Trial *in Absentia* in Ethiopia: Legal and Practical Appraisal

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Abstract

The trial of a criminal charge may be held *in absentia* if the accused, duly summoned, fails to appear totally or after s/he was initially present when the trial begins. Ethiopia's Criminal Procedure restricts trial *in absentia* to grave crimes and specific fiscal crimes. It also has procedures for summons and retrial. However, it lacks sufficient clarity about issues relating to the partial absence of the accused, the requirement of personal summons, setting aside sentences imposed *in absentia*, the possibility of rehearing if a defendant fails to appear in appeals by the prosecution and whether an accused may choose representation by defense counsel than standing trial in person. The Cassation Division of the Federal Supreme Court has continued giving binding interpretations that expand the scope of trial *in absentia* even for minor crimes precluding retrial. Having examined relevant literature and comparative experience, it is suggested that express provisions that address these gaps need to be embodied in the Draft Criminal Procedure and Evidence Law. The Cassation Division should also reconsider its binding interpretations in light of restricting the scope of trial *in absentia* and towards allowing retrial in cases the accused's absence for good cause.

Keywords:

trial *in absentia*, the right to be present, the right to defense, criminal procedure

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1. Introduction

Literally, "*in absentia*" means "in the absence of."[1] Trial *in absentia* is a procedure to decide criminal cases in the absence of the accused.[2] Persons accused have defense rights,[3] which the accused cannot exercise unless present at trial.[4] Cognizant of this, Article 14(3)(d) of the International Convention on Civil and Political Rights (ICCPR) recognizes the right to be present at one's trial as a minimum guarantee. However, if the accused absents despite sufficient notice, the trial may be held *in absentia*.[5] In Ethiopia, the

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[1] Bryan A Garner (ed.) (2004), *Black's Law Dictionary* (8th ed, Thomson West), p. 774; Stan Starygin and Johanna Selth (2005), "Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code" *in Singapore Journal of Legal Studies*, p. 171.

[2] Amnesty International (2014). *Fair Trial Manual* (2nd ed.), p. 157.

[3] OSCE Office for Democratic Institutions and Human Rights (2012), *Legal Digest of International Fair Trial Rights*, pp. 116-123 &140-152; Sarah Summers (2007), *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing), pp. 63-78, 113-118 &132-142; Nihal Jayawickrama (2002), *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press), pp. 550-573

[4] *Colozza v. Italy*, European Court of Human Rights (ECtHR) 7A/1983/63/97, 9 (12 February 1985).

[5] United Nations Human Rights Committee (HRC): General Comment No. 32 (CCPR/C/GC/32), 23 August 2007; Mbenge *v* Zaire, Communication No. 16/1977, 25 March 1983*)* and *Mukhammed Salikh v Uzbekistan*, Communication No. 1382/2005 (CCPR/C/95/D/1382/2005), p. 157

Constitution recognizes the right to defense.[6] While the Criminal Procedure Code requires the accused to defend the case personally,[7] Article 160(2) of the Code allows trial *in absentia* as an exception.

Practical controversies about trial *in absentia* have led the Cassation Division to give binding interpretations in several cases encompassing the definition of trial *in absentia*,[8] the substantive and procedural requirements to trial *in absentia*,[9] appeal from and setting aside decisions passed *in absentia*,[10] and respondent's absence in appeals by the prosecution.[11] This article examines the law and these controversies in five sections. Next to this introduction, Section 2 presents the theoretical framework and the position of international (human rights) instruments about trial *in absentia* vis-à-vis the right to defense. Section 3 presents the experience of different jurisdictions. Sections 4 to 7 examine the law and practical controversies about trial *in absentia* in Ethiopia and whether the Draft Criminal Procedure and Evidence Law[12] has provisions that mend existing gaps followed by a conclusion.

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[6] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Article 20(4).

[7] Criminal Procedure Code of Ethiopia Proclamation No. 185/1961, Article 27(1).

