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**Proceedings *in absentia* in comparative
and international criminal law**

By

Lena Mertins



Duncker & Humblot · Berlin

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Europäischen Strafrecht

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European Criminal Law and Procedure

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*Meinem Opa Norbert
und meinem Patenkind Lasse*

Preface

“When I came back to Dublin, I was court-martialled in my absence and sentenced to death in my absence, so I said, they could shoot me in my absence.”

– *Brendan Behan* (1923–1964), *Hostage*, London 1958

This thesis was accepted as a dissertation by the Faculty of Law of the University of Bonn in November 2021. Pertinent literature was taken into account up until February 2021.

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Cologne, November 2021

Lena Mertins

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Abbreviations

A.2d	Atlantic Reporter, Second Series
A.C.D.	Administrative Court Digest
AA	Ars Aequi
AC	Appeals Chamber
ACHPR	African Convention on Human and Peoples' Rights (Banjul Charter)
ACHR	American Convention on Human Rights (Pact of San José)
ACtHPR	African Court on Human and Peoples' Rights
AIDP	Association Internationale de Droit Pénal
AJIL	American Journal of International Law
AJP	Aktuelle Juristische Praxis
AK	Alternativkommentar
All ER	All England Law Reports
Am J Comp L	American Journal of Comparative Law
Am U Int'l L Rev	American University International Law Review
AöR	Archiv des öffentlichen Rechts
AP	Archivo Penale
App. DC	Appeal Cases, District Columbia
App.3d	California Courts of Appeal Cases, Third Series
Appl.	Application
ARIEL	Austrian Review of International and European Law
ARSP	Archiv für Rechts- und Sozialphilosophie
Art.	Article
ASP	Assembly of the State Parties to the RomeSt
AT-StGB	Austrian Criminal Code (<i>Strafprozessordnung</i>)
AT-StPO	Austrian Code of Criminal Procedure (<i>Strafprozessordnung</i>)
AU	African Union
AustYBIL	Australian Yearbook of International Law
AVR	Archiv für Völkerrecht
BayObLG	Bayerisches Oberstes Landesgericht
BBl	Bundesblatt
BeckOK	Beck'scher Online Kommentar
BeckRs	Beck-Online Rechtsprechung
BGBI	Bundesgesetzblatt
BGE	Sammlung der Bundesgerichtsentscheidungen
BGer	Schweizerisches Bundesgericht
BGG	Schweizerisches Bundesgerichtsgesetz
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BiH	Bosnia and Herzegovina
BSK	Basler Kommentar zur Strafprozessordnung

BT-Drs.	Bundestag Drucksache
BV	Schweizerische Bundesverfassung
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BWCC	War Crimes Section of the Court of Bosnia and Herzegovina
CAA	Criminal Appeal Act
CAJA	Coroners and Justice Act
Cal.App.3 rd	California Appellate Reports, Third Series
Cal.App.4 th	California Appellate Reports, Forth Series
CAR	Central African Republic
CCP	Court of Criminal Procedure
CDA	Crime and Disorder Act
ChiJIntlL	Chicago Journal of International Law
ChiKentLRev	Chicago-Kent Law Review
CH-StPO	Schweizerische Strafprozessordnung
CIC	Code d'Instruction Criminelle, 1808
CIJ	Co-Investigating Judges at the ECCC
Cir.	Circuit
CJA	Criminal Justice Act
CJIA	Criminal Justice and Immigration Act
CJPA	Criminal Justice and Police Act
COD	Crown Office Digest
ColumJTransnatlL	Columbia Journal of Transnational Law
CPC	Criminal Procedural Code
CPIA	Criminal Procedure and Investigations Act
CPP	Codice di Procedura Penale Italiano
CPR	The Criminal Procedure Rules
CPS	Crown Prosecution Service
Crim App R	The Criminal Appeal Reports
CrimLF	Criminal Law Forum
CrimLR	Criminal Law Review
CrimPR	Criminal Procedure Rules
Curt CC	Curtis' United States Circuits Court Reports
DD	Delikt en Delinkwent
Doc.	Document(s)
DPC	Diritto Penale Contemporaneo
DPP	Diritto Penale Procedurale
DRC	Democratic Republic of Congo
DRiZ	Deutsche Richterzeitung
DukeJComp&IntlL	Duke Journal of Comparative and International Law
e. g.	for example
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights
EGMR	Europäischer Gerichtshof für Menschenrechte
EGStGB	Einführungsgesetz zum Strafgesetzbuch

