Commentary on China's Trial in Absentia: Purpose, Legitimacy, and Application

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Abstract

To provide an additional procedural device to pursue the corrupt officials who fled China and have been hiding abroad, the 2018 PRC Criminal Procedural Law (CPL) has introduced the trial in absentia procedure (TIA procedure). As a special mechanism that might infringe on the defendant's rights, China's TIA procedure has adopted the French model and designed sophisticated rules for the notice of the trial, the right to a lawyer, and the right to a retrial so that it could pass the legitimacy test following the principle of due process. However, this article argues that more significant crises of applying trials in absentia lie in the substantive aspects. Although China's TIA procedure can mostly meet the procedural requirements of a fair trial, TIA procedure in China might fail to achieve its legislative purposes. For instance, the accused who has been convicted in a trial without his presence might be a refusal ground to an extradition request, and the convictions in absentia might not be able to be enforced. In order to promote the interest of justice, it is recommended to adopt a purposive approach to interpret the rules of the TIA procedure, which leads the prosecutor to play a role as a filter to limit the prosecution in absentia. Only if the benefits of conducting a trial in absentia, such as pushing the fugitives to return to

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China, maintaining obedience to law and order, and providing comfort and relief to the victims, etc. outweigh the costs of conducting such a trial may the prosecutor file a prosecution with the absence of a suspect.

(Keywords: trials in absentia, right to be present, rights to a fair trial, extradition, positive prevention)

1. Introduction

An ‘*in absentia* trial’ refers to a trial where the accused is absent or, in other words, is not physically present in the courtroom. Trial *in absentia* has been studied by many researchers and sparked some lively debates.(1) Although much work has been done to examine the requirements of justifying an *in absentia* trial and the legal remedies to the right of being present,(2) the analysis of the TIA procedure from the substantive aspects has rarely been conducted. Besides, previous studies are limited to western jurisdictions and the practices of international criminal tribunals.(3) The newly introduced trial *in absentia* procedure (TIA procedure) in the Criminal Procedural Law of the People’s Republic of China (PRC) has yet to be closely examined.

In 2018, the PRC Criminal Procedural Law (CPL) experienced a significant

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（1） See Neil P. Cohen, 1973. Trial in Absentia Re-Examined, Tennessee Law Review, Vol. 40, 155-194; see also Elizabeth Herath, 2014. Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal, Harvard International Law Journal, Vol. 55, 1-12.

（2） See Leslie Anderson, 1983. Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception, Michigan Journal of International Law, Vol. 4, 153-170; see also Chris Jenks, 2009. Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?, Fordham International Law Journal, Vol. 33, 57-100.

revision covering a wide range of issues in the criminal procedure. The most important changes in the 2018 Amendment include adjusting the relationship between the People's Procuratorate and the supervisory authority, introducing the mechanism of admitting guilt and accepting punishment ("China's Plea bargaining"), and the establishment of the TIA procedure in criminal justice.

According to the 2018 CPL, the TIA procedure consists of three types.(4) The first type is the trial *in absentia* for fugitives hiding outside China written in Art. 291, which provides:

> *Where the criminal suspect or defendant is outside China in a case regarding a crime of embezzlement or bribery, or in a case regarding a crime of seriously compromising national security or terrorist activities that requires a timely trial as confirmed by the Supreme People's Procuratorate, and if the supervisory authority or public security authority transfers the case for prosecution and the people's procuratorate deems that the facts of the crime have been substantiated, the evidence is definitive and sufficient and the criminal suspect*

（3） See Neil P. Cohen, 1984. Can They Kill Me if I'm Gone: Trial in Absentia in Capital Cases, University of Florida Law Review, Vol. 36, 273-287; see also Maggie Gardner, 2011. Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, The George Washington International Law Review, Vol. 43, 91-136; see also Martin Bose, 2011. Harmonizing Procedural Rights Indirectly: The Framework on Trials in Absentia, North Carolina Journal of International Law and Commercial Regulation, Vol. 37, 489-510; see also Eugene L. Shapiro, 2012. Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to be Present, Marquette Law Review, Vol. 96, 591-622.

（4） There is an opinion that there are four types of absentia trials. See Chen Weidong, 2018. On the Trials in Absentia in Criminal Procedure with Chinese Characteristics, Chinese Criminal Science, Vol. 3, 14-26.

> *or defendant shall be held criminally liable in accordance with the law, it may file a public prosecution with the people's court. After examination, the people's court shall decide to hold a court session to hear the case if the facts of the crime alleged in the criminal complaint are clear and the conditions for the application of the procedure for trial in absentia are met.*

Trial *in absentia* for fugitives is of the most importance among the three types, which drives the establishment of the very procedure. Trial *in absentia* for fugitives contains two features, which specify the TIA procedure a strong Chinese Characteristic. Firstly, it targets suspects or defendants who fled outside PRC. Anyone who lives in PRC territory or has been proven dead cannot be tried *in absentia* under this type of trial. Secondly, it applies only in cases related to the crime of embezzlement or bribery, cases of the crime of seriously acting against national security and cases involving terrorist activities, the latter two of which additionally require a timely trial as confirmed by the Supreme People's Procuratorate (the SPP). Except from the above-mentioned crimes, no crime is applicable to trial *in absentia*, including homicide, kidnapping and the other serious crimes.

The other two types of trial *in absentia* are trial *in absentia* for the defendants suffering from a severe illness and trial *in absentia* for the defendants who have already been dead, which are respectively provided in Art. 296 and Art. 297. It is reckless to say trial *in absentia* for seriously ill or deceased people is not as crucial as trial *in absentia* for fugitives. However, it is also true that neither type of the two *in absentia* trials is the core of the TIA procedure. Regarding the presence of a seriously ill defendant, it is possible to accomplish the hearing with the internet court and video technology. For the case where the defendant dead, the People’s Court could give a verdict of not guilty under the supervisory trial procedure even before the 2018

amendment. For instance, *Hugejiletu* and *Nie Shubin* were announced innocent while they were absent due to the wrongful execution.

This study focuses on trial *in absentia* for fugitives and aims to give new insights into the unique features of China’s TIA procedure. The main issues addressed in this paper are a) why the TIA procedure was established, b) whether China’s TIA procedure meets the international standards of TIA and due process requirements, and c) whether the TIA practice can accomplish the legislative goals. To answer these questions, the article first reviews the background and objectives of the establishment of the TIA procedure. Then the article will compare the procedural safeguards of China’s TIA procedure with the rules of the continental legal system, common law system, and the international criminal tribunals. It will also examines the underlying philosophy of China’s TIA Procedure and attempts to give suggestions to the application of the TIA procedure in the future.