[8] *Ermiyas Kassa Tefera v Prosecutor*, Federal Supreme Court Cassation Division, File No. 29325 (Yekatit 18, 2000 E.C.), Federal Supreme Court Cassation Decisions, Vol. 7, pp. 275-277; *Fetiya Awel v Federal Public Prosecutor,* Federal Supreme Court Cassation Division, File No. 76909 (Ginbot 10, 2004 E.C.), Federal Supreme Court Cassation Decisions, Vol. 13, pp. 305-307*; Federal Attorney General v Biniyam Mulugeta*, Federal Supreme Court Cassation Division, File No. 137209 (Hidar 27, 2010 E.C.), unpublished; *Region Justice Bureau v Andualem Genanaw Melaku*, Federal Supreme Court Cassation Division, File No. 127313 (Meskerem 22, 2010 E.C.), Federal Supreme Court Cassation Decisions, Vol. 22, pp. 187-191. .

[9] *Haleqa Niguse Abraha v Tigray Region Justice Bureau*, Federal Supreme Court Cassation Division, File No. 179416 (Sene 23, 2012 E.C.), Unpublished; *G/Medhin H/Maryam v Tigray Region Prosecutor*, Federal Supreme Court Cassation Division, File No. 94227 (05/09/2006 E.C.), Federal Supreme Court Cassation Decisions, Vol. 16, pp. 253-256; *Zewde Tesfay Smegn v Tigray Region Justice Bureau*, Federal Supreme Court Cassation Division, File No. 93577 (Hidar 22, 2007 E.C.), Federal Supreme Court Cassation Decisions, Vol. 17, pp. 198-202.

[10] *Adamu Zeleqe e., al., v Amhara Region Prosecutor*, Federal Supreme Court Cassation Division, File No. 95875 (Sene 17, 2007 E.C.), Federal Supreme Court Cassation Decisions, Vol. 16, pp. 238-242.

[11] *Semahegn Belew v Federal Prosecutor*, Federal Supreme Court, File No. 57632 (Tahsas 25, 2003 E.C.), Federal Supreme Court Cassation Decisions, Vol. 12, pp. 179-195.

[12] The Amharic version as revised in 2015 E.C. is used in this article.

2. Trial *in absentia* versus the Right to Defence: Rationale and International Instruments

2.1 Situations for Trial *in Absentia* and competing perspectives

There are two situations for trial *in absentia*. The first is when the accused did not appear for trial at all, making the case a full trial *in absentia*. In this situation, whether the accused has been duly summoned about the existence of the charge may be doubtful and may be an issue that needs proof.[13] The second is when the accused was present at the beginning of the trial but is absent in later adjournments. In like situations, the accused is considered as if present partly in the trial. The first appearance of the accused proves that s/he was duly summoned and may be *prima facie* evidence that his/her absence is a conscious decision to waive one's right to be present at trial, save if s/he was prevented by a cause beyond control.[14] The second situation where the accused is considered to be partly present at trial also includes cases of temporary removal of the accused from the courtroom if s/he persistently disturbs the proceedings.[15]

The primary concern relating to trial *in absentia* is the question of its compatibility with the right to defense. The right to defense constitutes a bundle of rights encompassing rights to be informed of the details of the charge; to be assisted with an interpreter if the accused cannot understand the language of the proceedings; to legal counsel of one's choice or free legal aid if the accused cannot afford the cost for defence; adequate time, facilities and disclosure of information to prepare one's defense; challenge the prosecution evidence, including to cross-examine witnesses; present the defendant's version of the case and defense evidence; to be presumed innocent until proved guilty by a court; and protection from enforced confession and self-

[13] Starygin & Selth, *supra* note 1, p. 171.

[14] Ibid*;* Alexander Schwarz (2016), "The legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal Court and their compatibility with human rights" in *African Human Rights Law Journal*, Vol. 16, p. 102.