EMRK	Europäische Menschenrechtskonvention
et al.	et alii, et aliae or et alia
et seq.	and the following
etc.	et cetera
EU	European Union
EU FRCh	Charter of Fundamental Rights of the European Union
EuCLR	European Criminal Law Review
EuGRZ	Europäische Grundrechte Zeitschrift
EULEX	European Union Rule of Law Mission in Kosovo
EurJIntL	European Journal of International Law
EvBI	Evidenzblatt der Rechtsmittelentscheidungen
EWCA Crim	Court of Appeal (Criminal Division)
EWHC (Admin)	High Court (Administrative Court)
F & F	Foster and Finlayson's Nisi Prius Reports (1858–1868)
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F.Cas	Federal Cases
F.Supp.	Federal Supplement
FCJ	Federal Court of Justice
Fed.Appex	Federal Appendix
FG	Festgabe
FlaLRev	Florida Law Review
FordhamIntLJ	Fordham International Law Journal
FordhamLRev	Fordham Law Review
FRCrP	Federal Rules of Criminal Procedure
FRD	Federal Rules Decisions
FS	Festschrift
GA	Golddammers Archiv
GaIntl&CompL	Georgia Journal of International and Comparative Law
GeoWashIntLRev	George Washington International Law Review
GG	Grundgesetz
GS	Gedächtnisschrift
GVG	Gerichtsverfassungsgesetz
GYIL	German Yearbook of International Law
HarvIntLJ	Harvard International Law Journal
HarvJL& PubPoly	Harvard Journal of Law & Public Policy
HastingsLJ	Hastings Law Journal
HR	Hoge Raad
HR&IntlLegalDiscourse	Human Rights & International Legal Discourse
HRA	Human Rights Act
HRC	Human Rights Committee
HRLR	Human Rights Law Review
HumRtsQ	Human Rights Quarterly
i. e.	id est
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice

ICJSt	Statute of the International Court of Justice
ICL	International Criminal Law
ICLR	International Criminal Law Review
ICT	International(ised) Courts and Tribunals
ICTR	International Criminal Tribunal for Rwanda
ICTRSt	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ICTYSt	Statute of the International Criminal Tribunal for the Former Yugoslavia
Imm AR	Immigration Appeal Reports
IMT	International Military Tribunal at Nuremberg
IMTCh	Charter of the International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
IMTFECh	Charter of the International Military Tribunal for the Far East
IntKommEMRK	Internationaler Kommentar zur Europäischen Menschenrechtskonvention
Intl&CompLQ	International and Comparative Law Quarterly
Intl&CompLRev	International and Comparative Law Review
IntlLRev	International Law Review
IPBPR	Internationaler Pakt über bürgerliche und politische Rechte
IR	Internal Rule
IRG	Gesetz über die internationale Rechtshilfe
JA	Juristische Ausbildung
JB1	Juristische Blätter
JCE	Joint Criminal Enterprise
JCrimL	Journal of Criminal Law
JCrimL&Criminology	Journal of Criminal Law and Criminology
JICJ	Journal of International Criminal Justice
JICL	Journal of International Criminal Law
JOC	The Journal of Criminal Law
JP	Justice of the Peace Reports
JR	Juristische Rundschau
JSt	Journal für Strafrecht
JuS	Juristische Schulung
JZ	Juristen Zeitung
KB	Law Reports, King's Bench
KG	Kammergericht
KK	Karlsruher Kommentar zur StPO
KMR	Kommentar zur Strafprozessordnung
KRT	Khmer Rouge Tribunal
KSC	Kosovo Specialist Chambers
Law&ContempProbs	Law and Contemporary Problems
Law&Soc'yRev	Law and Society Review
LCCP	Lebanese Code of Criminal Procedure
LG	Landgericht
LJIL	Leiden Journal of International Law