2. Needing the Procedure: Why Did China Establish the TIA Procedure?

Since the first PRC CPL came into force in 1979, it has been more than 40 years that China only conducts trials with the presence of both parties. Although before the 2018 amendment, Art. 199 of the CPL allows the presiding judge to force the person who consistently disrupts the hearing out of the courtroom, it does not shake the fundamental position of the CPL, which is that the court does not permit trials with the absence of an accused.

Thus, what makes the change? The “Explanation on the Draft Amendment to the Criminal Procedure Law of the People's Republic of China” (the Explanation) made by the National People’s Congress (NPC) has provided an answer. According to the Explanation, “to enhance the possibility to pursue the fled officials, there is a need to establish the trial *in absentia* procedure.” In other words, the TIA procedure can

give an end to impunity.

(1) Zero Tolerance for Corruption and Campaigns against escaped corrupt Officials

Since the 18th National Congress of the Communist Party of China, China has launched a series of campaigns to combat corruption, and the Zero Tolerance policy has been established for corruption and related offences. By June 2021, the inspection and supervision organs across the country had filed 3.805 million cases, in which 4.089 million people had been investigated and punished.

Apart from putting a hammer on the corrupt officials at home, China has also spent lots of judicial resources on pursuing the corrupt officials hiding abroad. It successively launched Operation “FOX HUNT” and Operation “SKY NET” as the main channels to arrest fugitives abroad or help them return to China voluntarily. From the Mid-1990s to 2010, many Chinese corrupt officials had escaped overseas. They successfully avoided justice and lived a luxurious life abroad. Such trends seriously damaged China’s international image and were deemed to be stopped as soon as possible. The reality that some fugitives are still hiding in the US, Canada, Australia, and the other countries without punishment will encourage the crime of embezzlement, the transfer of assets and the escape of justice. To put an end to impunity, the pursuit of fled officials becomes an essential part of the anti-corruption campaign. By June 2020, China had received 7,831 fugitives from more than 120 countries and regions, among which there are 1306 state officials and 60 on the global warrant list of the “100 most-wanted corrupt officials” issued by Interpol and recovered 19.65 billion RMB stolen money.

(2) Current Channels to Pursue the Escaped Officials Start to Show Limitations

As the Commission of Discipline Inspection released on their website,[5] there are four main channels to get back the escaped corrupt officials: extradition, repatriation of the fugitives as illegal migrants, transfer of criminal proceedings, and

persuading the fled officials voluntarily return to China. Each way has its legal barriers.

1. Extradition. — Extradition is the official channel of getting back fugitives from foreign states. Unfortunately, current practice shows extradition is also the most inefficient way of getting back the escaped officials. Among the 60 returned officials who were on the Interpol's warrant list for the 100 most-wanted corrupt Chinese officials, none of them was extradited to China. Although China has promulgated the "Extradition Law" for more than 20 years, China still lacks extradition cooperation with other states. According to the website of the Ministry of Foreign Affairs of the PRC, by February 2017, China had concluded 48 bilateral agreements with other countries on extradition,(6) which failed to reach one-third of the number of extradition treaties between the US and the other countries. What's more, few of those countries with whom China has extradition agreements are the destination states of the fled officials. Among the "100 most-wanted corrupt officials" on the Interpol's Global red list, 90 people escaped to the US, Canada, Australia, New Zealand, UK, Singapore,

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(5) COMMISSION OF DISCIPLINE INSPECTION REVEALS THE SECRET OF HUNTING FUGITIVES AND RECOVERING STOLEN ASSETS UNDER THE SKYNET OPERATION, XINHUA NEWS (http://news.xinhuanet.com/politics/2015-04/10/c_127676229.htm (accessed 24.05.22)).

(6) Countries have effective agreements with China on extradition are Thailand, Belarus, Federation of Russia, Bulgaria, Romania, Kazakhstan, Mongolia, The Kyrgyz Republic, Ukraine, Cambodia, Uzbekistan, South Korea, Philippine, Peru, Tunisia, South Africa, Laos, The United Arab Emirates, Lithuania, Pakistan, Lesotho, Brazil, Azerbaijan, Spain, Namibia, Angola, Algeria, Portugal, Mexico, France, Italy, Iran, Bosnia & Herzegovina, Tajikistan. Countries have signed agreements with China on extradition but not enter into effect: Australia, Indonesia, Argentina, Afghanistan, Ethiopia. See THE OFFICIAL WEBSITE OF MINISTY OF FOREIGN AFFAIRS (http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml (accessed 28.05.22)). See also THE OFFICIAL WEBSITE OF COMMISSION OF DISCIPLINE INSPECTION AND MINISTRY OF SUPERVISION (http://www.ccdi.gov.cn/special/ztzz/ (accessed 28.05.22)).

and the other western developed countries.[7] Furthermore, among the 90 persons, 40 fled to the US, 26 fled to Canada. These common law countries only conduct extradition based on bilateral agreements. For instance, Art. 3(1) of the Extradition Act of Canada provides, “a person may be extradited from Canada in accordance with this Act and a relevant extradition agreement”. The treaty-based extradition model insisted by the common law countries becomes the biggest obstacle for China to pursue fugitives in US, Canada and Australia.

2. Repatriation. — Another way to get back the corrupt officials is to repatriate them as illegal migrants. This is almost the most frequently used alternative to extradition. The legal barrier, which can easily be assumed in this case, is that the fugitives may not breach the laws and regulations of migration. Instead, some have already got a Green Card, permanent residence, or a temporary stay. Therefore, they can't be treated as illegal aliens unless the immigration authority of the requested country is willing to verify whether the fugitives provided authentic documents when they applied for residence or permission to enter. If an immigration court or an administrative organ can confirm the use of fraudulent documents by those people at the time of the application, then their legal permission to stay can be declared as invalid. However, even if they are proved having breached migration laws and regulations, the wanted fugitives could turn to apply for asylum or refugee protection to avoid the repatriation. Not surprisingly, the asylum and refugee status-seeking process could be very long.

（7） The other 10 escaped to Southeast Asia, South America, and Africa. See A PICTURE TO UNDERSTAND THE 100 MOST-WANTED FUGITIVES ON THE RED WARRANT LIST (http://www.ccdi.gov.cn/jdtp/201504/t20150422_55186.html (accessed 28.05.22)). See also Lei Zhang, 2017. From the 100 Most-Wanted Fugitives’ Return to See the Development of China’s Oversea Fugitive Repatriation, Journal of Beijing Normal University (Social Sciences Edition), Vol. 3, 151-159.

3. Transfer of Proceedings. — Prosecuting corrupt officials abroad is certainly not the best option for China. Prosecuting a fugitive in another country is a special international cooperation between the requesting and the requested states when they find it is rather difficult to carry out extradition. Then the requested state may prosecute the fugitive according to its domestic law and deport the fugitive to his home country to serve a sentence. A prosecution brought by the requested state might also serve as pressure to force the fugitives to voluntarily return to their home countries.(8) The problem with transfer is that it has rarely been done.