[15] For example, as will be dealt with later, in USA and in the Republic of South Africa the trial court may remove the defendant if s/he persists disturbing the proceedings despite warning about possible removal from courtroom. See US Federal Rules of Criminal Procedure (December 16, 2016)), Rule 43(c)(1)(c) and South African Criminal Procedure Act 51 of 1977 (with amendments through 2013), Sec. 159(1). Article 63(2) of the Rome Statute of the International Criminal Court (ICC Statute) has similar provision for the temporary removal of the accused for her disruptive behaviours.

incrimination.[16] As the European Court of Human Rights (ECtHR) noted in *Colozza v Italy*,[17] the accused cannot exercise these defense rights unless s/he is present or represented at trial.

The importance of the presence of the accused at criminal trial has been recognized for long. For example, Hume, a Scottish jurist, wrote in 1844 that except in treason cases, it was a custom for no criminal trial to take place in the absence of the accused.[18] In modern times, the right to be tried in one's presence has (expressly or by implication) got recognition in several international and domestic human rights instruments as part of the right to defend one's case. Article 14(3)(d) of the ICCPR recognizes the right to be present at one's trial as a minimum guarantee of a fair trial. In this light, although the right to defense and the right to be present at one's trial may appear interchangeably in this article, it is to be noted that presence of the accused at trial is a precondition for the fullest exercise of the right to defense.

The clash between the right to be present to defend one's case and the recognition of trial *in absentia* has led to arguments from competing perspectives. Arguments for trial *in absentia* include its efficiency in running the criminal justice system because it requires lesser investigative police work, and shorter duration and lesser expenses for the trial process. Second, it meets the victim's right to have the accused brought before justice.[19] Lastly, the inability to hold a trial *in absentia* may paralyze criminal proceedings due to possible dispersal of evidence or lapse of limitation period to institute charges if the accused is not detained within a short time.[20]

Arguments against trial *in absentia* include first, it goes against the right of the accused to defense, because unless present at trial s/he will be unable to challenge prosecution evidence, present the accused's own version of the case and plead for mitigating circumstances. Second, the absence of examination

[16] OSCE/ODIHR, *supra* note 3, pp. 116-123 and 140-152; Summers, *supra* note 3, pp. 63-78, 113-118 and 132-142; Jayawickrama, *supra* note 3, pp. 550-573; Amnesty International, supra note 2, pp. 108-130; Commonwealth Human Rights Initiative (2010), *Fair Trial Manual: A Handbook for Judges and Magistrates*, PP. Chapter 4 pg. 1-Chapter 4 pg. 39.

[17] *Supra* note 4.

[18] D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, quoted in Summers, *supra* note 3, p. 63.

[19] Starygin & Selth, *supra* note 1, p. 172.

[20] Ibid; *Colozza v Italy*, *supra* note 4, p. 11; European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (2013), *Questionnaire Concerning Judgment in Absentia and the Possibility of Retrial: Summary and Compilation of Replies*, p. 10.

of the prosecution evidences by the accused or the defense lawyer and the absence of the defense evidence makes conviction inevitable and trial unsafe, unreliable and prone to error and abuse. Third, in certain circumstances, courts may hold 'show trials' *in absentia* in political cases to merely address public condemnation. In such circumstances, trials *in absentia* are signs of judicial weakness. The fourth argument notes that the police may shift their focus to new crimes rather than arresting the absconder, and sentences *in absentia* may not be enforced unless the convict surrenders, making trial *in absentia* pointless.[21]

Notwithstanding arguments against trial *in absentia,* there is no universal agreement on banning it although it is highly discouraged in international criminal law and even if some jurisdictions have banned it in their domestic laws. Thus, the mainstream focus seems to be balancing trial *in absentia* with the right to defense.

2.2 Trial *in absentia* vis-à-vis the right to be present under international (human rights) instruments

The Universal Declaration of Human Rights embodies two provisions relating to fair hearing. Article10 provides that the accused has the right "to a fair and public hearing by an independent and impartial tribunal" in "any criminal charge". Although this provision does not seem to implicate the right to be present, Article 11 provides that guilt should be established only "according to law" and "in a public trial" where the accused "has had all the guarantees necessary" to exercise the right to defense.

