



Trial *in Absentia*: Evaluating Compatibility of the International Criminal Law with Islamic Law

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ABSTRACT

The notion of conducting trials in absentia has consistently been a subject of debate and contention in discussions regarding the operations of the International Criminal Justice System. Discussions have frequently centered on its legal standing and adherence to principles such as fair trial rights and self-representation. Generally, a trial in absentia is where the trial is held and evidence is adduced against the accused in his absence. Every individual is entitled to be present during trial: This principle is firmly established under both the regimes of Islamic law and International Criminal Law (ICL). Historically, the International Military Tribunal (IMT) in Nuremberg and Tokyo permitted implicitly the trials in absentia. Afterwards, except in one case Special Tribunal for Lebanon, practice got changed and strict approach was taken with regard to trial in absentia in international arena. Conversely, trial in absentia is permitted under Islamic law in limited and exceptional circumstances. Firstly, an effort was made to portray the understanding and concept of trial in absentia in this paper. The major push of this paper was to assess the position of trials in absentia in both regimes namely Islamic law and ICL, with a focus on analyzing the similarities between this set of laws. Generally, this paper demonstrated that contemporary ICL does not collide with Islamic law on the aspect of trials in absentia. The present paper adopted the doctrinal research methodology to complete this paper.



Introduction

The subject of trial in absentia (TiA) has persistently been a source of intense debate throughout the history of the international criminal justice system (Zakerhossein & De Brouwer, 2015). Generally, an accused is always considered a favourite child of law (Supreme Court of Pakistan,

2021). During the trial, the accused is granted a range of rights under the criminal justice system, including, but not limited to, the right to be heard, the right to present a defense, and the right to be present (Boas, Schabas, & Scharf, 2015). International Criminal Law and Islamic law both guarantee similar fundamental rights to the alleged person (Malekian, 2011).

The presence of the accused is essential at the commencement of the trial, as it forms the foundation for the exercise of other rights, including the right to be present. Throughout the paper, the word “*accused*” will be used only for the masculine gender. In accordance with International Law, the accused is entitled to relinquish their right to be present during trial proceedings (International Criminal Court, 2013). This principle is reaffirmed by the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) (International Criminal Tribunal for Rwanda, 2007) and the European Court of Human Rights (ECHR) (European Court of Human Rights, 2008). Under Islamic law, a trial is permitted to begin only after the accused has submitted themselves before the court (Fazaeli, 2014).

The ability to be present in a proceeding that concerns you, like the ability to understand what is being said about you, is a right so elemental that it may be taken for granted (Clooney & Web, 2021). A fundamental principle of criminal procedural law is the requirement for the defendant's presence at trial, guaranteeing them a fair and meaningful opportunity to engage in the proceedings. The presence of the accused before the court is essential for the prosecution to present its case and for the court to assess the defendant's conduct accurately (Cassim, 2005). In order to exercise the right of defence effectively, it is necessary that accused should be present in the court of law. (Childers & Hinesley, 1982-1983)

Understanding “Trial in Absentia”

The concept is not straightforward or universally defined (Zakerhossein & De Brouwer, 2015). Jenks observes that the phrase is interpreted differently depending on the perspective (Jenks, 2009). There are two key components to this term: “trial” and “in absentia,” both of which require clear definitions. Pons notes that the precise meaning of “absentia” and the exact point at which a TiA begins remain unclear (Pons, 2010). Generally, the term “in absentia” originates from Latin, meaning “in the absence of” (Starygin & Selth, 2005). The phrase “in absentia trial” is often ambiguous (Sluiter et al., 2013). The legal definition as given in a well-reputed law dictionary is “*in the absence of someone*” (Black's Law Dictionary, 2004). This ambiguity arises because the term is used in various contexts (Klerks, 2008). Essentially, TiA refers to a trial proceeding without the accused being present in court (Jenks, 2009). This definition remains consistent in legal dictionaries (Ammer, 1997).