4. Voluntary Return. — Voluntary return means persuading and convincing the fugitives to voluntarily return to their home countries to face the prosecution, trial, or punishment if there is any. The persuasion is mainly done by motivation. Specifically, the fugitives will be provided with general consultation to the current law, especially to the mandatory and discretionary lenient circumstances in the criminal law and criminal procedural law, so that they could figure out what kinds of mitigation they might be given if they surrender themselves, make a meritorious service or "admit guilt and accept punishment".(9) With these efforts, fugitives might change their minds and return to China.

The methods used to pursue fled officials are beneficial and problematic at the same time. The current methods of getting back fugitives start to show their vulnerability in terms of legality. Some destination states accuse the persuasive

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（8） See Lei Zhang, 2017. Alternative Measures to Extradition and its Application in Hunting Fugitives Oversea---From the Xiuzhu Yang Case as the Center, Law Review, Vol. 2, 159-171.

（9） According to the "Chinese Criminal Procedural Law" and the "Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Court and the Supreme People's Procuratorate to Conduct the Pilot Program of the System for Imposing Lenient Punishments on Those Confessing to Their Crimes and Accepting Punishments in Criminal Cases in Certain Areas", a criminal suspect admits guilt and accepts punishment might be offered a lenient sentence.

methods have breached the sovereignty of their countries. Moreover, the persuasive return also faces critics at home. If a fugitive accepts to return voluntarily, he may be given quite a lenient punishment compared with a suspect at home, the righteousness of which has been questioned by the public in the sense of equal application of criminal law.

(3) TIA Procedure as a New Device to Pursue the Escaped Officials

Based on the situation mentioned above, the National People's Congress started to adopt new legal methods of pursuing fled fugitives with less dependence on destination state's assistance. In 2012, the Supreme People's Court (the SPC) and the SPP jointly issued the "Provisions on Several Issues concerning the Application of the Confiscation Procedures for Illegal Income in a Case Where a Criminal Suspect or Defendant Escapes or Dies" and established the Confiscation Procedure for the Deceased and Escaped. According to the 2012 provisions, the confiscation procedure is applicable to criminal cases concerning the crime of graft, embezzlement, bribery and the crime of terrorist activities. The underlying logic is to forfeiture the money of the escaped and force them to return to China.

Even the logic of the confiscation procedure seems to be reasonable, it is still problematic since it is in nature a confiscation without a conviction. A confiscation without a conviction, even allowed by the United Nations Convention Against Corruption, does have a legitimacy defect because it has skipped the trial proceedings and directly confiscated the fugitive's assets. It might breach the principle of "presumption of innocence" which says anyone should be deemed not guilty until they have been proven guilty.

That being so, rendering a guilty conviction before a confiscation might be a promising solution to fix the legitimacy problem of the confiscation procedure. By conducting an *in absentia* trial without the presence of the defendant and then confiscating the assets of the escaped, the authority believes it may squeeze the living

space of the fugitives and eventually force them to return to China voluntarily. In addition, if the destination states admit the *in absentia* conviction, they might assist the extradition process or revoke the immigration permission and repatriate the convict. Hence, the impetus to introduce the TIA procedure is to offer more legal tools to the regular methods to pursue fled officials and end impunity.

3. Shaping the TIA Procedure: Which Model Does China Follow?

Under the given circumstances, the NPC determined to incorporate the TIA procedure into the CPL. Thus, the question comes down to how to frame the TIA procedure so that China's TIA procedure can guarantee a fair trial and protect the fundamental human rights of the absent defendant while fulfilling the task of pursuing the fled officials.

Since the whole criminal procedure is an art of balancing crime control and due process, the trial *in absentia* will not make an exception. According to Article 14(3) of the International Covenant on Civil and Political Rights, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. Nevertheless, if we closely examine the practice of trials *in absentia* worldwide, we will find that the right to be present is not absolute. Different jurisdictions adopt different approaches to ensuring the check and balance. To facilitate the research, this article chooses three typical models as examples to illustrate the balancing strategies between crime punishment and due process in the case of trial *in absentia*.

(1) The German Model of the TIA Procedure

By allowing the TIA procedure only in misdemeanor cases,[10] Germany manages to respect the rights of the absent defendant almost at the highest level.

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(10)　See Yang fan, 2019. Comparative study on the Criminal Trials in Absentia—With the Application Scope and Rights Protection as the Key Point, Political Science and Law, Vol. 7, 26-37.

According to Section 232 of the German Code of Criminal Procedure, titled "Conduct of hearing despite defendant's failure to appear,":

> *The main hearing may be held in the defendant's absence if he was properly summoned and the summons referred to the fact that the hearing may take place in his absence and if only a fine of up to 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is to be expected.*

Therefore, only if the defendant is charged with an offense, in which the punishment is up to a fine of 180 daily rates, he may be subject to a trial *in absentia*. The reason behind the German model, as Claus Roxin stated, is that the effect of German courts requires the presence of the criminal defendant to ensure proper adjudication.(11) It would be extremely difficult or even impossible for a criminal court to announce innocent or guilty of an accused in his absence. Hence, the German approach believes the defendant's absence is firstly inconsistent with the requirements of due process and secondly infringes the facts-finding function of criminal procedure. Based on this regard, a practical way to constraint the use of trial *in absentia* is to define a line in the legislature from the substantive aspect so that even if the rights of the absent defendant were in danger of infringement, the fairness of the trial would not be in question since the balancing of the interests at stake still complies with the principle of proportionality.

(2) The French Model of the TIA Procedure

Unlike Germany, France applies the TIA Procedure in both felony and misdemeanor cases,(12) and the French way of controlling the TIA procedure focuses on the procedural aspect. According to Art. 270 of the French Code of criminal

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（11） See Maggie Gardner, supra note 3, 133.

procedure,

> *If the accused is in flight or fails to appear, he may be tried by default in accordance with the provisions of Chapter Ⅷ of the present title.*

If the accused escapes from the justice, the Court can initiate a trial by default, namely the Procès par defaut, to continue the process to avoid impunity. Therefore, the basic idea is that the accused has an obligation to attend the trial; if he fails to do so without a legitimate excuse, he will get a procedural sanction according to the law.