As noted above, Article 14(3)(d) of the ICCPR expressly acknowledges the right to be present as a minimum guarantee. However, the UN Human Rights Committee (HRC) has established that the right to a fair trial or due process of law in general and the right to be present in particular "cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence".[22] The HRC has also made it clear that trial *in absentia* is permissible in cases where the accused absents or fails to exercise his/her right to be present despite sufficient and advance notice about the charge and the time and place of trial.[23]

At the regional level, Article 8(2)(d) of the American Convention on Human Rights and Article 6(2)(c) of the European Convention on Human Rights and Fundamental Freedoms (European Convention) recognize the

[21] Starygin & Selth, *supra* note 1, pp. 171-172.
[22] Mbenge *v* Zaire, *supra* note 5, para. 14.1; Salikh *v* Uzbekistan, *supra* note 5, para. 9.4.
[23] Ibid; General Comment No. 32, *supra* note 5, para. 36.

right of the accused to defend personally or through legal counsel although they do not provide for the right to be present as a mandatory requirement. As noted above, in *Colozza v Italy,* a benchmark case, the ECtHR has established the right to be present as a precondition to exercise the right to a fair trial as recognized in the European Convention when it held that it is difficult for an accused person to exercise the right to fair trial unless present at trial.[24]

Although Article 7 of the African Charter on Human and Peoples' Rights does not expressly recognize the right to be present, it impliedly acknowledges the right to be heard as recognized in other "conventions, laws, regulations and customs in force." Moreover, the African Commission on Human and Peoples' Rights has adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provides that "the accused has the right to be tried in his or her presence" and prohibits trial *in absentia* except in cases where the accused waived "the right to appear at a hearing … unequivocally and preferably in writing".[25]

According to these international human rights instruments, balancing trial *in absentia* with the right to be present requires that even though trial *in absentia* does not need to be entirely banned, the necessary efforts should be taken to inform the accused of the charges and the time and place of trial.[26] With regard to the minimum standard of efforts to be made to notify the accused, the HRC noted that "there must be certain limits to the efforts that can reasonably be expected of the competent authorities with a view to establishing contact with the accused".[27]

While trial *in absentia* without, at least, sufficient effort to notify the accused amounts to violation of the right to defense what is sufficient or not seems to develop from case-by-case analysis. For example, in *Mbenge v Zaire*,[28] Mbenge, a Zairian refugee residing in Belgium was required to stand trial in Zaire. The summons was issued three days before the trial date and no effort was made to transmit the summons to his residence in Belgium, which was known to the judicial authorities. The HRC found that sufficient effort

[24] *Colozza v Italy, supra* note 4, p. 9. For summary of cases before the ECtHR pertinent to trail *in absentia*, see Jeremy McBride (2009), *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights*, (Council of Europe Publishing), pp. 285-90.

[25] African Commission on Human & Peoples' Rights, *Principles and Guidelines on the Right to A Fair Trial and Legal Assistance in Africa* (DOC/OS(XXX)247), N(6)(c)(ii) & (iii).

[26] Jayawickrama, *supra* note 3, p. 563.

[27] Salikh *v* Uzbekistan, *supra* note 5, para. 9.5.

[28] Mbenge *v* Zaire, *supra* note 5.

was not made to notify the accused. In *Salikh v Uzbekistan*, Salikh, an Uzbek national, was accused of several counts of criminal charges, including murder and terrorism. He was convicted and sentenced to fifteen and half years of imprisonment *in absentia* while he was in refuge in Norway.[29] In this case, the HRC seems to have added a new standard for the efforts to be made to notify the accused. It noted that trial *in absentia* requires all due notifications "to inform him or the family of the date and place of his trial and to request his attendance".[30] The HRC also established that Uzbekistan violated Salikh's right to defense by notifying neither him "nor his family" about the charges and proceedings.[31] The HRC also mentioned Uzbekistan's failure to make efforts to transmit the summonses to the accused where he was.[32]

