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The ICC and *in-absentia* proceedings:

Finding a response to the difficulties of executing arrest warrants

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Introduction

Proceedings *in absentia* tend to be controversial in both national and international criminal legal systems. In essence, critics complain that *in absentia* proceedings can deny the defendant the constitutional and human rights guarantees of due process. Despite these challenges, and under exceptional circumstances, international ad-hoc tribunals and the International Criminal Court (ICC) have allowed or incorporated some or all of their proceedings to occur in the absence of the accused. This Reflections piece aims to analyse the use of procedures *in absentia* in the face of the ever-present challenge international courts face in securing the presence of alleged perpetrators of international crimes. In doing so, this work will consider the first ever request in the history of the ICC to carry out proceedings confirming charges against the accused *in absentia* in the case against Joseph Kony. Finally, this piece draws conclusions related to the need to rethink some aspects of international criminal procedure in order to address certain challenges posed by the nature of international law and to provide solutions for victims while upholding their rights.

The ICC's Office of the Prosecutor's (OTP) request to confirm charges *in-absentia* in the case of Joseph Kony

On November 23, 2023, upon the request of the Office of the Prosecutor (OTP), the Pre-Trial Chamber II of the ICC issued a preliminary decision in the case of Joseph Kony to hold a hearing confirming charges against Kony in his absence. After carefully analysing the circumstances presented by the OTP, the preliminary decision indicated that Kony is a person who, despite the efforts of the ICC Registry and the OTP, cannot be found, and determined "that under the prevailing circumstances, there is cause to hold a confirmation hearing against Mr Kony, in his absence."

However, to fulfil the requirements of Article 61 (2)(b) of the Rome Statute for confirming charges *in absentia*, the Chamber also required the OTP to file a public "Document containing the charges," within eight weeks of its preliminary decision, and ordered the ICC Registry to submit within four weeks a plan indicating the outreach activities and notification efforts it would pursue to notify Kony–once again–of those charges. On January 26, 2024, in a new decision, the Pre-Trial Chamber II ordered the Registry to start "notification efforts and outreach activities," and to report on them within four weeks of that request. Finally, in March, the Pre-Trial Chamber II authorized that the first hearing *in absentia* be held next October.

As established in Article 61 of the Rome Statute, the confirmation of charges is the procedural moment that determines whether the prosecution's evidence is sufficient to start the trial against the accused. As a rule, the hearing for this confirmation should be done in the presence of the accused. However, Article 61.2 authorizes such hearings *in absentia* under one of the following conditions: if the accused (a) has waived the right to be present or (b) has fled or cannot be found after all reasonable measures have been taken to secure his or her presence.

The ICC's first arrest warrant against Kony was issued in 2005 for 12 counts of crimes against humanity and 21 counts of war crimes. Joseph Kony is the founder and head of the Lord of Resistance Army (LRA), a terrorist revolutionary organization created in northern Uganda during the 1980s with the purpose of fighting against the government and establishing his version of the Ten Commandments. Due to the gravity of his crimes, he was first on the ICC's Prosecutor's list of individuals to be investigated and the first person indicted by the ICC in 2002. As of today, according to the OTP's latest Public Document Containing the Charges issued on January 19, 2024, Kony is being charged with 36 counts of war crimes and crimes against humanity.

However, Kony remains at large, despite what appear to be significant efforts by the OTP to procure his arrest or surrender for trial. As stated by the OTP in a presentation in November 2022, the efforts to find the leader of the LRA "were assisted to an unprecedented degree by States, international organisations, and civil society." Although no further details were included due to the confidentiality of the submission, the collaboration of different national and international officials is of public notoriety. US Special Agents, UN Soldiers, and an African Union (AU) task team supported by members of the army in the nations where the LRA operates have searched for Kony since his arrest warrant was issued in 2005.