A TiA involves a legal process in which the person accused of a crime is not present during the trial (Plucknett, 1956). These proceedings have remained controversial, often seen as incompatible with the principles of natural justice and fairness (UN Human Rights Committee, 2007). According to critics, this trial procedure denies the accused the opportunity to defend themselves and to question the prosecution's witnesses (Luban, 2008).

Trial in Absentia and Doctrine of Fair Trial

In Islamic law as well as International Human Rights Law (IHRL), an equitable system aimed at dispensing and securing the ends of justice is necessary to build harmony in a society (Norullah, 2021).

The presence of the defendant is connected with the realization and enjoyment of other fair trial rights (OSCE Office for Democratic Institutions, 2012). When a trial does take place in the alleged person's absence, IHRL requires vigilant respect for his rights to defence, especially the right to counsel (African Court on Human and People's Rights, 2016). The Human Rights Committee has noted that the right to be present is intrinsically linked to several other fundamental rights associated with a fair trial. It has emphasized that conducting trials in the absence of the accused necessitates the provision of notice to the accused, specifying the time and location of the trial and requesting their attendance at the proceedings (Human Rights Committee, 1983). Without such an assessment, the accused is deprived of adequate time and opportunity to prepare arguments in their defense, to obtain assistance from counsel, to examine or compel the examination of prosecution witnesses, and to present evidence in their favor. The European Court has similarly emphasized that every accused individual is entitled to the right to defend themselves, to examine or facilitate the examination of opposing witnesses, and to receive free assistance from an interpreter if they are unable to understand the court's language. These rights cannot be effectively exercised by the defendant in the absence of their presence in court (European Court of Human Rights, 1997). Indeed, an accused's physical appearance is vital to ensuring the accuracy of his statements and for challenging those of any victims or witnesses, either in person or through his counsel. (European Court of Human Rights, 2016) The defendant "because of his presence should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him" (Kunnath v. The State, 1993)

The presence of the accused is essential in a trial for two primary reasons: safeguarding the rights of the accused and serving the interests of the general public (Cassim, 2005). The concept of a fair trial inherently includes two critical elements: the defendant's presence and their active participation in the proceedings (Gallant, 2010). According to Article 63(1) of the Rome Statute of the International Criminal Court (ICC Statute), the presence of the defendant is crucial for the commencement of the trial. The meaning of the seven words in Article 63(1) is clear when read in isolation and even more so when viewed within the broader context of the Statute, which allows the accused to waive their presence at a confirmation hearing but not during the trial itself (Trechsel, 2005). When a trial proceeds without the accused being present and they are unable to challenge or respond to the charges, the legitimacy of such proceedings is often questioned, as they may be seen as contrary to the principles of justice and equality (ICC, 2010).

Right of Self-Representation In ICL

The right to self-representation is recognized in numerous international and regional agreements (International Criminal Court, 2010) and is regarded as a fundamental right (ICTY, 2004). The presence of the accused typically means that the defendant must be given the opportunity to be "physically" or "personally" present in the courtroom (ICTR, 2006). In the Milosevic case, Judge May emphasized that the defendant's right to be present at trial is a matter of *Jus cogens* (Boas, 2001), a view also supported by Markovic (Markovic, 2005). The Human Rights Committee affirms that the right to be present entails the "opportunity to personally attend the proceedings" (HRC, 1992). Similarly, the European Court interprets this presence as the "personal attendance" of the defendant (ECtHR, 2000). The ICTR further clarified that this right includes "physical presence, as opposed to facilitated presence via video-link" (ICTR, 2006). The accused's presence is essential, as it ensures that they are fully informed of the charges brought against them, which is an inalienable right (Jordash & Parker, 2010). Being present at trial enables the accused to exercise several associated fundamental rights, such as understanding the charges against them, presenting

arguments in their defense, consulting with their legal counsel, and challenging the prosecution's evidence (International Criminal Tribunal for Rwanda, 2006). International Law explicitly guarantees the defendant's right to be present during the trial (Jordash & Parker, 2010).

