiating a trial *in absentia* in an international court in the case of *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*.⁵ The case of *The Prosecutor v. Abul Kalam Azad*⁶ in the International Crimes Tribunal (Bangladesh) is another example of a controversial ruling to hold a trial *in absentia*. The Bangladeshi government established the tribunal in 2009 to investigate and prosecute individuals

² Article 21(d) of the ICTY Statute provides that the accused has the right "to be tried in his presence and to defend himself in person or through legal assistance of his own choosing" and makes no mention of permitting trials in absentia. Statute of the International Tribunal, 32 I.L.M. 1192 [hereinafter ICTY Statute], available at <http://www.un.org/icty/basic/statut/statute.htm>, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203. Article 17(4)(d) of the Statute of the Special Court for Sierra Leone also provides that the accused shall have the right "[t]o be tried in his or her presence." Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000) [hereinafter Statute of the Special Court for Sierra Leone].

³ International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 80(b) provides that "[t]he Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom." ICTY R.P. & Evid. 80(B), U.N. Doc. IT/32/Rev. 49 (May 22, 2013) (as amended). Rule 60(A) of the Special Court for Sierra Leone's Rules of Procedure and Evidence further states that "[a]n accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court." SCSL R.P. & Evid. 60(A) (May 27, 2008) (as amended).

⁴ See generally Yale Law School, *Nuremberg Trial Proceedings Vol. 1 Indictment*, THE AVALON PROJECT, <http://avalon.law.yale.edu/imt/count.asp> (containing documents relating to the Trial of German Major War Criminals at the International Military Tribunal, including the trial *in absentia* of Martin Bormann).

⁵ See generally *Prosecutor v. Jamil Ayyash*, Case No. STL-11-01/I/TC, Decision to Hold Trial *in Absentia* (Special Trib. for Lebanon Feb. 1, 2012).

⁶ Chief Prosecutor v. Maulana Abul Kalam Azad, alias Bachu (trial *in absentia*), ICT-BD Case No. 05 of 2012 (International Crimes Tribunal in Bangladesh Jan. 21, 2013) (discussing the issue of trials *in absentia*), available at http://bangladeshtrialobserver.files.wordpress.com/2012/12/full_judgement_azad.pdf [hereinafter *Prosecutor v. Azad*].

for war crimes committed during the Bangladesh Liberation War in 1971.⁷ Abul Azad, the defendant in the case, was a politician and cleric tried and convicted *in absentia* for genocide and crimes against humanity on January 21, 2013.⁸

II. TRIALS *IN ABSENTIA* UNDER INTERNATIONAL LAW

A defendant's right to be present during trial is fundamental to due process and is encapsulated in the International Covenant on Civil and Political Rights ("ICCPR"), which provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

....(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.⁹

General Comment No. 13 of the UN Human Rights Committee ("UNHRC") states, "The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defense is all the more necessary."¹⁰ This Comment does not define "justified reasons." However, in *Mbenge v. Zaire*,¹¹ the UNHRC shed some light on the particular circumstances that could justify a trial *in absentia*:

According to Article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in Article 14 cannot be construed as invariably

⁷ See generally International Crimes Tribunal-1, Bangladesh, *About ICT-BD*, INTERNATIONAL CRIMES TRIBUNAL, BANGLADESH, www.ict-bd.org/ict1/indexdetails.php.

⁸ See *Prosecutor v. Azad*, *supra* note 6, ¶ 332.

⁹ International Covenant on Civil and Political Rights art. 14(3)(b), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

¹⁰ Office of the High Commissioner for Human Rights, Human Rights Comm., 21st Sess., Art. 14, ¶ 11, HRI/GEN/1/Rev.9 (Vol. I) (Apr. 13, 1984).