In fact, the framework of trial *in absentia* in France has gradually shifted from a sanctions-based paradigm towards a rights-based approach. Before the *Procès par defaut*, France used to resort to the device so-called *Procès par contumance* to put sanctions on the accused of his abscondence. For instance, the absconding defendant may be denied legal representation and may be forfeited his civil rights if convicted. After having lost several cases in European Court of Human Rights (ECtHR), France replaced the *Procès par contumance* with *Procès par defaut* to comply with European Convention on Human Rights (ECHR). This change also demonstrates that any curtailment of the defendant's rights must be proportional and not violate fundamental rights.[13]

Apart from removing the unproportionate sanctions towards the absent defendant, the French criminal procedural law also provides the right to a retrial as additional protection to the absent defendant in order to rescue the curtailed rights of them. To be more accurate, once the defendant returns or is arrested, the verdict will be revoked automatically and a new trial will be proceeded according to the normal

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（12） See Rachel K. David, 2003. Ira Einhorn's Trial in Absentia: French law Judging United States Law, New York Law School Journal of International Law and Comparative Law, Vol. 22, 611-626. See also Yang Fan, supra note 9, 28.

（13） See Maggie Gardner, supra note 3, 136.

procedure.[14] According to Art. 379-4 of the French Code of Criminal Procedure,

> *If the accused convicted in the circumstances covered by article 379-3 surrenders to custody or if he is arrested before the limitation-period for the sentence has expired, the decision of the assize court is rendered void in every respect, and a new examination of the case is carried out in accordance with the provisions of articles 269 to 379-1.*

Although the French Model permits trial *in absentia* in felony cases, it is believed that the right to a new trial can rescue the curtailed rights of the defendant. Moreover, Art. 410 of the French criminal procedural law sets some preconditions for initiating a trial *in absentia* to guarantee its fairness, including the accused person must be notified about the date and time of the hearing in advance, and she or he does not attend the trial without any excuse.[15] Without limitations on the substantive aspects, the TIA procedure in France has regulated many procedural requirements and devices to protect fundamental human rights, which is consistent with the ECHR.

(3) The US Model of the TIA Procedure

The common law system does not have a history of trial *in absentia*. At one time in English law, trial *in absentia* of any criminal defendant was impossible.[16] During the time when guilt or innocence was ascertained through a test by the ordeal of water or fire, the defendant's presence was necessary. Even after the establishment of the modern criminal justice system, the TIA procedure could not easily find a place in the adversarial system.

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(14) Fair Trials, Hart Publishing, SUMMERS S. J., 2007, 64.

(15) See Richard S. Fras, 1990. Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, California Law Review, Vol. 78 (3), 539-684.

(16) See Neil P. Cohen, supra note 1, 167-169.

The US Model of the TIA procedure represents the practice of many other common law countries. Since the right of confrontation written in the sixth amendment is a constitutional right, and the right of presence is almost an inherent part of the right of confrontation, the TIA procedure lacks a solid legal basis in common law. However, precisely due to the rights-based approach of the TIA procedure and the fact that defendants have the right to be physically present at a proceeding does not mean that they must be present,[17] the US finally allowed the trial *in absentia*.

In the United States, the rules governing a defendant's absence from his criminal trial are defined by legislation and judicial decisions.[18] Legislation in most American jurisdictions follows Rule 43 of the Federal Rules of Criminal Procedure, which provides

> *The defendant need not be present in the following situations:*
> *(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.*

Obviously, Rule 43 permits *in absentia* trial in misdemeanor cases rather than felonies, and the waiver should be written. In other words, defendants in felony cases should be present. However, an exception was made in 1912 in Diaz v. United States[19] by the Supreme court. Diaz was a non-capital defendant who voluntarily absented himself from the examination and cross-examination of two witnesses. The Court recognized the defendant's right to attend every trial stage. However, the Court

(17)　See Neil P. Cohen, supra note 3, 275.

(18)　See Neil P. Cohen, supra note 1, 157.

(19)　Diaz v. United States, 223 U.S. 442 (1912).

continued to state that for non-capital trials, the defendant's voluntary absence after the trial has begun in his presence constitutes a waiver of the right to be present. In this regard, the Diaz approach also can be referred to as the "first appearance rule", which requires that the defendant must appear in the courtroom at the commencement of the trial instead of missing the whole trial procedure. Nevertheless, the Diaz case expanded the use of *in absentia* trial to felony cases.

The first appearance rule has dominated federal jurisdictions for several decades. Only until the United States v. Tortora[20] case, the first appearance rule was revised, since one defendant was absent throughout the trial. The Tortora case involved multiple defendants, which drove the judges to exercise their discretion to proceed with the trial in the defendant's absence. In the judgment, the Second Circuit, based on a "complex of issues" analysis, found that when the public interest outweighs that of the voluntarily absent defendant, the court could proceed with the trial if the absent defendant's waiver was both knowing and voluntary. Although the Second Circuit had no intention to lay down a general rule for every case, a "voluntary, knowing and intelligent" waiver has gradually become a constitutional standard of an *in absentia* trial.[21]

A similar practice of gradually accepting the trial *in absentia* could be found in UK. For a long time, British judges had struggled with the question that whether the Crown Court can conduct a trial in the absence, from its commencement, of the defendant. An affirmative answer was given in the case R v. Jones.[22] In that case, the appellant, Mr. Jones, had not been arrested or surrendered to the court by the date of his trial. At first the judge was reluctant to commence the trial. After the case was adjourned once, the judge for the first instance began the trial with the absence of the

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(20) United States v. Tortora, 464 F. 2d 1202 (2d Cir. 1972).

(21) See Eugene L. Shapiro, supra note 3, 608.

(22) Regina v. Jones, House of Lords, [2002] UKHL 5.

appellant, taking the view that a further delay would be very unfair to a large body of witnesses, some of whom had undergone a very traumatic experience. The idea of considering the overall fairness of the proceedings is almost the same with the "complex of issues" analysis in the Tortora case. However, a more far-reaching significance of the R v. Jones case is that Lord Bingham of Cornhill, the Lord of Appeal in Ordinary, has further demonstrated the question of whether a court has discretion to permit the commencement of a trial *in absentia*. As Lord Bingham stated, "I find it hard to discern any principled distinction between continuing a trial in the absence, for whatever reason, of a defendant and beginning a trial which has not in law commenced. If, as is accepted, the court may properly exercise its discretion to permit the one, why should it not permit the other?" That being so, the court can conduct a trial *in absentia* at the commencement of the trial if the threshold has been met.

Overall, the US Model of the TIA procedure restraints the application of trial *in absentia* from both a substantive and a procedural aspect. Designated by Rule 43 of the Federal Rules of Criminal Procedure, TIA procedure is only allowed to be applied in cases with punishment no more than one-year imprisonment. But the judicial practice supplemented the Federal rules and extended the application to felony cases with a doctrine that procedural safeguards would be sufficient to guarantee a due process, especially when there are some other public interests that should be taken into consideration.