Similarly, in *Sejdovic v Italy*,[33] the ECtHR ruled that holding the trial *in absentia* against an accused who was untraceable and declared a fugitive without managing efforts to notify them of the proceedings violates their right to defense. Beyond efforts to notify the accused before conducting trial *in absentia*, courts should also take extra vigilance measures to protect the accused's defense rights, including by appointing a defense counsel.[34] Technology may ease the presence of the accused from a distance. In this regard, the ECtHR has established that the participation of a convicted individual in an appeal through video conference while the defense counsel appeared in the courtroom did not restrict defense rights and that s/he could confidentially communicate with the defense counsel through a secured telephone line.[35]

Statutes that establish international criminal tribunals have moved from recognizing trial *in absentia* to disallowing and restrictively allowing it. The international criminal tribunals set up to try Nazi and Japanese war criminals "allowed trials in absentia if the accused 'has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence'."[36] Article 21(4)(d) of the statute of the International Tribunal for the Former Yugoslavia and Article 20(4)(d) of the statute of the International Tribunal for Rwanda excluded trial *in absentia* by providing in

[29] Salikh *v* Uzbekistan, supra note 5, para. 1.1.
[30] Id., para. 9.4.
[31] Id., para. 9.5.
[32] Ibid
[33] Sejdovic *v* Italy [GC] - 56581/00 (Judgment, 1.3.2006 [GC])
[34] Amnesty International, *supra* note 2, p. 158.
[35] Viola *v* Italy, (Application no. 45106/04), 5 October 2006; *Golubev v Russia*, (Application no. 26260/02), 9 November 2006
[36] Starygin & Selth, *supra* note 1, p. 176.

identical terms that "the accused has the right 'to be tried in his presence, and to defend himself in person or through legal assistance'".[37] The statute that established the Special Court for Sierra Leone prohibited trial *in absentia*, allowing it only in two exceptional situations. The First was if the accused absconded or refused to appear before the Court after their first appearance. The second was if the accused waived their right to be present either expressly or impliedly.[38]

The ICC Statute provides that "[t]he accused shall be present during the trial", although one wonders whether presence at trial is a right or an obligation in this context.[39] The Statute allows trial *in absentia* only very restrictively if the accused persistently disrupts the proceedings where the trial chamber may remove them and make arrangements for them to attend the trial and to instruct their counsel through the use of communication technology if the trial chamber finds it necessary. Still, however, removal of the accused is to be resorted to only if other less severe alternatives fail to correct the accused.[40] One important point here is that the ICC Statute does not allow trial *in absentia* on the ground that the accused has fled.[41]

However, there is a developing trend of allowing absence or excusing from a continued appearance at the ICC after Uhuru Kenyata's case where he was accused of crimes against humanity allegedly committed after the 2008 elections. Kenyata requested for excuse from a continuous appearance citing that his duty as Kenyan president did not allow him continued appearance before the ICC. His request was accompanied by demands of African states for acting heads of states not to stand trial before any international criminal tribunal. To respond to these demands, the Assembly of Member States to the ICC Statute amended the Rules of Procedure for the ICC to allow three exceptions to the mandatory presence of the accused. These exceptions are (i)) virtual presence through video conferencing, (ii) presence only through a defense counsel, and (iii) excusal from appearance for those having extraordinary public duty at national level.[42]

In different jurisdictions, there is a similar trend of excusing the accused from personal appearance in court. In appeal cases, there is an understanding that that the presence of the accused is not as significant as in first-instance

[37] Ibid
[38] Id., pp. 176-77.
[39] ICC Statute, *supra* note 15, Article 63(1).
[40] Id., Article 63(2).
[41] Starygin & Selth, *supra* note 1, p. 177.
[42] Alexander Schwarz, *supra* note 14.