¹¹ U.N. Human Rights Comm., *Mbenge v. Zaire*, U.N. Doc. CCPR/C/OP/2 (Mar. 25, 1983).

rendering proceedings *in absentia* inadmissible, irrespective of the reasons for the accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.¹²

Referring to previous UNHRC decisions, the UNHRC in its General Comment No. 32 has recently set out safeguards that must be met before initiating trials *in absentia*.¹³ When a trial *in absentia* is necessary for the proper administration of justice, to satisfy Article 14(3)(d) of the ICCPR, the prosecution must show that all due steps have been taken to inform the accused of the charges and proceedings.¹⁴ The UNHRC states:

Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.¹⁵

In *Maleki v. Italy*,¹⁶ the HRC concluded that exercising due diligence when attempting to notify the accused of the proceedings is insufficient to justify commencing a trial *in absentia*.¹⁷ When the accused otherwise cannot be found, reasonable steps will not be sufficient unless the defendant is afforded the right to a retrial.¹⁸ The prosecution must demonstrate that the defendant had actual knowledge of the proceedings. A failure to show this knowledge results in a violation of the defendant's right to be present.¹⁹

¹² ICCPR, *supra* note 9, ¶ 14.1.

¹³ See Centre for Civil and Political Rights, Human Rights Comm., 90th Sess., Gen. Comment No. 32, Art. 14, ¶ 36, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

¹⁴ See ICCPR, *supra* note 9, ¶ 14.1.

¹⁵ CCPR, *supra* note 13.

¹⁶ See U.N. Human Rights Comm., *Maleki v. Italy*, Comm. No. 699/2996, U.N. Doc. CCPR/C/66/D/669/1996 (July 27, 1999).

¹⁷ *Id.* ¶ 9.4.

¹⁸ *Id.* ¶ 9.5.

¹⁹ *Id.* ¶ 36.

III. EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE ON TRIALS IN *ABSENTIA*

Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”) specifies that anyone charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing.”²⁰ Interpreting Article 6 of the ECHR, the European Court of Human Rights (“ECtHR”) stated in *Colozza v. Italy*:²¹

Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person,’ ‘to examine or have examined witnesses’ and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court,’ and it is difficult to see how he could exercise these rights without being present.²²

In *Poitrimol v. France*, the ECtHR declared, “[S]uch a waiver [of the right to appear and to defend himself] must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance”²³

Subject to procedural safeguards, trials *in absentia* are permitted in certain prescribed circumstances. These safeguards can be summarized from the ECtHR jurisprudence as follows:

- (i) The accused must have knowledge of the indictment and proceedings (which must be demonstrated by the prosecution), and voluntarily chooses to be absent from the hearings and unequivocally states this to the court;
- (ii) The accused must have unequivocally stated to the court that he waives his right to be present at court but by his behavior implies

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3), Nov. 4, 1950, 213 U.N.T.S. 222.

²¹ *Colozza v. Italy*, 89 Eur. Ct. H.R. (ser. A) (1985) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57462>.

²² *Id.* ¶ 27.

²³ *Poitrimol v. France*, 277 Eur. Ct. H.R. (ser. A), ¶ 31 (1993), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57858>.

that he waives his right to be present e.g., when a defendant is absconding;
 (iii) The defendant has been expelled from the courtroom for disruption or misconduct.

In the first set of circumstances, a trial *in absentia* can be held provided that the accused has been duly informed of the proceedings and has unequivocally refused to be present during her trial. A defendant's silence after attempted notice does not constitute a waiver.²⁴

In *Sejdovic v. Italy*, the ECtHR acknowledged the importance of the accused's presence during trial. Recommending a balancing exercise between the defendant's rights and the rights of the victim and witnesses, the court states, "The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel."²⁵ Furthermore, the ECtHR confirmed in *Pelladoah v. The Netherlands* that the defendant has the right to legal representation, even if he or she is absent from the trial.²⁶

In the absence of an unconditional right to retrial, when the defendant is presumed to be absconding or cannot be located, the prosecution must show that the defendant had actual knowledge of the proceedings before a waiver of the accused's right to attend his trial can be inferred.²⁷ Arguably, a waiver of the right to attend can be inferred when public announcement of proceedings gives a defendant's constructive knowledge and allow courts to proceed in the defendant's absence. However, the jurisprudence on this point expresses that without a clear demonstration by the prosecution of the accused's actual knowledge of the proceedings, a court may *not* commence a trial *in absentia* unless the defendant has a right to retrial.²⁸ The burden of proving the defendant's actual knowledge of the proceedings lies with the prosecution or the applicant state.²⁹

In the final set of circumstances, the ECtHR most recently held that when a defendant's behavior is disruptive to the extent that the court deems it necessary to

²⁴ See *Colozza v. Italy*, App. No. 9024/80, Eur. Ct. H.R., ¶ 28 (1985).