(4) The Practice of the International Criminal Tribunals

The practice of trials *in absentia* and the TIA procedure of the international criminal tribunals varies significantly from one institution to another. Apart from the International Military Tribunal at Nuremberg after World War II, which tried Martin Bormann *in absentia* in 1946,[(23)] the other institutions, including the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Tribunal

for Rwanda (ICTR), and the International Criminal Court, hold a very strict position towards trials *in absentia*. Highly influenced by the common law model, ICTY and ICTR applied trial *in absentia,* mostly in cases with disruptive defendants and defendants with serious illnesses. Furthermore, the ICC, a hybrid of the continental and common law system, plays even stricter rules on trial *in absentia* under two considerations. First, according to Art. 63 of the Rome Statute of the International Criminal Court, "the accused shall be present during the trial". The right to be present is fundamental to the participants of the trial. Second, based on the same article of the Rome Statute, the presence of the accused is also an obligation. Only if the accused appeared in the court and listened to the victim's claims can the victims be healed and relieved.

However, the Special Tribunal for Lebanon ("STL"), founded more recently compared with the previous ones, changes the tradition and rules in favor of initiating a trial *in absentia*. This shift has raised a fierce discussion and many critics against international criminal justice. At one time, concerns regarding Art. 22 of the STL Statute were overwhelming, which states:

> *1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:*
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> *(a) Has expressly and in writing waived his or her right to be present;*
>
> *(b) Has not been handed over to the Tribunal by the State authorities concerned;*
>
> *(c) 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*

（23） See Elizabeth Herath, supra note 1, 2.

the charges confirmed by the Pre-Trial Judge.

The most prominent feature of the STL's trial *in absentia* is that it allows the "total *in absentia*," which pushes it into a group with the Nuremberg tribunal and drifts away from the others who only permit "partial *in absentia*." Nevertheless, the following section of Art. 22 of the STL statute stipulates the notification of the trial, the right to be designated a counsel, and the right to a retrial. These safeguard measures make the TIA procedure of the STL similar to the French Model.

Hence, the international criminal tribunals do not have a common practice regarding the TIA procedure. Instead, the tribunals lean towards either the civil law or the common law family.

(5) China's Choice of Constructing the TIA Procedure

As analyzed above, the basic framework of the TIA procedure in one country is mainly decided by the answers to the following questions.

First and foremost, whether to apply the TIA to both felonies and misdemeanor cases or just to misdemeanors? The answer to China's TIA procedure was the former one. Since the main objective of establishing the TIA procedure is to prosecute and try the escaped corrupt officials, and most corruption offences are felonies, the application of trial *in absentia* cannot be excluded in felony cases. To be more specific, the crime of embezzlement and taking bribery are crimes which can be sentenced to more than ten-year imprisonment, life imprisonment, and even the death penalty. Therefore, China could not follow the German model for the reason that the purpose of introducing the TIA procedure would only be served if China permits the application of trial *in absentia* in felonies.

Second, whether to allow a "total *in absentia* trial" or a "partial *in absentia* trial"? The answer was the former one. Because the fugitives who fled outside China did not escape on bail, instead, they had left China before their cases having been investigated, or the Prosecutor or Supervisory organizations just started looking into

their crimes. For most fugitives, if the court allows an *in absentia* trial, the defendant will miss the proceedings from the beginning. Therefore, China could not follow the American’s first appearance rule; otherwise, the trial could not commence since the defendant's appearance was impossible at the beginning of the trial. Even the US expanded the first appearance rule to situations in which the defendant was missing before the commencement of the trial, the defendant absconded has at least been arranged in front of a judge or arrested by the police, which might not suit the case of China.

Third, whether to give the defendant the right to a retrial to rescue the curtailed rights of the absent defendant? The answer is yes. After ruling out the German and US models, the most reasonable choice left would be to learn from France, which is to provide multiple procedural safeguards to the absent defendant, especially the right to a retrial, to secure the fairness of the trial.

Thus, the question comes down to what kind of procedural safeguards has been written down in the CPL of the PRC and whether the safeguards will be enough to guarantee a fair trial. The following part will try to demonstrate it in detail.

4. Controlling the TIA Procedure: How to Apply the TIA Procedure to Suit the Due Process

One of the most important conditions to apply the TIA procedure is to make sure that the application is consistent with the principle of due process. To guarantee the fairness of an *in absentia* trial, the CPL of the PRC provides four rights to the absent defendants, which consist of the right to be noticed, the right to a lawyer, the right to appeal, and the right to a retrial.

(1) The Right of Notification as a Bottom Line to Commence a Trial *in absentia*

The right of notification is the core of evaluating whether the right to be present is legally relinquished. [(24)] For countries that adopt a rights-based approach of

the trial *in absentia*, one pre-condition of a valid waiver is that the accused has already been noticed of the upcoming trial and the result he might face because of the absence. For countries using the *in absentia* trial as a policy of sanction, the bottom line is that the accused has already known about the trial and has no excuse to miss the trial. Therefore, the notification of the fled fugitives who hide abroad is a key issue for China's *in absentia* trial, which determines the legitimacy of the trial.

Art. 292 of the CPL of the PRC regulates the notification process of the trial, which states:

> *A people's court shall, in a manner of judicial assistance specified in the relevant international treaties or proposed through diplomatic channels or in any other manner permitted by the laws of the place where the defendant is located, serve the summons and a copy of the criminal complaint of the people's procuratorate upon the defendant. If the defendant fails to appear in court as required after the summons and the copy of the criminal complaint are served on him or her, the people's court shall hear the case in a court session, render a judgment in accordance with the law, and handle the illegal income and other property involved in the case.*

Instead of clarifying the legal ways of serving summons to the absent defendant, such as delivering in person, posting by mail, leaving at the residence, delivering to a lawyer, announcing by advertisement, Art. 292 of the CPL has chosen a relatively comprehensive and flexible expression. According to Art. 292, there are

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(24) See Evert F Stamhuis, 2001. In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principles into the Dutch Criminal Justice System, Victoria University of Wellington Law Review, Vol. 32, 715-728.

three ways of serving the summons and the copies of indictments. The first one is sending the documents through mutual legal assistance under international treaties. The second one is noticing the defendant through diplomatic channels. The third way is to notice the defendant in any manner permitted by the laws of the place where the defendant is located. An apparent paradox here is that the first two channels highly rely on cooperation between states, whereas most destination states hold the view that summons serving assistance is mutually legal assistance, which is also based on bilateral agreements. What's more, those countries simply don't have the political will to cooperate with China. To put it in a simple way, there is little possibility of serving summons and copies of indictments through the first two channels.

Therefore, the manner permitted by the laws of the place would be a rather practical method to resort to. For instance, if the fugitive hides in the US, then the notice will probably be conducted in manners permitted by US law; accordingly, if the fugitive hides in Canada, manners written in the Canadian law can be used to notify the defendant. The reason why the CPL only allows the notification methods permitted by the law of the hiding place is to satisfy the destination state so that the destination state might agree the extradition request with the upcoming *in absentia* conviction. After all, an *in absentia* trial, even an *in absentia* conviction, is not an end to the fugitive-hunting mission but a means to get back the fled officials and recover stolen assets. It is necessary to respect the law of the destination states in order to avoid misunderstanding and build trust for possible future cooperation.