trials except in cases where the appellate court considers both issues of fact and law and where fair trial requires the accused and/or their defense counsel to be present.[43] The ECtHR has ruled in several cases that the absence of the accused represented by a counsel in an appeal that addresses only an issue of law may not violate the right of the accused. However, the absence of an accused in an appeal that considers whether to amend the sentence based on factors such as their character, dangerousness and motives violates their right.[44] Similarly, empowering the Supreme Court to overturn acquittal in lower courts without summoning and hearing the accused does not, in itself, violate fair trial. However, to convict and sentence an accused reversing acquittal by the lower court without summoning the accused based on interpretations as to what amounts to neglect and carelessness violates their right to defense, because, establishing neglect and carelessness requires hearing beyond interpretation of law.[45]

In relation to the possibility of retrial, international human rights instruments have been interpreted to the effect that if apprehended after judgment *in absentia*, the accused must have the right to retrial if they were not notified about the trial sufficiently or they absented for reasons beyond control.[46] Moreover, the ECtHR has made it clear that in claims for retrial, the accused "must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*."[47] However, the ECtHR noted that state parties to the European Convention have wide discretion to determine how to ensure that their laws and procedures comply with the requirements of fair trial as recognized in Article 6 of the same Convention, and an individual who contributed to making presence at trial impossible cannot claim violation of fair trial rights.[48] Amnesty International recommends a fresh trial if the accused "were not duly notified of the trial" or failed appearance "for reasons beyond their control".[49]

Likewise, the African Commission of Human and Peoples Rights recommends retrial if the accused proves that notice was inadequate, or "the

[43] Jayawickrama, *supra* note 3, p. 563; Amnesty International, *supra* note 2, p. 158; *Sibgatullin v Russia* (ECtHR), cited in Amnesty International, *supra* note 2, p. 158.
[44] Kremzow *v* Austria (Application no. 12350/86), 21 September 1993; Cooke *v* Austria (Application no. 25878/94), 8 February 2000
[45] Botten *v* Norway (Application no. 16206/90), 19 February 1996
[46] *Colloza v Italy*, *supra* note 4, p. 11; HRC, *Meleki v Italy,* Communication No. 699/1996 (CCPR/C/66/D/699/1996), 13 September 1999.
[47] *Colloza v Italy*, *supra* note 4, p. 11.
[48] Medenica *v* Switzerland (Application no. 20491/92), 14 June 2001
[49] Amnesty International, *supra* note 2, p. 158.

notice was not personally served on the accused" or that the accused failed to appear for exigent reasons beyond their control. It also recommends that if a retrial is allowed for either reason, "the accused is entitled to a fresh determination of the merits of the charge".[50]

However, retrial may not always be the appropriate recourse. In Thomas *v* Tanzania,[51] the applicant absented after the prosecution finalized its case and on the date the defense opened its case. The reason for his absence was that he was hospitalized for severe ill health due to tuberculosis and asthma, which the trial court was aware of from his absence in two prior instances pending the trial. He was convicted *in absentia* and sentenced to thirty years imprisonment. His appeal and petition for review before Tanzanian courts brought for him nothing other than delay of his case. When the African Court of Human and People's Rights (African Court) rendered its decision on the case, he had already served twenty of the thirty years. The African Court found that the right to defense is violated. However, it declined to order a retrial.

The Court held that "[t]he appropriate recourse in the circumstances would have been to avail the Applicant an opportunity for reopening of the defence case or a retrial", and further stated that "[h]owever, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice".[52] In effect, the Court ordered the Respondent State to take measures to remedy the violations, but excluded retrial.[53] Upon request by the Respondent State, the Court interpreted the measures to be taken to include all measures to "erase the consequences of the violations" including "the release of the Applicant" from prison, but not retrial.[54]

[50] Principles and Guidelines, *supra* note 25, N(6)(c)(ii).
[51] Alex Thomas *v* United Republic of Tanzania (Application No. 005/2013), 20 November 2015
[52] Id., para. 158.
[53] Id., para. ix (the operational part of the judgment).
[54] Thomas *v* Tanzania (interpretation) (Application 001/2017) 2 AfCLR 126, para., 39.