The right to self-representation ensures that the defendant can either participate directly or through counsel, allowing them to be aware of the proceedings and effectively engage in the trial (African Commission on Human Rights, 2010). This right facilitates the exercise of other essential fair trial rights, such as the right to cross-examine witnesses and defend oneself personally (ICC, Ruto case).

The draft Universal Declaration of Human Rights (UDHR) initially referenced the concept of “appearing in person,” which, in this context, did not relate to the right to be present, but rather to the situation where a defendant is self-represented and requires the trial process to be explained to them (Hussain, 1970). This blending of concepts caused some confusion among the delegates (International Criminal Court, 2013). However, in certain circumstances, the right to self-representation may be fulfilled through virtual appearances (European Court of Human Rights, 2018). The European Court has ruled that participation via video link is acceptable as long as the measure serves a legitimate purpose and complies with due process (European Court of Human Rights, 2006). In subsequent rulings, the Court affirmed that the use of a video link is not inherently incompatible with the right to a fair and public hearing, provided the defendant can follow the proceedings, be heard clearly, and maintain effective, confidential communication with their lawyer (European Court of Human Rights, 2018).

While virtual participation via video link is generally not seen as a substitute for physical presence at trial, it may be acceptable during the appeal stage (Human Rights Committee, 1992; European Court of Human Rights, 2000). The ICTR also recognized that the defendant's right to be present is not absolute and may be restricted in specific cases, such as through the use of a video link, provided that the restriction adheres to the principle of proportionality. This means any limitation on a fundamental right must serve an important purpose and limit the right only to the extent necessary to achieve that purpose (International Criminal Tribunal for Rwanda, 2006).

Similarly, the ICTY has stated that reasonable alternatives to video link should be prioritized. For example, using a video link when the defendant is in detention, despite health issues affecting the trial process, was deemed unreasonable when other reasonable alternatives, such as conducting the case during the pre-trial phase, were available (International Criminal Tribunal for the Former Yugoslavia, 2008).

Right of Self-Representation Present in Islam

In the Islamic regime, the right of the accused's presence is given significant value under the head of the right of fair trial. (Ashouri, 2004) The counsel of the accused's own choice and the self-representation are important features in the Islamic criminal justice system (International Criminal Tribunal for Rwanda, 2006) (Karamzadeh & Feiz, 2021). A fair trial and preserving the dignity of humans are the significant features of the Islamic criminal justice system, and the same are guaranteed to exercise the basic principles of human life for instance liberty and equity.

The dispensation of justice is considered a cardinal principle of Islam. (Baderin, 2007) In Islamic law, the recognition of human rights is old as the history of Islam itself and it has been directed to law enforcers that the doctrine of innocence should remain intact unless the judgment of a court of

law convicting the defendant is announced. (Kilzi, 2007) The principle of innocence is so important that it is specified in almost every constitution of the Islamic country of the world. (Brown & Revkin, 2015)

Waiver of Right to Be Present and Trial *in Absentia*

In the following instances, a TiA may occur in administering the criminal justice system:

a. Disruptive Behaviour

The exception to the right of presence envisaged in the Rome Statute of International Criminal Court of the accused is disruptive behaviour of the accused. (International Criminal Court, 2020) In ICL, the first instance leading to the waiver of the right of presence is disruptive behaviour on the part of the defendant. (Wheeler, 2018) The Appeals Chamber of the ICC ruled that continuous accused's disruption would be deemed as an implicit waiver of his right of self-representation. (International Criminal Court, 2013) In ICL, it is undisputed contention that if accused, being aware of consequences attached to that act disturbs the proceedings of the court then it shall be deemed that he waives the right to be present in the trial. (Brook, 1998-1999)

b. Abscondence of accused

The second circumstance under which TiA may be held is when the accused voluntarily absconds and does not appear before the trial court. (Tellenbach, 2004) This condition may occur either at the start of the trial or during a trial. (Al-Hargan, 2006) Hence, under this condition, a TiA may occur too.