However, whether the accused will be promptly and efficiently noticed through those ways remains unanswered. First of all, under the push of the Human Rights Committee and the European Court of Human Rights , the "actual knowledge" rule has been established as the standard of the notification of the trial.[25]

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(25) European Court of Human Rights, Colozza v. Italy, Application no. 9024/80, 1985.

Consequently, assumptions about the accused's knowledge of the trial are not welcomed. Second, A diligent notice by a sovereign state does not necessarily meet the criterion of "actual knowledge." The prosecutor has done whatever they can to locate and notice the accused does not mean the defendant has knowledge of the trial.[26] Finally, sending notice to other persons, including family members, relatives, members sharing the same residence, and lawyers might also be questionable.

Nevertheless, China has neither ratified the International Covenant on Civil and Political Rights nor joined the ECtHR. Moreover, it is challenging to say the "actual knowledge" rule constitutes customary international law. Hence, legally speaking, China is under no international obligation to respect the "actual knowledge" requirement. Yet, due to practical reasons, China needs to respect the international standards so that the destination states would provide follow-up cooperation after the *in absentia* trial. Even if the law does not make itself clear about the notification standard, the judicial practice should uphold the "actual knowledge" standard to make the judgment easier accepted by foreign states.

(2) The Right to a Lawyer as a Fundamental Guarantee to Absent Defendants

Giving the absent defendant the right to a lawyer is a standard practice to fulfill the requirement of equal-armed. China absorbed this general practice when revising the CPL in 2018. According to Art. 293 of the CPL, the absent defendant, will get a lawyer either by voluntarily retaining one or by receiving one through mandatory designation. It states,

> *Where a people's court tries a case in absentia, the defendant shall have the right to retain a defender, and a close relative of the defendant may retain a defender on behalf of the*

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(26)　HRC, Maleki v. Italy, Communication No. 699/1996, U.N. Doc CCPR/C/66/D/699/1996(1999).

> *defendant. If the defendant and his or her close relatives do not retain such a defender, the people's court shall serve a notice on a legal aid requiring the designation of a lawyer to defend him/her.*

Compared with the general rules of getting a lawyer for defendants at home, Art. 293 has made some special arrangements. Under the CPL, the accused can either retain a lawyer as a defender or apply to the legal aid agency for a lawyer if he has not retained a defender for financial hardship or other reasons. If he fails to retain a lawyer or apply for legal aid services, the people' court will designate a lawyer for him. Before the Legal Aid Law came into effect, the accused is entitled to have a designated legal aid service only in the circumstances that he is blind, deaf, dumb, or a minor and when he may be sentenced to life imprisonment or capital punishment.[27]

Nevertheless, all these ways of getting a lawyer might be problematic for the escaped corrupt officials. First of all, the fled defendants for a big percentage may not retain a lawyer to participate in the trial because it will contradict with their intention to get away with the justice. Second, based on the same reason, the defendant may not apply to the legal aid agency to get a lawyer. Last but not least, the main objective of the legal aid mechanism is to help those who cannot afford a lawyer due to financial difficulties. However, most corrupt officials do not have economical problems. In addition, the fled accused may not fit in the conditions for mandatory designation, which only provides mandatory designation of lawyers to suspects or defendants who are blind, deaf, dumb, minors and those who might face life imprisonment or the death penalty.

During the law-making process, whether to give the absent defendant special treatment, namely the mandatory designation of a lawyer, has been discussed

(27) Art. 12 Para. 2 of the Regulation on Legal Aid.

thoroughly. The opponents claim that the whole legal aid system is for those who have financial difficulties. By contrast, the fled corrupt officials usually possess a huge amount of money from either the state or the bribers. If the law admits the absent defendant has the mandatory right to a lawyer, the absent defendant will benefit from the act of evading justice, which encourages the unlawful acts in the future. Supporters emphasize the importance of the mandatory designation because if the law does not provide a mandatory lawyer to the absent defendant, then it might be possible that the defendant side will present nobody in the hearing, which is against the basic adversarial requirements even for jurisdictions adopting the inquisitorial system. Finally, the supportive approach prevails because the accused must be legally represented is fundamental to an *in absentia* trial.(28)

(3) The Right to a Retrial would be a Sufficient Rescue to Trial *in absentia* for Fugitives Abroad

In theory, the right to a retrial is a crucial rescue to trial *in absentia* for fugitives abroad. For absent defendants who hide broad, the convictions under trials *in absentia* could not be enforced. Only if a fled official returns to the requesting country can the conviction be executed, and that is the time when the curtailed procedural right turns into actual harm. Thus, if the law inserts the right to a retrial on the return of the fled, it will successfully prevent the disadvantage of being absent from becoming a punishment.

As discussed above, China has adopted the French model to shape the framework of the TIA procedure, and the most important safeguard of the French model is the right to a retrial. However, the Chinese version of the right to a retrial is slightly different from the original one. In France, the *in absentia* conviction will be revoked automatically once the accused appears or is arrested by the authority. While

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（28） See Elizabeth Herath, supra note 1, 9.

according to Art. 295 of the CPL, which provides,

> *Where the defendant voluntarily surrenders himself or herself or is captured during the trial period, the people's court shall try the case anew.*
>
> *Where a convict appears before court after a judgment or ruling takes effect, the people's court shall deliver the convict for execution of the criminal penalty. The people's court shall before delivering the convict for execution of the criminal penalty, inform the convict that he or she has the right to raise an objection to the judgment or ruling. If the convict raises any objection to the judgment or ruling, the people's court shall try the case anew.*

Obviously, the Chinese CPL has modified a little bit to the French retrial mechanism by considering the judicial cost. The judgment made while the defendant was absent is not revoked automatically but by his objection upon return. Indeed, in order to give better protection to an absent defendant, the objection does not require any threshold like presenting new evidence or proving a misapplication of the law. In this regard, China's practice is quite similar to the rule of STL. Art. 22 section 3 of the STL Statute states:

> *In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgment.*

Like the Chinese CPL, the STL Statute has also balanced the value of efficiency with the interest of justice and allowed the recognition of the judgment *in absentia*. The key difference here is that the STL Statute does not offer the right to a retrial to the accused, who hires his own lawyer. If the defendant chooses his own

lawyer, then the right to a retrial will not be rendered to the absent defendant since the lawyer's presence will be deemed as the defendant's presence.

To emphasize more, if the convict returns to China and objects to the judgment *in absentia*, he or she will be granted a whole new trial. The previous hearings and judgment will no longer have any effect. The new trial is a first instance trial which is different from the appeal procedure. Under the appeal procedure, the appellant will be protected by the principle that "a people's court of second instance shall not aggravate the criminal punishment on the defendant"(29) . However, in the new trial holding for the absent defendant, he might have an aggravated punishment.