LoyUChiLJ	Loyola University of Chicago Law Journal
LPICT	Law & Practice of International Courts and Tribunals
LR	Löwe-Rosenberg Kommentar zur StPO
LR PC	The Law Reports of Privy Council Appeals
LSK	Leitsatzkartei des deutschen Rechts
MCA	Magistrates' Courts Act
MCR	Magistrates' Court Rules
MDR	Monatsschrift für Deutsches Recht
MichJIntlL	Michigan Journal of International Law
MichLRev	Michigan Law Review
MICT	Mechanism for International Criminal Tribunals
Minn.	Minnesota Law Reports
Misc.2d	New York Miscellaneous Reports, Second Series
MPEPIL	Max Planck Encyclopedia of Public International Law
MvT	Memorie van Toelichting
N.E.2d	North Eastern Reporter, Second Series
N.Y.2d	New York Reports, Second Series
N.Y.S.2d	New York Supplement, Second Series
NCJIntlL & Com Reg	North Carolina Journal of International Law and Commercial Regulation
NewEngLRev	New England Law Review
NewJEuropeanCrimL	New Journal of European Criminal Law
NGO	None Governmental Organisation
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
No.	Number
NordicJIL	Nordic Journal of International Law
Nos	Numbers
NotreDameILJ	Notre Dame International Law Journal
Nr.	Nummer
NStZ	Neue Zeitschrift für Strafrecht
NStZ-RR	Neue Zeitschrift für Strafrecht – Rechtsprechungsübersicht
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NW.2d	North Western Reporter, Second Series
NYIL	Netherlands Yearbook of International Law
NYU JIL	New York University Journal of International Law and Politics
OClJ	Office of the Co-Investigating Judges at the ECCC
OCLICC	Online Commentary on the Law of the International Criminal Court
OGH	Österreichischer Oberster Gerichtshof
OJ	Official Journal of the European Union
OJLS	Oxford Journal of Legal Studies
ÖJZ	Österreichische Juristenzeitung
OLG	Oberlandesgericht
ÖRZ	Österreichische Richterzeitung
Os	Orientierungssatz
OTP	Office of the Prosecutor
OWiG	Gesetz über Ordnungswidrigkeiten

p.	Page
P.2d	Pacific Reporter, Second Series
Para.	Paragraph
Paras.	Paragraphs
PCC(S)A	Power of Courts (Sentencing) Act
PCIJ	Permanent Court of International Justice
PC-OC Committee	Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters
PK	Praxiskommentar
pp.	Pages
PTC	Pre-Trial Chamber
PTJ	Pre-Trial Judge
QB	Law Reports, Queen's Bench (1891–1901 and 1952; today)
RAF	Rote Armee Fraktion
RCADI	Recueil de Cours de l'Académie de Droit International
RCCJ Report	The Royal Commission on Criminal Justice Report of 1993
RDTL	República Democrática de Timor-Leste
Reg	Regulation
RG	Reichsgericht
RGSt	Rechtsprechungssammlung des Reichsgerichts
RLLu	Rechtspleging bij de Land- en Luchtmacht
RO	Wet op Rechterlijke Organisatie
RomeSt	Rome Statute
RPE	Rules of Procedure and Evidence
RSCSL	Residual Special Court for Sierra Leone
RStPO	Reichsstrafprozessordnung
RZ	Richterzeitung
S.Ct	Supreme Court Reporter
S.W.3d	South Western Reporter, Third Series
SCC	Supreme Court Chambers of the ECCC
SCCC	Specialist Constitutional Court Chamber within the KSC
SCLRv	South Carolina Law Review
SCSL	Special Court for Sierra Leone
SCSLSt	Statute of the Special Court for Sierra Leone
SeattleULRev	Seattle University Law Review
Sez.	Sezione
SG	Secretary-General
SJZ	Schweizerische Juristen Zeitung
SK	Systematischer Kommentar zur StPO
So.2d	Southern Report, Second Series
So.3d	Southern Report, Third Series
SPSC	Special Panel for Serious Crimes of the District Court in Dili
SSt	Entscheidungen des Österreichischem Obersten Gerichtshofes in Strafsachen und Disziplinarangelegenheiten
SSW	Satzger – Schluckebier – Widmaier, Strafprozessordnung Kommentar
St	Statute
StanJIntL	Stanford Journal of International Law

