CHAPTER 12

Trials in Absentia

1 Introduction

Ten years after opening its doors, the International Criminal Court (ICC) finally delivered its first judgment in the case against Mr. Thomas Lubanga Dyilo. One of the main criticisms on the functioning of the ICC and other ICTs, apart from its Africa-oriented prosecutions, has been that (pre-)trial proceedings are quite time consuming and do not deliver swift justice. As a response, the ICTs and the ICC have tried to incorporate measures to enhance the expediency of trials in international criminal law. This Chapter will discuss one of the newest and most controversial measures of expediency in ICL, namely trials in absentia, which mechanism – after having been dormant for years – was re-instated at some ICTs.

2 Trials in Absentia

Trials in absentia entail a criminal trial in the absence of the accused. The roots of trials in absentia can be found in French law in the Criminal Ordinance of 1670, yet, most European countries have some form of trials in absentia. In civil law countries, trials in absentia can be used if the national system abides by the safeguards that are codified in, for instance, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Trials in absentia are part of criminal procedure in civil law countries but have only been allowed in limited cases in common law countries. In common law systems, trials in absentia can only be used if an accused voluntarily absconds after the start of the trial, during which he or she was present. This difference can be explained by the nature of the criminal proceedings in the two different systems. In common law countries, the proceedings are adversarial but in civil law countries, the proceedings are mainly inquisitorial. Due to the pivotal role within common (adversarial) law countries of the presentation of evidence at trial, whereas in civil law countries the evidence is adduced (through a dossier) in advance – either with or without the presence of the accused – trials within common law systems require more

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1 Even though the ECHR is a regional human rights mechanism, it is interesting to incorporate as ICTS often look at ECtHR jurisprudence as well.
checks and balances. Because the presentation of the evidence at trial plays such a central role in common law countries, the accused is to be afforded more robust safeguards compared to an accused in civil law countries. As ICTs and, moreover, the ICC system intends to combine the common law traits and the civil law traits, it is interesting to ascertain whether trials in absentia have a standing within ICTs.

Recently, scholars started asking themselves whether it would be beneficial and desirable to use trials in absentia for ICTs to prevent any unnecessary lengthy delays.²

2.1 The Legitimacy of Trials in Absentia

2.1.1 The International Covenant on Civil and Political Rights (ICCPR)

Trials in absentia in international criminal law are controversial, as the right to be present during one’s own trial is fundamental, being incorporated in the ICCPR and the ECHR. The ICCPR promulgates, in Article 14(3)(d), that:

“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.”³

The United Nations Human Rights Committee (hereinafter: the Committee) has the right to monitor whether the States Parties are adhering to the rights incorporated in the ICCPR. According to the Committee, Article 14 contains three separate rights: the right to be present during one’s own trial; the right to defend themselves personally or through counsel; and the right to representation, even when the accused cannot afford this.⁴ Two Individual Communications concerning trials in absentia were filed before the Committee.

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