3. Trial *in Absentia* in Different Jurisdictions

3.1 The influence of the 'due process' and 'crime control' models

There is scholarly agreement that trial *in absentia* is an exception in common law but is extensively used in civil law countries.[55] According to these scholars, the common law countries' reluctance against trial *in absentia* is based on a human rights approach to it, whereas civil law countries rely on the inquisitive approach to search for truth with the involvement of the inquisitorial court.[56] In the discourse relating to trial *in absentia*, we may categorize countries into the *due process*, *crime control*[57]and *balancing models* of criminal justice beyond the common law-civil law dichotomy. Adherents of the *due process model* stress procedural safeguards for the accused such as the presumption of innocence, fair trial, and equality before the law,[58] and "insist that the system [should preferably] err on the side of offenders rather than risk unjustly depriving innocent people of their rights or their liberty."[59] Adherents of the crime control model stress more on enabling citizens to live in safety by repressing crime and emphasizing on apprehending and punishing offenders.[60] The problem with the crime control model is that its "[i]mplicit presumption of guilt" may lead to disregard for the rights of suspects and the accused.[61] The choice of criminal justice model is also reflected in the recognition of trial *in absentia*. To separate jurisdictions that try to accommodate both models, the balancing model has been added.

It is to be noted that the *due process* and *crime control* dichotomy does not imply a water-tight classification. Indeed, there are arguments that the due process and crime control models are "in many ways two sides of the same

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[55] Amnesty International, *supra* note 2, pp. 102-103; Starygin & Selth, *supra* note 1, p. 173.

[56] Starygin & Selth, *supra* note 1, p. 172. The common law tradition against trial *in absentia* has led to a development that requires for an accused to be mentally competent to stand trial before his guilt or innocence is assessed in a criminal trial. *See* John N. Fedrico et., al (2009), *Criminal Procedure for the Justice Professional*, (10th ed., Wadsworth), p. 84

[57] For a discussion on the due process, crime control and other additional six models, see Malcolm Davies, Hazel Croall and Jane Tyrer (2005), *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales* (3rd ed., Pearson Education Limited), pp. 23-28.

[58] Id., pp. 24-25.

[59] Jeffrey B. Bumgarner (2004). *Profiling and Criminal Justice in America: A Reference Handbook* (ABC-CLIO, Inc), p. 10.

[60] Id., p. 9.

[61] Davies, Croall & Tyrer, *supra* note 57, pp. 24 & 25.

coin".[62] One explanation for this argument is that, as part of the innocence movement, "DNA not only freed the innocent but also identified the true perpetrator".[63] The point seems to revolve around whether '*absolutely certain*' convictions and acquittals are attainable. However, as Jeremy Bentham noted, "the inexorable nature of things has placed [absolute certainty] forever out of reach" and what we can have is "[p]ractical certainty, a degree of assurance sufficient for practice".[64] In light of this, the objective of the innocence movement has been "to identify what we can learn from these cases to help mitigate the potential for erroneous convictions".[65] Hence, *absolutely certain* convictions and acquittals may not be possible. In tandem with this reality, while *due process model* advocates prefer to err on the side of the accused, *crime control model* advocates stand in favour of caveat against free-riding in acquittals.

Yet, these two models have common grounds. Herbert Packer, who first introduced the due process and crime control dichotomy, notes "that values are too various to be pinned down to yes or no answers".[66] Particularly, Packer notes that the due process and crime control models have common grounds. For example, one common ground is that "there are limits to the powers of government to investigate and apprehend persons suspected of committing crimes".[67] Proponents of either model do not deny the importance of the values that the proponents of the other model prioritize.

For example, in the debate about the *evidentiary exclusion rule,* proponents of the due process model argue for the exclusion of evidence collected through a process that violates the individual rights of the accused not out of disregard for societal interest but out of the conviction that admitting such evidence

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[62] Keith A. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process", <https://media.law.wisc.edu/m/dfknm/findley_new_paradigm-10-10-08.pdf>, accessed on 25 December 2023, p. 9.