Stb	Staatsblad
StJohn'sLRev	St. John's Law Review
STL	Special Tribunal for Lebanon
STLSt	Statute of the Special Tribunal for Lebanon
StPÄG	Gesetz zur Änderung der Strafprozessordnung und des Gerichtsverfassungsgesetzes
StPO	Strafprozessordnung
StraFo	Strafverteidiger Forum
StV	Strafverteidiger
Sv	Wetboek van Strafvordering
TC	Trial Chamber
TEU	Treaty on European Union
UCLAJIntlL&ForeignAff	UCLA Journal of International Law and Foreign Affairs
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCh	Charter of the United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAET	United Nations Transitional Administration in East Timor
UPaLRev	University of Pennsylvania Law Review
US	United States Supreme Court Reports
USA	United States of America
USC	United States Code
v.	versus
VaJIntlL	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties
VfGH	Verfassungsgerichtshof
VfSlg	Sammlung der Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes
VLR	Victorian Law Reports
Vol.	Volume
VRS	Verkehrsrechtliche Rechtsprechung
Wash.	Washington
WHO	World Health Organisation
Wistra	Zeitschrift für Wirtschafts- und Steuerstrafrecht
WK	Wiener Kommentar zur Strafprozessordnung
WL	Westlaw
WLR	Weekly Law Reports
YaleJIntlL	Yale Journal of International Law
YaleJWorldPubOrd	Yale Journal of World Public Order
YJCEA	Youth Justice and Criminal Evidence Act
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEE	Zeitschrift für Evangelische Ethik
ZfRV	Zeitschrift für Europarecht, Internationales Privatrecht & Rechtsvergleichung
Ziff.	Ziffer
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik

ZPO	Zivilprozessordnung
ZRP	Zeitschrift für Rechtspolitik
ZStR	Schweizerische Zeitschrift für Strafrecht
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

A. Introduction

There exists a scattered history of trials *in absentia* conducted with regard to core international crimes. Among others, these include the 1966 Russell Tribunal, conducted by European intellectuals such as Bertrand Russell and Jean-Paul Sartre, convicting US officials for war crimes in Vietnam and the 1979 trial held *in absentia* by the People's Revolutionary Tribunal against Pol Pot and Ieng Sary, however, the latter did not prevent the ECCC's Pre-Trial Chamber from opening prosecution against Ieng Sary.¹ Also, the International Crimes Tribunal of Bangladesh, which effectively started working in 2010 after having been established as early as 1973, convicted three defendants *in absentia*, although the defendants still have not been effectively notified nor did the legal framework foresee the possibility of a re-trial.² Then there is the fact that the Bangladeshi International Crimes Tribunal³ – still in the 2010's – regularly imposes the death penalty. Most of these trials have a negative connotation attached to them. However, the negative flavour with regard to these trials arises not because the defendants were tried *in absentia*, but because they were tried by “kangaroo courts”⁴ which conducted very brief farcical trials that did not abide by international fair trial standards. Considering these circumstances, the tribunals have forgone any possibility of apprehending the convicts – if their whereabouts are in a foreign territory – be it by mutual assistance or extradition by another country.⁵

¹ ECCC, *Prosecutor v. Ieng Sary*, 2, PTC, Decision on Ieng Sary's Appeal Against the Closing Order, Doc. No. D427/1/30. Pol Pot has deceased in 1998 and Ieng Sary has been given amnesty by the Cambodian King in 1996, which similarly did not bar prosecution.