In a statement made on December 2022, the Prosecutor of the ICC, Karim A. A. Khan KC, explained his decision to close the investigation on the crimes committed in Uganda and to request the *in-absentia* confirmation of charges as part of a prosecutorial strategy "to deliver the greatest impact for those affected by crimes falling within our jurisdiction globally." Khan specifically noted that proceeding *in absentia* in this case would allow the ICC to deliver justice to the many victims who had suffered as a result of acts committed by the LRA under Kony's leadership. Thus, in November 2022, for the first time in the history of the ICC, the Prosecutor requested that the Pre-trial Chamber II confirm charges against Joseph Kony *in absentia* as the Court had for years been unable to secure his presence.

The confirmation of charges is a crucial procedural moment in which the events that have occurred are verified as crimes, a potential link is established between the crimes and the accused, and the status of victim is recognized for those who have suffered from the crimes and/or for their relatives.

Challenges associated with apprehending accused individuals and the intrinsic characteristics of international law

The case of Kony is not the first one at the ICC in which the arrest warrants have not been executed and the accused has not appeared or been brought to The Hague. Many individuals accused of international crimes have avoided justice for different reasons. The case of Omar Al-Bashir, former president of Sudan, is likely one of the most resonant ones. Al-Bashir was indicted for his role in genocide, crimes against humanity and war crimes allegedly committed at least between 2003 and 2008. The ICC issued its first arrest warrant against him in March of 2009, followed by a second one in July 2010. As of 2016, Al-Bashir had travelled 75 times to 22 countries, some of them members of the ICC. Moreover, in 2018, he was the first Arab president to visit Syria after the crisis started in 2011, and in 2019 he visited Qatar. Still, the arrest warrant was not executed. It appears evident from these

conditions that the exercise of international jurisdiction is contingent upon collaboration and unity between member nations. This lack of cooperation can result in the stagnation of procedures and thus the inability to achieve the objectives and purposes of institutions like the ICC.

Judges of the ICC have authorized arrest warrants against 40 individuals. Of those, only 21 have been apprehended and presented before the ICC. Fifteen individuals continue to evade capture, and charges have been dismissed against six individuals following their death. As such, a high percentage of accused individuals—nearly 50%—are not brought to justice and, although authorizing the confirmation of charges in their absence would not fully bridge this gap, it would contribute to fighting against impunity and give some redress to victims. In fact, if the request of the prosecution is granted, victims will have the chance to express their "views and concerns" in court through their representatives, thus giving them an opportunity to actively participate in the process as established in Article 68.3 of the Rome Statute.

A more recent but very resonant case is the one of Vladimir Putin and Maria Lvova-Belova. On March 17, 2023, the ICC Pre-Trial Chamber II issued arrest warrants against Putin and Lvova-Belova for the war crimes of the unlawful deportation of children and the unlawful transfer of children from occupied areas of Ukraine to Russia. As I analyse in a recent work related to the crime of aggression and the possibility of considering trials *in absentia* for the crime of aggression against Ukraine, the question remains whether "accountability mechanisms will soon—or ever—be able to obtain custody over Putin and other high-level offenders, all of whom are likely in Russia and will remain so." In fact, Putin recently avoided traveling to the BRICS summit in South Africa due to the possibility of being arrested following the warrant issued by ICC.

According to the rules of the court, all cases against the above-mentioned alleged perpetrators will remain inactive in the pre-trial stage until both individuals appear in court as the ICC does not currently allow for trials *in absentia*. Presently, Putin, Lvova-Belova and Al-Bashir continue to avoid justice, just as Kony has. Yet, this Reflections piece poses the question of whether the confirmation of charges without the presence of the accused could be a positive move towards justice and, consequently, assist in overcoming the pre-trial stagnation caused by the cooperative nature of international law.