Position of Trial *in absentia* in ICL

Over the years, the International Criminal Law caused the establishment of numerous trials and each of them differently dealt with the TiA.

A. International Tribunals permitting the Trials *in Absentia*

As per the report of the Human Rights Committee, TiA is allowed in certain conditions in the fairness of trial when the alleged persons, being well aware of proceedings against them, decline to exercise their right to be present at a trial (Human Rights Committee, 2007, Human Rights Committee, 2016); To simplify, a fair trial may be held in the *absentia* of an alleged person because he voluntarily waived his right to be present, either expressly or by implication. (Clooney & Webb, 2016) Article 63(2) of ICC Statute refers to a circumstance whereby the defendant is compelled to leave the courtroom conducting the trial on the account of disruptive behaviour. (Shaw, 2012)

Certainly, it the well-established rule of law that the accused should be present in a trial and any inconsistent action to this rule must be an exception. Such exception should always remain an exception and not become the rule of a law. (Broomhall, 2004) These proceedings have always remained the talk of every table in the international arena. (Overy, 2009) The different approaches adopted by the different international tribunals are discussed in connection with the trials *in absentia*.

i. International Military Tribunal (IMT) Nuremberg

Although serious criticism has been noted on the drawbacks of IMT in Nuremberg, it laid down the foundation of what is being currently perceived in the contemporary justice system of globe. The statute of IMT permitted to hold trials *in absentia* totally.

The importance of the rule mentioned above stems from its contrast with the legal traditions followed in the domestic jurisdictions of two founding countries, the UK and the USA. Cassese suggests that the severity of the offenses committed by the accused offers a reasonable justification for this inconsistency (Cassese, 2008). However, another explanation for the practice of trials in *absentia* can be found in the characteristics of civil law systems (Priemel & Stiller, 2019). The inclusion of civil law principles in the statute of the Nuremberg tribunal likely aimed to reconcile differences and address the concerns of France, one of the original members (Stoltzfus & Friedlander, 2008). As Overy noted, French legal practitioners were dissatisfied with a tribunal primarily based on Anglo-Saxon common law rather than Roman law (Overy, 2009).

Despite this, trials in *absentia* were not entirely unrestricted; they were subject to specific conditions and were only permissible under certain circumstances, rather than being an unchecked authority (Glueck & Sheldon, 1946).

ii. IMTFE Tokyo Tribunal

History apprises that Tokyo Tribunal allowed trials *in absentia*. (Kumar, 2012) But, it is also a fact to be noted that the constitution of the Tokyo Tribunal did not provide express provision concerning the right of self-representation. (Amnesty International, 2014) Klerks wrote that since Article 9 of Tokyo Tribunal, containing the rights of the accused, did not mention the right of self-representation at trial, it is therefore inferred that theoretically TiA was allowed at Tokyo Tribunal. (Klerks,)

B. International Tribunals not permitting trial *in absentia*

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) are two well-known ad hoc tribunals in the field of international criminal law (Schomburg, 2009). The matter of conducting trials in *absentia* will be explored in the subsequent sections.

The ICTY and ICTR

The statutes of ad hoc tribunals like the ICTY and ICTR do not explicitly address the issue of trials in *absentia*. However, both statutes include common Article 21(4)(d), which guarantees the right of the accused to be present before the trial court. This provision suggests that trials in *absentia* may not be permitted within the framework of these tribunals. This view, however, is at odds with the position expressed by UN Secretary-General Boutros Boutros-Ghali in his report to the UN Security Council on 3 May 1993 regarding the ICT. (United Nations Security Council, 1993). In this report, he emphasized that a trial should not proceed unless the accused is physically present before the Tribunal.