² *Robertson*, Report on the International Crimes Tribunal of Bangladesh, 84. The cases were: Bangladeshi International Crimes Tribunal, *Prosecutor v. Abul Kalam Azad and Prosecutor v. Ashrefuzzaman Khan and Chowdhury Mueen Uddin*, 3 November 2013, ICT-BD Case No. 01 of 2013.

³ Although the title suggests that the Tribunal is of international nature, there is nothing international about it. None of the judges, prosecutors or staff members are international and defence counsel from abroad have been abandoned. Also UN legal advisers withdrew due to the court's ability to impose the death penalty. See as for the details: *Robertson*, Report on the International Crimes Tribunal of Bangladesh, 12. Accordingly the Tribunal will not be object of further investigation.

⁴ *Ohlin*, 14 UCLAJIntL&ForeignAff 2009, 77, 119.

⁵ *Cf. inter alia* EU Council Framework Decision 2009/299/JHA; BVerfG, Second Senate, Order, 15 December 2015, 2 BvR 2735/1, para. 48 et seq. rejecting the decision of the Düsseldorf Higher Regional Court to comply with a request for extradition of a defendant that has been tried *in absentia*, because the principle of guilt rooted in the human dignity was not recognised during the trial; neither was it established with certainty that the defendant was aware of the proceedings instituted against him nor was there an opportunity for re-trial nor did

In light of this, it might seem astonishing to dedicate a study to the question of whether trial *in absentia* is a suitable procedure for ICTs. There are several reasons that make the undertaking of such a study worthwhile, nonetheless: ICTs do not have their own police forces or other agents of law enforcement. Therefore, ICTs crucially depend on the state's cooperation. States that are looked to for cooperation are often the very jurisdiction where the conflict situation under investigation occurred. As a result, if the affected state did not cooperate when the ICT was set up, had not ratified the RomeSt or did not support the referral of a situation to the ICC, the state has been ousted of its sovereignty of criminal prosecution by the imposition of an ICT or the obligation to cooperate with the ICC. In this context, dependence on state cooperation can be particularly difficult. In fact, only 87 out of 370 indictees have been prosecuted in East Timor. The other defendants remain at large and many of them live unaffected in Indonesia.⁶ Nine ICTR fugitives remain at large, even after the tribunal's doors have been closed. The MICT is now the relevant authority to arrest and surrender these nine individuals, but so far without success. The ICC also faces notorious problems with state cooperation in order to have suspects arrested and surrendered to the Hague. 14⁷ outstanding arrest warrants against 13 individuals remain, among them two arrest warrants against the ICC's high-profile suspect Al Bashir.⁸ As far as the latter suspect is concerned, cooperation issues have become especially obvious. There have been at least ten cases of non-cooperation with the ICC with regard to Al Bashir's arrest by predominately African States, despite their status as party to the RomeSt.⁹ Even after his fall as president, he has so far not been handed over to the ICC, though the intention to extradite him was recently an-

he have the opportunity to make himself heard and defend himself effectively in front of a court; *Bicioc v. Romania* [2014] EWHC 628 (Admin); *Cretu v. Romania* [2016] EWHC 353 (Admin); UK Extradition Act 2003, Sections 20, 86. See further *Davidson/Lloyd/Payer*, *The Criminal Law Review* 2016, 757, who assess potential changes to the UK extradition law following Brexit.

⁶ *Drumbl*, *Atrocity, Punishment, and International Law*, 170.