5. Applying the TIA Procedure: How to Make the TIA Procedure Fulfill the Purpose?

Except from ensuring the legitimacy of the TIA procedure in the sense of a fair trial, it is also important to make sure the application of the TIA procedure could fulfill the legislative goals. The question that how to make the TIA procedure fulfill the purpose can be divided into two sub-questions: a. which institution is responsible for deciding whether the TIA procedure is beneficial for achieving the purpose and b. what factors should be taken into considerations while making the decision.

Usually, the power to decide whether to proceed with a trial *in absentia* lies in the hand of a court. By contrast, the power of discretion, under the Chinese CPL, has been delegated to the prosecutor. According to Art. 291 of the CPL,

> *where the criminal suspect or defendant is outside China in a case regarding……if the supervisory authority or public security transfers the case for prosecution, and the people's procuratorate deems that the facts of the crime have been*

(29) Art. 237 of the Criminal Procedural Law of the People's Republic of China.

> *substantiated, the evidence is definitive and sufficient and the criminal suspect or defendant shall be held criminally liable in accordance with the law, it may file a public prosecution with the people's court. After examination, the people's court shall decide to hold a court session to hear the case if the facts of the crime alleged in the criminal complaint are clear and the conditions for the application of the procedure for trial in absentia are met.*

It is not difficult to notice the law uses different words, namely "may" and "shall", to distinguish the discretion for the prosecutor and the court to proceed with the trial *in absentia* procedure.

Interpreting the provision literally, we will find that the prosecutor has the power to decide whether to file a public prosecution or not, with the absence of the suspect, when the standard of proof and evidence has already been met. Instead, the court may not refuse to commence an *in absentia* trial if the conditions for the application of the TIA procedure are met. As a result, the court will have to respect, to some extent even "obey", the decision made by the prosecutor. Thus, does it mean the court has no discretion to decide whether to commence a trial *in absentia*? It's certainly not. According to Art. 291, the court has the power to evaluate whether the conditions for the application of the TIA procedure have been met. Then the question comes down to how to define the conditions for the application of the TIA procedure.

A reasonable explanation could be the "conditions" only refer to the minimum procedural safeguards to a fair trial. Because if the court can interpret all the criteria to decide whether to proceed with a trial *in absentia*, the word "shall" will lose its meaning. It only makes sense if the prosecutor is responsible for analyzing whether the application of the TIA procedure could suit the interest of justice, and the court evaluates whether the procedural conditions to secure a fair trial, especially the

conditions written in Art. 292 and 293 of the CPL, have been met. To put it in another way, the prosecutor first evaluates whether it is worth initiating the whole trial *in absentia* procedure. Then the court will decide whether the conditions for a fair trial have been met. Hence, the prosecutor will in fact play a role of a filter to exclude the cases which are not suitable for the TIA procedure.

However, the evaluation of whether the interest of applying the trial *in absentia* procedure tramps the cost of it would be highly problematic, even if it is not completely no answer. A preliminary analysis could be the prosecutor, while deciding the necessity of filing a prosecution *in absentia*, should consider the principle of rationality, the principle of economic litigation, and the principle of public interest. For instance, according to the principle of rationality, the application of the trial *in absentia* should be consistent with its purpose. For cases where the fugitive might not be extradited, be repatriated, or return to China voluntarily even after the *in absentia* trial, there is a concern that needs to be taken into consideration which is the judgment will not be able to be enforced and eventually damages the authority of law. According to the principle of economic litigation, the application of the TIA procedure should be the most economical option for pursuing the fugitives. For cases where the fugitive will be extradited, be repatriated, or voluntarily return to China in a predictable amount of time, there is no need to resort to trial *in absentia* but to wait for the result of the other options. Last but not the least, according to the principle of public interest, some special interest should be valued such as the rights of the victims and witnesses who suffer body injuries and mental trauma. For small rates of cases related to public interest, even if the trial *in absentia* consumes many resources and the conviction *in absentia* might not be enforced, there is still a need to conduct the trial *in absentia*. From these aspects, the TIA procedure might be applicable in the following situations.

(1) TIA Procedure as an Intermediate Procedure to Pursue the Fugitive

The first reason to file a prosecution *in absentia* is that the procedure could play a role as an intermediate procedure to pursue the fugitives. The primary objective of applying the TIA procedure is not completing the trial and rendering a verdict, but rather using the procedure as a push or deterrence to drive the fugitives to return. The application of the TIA procedure and a conviction *in absentia* is not the end, but a means to get the fled fugitives back to China and put them under justice.

An optimist possibility would be that after the trial *in absentia* or even during the trial, the defendant decides to return to China voluntarily. If that is the case, the TIA procedure did make some deterrence or impact on pushing the fugitives back to China. Certainly, whether it will happen is hard to predict and depends on the different situations of different defendants. If the conviction *in absentia* comes with a confiscation of property punishment and the fugitive has property remains in China, then by confiscating the fugitive's assets including legal property could limit the living resources of the fugitive and force him/her to return.

A second possibility would be that after the conviction *in absentia*, the destination state recognizes the judgment and decides to extradite or repatriate the fugitive back to China. Nevertheless, this assumption would be too optimistic. On the one hand, trial *in absentia* is a refusal ground for an extradition request. Extradition law in most sovereign states provides, a request for extradition shall be rejected if the judgment is based on a trial *in absentia*. For instance, Art. 8 (8) of the Extradition Law of the People's Republic of China stipulates the request for extradition made by a foreign state to the People's Republic of China shall be rejected if the request is on the basis of a judgement rendered by default. Besides, extradition treaties between states also provide similar rules. For example, "Mandatory grounds for refusal" written in Art. 3 of the "Model Treaty on Extradition"[(30)] include one situation that "if the judgment of the requesting State has been rendered *in absentia*, ……". Art. 9 of the "Extradition Treaty between the Government of the United States and the

Government of the Republic of Austria" provides, extradition requested for the imposition or enforcement of a sentence may be refused if the judgement has been rendered *in absentia* in the requesting state.

On the other hand, extradition request based on a conviction *in absentia* always faces challenges in practice. The famous extradition case between the United States and France for Ira Einhorn lasted for many years because of the *in absentia* trial. Einhorn was accused of and convicted of murder by a trial in which he was not present in the United States. Questioning that Einhorn would not get a chance for retrial upon his return, France refused to surrender Einhorn to the US. Until Pennsylvania changed the law and incorporate the right to a retrial, France finally agreed on the extradition. In short, a conviction *in absentia* doesn't necessarily help the extradition cooperation. On the contrary, *in absentia* trial could create legal obstacles to extradition.