As mentioned above, those who are most harmed by the fact that these accused are not arrested or do not surrender to face charges against them are the many victims who have suffered injuries; impunity has serious and vast consequences for individual victims, but also for societies in general,

as international criminal justice is intended to have a restorative impact. Thus, impunity violates victims' fundamental rights to access to justice, reparations, and truth. Moreover, impunity diminishes the power of criminal justice in general, and international criminal justice, in particular, to function as a deterrent. The impossibility of securing the presence of the accused in court conveys the message that it is possible to commit an international crime and avoid justice.

Furthermore, the impossibility of continuing with the proceedings at the ICC because of the absence of suspects has also weakened peoples and states' confidence in the international criminal system that was once the hope of many, especially victims. As stated in its Preamble, the ICC has a duty towards justice, ending impunity, and the human rights of both the international community and of the victims of atrocities. Consequently, the "legitimacy and authority [of the ICC] have been validly questioned," as per its inability to fulfil its core duties.

For these reasons, and the almost two decades of impunity that Joseph Kony has enjoyed, the Prosecutor's request to convene the hearing for confirmation of charges *in absentia* appears to be a step towards upholding certain rights of victims and demonstrating that the absence of the accused cannot fully paralyze the justice and truth-finding process and the fight against impunity for which the ICC was established in the first place.

The current lack of progress in the Court's efforts to enforce arrest warrants appears to benefit only those who are evading punishment. The inability to carry out nearly 50% of arrest warrants within a domestic criminal system would give rise to concerns regarding the legitimacy and effectiveness of the judiciary, while also exerting significant social and political ramifications. Such situations would profoundly undermine the foundational principles and purposes of any domestic criminal justice system.

As mentioned, the issue of enforcement in international law is clearly different from that at the domestic level. International law, in general, requires consent and cooperation; adherence to its rules is, by nature, voluntary. International criminal law is by no means different; its institutions have limited powers and no police force to enforce decisions. States face few to no legal or political consequences for their lack of cooperation. Thus, precisely because it is different in so many ways, the tools to fight impunity and respond to the demands of victims must also be different.

In this context, procedures *in absentia*, such as the confirmation of charges, and other related measures, may serve as a potential solution to the inherent difficulties within international criminal law, albeit an imperfect one. Despite the absence of the accused, victims would still have an opportunity to finally speak out before a court; the evidence would be examined, presented and documented for future reference, and the judicial process would become a relevant element on the path towards the search for truth, justice, reparations, and the reconstruction of historical individual and collective memory.

In-absentia proceedings in ad-hoc International Criminal Tribunals

Due to the nature of international law, the ICC is not the only international criminal court that has encountered problems securing the presence in court of international crime suspects, and subsequently authorizing *in-absentia* procedures to preserve evidence and to at least partially fulfil its objectives of justice for the victims and accountability for perpetrators.

The International Tribunal for the former Yugoslavia (ICTY) also faced the impossibility of capturing all accused individuals, and thus eventually allowed *in absentia* proceedings through Rule 61 of the Rules of Procedure and Evidence, which some scholars understand as similar to a full trial *in absentia*.[1] Rule 61 is a procedure used to reconfirm an indictment and not to determine the guilt of an accused person; however, it has influenced decisions in the subsequent trial stage.[2] Scholars have criticized it, stating that it works as a "'*quasi*-trial' under which the probability of the accused's commission of the crime is decided after examining the evidence."

As mentioned in the Public Redacted Version of the "Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence," Rule 61 of the ICTY allowed for a public hearing before the Trial Chamber to present the evidence in support of the Prosecutor's indictment in the absence of the accused. Clearly, this Rule went beyond the current regulations of the Rome Statute as it not only allowed for the confirmation of charges *in absentia* but also for the presentation of evidence in an open court, including live witness testimony. Finally, after all evidence was presented, the Trial Chamber could determine "that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment."

[1] Shuichi Furuya, Commentary: Rule 61 Procedure in the International Criminal Tribunal for the Former Yugoslavia: A Lesson for the ICC, 12 LEIDEN J. INT'L L. 635 (1999).
[2] Ibid.