⁷ One of the suspects, *Vincent Otti* who is warranted for alleged war crimes and crimes against humanity in Uganda is presumed to have deceased in 2008. The ICC is awaiting official notification before the arrest warrant will be withdrawn: Coalition for the ICC, 2017 at a Glance, 23 November 2017, p. 6, http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/2017%20At%20a%20Glance.pdf (last accessed: 7 February 2021).

⁸ The first arrest warrant: ICC, *Situation in Darfur, Sudan: Prosecutor v. Al Bashir*, PTC I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, Case No. 02/05-01/09 included war crimes and crimes against humanity, whereas the second arrest warrant was extended to include counts of genocide: ICC, *Situation in Darfur, Sudan: Prosecutor v. Al Bashir*, PTC I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, Case No. 02/05-01/09.

⁹ *Tladi*, ZIS 2015, 493, *ibid.* mentions 7 incidents. However, since June 2015 at least three incidents have occurred that add to the list where state parties to the RomeSt did not arrest the Sudanese president: Al Bashir's visit to the African Union Summit in June 2015 in South Africa, his visit to the Arab League Summit in Amman in March 2017 and his visit to Uganda in November 2017.

nounced.¹⁰ Moreover, the STL has recently pronounced the trial judgment against Ayyash and three co-defendants *in absentia*.¹¹ Apart from this, the ICTs' objective is to conduct a prompt reappraisal of a conflict situation to prevent the loss of evidence and bring justice to the victims. Hence, it might be in the interests of justice to conduct trials *in absentia*. That is especially true since many ICTs have a temporary mandate. ICTs, however, must respect the fair trial right and other fundamental rights of the defendant. This is particularly important since proceedings take place in the public spotlight and can, to some extent, be seen as model for domestic proceedings for international crimes in post-conflict countries.

I. Goals and scope of this study

Much has been written¹² about whether trial *in absentia* is suitable for ICTs and a regular set of arguments is exchanged between opponents and promoters of proceedings *in absentia*. Naturally, these arguments cannot simply be put aside, they are imperative to present a picture of what issues may arise when conducting procedures *in absentia*. Nonetheless, this study tries to approach the question from a different viewpoint. It tries to find a normative approach by applying classical sources of international law and combining institutional aspects of the procedural theory, specifically the goals of a criminal trial, with the individual frameworks of fundamental rights, namely the right to be present. Moreover, concepts presented as models for trial *in absentia* shall be critically assessed.

The goal of the present study is to discuss whether trials *in absentia* are suitable for ICTs. The study consists of nine chapters. The chapter following this introduction provides a background to proceedings *in absentia* at ICTs and describes the different types of procedures held in absence at the different courts. It surveys the different statutory regulations and practices of the courts with regards to procedures *in absentia* at the different phases of the criminal process: the investigations, the trial and the appeals stage. Concluding that the only controversial part with regard to a procedure in absence of the defendant is the trial phase, the next chapter delves into questions of procedural theory and assesses whether the conduction of trials *in absentia* is compatible with the goals of international criminal procedure. It suggests

¹⁰ <https://www.faz.net/aktuell/politik/ausland/voelkermord-sudan-liefert-ex-praesident-al-baschir-an-den-haag-aus-17480428.html> (last accessed: 29. October 2021).

¹¹ In June the commencement of another trial *in absentia* against Ayyash has been canceled due to lack of funding: <https://www.stl-tsl.org/en/the-cases/stl-18-10> (last accessed: 29. October 2021).

¹² See *inter alia* Elberling, The Defendant in International Criminal Proceedings, 36 et seq.; Friman, Trying Cases in the Absence of the Accused?; Gaeta, Trial in Absentia; Gaeta, 5 JICL 2007, 1165; Gardner, 43 GeoWashIntLLRev 2011, 91; Hoven, Rechtsstaatliche Anforderungen, 438 et seq.; Oehmichen, FS-Kühne; Pons, 8 JICJ 2010, 1307; Zakerhossein/de Brouwer, 26 CrimLF 2015, 181.