In this regard, the prosecutor should be very cautious with the decision to file a prosecution without the presence of the suspect. If the prosecutor does not restraint the application of the TIA procedure and files public prosecution against every defendant hiding abroad, it can be predicted that a big number of fugitives cannot be extradited back based on the convictions *in absentia*. In addition, in order to reduce adverse impacts to the extradition cooperation caused by trial *in absentia*, it is very important to provide the absent defendant the right to a retrial, which could be a solution to prevent the destination state from refusing the extradition request on the ground of trial *in absentia*. According to section 7 para. 2 of the "Model Law on Extradition",[31] extradition request based on judgment rendered in absentia may be refused unless the competent authorities of the requesting state give assurances

(30)　Model Treaty on Extradition, United Nations Office on Drugs and Crime, adopted by General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88, available at https://www.unodc.org/pdf/model_treaty_extradition.pdf (accessed 05.11.22).

considered sufficient to guarantee to that person the right to a re-trial which safeguards his rights of defense. Not to mention, giving the defendant the right to a retrial will help offset the possible concerns of the defendant who might choose to voluntarily return to China.

(2) TIA Procedure as a Mechanism to Maintain the Law and Order

A second benefit of conducting a trial *in absentia* is to maintain obedience to the law. The biggest challenge of letting the fled officials unpunished is that it creates loopholes in the law and infringes the authority of the law. Hence, even if the fugitive could not return to China after the trial *in absentia*, still, the procedure is meaningful, because it can recover the authority of law damaged by the offenses and enhance people's belief that the law is still effective.

This approach is rooted in the theory of "positive general prevention", which is widely considered to be among the "great achievements" of German criminal law science.[32] Positive general prevention is a punishment theory that uses punishment to prevent a crime of the others rather than the particular offender, not by scaring potential lawbreakers into compliance, but by bolstering the law-abidingness of the rest of the population. As Binding argued, the right to punishment was "nothing but the right to obedience of the law" and "the purpose of punishment was the inmate's subjugation under the power of law for the sake of maintaining the authority of the laws violated. "[33]

The deterrence of criminal punishment lies in its certainty rather than

(31) Model Law on Extradition, United Nations Office on Drugs and Crime, available at https://www.unodc.org/pdf/model_law_extradition.pdf (accessed 05.11.22).

(32) See Markus Dirk Dubber, 2005. Theories of Crime and Punishment in German Criminal Law, American Journal of Comparative law, Vol. 53, 679-708.

(33) See Karl Binding, Das Problem der Strafe in der heutigen Wissenschaft, 61 Strafrechtliche and Strafprozessuale Abhandlungen, 1915, 84.

severeness. It is reasonable to believe that if some crimes and criminals can keep unpunished, even a law-abiding citizen will try to follow the examples. As G laukon stated in the story of "Ring of Gyges," without any restraint, a righteous person will surely become unjust. Suppose the CPL does not establish the trial *in absentia* procedure and lets the corrupt officials hide in other countries without punishment; it will probably stimulate imitation. Hence, when the prosecutor chooses cases for trial *in absentia*, he should consider the value of ending impunity. Accordingly, the prosecutor might consider the following factors, such as the nature of the crime, the number of the embezzled or bribed money if it is a corruption case, the influence on the society, the number of victims, the losses of the victims and so on. Regarding victimless crimes like embezzlement and taking bribery, indirect victims might be taken into consideration. For instance, in a case where a public official takes bribery and seeks improper benefits for others in the bidding of a bridge construction project, which eventually causes the collapse of the bridge and people's death and injuries, the victims here can be deemed as indirect victims. In cases with indirect victims, the benefit of applying the TIA procedure is significant.

(3) TIA Procedure as a Communication Channel to Comfort the Victims

One of the other benefits of conducting a trial *in absentia* is to comfort the victims and their families. In *Sejdovic v. Italy*, the ECtHR recommended a balancing exercise between the defendant's rights and the rights of the victims and the witnesses[(34)] and emphasized that the legislature must be able to discourage unjustified absences, provided that any sanction used is not disproportionate to the crime and the defendant is not deprived of his right to be defended by counsel.[(35)]

Usually, in the crime of terrorist activities, which is a type of crime applicable

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（34） See Elizabeth Herath, supra note 1, 6.

（35） Sedjovic v. Italy, App. No. 56581/00, European Court of Human Rights, 2000, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72629 (accessed 05.06.22).

to trial *in absentia* under Art. 291 of CPL, there are victims who suffer death and injuries. In terrorist activity cases, the victims and their families deserve justice, which could not be done without the TIA procedure if the suspects hide in other countries. In this regard, the TIA procedure makes justice come true and provides a formal proceeding for the victims and their families to express their hate, anger, claim, and request. Although deciding the punishment is a unique power of the judge, the whole idea that the victims deserve to be heard gives the TIA procedure solid legitimacy. Moreover, a considerable number of casualties also harms the very fabric of society which may increase the value of preventing a fugitive from escaping justice.

The consideration for the victims is most closely associated with the expressive theory of punishment, which asserts that punishing a criminal offender does increase the victim's social standing in the community and failing to punish diminishes it. Punishment sends a message to victims, to offenders, and to the third parties announcing that someone was wronged in a very particular way. A failure to punish fails to acknowledge the victims' social standing than they deserved and fails to express the collective willingness to step in to protect them and affirm their losses.[36] As a result, even if the fugitive does not successfully return to China because of the trial *in absentia*, the trial is still meaningful for the victims and their families.

6. Conclusion

In the end, a trial *in absentia* will never be an ideal outcome and should only be an alternative to other options to pursue the fugitives. When the traditional methods of pursuing fugitives fail, a complementary option to achieve justice may be

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（36） See Kenworthey Bilz, 2016. Testing the Expressive Theory of Punishment, Journal of Empirical Legal Studies, Vol. 13, 358-392.

to conduct a trial *in absentia*, since achieving even partial justice is better than doing nothing. Compared to the law and jurisprudence of other countries, China's trial *in absentia* procedure has provided sophisticated guarantees to the defendant's rights, which include but are not limited to the right to be noticed, the right to a lawyer, the right to a retrial. The right to a retrial could be a rescue to the curtailed right of the accused and prevent the conviction *in absentia* from causing direct harm to the defendant. Still, considering China's TIA procedure allows "total *in absentia*" and applies to felonies, the right of notification should be absolutely guaranteed and therefore the rule of "actual knowledge" must be established in the judicial practice. However, before a court examines whether the procedural safeguards meet the standard of a fair trial and whether to commence the trial, the prosecutor has the mandate and discretion to decide whether to file a public prosecution without the presence of the defendant. To serve the interest of justice, the prosecutor needs to conduct a cost-benefit analysis before filing a prosecution *in absentia*. The benefits of conducting a trial *in absentia* might include pushing the fugitives to return to China, maintaining obedience to law and order, and providing comfort and relief to the victims.