For these reasons, some authors criticize Rule 61 as aberrant to procedural law for being an "imperfect substitute of trials *in absentia*."[3] Others, instead, affirm that Rule 61 is a trial *in absentia* "in disguise," characterized as the functional equivalent of a trial without the presence of the accused, although consistent with international law principles.[4] Regardless of the nature of this Rule, it has emerged as a significant antecedent for authorizing certain proceedings without the presence of the accused.

According to most of the literature on Rule 61, the reasons for incorporating this peculiar procedure rest on the impossibility of finding the accused and the pragmatic problem this presented in the functioning of the ICTY. The incorporation of Rule 61 was an attempt to address this issue, give some response to victims' demands, and preserve evidence, especially oral testimonies.

Since victims and witnesses played an important part in ICTY proceedings, this probably influenced the incorporation of the rule under discussion. Unlike the Nuremberg trials, which relied primarily on documentary evidence, the ICTY relied on witness testimony to provide most of the information. The ICTY's official website expressly states:

> "a testimony not only enables the judges to render a fair judgement, it also helps the people of the region and the international community to learn the truth about the crimes committed in the former Yugoslavia and to deter persons from committing these crimes again. By testifying, witnesses make a necessary and valuable contribution to the restoration of justice and reconciliation in the region. In addition to that, testifying at the Tribunal also provides an opportunity for victims to describe what happened to them."

Rule 61 was indeed used several times throughout the life of the ICTY, and witnesses gave testimony in the hearings to review the indictments as established by procedure. Examples include the cases of *"Prosecutor v. Ivica Rajic a/k/a Viktor Andric (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence)"*, decision of 13 September 1996, and of "*Prosecutor v. Radovan Karadžić and Ratko Maldić (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence)"*, decision of 11 July 1996.

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[3] Carlo Tiribelli, Judgment in Absentia in International Criminal Law: Its Admissibility before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant, 18 Sri LANKA J. INT'l L. 369 (2006).

[4] Mark Thieroff & Edward A. Amley Jr., Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61, 23 YALE J. INT'l L. 231 (1998).

The controversial Rule 61 was implemented as a solution to the challenges encountered in locating several suspect individuals. In fact, experts have affirmed that trials *in absentia* were not accepted as they could have risked becoming the rule and not the exception. Yet again, as international criminal law has a voluntary nature based on consent and cooperation, its institutions and principles should be subject to analysis and consideration to address its core nature. As with the case of Kony, Al-Bashir, Putin, and many others, finding accused individuals will continue to be a problem, even after having a permanent court for international crimes with 124 member States.

The International Criminal Tribunal for Rwanda (ICTR), established in the aftermath of the Genocide Against the Tutsi in Rwanda that occurred from April to July 1994, followed the example of the ICTY on this issue. The Court was set in 1994 via UN General Assembly Resolution 955. Originally, the ICTR did not authorize *in absentia* proceedings. However, in 2003, the ICTR reformed its Rules of Procedure and Evidence to introduce Rule 82 *bis*, which allowed for the use of trials *in absentia*. In this case, it went beyond the confirmation of charges or the public and oral revision of the evidence for the indictment, to allow the full trial to proceed in the absence of the accused.

Rule 82 *bis* stated "[i]f an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists." The rule also required an initial appearance of the accused as established under Rule 62, due notification and a defense counsel to protect the interest of the individual under trial.

This Rule was adopted by the Court in order to hold the trial against Jean-Bosco Barayagwiza in his absence. The biggest criticism lay within its retroactivity, as the rule was passed long after the set trial start date. Although the rule lasted many years until July 2015, when it was removed by new amendments to the Rules of Procedure, it was not used in any other cases.