²⁵ *Sedjovic v. Italy*, App. No. 56581/00, Eur. Ct. H.R., ¶ 92 (2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72629>.

²⁶ See *Pelladoah v. The Netherlands*, App. No. 16737/90, Eur. Ct. H.R., ¶ 40 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57902>.

²⁷ See *Sejdovic v. Italy*, ECtHR Application No. 56581/2000, judgment of 1 March 2006, reported at [2008] ECHR 620.

²⁸ See generally *Krombach v. France*, 2001-II Eur. Ct. H.R. 88, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59211>.

²⁹ See *Maleki*, supra note 16, ¶ 9.4.

expel him from the courtroom, the presiding judge should “establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to her decision to order his removal from the courtroom.”³⁰ This can be done by issuing a warning or allowing for a short adjournment to permit the defendant an opportunity to consider the consequences of his action and to compose himself.³¹

IV. TRIALS IN *ABSENTIA* AND INTERNATIONAL TRIBUNALS

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Sierra Leone Special Court make no mention of permitting trials *in absentia* but expressly declare the importance of the presence of the accused during trial. The ICTR Statute provides that the accused has the right, “to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing.”³² Likewise, the ICTY Statute provides that the accused has the right “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.”³³ The Statute of the Special Court for Sierra Leone echoes the aforementioned statutes, stating that the accused has the right to be “tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing.”³⁴

In *Prosecutor v. Delalic*, the defendant was absent one morning for unknown reasons and had not explicitly waived his right to be present through his counsel.³⁵ The court ruled that absent a clear waiver, the right to be present at trial is virtually absolute.³⁶ Rule 60 of the Special Court’s Rules of Procedure and Evidence further states:

An accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear

³⁰ *Idalov v. Russia*, App. No. 5826/03, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110986> (citing *Jones v. the United Kingdom*, No. 30900/02, Eur. Ct. H.R. (2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23360>).

³¹ *Id.* ¶ 177.

³² Statute of the International Criminal Tribunal for Rwanda art. 20, ¶ 4, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

³³ ICTY Statute, *supra* note 2, art. 21, ¶ 4.

³⁴ Statute of the Special Court of Sierra Leone, *supra* note 2, art. 17, ¶ 4.

³⁵ *Prosecutor v. Delalic*, Case No. IT-96-21-A, Transcript, ¶¶ 8967-8976 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 4, 1997).

³⁶ *Id.* ¶ 8969.

at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.³⁷

In *Prosecutor v. Blaskic*, the ICTY Appeals Chamber indicated the possibility of initiating trials *in absentia* in specific cases, holding that “*in absentia* proceedings may be exceptionally warranted in cases involving contempt of the international tribunal, where the person charged fails to appear in court, thus obstructing the administration of justice.”³⁸

In *Prosecutor v. Barayagwiza*, the ICTR held that when an accused is aware of his right to attend his trial but chooses to waive that right, “neither the Statute nor any human rights law prevents the case from proceeding in his absence.”³⁹

The International Criminal Court (“ICC”) distinguishes between pretrial proceedings and trial proceedings. The Rome Statute provides that the accused must be present during the trial, unless they are disruptive enough to court proceedings to require expulsion.⁴⁰ Nonetheless, the accused must still be provided with “communications technology for him or her to observe the trial and instruct counsel from outside the courtroom.”⁴¹ This measure should only be taken in “exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”⁴² The ICC permits pretrial proceedings to be held *in absentia* if the accused has waived his right to be present or if the accused has “fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.”⁴³ In this instance, the court will provide an accused with legal representation.

³⁷ SCSL R.P. & Evid., *supra* note 3, at 60.

³⁸ *Prosecutor v. Blaskic*, Case No. IT-95-14-AR, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 59 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

³⁹ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defense Motion to Withdraw ¶ 6 (Int’l Crim. Trib. for Rwanda Nov. 2, 2000).

⁴⁰ Rome Statute of the International Criminal Court art. 63, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁴¹ *Id.* art. 63, ¶ 2.