The majority opinion holds that trials in *absentia* should be disallowed, as they would conflict with Article 14 of the International Covenant on Civil and Political Rights (ICCPR). (Damaska, 2010). The physical presence of the accused in court is considered "one of the most fundamental and universally accepted principles of a fair criminal trial." (ICTR, 2006). This principle is affirmed

across global, regional, and domestic legal systems, all of which interpret the right to be present as necessitating physical presence.

Nevertheless, Rule 61 of the Rules of Procedure and Evidence for both the ICTY and ICTR outlines the procedure in cases where an arrest warrant fails to be executed. In some instances, the procedure described in Rule 61 is perceived as a TiA, reflecting the differing perspectives on the subject matter between civil and common law systems. (Schabas, 2010). However, it is argued that the procedure outlined in Rule 61 serves not only to reconcile differences between legal systems but also to ensure that the Tribunals operate efficiently and without delay. Unlike the ICTY, however, proceedings under Rule 61 were never initiated before the ICTR (ICC, 2013). Rule 61 is not meant for actual trials; rather, it serves as a mechanism for confirming the charges against the accused. The Trial Chamber of the Special Tribunal for Lebanon interpreted Rule 61 of the ICTY and ICTR Rules of Procedure and Evidence in this context, stating that "it is a procedure in absentia but not a TiA. This highlights that Rule 61 is a pre-trial procedure and is not intended to determine the guilt of the accused (Paulussen, 2010). Rule 61 is applicable when an arrest warrant, issued following the confirmation of an indictment by a judge, has not been executed, and as a result, the indictment has not been served on the accused (STL, 2012).

International Criminal Court

Presence at trial is a multifaceted norm. (Schwartz, 1996) The Rome Statute categorically envisages that the accused shall be present during a trial. The heading of the same article reads as "*trial in the presence of accused*". It is not only a right, but it is also the accused's duty. (Tuinstra, 2008) Article 63 (1) Rome Statute maintains that "the accused shall be present during the trial" (Jorgensen, 2008). The word 'shall' implies an obligation and this obligation is imposed on both the ICC and the accused. Since the right of self-representation is a waivable right, if the accused relinquishes his right to be present at trial and explicitly requests the judge to be exempted from part of the hearings and trial, the trial court may accept such a request (David, 2003). Rule 124 of Rules of Procedure and Evidence substantiates Article 61(2) (a) which mandates the accused to move an application seeking permission to remain absent at the trial and surrendering his right of self-representation. Eventually, the Pre-Trial Chamber has the jurisdiction to hold consultations among the persons concerned in the case and the right to be present would be waived if the Court is satisfied that the defendant is cognizant of his right to be present and consequences of the same right too.

The Pre-Trial Chamber may decide to conduct consultations with the parties to the case and waiver would only be permitted if the court is convinced that the alleged person is aware of his right of self-representation and consequences of the same right too.

The right envisaged in Article 63 is further supported by Article 67 of the Rome Statute. However, Article 61 enshrines that hearing involving the charges' confirmation before the trial court must be held within a reasonable time once either the person surrenders before the court or voluntarily appear before the court. In ordinary circumstances, the proceedings shall be conducted in the presence of the person charged, as well as his or her counsel.