The difficulties of having a high-level perpetrator appear in court played a relevant role in the support of the *in absentia* procedure under the ICTR. Although the ICTR proved insufficient to respond to the demands of the genocide committed in Rwanda—where the number of victims exceeded one million and the number of perpetrators may have numbered as high at 200,000—allowing one high-ranking perpetrator to skirt the international justice process would have done much harm to the Court, in particular, but also to international criminal law, in general, as an emerging field.

Conclusions

The difficulties in apprehending the accused have been a problem since the very first contemporary experiences of international criminal accountability, namely, the Trials of Constantinople for the Armenian Genocide, and the Nuremberg Trials, in the aftermath of World War II. Both international tribunals accepted full trials *in absentia* because alleged perpetrators had fled to other countries such as Germany and Argentina, respectively. Once again, finding and apprehending the accused depended on the cooperation of both those nations and other countries. In fact, Martin Bormann, Adolf Hitler's private secretary and Head of the Nazi Party Chancellery, was sentenced to death in his absence in 1946.

As mentioned previously, the fact that jurisdictions dealing with international crimes have partially or fully accepted *in absentia* proceedings, underlines three persistent and interrelated challenges facing the international criminal process: (1) the difficulties in apprehending the accused, (2) the obligation to fulfill victims' rights to truth, access to justice, and reparations, and (3) the need to provide justice for victims and accountability for perpetrators, even if not perfect in both instances.

Due process should no longer be an issue. The International Bar Association (IBA) has proposed already the conditions that should be adopted in all jurisdictions to ensure judicial guarantees in international criminal justice processes when *in absentia* proceedings occur. These requirements were established by IBA for trials *in absentia*. However, under the proverb "he who can do more can do less," these conditions could also apply to other procedural moments such as the confirmation of charges. While it is imperative to maintain ongoing deliberation on this matter to safeguard due process at all stages of a criminal procedure, it should not hinder the pursuit of legal procedures in the absence of persons who are accused of perpetrating the most serious offences.

A valid case can be made that the confirmation of charges *in absentia* has the potential to become a prevailing practice within the ICC, thus undermining efforts to apprehend and/or surrender suspects. However, as per the numbers of effective warrants since 2005, suspects are difficult to apprehend despite efforts by the international community to find them, or they are not apprehended due to the refusal of many states to do so, such as in the case of Al-Bashir. The acceptance or authorization of at least certain proceedings *in absentia* should be accompanied by the international community's commitment and efforts to strengthen the measures taken and methods applied to apprehend individuals.

The persistent evasion of justice by Joseph Kony and other individuals accused of international crimes since 2005 should serve as a compelling indication to the ICC that certain procedural measures need to be implemented. Initially, it is imperative that specific proceedings be carried out *in absentia*. As previously described, international criminal law has accepted both full *in absentia* trials and/or parts of the process in the absence of the accused. The judges of the International Criminal Court cannot have a reductionist and restrictive interpretation of the Rome Statute. They should acknowledge the embedded challenges of the legal field they practice. Consequently, in instances such as the case of Kony, it is advisable to grant authorization for the confirmation of charges *in absentia*.

Stagnation serves no objective of the international criminal process, let alone confidence in the rule of law. Victims have rights, and the realization of those rights cannot wait another decade or two, or even forever in the case of the death of the accused individuals. International justice is not exclusively about accountability for perpetrators, but it is also about fulfilling the fundamental rights of victims to access to justice, reparations, and truth. That fulfilment can only be achieved through a series of actions that include judicial processes as the most relevant one.

The confirmation of charges even in the absence of the accused can be a step closer to fulfilling those rights by giving victims a chance to actively participate in different stages of the judicial process. On the other hand, the state parties to the Court should often renew their commitments within the international legal system so that *in absentia* proceedings do not become the rule, and so that suspects are apprehended and handed over to justice. In conclusion, considering the voluntary and cooperative nature of International Criminal Law, the foundational principles and purposes of the international criminal system, and the obligations to offer redress to victims and uphold their rights, the ICC must reconsider the current and future procedural requirements of international criminal justice.

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