⁴² *Id.*

⁴³ Rome Statute, *supra* note 41, art. 61, ¶ 2.

V. ABUL KALAM AZAD'S TRIAL *IN ABSENTIA*

The Special Tribunal for Lebanon (“STL”), established in 2007,⁴⁴ is the only international tribunal whose statute permits trials *in absentia*. They are permitted when the accused:

- (i) Has expressly and in writing waived his or her right to be present;
- (ii) Has not been handed over to the Tribunal by the State authorities concerned;

From the jurisprudence of the ECtHR and international tribunals, the following procedural safeguards must be met before a trial *in absentia* can be legitimately held:

- (i) The accused must have been informed of the proceedings and it must be demonstrated that the accused had actual knowledge;⁴⁵
- (ii) The accused must be afforded the right to appear in court at any moment and request a retrial;⁴⁶
- (iii) The accused must be legally represented;⁴⁷
- (iv) It must be clearly demonstrated that the accused is absconding and not simply that he cannot be located.⁴⁸

Taking the first condition, whether Mr. Azad was properly informed of the impending trial and whether the prosecution demonstrated that he had actual knowledge, we look to the findings of fact made by Bangladesh’s Tribunal. The judgment states:

Dhaka Metropolitan Police (DMP) submitted the execution report before the Tribunal stating that the accused Abul Kalam Azad @ Bachchu could not be arrested as he has already absconded and he is learnt to have left the country instantly before the earlier warrant for arrest issued by this Tribunal. In this circumstance, the Tribunal, as required under Rule 31 of the ROP, ordered to publish a notice in two daily newspapers, one in Bangla and another in English asking the accused to appear before this Tribunal within ten (10) days from the date of publication of such notice. Accordingly, the notice has been published on 25 October issue of ‘The Daily Janakantha’ (Bengali daily) and ‘The Daily Star’ (English daily). But despite

⁴⁴ S.C. Res. 1757, ¶¶ 1–4, U.N. Doc. S/RES/1757 (May 30, 2007).

⁴⁵ See generally *Colozza v. Italy*, *supra* note 24; see also *Poitrimol v. France*, *supra* note 23.

⁴⁶ See CCPR, Human Rights Comm., 66th Sess., July 12–30, 1999, Annex, ¶ 9.5 Comm’n No. 699/1996 (Sept. 13, 1999).

⁴⁷ See *Mbenge v. Zaire*, *supra* note 11, ¶ 14.1.

⁴⁸ See *id.* ¶ 14.2.

publication of such notice the accused has not appeared before this Tribunal.⁴⁹

This paragraph relates to two of the aforementioned conditions: the first of proper defendant notification and the fourth of demonstrating that the accused is absconding and not simply unable to be found. The jurisprudence on this first point underscores that the prosecution must clearly demonstrate that the accused has been notified. The next point of contention is that although according to the Tribunal's Rules of Procedure, notice must be made publicly in two national newspapers, this is not sufficient to meet the requirement that the accused must be properly informed of the proceedings before absconion can be concluded. Secondly, the Tribunal fails to mention the facts relied upon to decide that Mr. Azad had absconded. Instead, they merely write that the police had reported "that [Mr Azad] has already absconded."⁵⁰

The *Azad* judgment explains:

United Nations reversed its policy against trials *in absentia* with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end...without an accused ever having showed up in court. The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused in article 22 of the STL Statute, entitled "Trials in absentia." Article 22(1), lists the situations where the STL can hold trials in the accused's absence.⁵¹

While true, this statement is somewhat misleading as the Tribunal fails to mention Article 22 section 3 of the STL Statute, which states:

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.⁵²

Accordingly, a defendant has the right to a retrial when a trial is held in her absence, but only if she had not appointed a defense counsel. However, this provision is not fully compliant with the jurisprudence on trials *in absentia* since the right to a retrial as stated in the STL statute disappears if the accused has appointed counsel. This is a violation of both the right to a retrial and the defendant's right to counsel as per the ECtHr's and UNHRC's jurisprudence. The exercise of one right cannot diminish the

⁴⁹ Prosecutor v. Azad, *supra* note 6, ¶ 20.

⁵⁰ *Id.*

⁵¹ *Id.* ¶ 50.

