

The Virtual Courtroom: The Step Forward to Prevent *In Absentia*?

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Question

- ▶ Would it be possible to use complete video trials in criminal cases in the European Union as a way to prevent *in absentia* trials and the subsequent issues with requests for the surrender of those accused?

The EAW System and Article 4a(1) Framework Decision 2002/548/JHA

- ▶ If the requested person “did not appear in person at the trial resulting in the decision,” the executing judicial authority “may . . . refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, **unless** the issuing judicial authority indicated in the EAW that one or more of **four situations** apply.
- ▶ Those four situations are:
 - ▶ The accused was summoned in person to attend the criminal trial
 - ▶ The accused was defended at the criminal trial by a mandated legal counselor
 - ▶ The accused was served with the decision after the *in absentia* trial, but did not make use of the right to a retrial
 - ▶ The arrest warrant indicates that the accused will be expressly informed of his right to a retrial

Two-Way Live Videoconferencing Technology (VCT)

- ▶ Can connect witnesses in remote locations around the world as long as both have the necessary technology for video and audio transmission
- ▶ Technology continues to improve
- ▶ Technology continues to be more affordable

Some Benefits/Criticisms of Using VCT

▶ Benefits

- ▶ Cost effective
- ▶ Reduces safety concerns transporting prisoners
- ▶ Saves court time
- ▶ Similar to live in-person proceedings

▶ Criticisms

- ▶ Technology can be expensive to obtain and operate
- ▶ Not similar enough to live-in person proceedings (demeanor and truthfulness, body language)
- ▶ May impair effective cross-examination
- ▶ Does not convey to the remote witness the same importance and solemnity of the judicial proceeding
- ▶ For criminal proceedings, remote testimony may violate the defendant's right to a fair trial and to be confronted with the witnesses against him/her

Some Courts are using VCT in Some Circumstances

- ▶ Civil courts
 - ▶ Pre-trial conferences
 - ▶ Administrative hearings (like veterans benefits)
 - ▶ Witness appearances
 - ▶ Trials
- ▶ Criminal courts
 - ▶ Bail hearings
 - ▶ Vulnerable witnesses like children
 - ▶ For other witnesses at trial in the interests of justice
 - ▶ But, some laws in US require defendant's consent

International Criminal Tribunals and VCT

- ▶ ICTY Rule 81 bis: proceedings may be conducted by videoconference link if consistent with the interests of justice
- ▶ ICTR: permits remote VCT witness testimony when “‘necessary to safeguard the witness’s security’ or in the interest of justice”
- ▶ SCSL Rule 85D: video testimony allowed on order of the court
- ▶ Special Tribunal for Lebanon Rule 105: Upon court authorization, permits an accused to participate in hearings via video-conference provided that counsel attends the hearings in person
- ▶ ICC
 - ▶ Rule 67: Permits a witness to testify remotely by audio or video provided that the technology permits the witness to be examined by all parties remotely and the trial chamber ensures that the remote venue is conducive to the giving of truthful testimony and to the safety and well-being of the witness
 - ▶ Rule 134 bis: Presence through the use of video technology 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial. 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Waiving Defendant's Presence at Trial

- ▶ United States -- Rule 43 of the Rules of Criminal Procedure: trial *in absentia* permitted if defendant is voluntarily absent after the trial commenced
- ▶ Europe
 - ▶ European Court of Human Rights law indicates that the right to be present can be waived—either expressly or by implication
 - ▶ Some national criminal law systems permit trials in the absence of accused persons who abscond from their own trials
- ▶ ICTR -- Conducted the trial of Jean-Bosco Barayagwiza in the absence of an accused who refused to be present
- ▶ SCSL -- Rule 60 allows *in absentia* proceedings where the accused has appeared and later absconded
- ▶ Special Tribunal for Lebanon -- Allows *In absentia* trials if the accused has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge
- ▶ CC Rule (post Kenya-trials) -- Rule 134 ter
 - ▶ Excusal from presence at trial 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial. 2. The Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. 3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

ICC Ruto Presence at Trial Decision

- ▶ Prosecution and Victims opposed Ruto's motion.
- ▶ Court's reasoning focused on Rule 63(1). Right for the accused and also a duty on the accused.
- ▶ In response to the Prosecution argument that Rule 63(1) prevented *in absentia* trials, ICC Court stated: "This Chamber remains **to be convinced** that the trial is foreclosed in this Court in the case of an accused who absconded from his own trial after having made appearances before the Court and accepted the Court's jurisdiction."
- ▶ Granted motion, but required presence at some proceedings, such as opening statements, closing statements, where witnesses were presenting their views in person, and for sentencing.
- ▶ Note that Ruto's counsel would still participate in all court proceedings.
- ▶ Note also that even while not present, Ruto could follow proceedings on the court's website video stream.

Equating Video Presence with Actual Presence at Trial

- ▶ Special Tribunal for Lebanon:
 - ▶ Rule 104: Proceedings shall not be in absentia if an accused appears before the Tribunal in person, **by video-conference**, or by counsel appointed or accepted by him.

Defendant's Right to Confront Witnesses Against Him/Her

- ▶ Does confront mean “face-to-face”?

Video Trial May Satisfy Defendant's Trial Rights

- ▶ 1. Defendant can waive his/her right to be present at trial
- ▶ 2. Some law and reasoning by courts indicates that live two-way video testimony is sufficiently similar to in-person testimony
- ▶ BUT . . .
 - ▶ Some people will argue that presence necessarily means physical presence not video presence

Some Practical Considerations

- ▶ Would the accused agree to a remote video trial?
- ▶ Location of defense counsel?
 - ▶ With defendant?
 - ▶ In courtroom?
 - ▶ Two defense counsel?
 - ▶ Prosecutor also remote?
- ▶ Interpreters?

Some Practical Considerations (Con't)

- ▶ Technology
 - ▶ Quality of video transmission
 - ▶ Cameras
 - ▶ Defendant's Image

Thank you!

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