James Stewart in his article, pertaining to the doctrine of fair trial and TiA, states that this is one of the intrinsic values of a fair trial and are significant to the sound application of ICL and administration of justice and that result of such fair trial would be carrying credibility and further enhances the respect for the justice and equity. (Stewart, 2014)

Trial in absentia in Islamic Law

Islamic law places significant emphasis on the right of the accused to be present when the trial begins. (Black, Esmaeili, & Hosen, 2013) In the Islamic legal framework, it is mandated that the accused must be present for the trial to commence. (Peters, 2005) One of the fundamental principles of a fair trial is the guarantee that the trial shall be conducted in the presence of the accused. Although, Islamic Criminal Law does not provide an explicit theoretical discussion on the defense of the accused or the right to self-representation, various traditions of the Holy Prophet (SAW) provide insight into the importance of the accused's awareness of the charges against him (Peters, 2005). For instance, in one tradition, the Holy Prophet (SAW) directed Hazrat Ali (AS) to govern Yemen with the following advice: "O Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for one until you have heard from the other. It is more appropriate for justice to be evident to you and for you to understand what is right." (Norullah, 2011). Additionally, Hazra Omar (RA) instructed judges, stating, "If an adversary whose eye has been blinded by another comes to you, do not rule until the other party attends." (Baderin, 2005)

In several countries where laws are aligned with Islamic principles, TiA is generally permitted but considered an exception. This is the case in Pakistan, where it is allowed under specific conditions. (Section 512, Code of Criminal Procedure, Pakistan, 1898) In Pakistan, evidence can be recorded in the absence of the accused, but a judgment cannot be pronounced until the accused is present. (Peshawar High Court, 2017) The rationale for recording evidence in the accused's absence is to preserve the evidence against a fugitive defendant. (Mahmood, 2014) Similarly, other countries with Islamic legal traditions also include provisions that allow it under exceptional circumstances, primarily to protect the integrity of evidence.

Trial in absentia: Points of Convergences between Islamic Law and ICL

Islamic law and International Criminal Law both give paramount importance to a fair trial. By comparing the subject of TiA, we find that both regimes emphasize on the rights of the accused and consider the accused innocent until proved guilty (Hussain, 2011). Generally, both regimes are on equal footing and consistent with each other on the subject matter of TiA.

a) Presence of accused during trial

The accused's right of self-representation is saved in Article 14 of ICCPR. Similarly, the ICC statute envisages similar rights. On the other hand, it is crystal evident that trial should begin only when the accused is available in the court of law in Islamic law. (Hussain, 2011) Therefore, both regimes are consistent with each other to this aspect.

b) Trial in absentia in exceptional circumstances

ICL permits the TiA only in exceptional circumstances namely disruptive behaviour and voluntarily absconding from the trial. (Jørgensen, 2004) In Islamic law's regime, it is permitted in only few different scenarios i.e., when there is an apprehension of loss of evidences then evidences are placed on the record and a trial commenced *in absentia* of accused. The same case is in the Code of Criminal Procedure, Pakistan 1898. (Section 512, CrPC, Pakistan)

c) Counsel's appearance in accused's absence

In the sphere of the ICL, if the attendance of the accused is dispensed with the permission of court, eventually his counsel may appear and defend the alleged person. (Ellis, 2003) A similar position lies in the sphere of Islamic law. This regime permits too that if the court is satisfied then the accused's attendance may be dispensed with.

Conclusion

International Criminal Law and Islamic law concur and stand on equal footing with regard to TiA. Islamic law enshrines various rights to the defendant that are not even found in International Criminal Law. Under Islamic law, there is hardly a concept of appearance via video link during the trial and it envisages the concept of physical presence. On the other hand, International Law does provide the option of appearing remotely as a last resort when the defendant starts to disturb the proceedings of the court.

TiA should be permitted only in exceptional circumstances to meet with the ends of justice. In case, it is made rule in the administration of criminal justice system, eventually it would violate various well recognized principles and doctrines such as right of self-representation, doctrine of fair trial, and equitable principles.

Currently, the Islamic Law and ICL both do not, in general terms, allow to hold trials in absentia. It is undisputed position that laws address the exceptional circumstances and provide the way to deal with those unprecedented cases. ICL enshrines the method of remote participation through artificial means in case alleged person begins to disrupt the proceedings of court. In Islamic law, if the accused absconds, it is permitted to save the evidences and proper trial would begin once the accused appears before the court of law.

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