

The contribution of international courts and tribunals to the development of procedural rules

OC - (ILA-14144) - PRE-TRIAL IN ABSENTIA AT THE INTERNATIONAL CRIMINAL COURT:

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Abstract

In the recent Jordan Al-Bashir decision, the International Criminal Court's Appeals Chamber accepted submissions from Jordan, academics, the Prosecutor, as well as *amicus curiae* such as the African Union on the question of the immunity of the President of Sudan from the Court's jurisdiction. The Court invited submissions by Sudan and President al-Bashir; however, they did not respond. The Court proceeded in its determination regardless. The Court found that President Al-Bashir did not enjoy immunity from the Court's jurisdiction.

At the same time, in the Myanmar Jurisdiction decision, Pre-Trial Chamber I discussed the jurisdiction of the Court over the crime of deportation that started in Myanmar, but was concluded in Bangladesh. The procedure took place in the absence of Myanmar, although the Court tried to remedy the situation by accepting as a submission press releases made public by Myanmar's government. The Court found that it had jurisdiction over the Rohingya deportation from Myanmar.

Finally, in the Gaddafi Admissibility decision of 5 April 2019, the Court accepted that it could decide on a challenge to admissibility filed by a suspect who was not present before the Court/remained at large in spite of an extant arrest warrant against him. The Court rejected Gaddafi's admissibility challenge.

The common theme pervading these three decisions is the possibility to hold and decide pre-trial in the absence of the interested party. This is at odds with the Court's obligation to conduct trials only in the presence of the various interested parties and constitutes a new procedural practice adopted by various chambers of the Court.

The present contribution will present this procedural innovation to the Court's scheme and discuss its contours from two perspectives. First, the paper will investigate the intentions of the drafters and explain that pre-trial in absentia is made possible through judicial interpretation – an instance of judicial law-making in the absence of legislative fiat. Secondly, the paper will test the validity of pre-trial in absentia against general principles of procedural law. Here, concepts such as the Monetary Gold rule, which provide that a trial may only proceed in the presence of all parties exerting an essential legal interest from its disposition, will be presented. The question would be whether the International Criminal Court can finally dispose of issues such as jurisdiction and admissibility in the absence of parties who are entitled under Article 19 to raise challenges to jurisdiction, particularly since the Rome Statute does not provide explicitly for the possibility to relinquish the right to file such challenges. This is especially important since one the issues are decided parties are precluded from raising relevant arguments later in the process by virtue of different provisions of the Rome Statute. If the overwhelmingly negative history for the absent

parties of these determinations is any indication, it is interesting to see how the Court will respond to future challenges filed by the currently absent parties, without rendering their challenges meaningless.

Palavras-chave : pre, trial, absentia