⁵² S.C. Res. 1757, *supra* note 45, art. 22, ¶ 3.

other; defendants must be afforded an unconditional right to both. Furthermore, neither the International Criminal Tribunals Act (Bangladesh) nor the Rules of Procedure of the International Crimes Tribunal (Bangladesh) mention the opportunity for a retrial so it is unclear where the tribunal draws its authority from in deciding to hold the trial of Abul Azad *in absentia*.

The Bangladesh Tribunal mentions that “under section 22(1)(c) of the STL statute, the accused may be tried *in absentia* when he refuses to appear after an initial appearance (absconded).”⁵³ The Tribunal has confused two different circumstances: first, when a defendant expressly waives his right to attend his trial, and second, when a defendant is absent without notice and may be absconding. If the first applies, then the jurisprudence suggests that the right to retrial is not a prerequisite to a trial *in absentia*.⁵⁴ However, if the second set of circumstances applies, the jurisprudence unequivocally states that compliance with Article 14 of the ICCPR and with Article 6 of the ECHR requires a right to retrial.⁵⁵ The Tribunal continues:

The jurisprudence of both the ICCPR and the ECHR confirms that a trial *in absentia* will not violate a person’s right to be present when he has expressly declined to exercise this right. The circumstance and the time and way the accused had gone to absconsion and left country led us to lawful inference that the accused has expressly declined to exercise his right to be present in trial.⁵⁶

The first sentence is correct, but based on the facts relied upon by the Tribunal, it cannot be concluded that Mr. Azad had expressly waived his right to be present. An express waiver can only exist when an accused has directly informed the court that he wishes to waive his right to be present. Absent this direct waiver, if a court is to be compliant with Article 14 of the ICCPR, as the Tribunal states it is,⁵⁷ clear evidence that the accused has been properly informed ~~and~~ of his absconding must be adduced before a trial *in absentia* can legitimately occur. Furthermore, there must be an unfettered right to a retrial. While strong evidence may have indicated that Mr. Azad indeed absconded, the Tribunal failed to mention it in its judgment. This strong evidence of absconding, missing in the Tribunal’s judgment, is crucial in adjudicating the legitimacy of initiating a trial *in absentia*.

In relation to the strict observance of defense rights in the absence of the accused, it is very unlikely that the defense were given sufficient time to prepare a proper defense case, an issue that is of even greater important in reference to a trial *in absentia*. On

⁵³ Prosecutor v. Azad, *supra* note 6, ¶ 51.

⁵⁴ See e.g., Maleki v. Italy, *supra* note 16, ¶¶ 9.3–9.4.

⁵⁵ See generally Mbenge v. Zaire, *supra* note 11, ¶¶ 14.1–14.2.

⁵⁶ Prosecutor v. Azad, *supra* note 6, ¶ 53.

⁵⁷ *Id.* ¶ 26.

October 7, 2012, the tribunal appointed Abdus Shukur Khan as Mr. Azad's state defense lawyer.⁵⁸ On October 11, 2012, Mr. Khan was supplied with copies of the formal charge and the documents the prosecution intended to rely on including the statements of prosecution witnesses.⁵⁹ On November 26, 2012, the trial commenced, with the prosecution calling 22 witnesses, meaning that the defense only had approximately six weeks to prepare a complicated case involving several witnesses, without the accused's presence to give instructions.⁶⁰

The *Azam* case highlights the confusion that exists about trials *in absentia*. It seems that greater clarification of the circumstances in which a trial *in absentia* is permissible would assist the prosecution in making applications to hold trials *in absentia* and afford defendants greater certainty with regard to due process. This result could be achieved either by incorporating the circumstances permitting a trial *in absentia* into the statutes and rules of evidence and procedure of tribunal statutes or by drafting appropriate provisions to include in existing international legal instruments such as the ICCPR.

⁵⁸ *Id.* ¶ 21.

⁵⁹ *Id.*

⁶⁰ For all the trial proceedings including charge framing, witness testimony and cross-examination see BANGLADESH WAR CRIMES TRIBUNAL, <http://www.bangladeshwarcrimes.blogspot.co.uk/2013/01/abul-kamal-azad-trial-index-of-posts.html> (last visited Mar. 8, 2014).