[63] Id., p. 10.

[64] Terence Anderson, David A. Schum, William Twining (2005), *Analysis of Evidence* 2nd Ed., (Cambridge: Cambridge University Press), quoted in Hanna Arayaselassie Zemichael (September 2014), "The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law", in *Mizan Law Review*, Vol. 8, No.1 p. 84.

[65] Gerald Laporte (2018). "Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science", *National Institute of Justice Journal*, Issue No. 279, p. 1.

[66] Hebert L. Packer (November 1964). "Two Models of the Criminal Process", *University of Pennsylvania Law Review*, Vol. 113, No. 1, p. 6.

[67] Id., pp. 6-9.

violates judicial integrity, which in itself is part of the societal interest that the legal system should protect. They also argue that people's security is threatened when law enforcement agencies are allowed to secure conviction based on such evidence. In the same vein, although proponents of the crime control model oppose most of the evidentiary exclusion rules on the ground that they are unnecessary for the innocent, they accept the exclusion of evidence such as coerced confessions citing that this evidence affects the reputability of the criminal justice process.[68]

There are several substantive and procedural elements of trial *in absentia* that jurisdictions discussed in the due process and crime control models share. As Joel Samaha notes, "both community security, in the form of crime control, and individual autonomy [in the form of due process] are highly valued 'goods'" and "striking the balance between them is difficult".[69] Indeed, the balance is flexible and "falls within a zone", not at a point.[70] Therefore, the discussion about jurisdictions with a balancing model to trial *in absentia* (in this section) does not imply a perfect balance. While the due process and crime control models show, to some degree, the priority between procedural fairness for the accused and public safety, the balancing model combines and harmonizes the essence and generic elements of both models.

3.2 Examples of trial *in absentia* that prioritize the right of defense

In this category, we have countries that prioritize the right of the accused and either disallow trial *in absentia* or restrict it to less serious crimes with strict summons procedure. For example, in Kenya, all evidence is required to be heard in the presence of the accused. However, in offences punishable with a fine or imprisonment not exceeding three months or both, courts may not require a personal appearance if the accused pleads guilty in writing or appears through an advocate.

In misdemeanor offences, where the accused absented after an adjournment is given in their or the defense advocate's presence, the court has the discretion to issue a summons or arrest warrant or to try the accused *in absentia*. The court may also set aside conviction *in absentia* if satisfied that the accused absented due to a cause beyond control and that s/he had a probable defense

[68] Kaylor, Elizabeth H. (2014). "Crime Control, Due Process, & Evidentiary Exclusion: When Exceptions Become the Rule", *Proceedings of the New York State Communication Association*, Vol. 2013, Article 6.
[69] Joel Samaha (2010), *Criminal Procedure* (8th ed., Cengage Learning), p. 6.
[70] Id., p. 7.

against the charge. In felony cases,[71] trial *in absentia* is impossible and the court should issue an arrest warrant against the defaulting accused. In this regard, the Kenyan High Court has reversed the conviction *in absentia* of an accused charged with the crime of defilement, punishable with 15 years of imprisonment minimum, and ordered a retrial on the ground that trial *in absentia* is impossible for felony cases and that the accused was not provided with an opportunity to explain his absence.[72] In appeal cases, the appellant has the right to be present except in cases involving issues of law, where there is no right to be present unless with leave by the High Court. An appellant in custody bears all expenses of their appearance unless the appearance is required by the court for the proper determination of the appeal.[73]

In South Africa, criminal proceedings should take place in the presence of the accused. However, courts may allow the accused or witnesses to appear through a video link if this does not hamper the accused from questioning the witnesses and observing how they react. Trial *in absentia* is also temporarily possible: (i) if the accused is removed from the courtroom for persistently disturbing the proceedings, or (ii) if the accused is unable to appear due to a physical condition or undesirable condition to attend the proceeding, illness or mourning the death of family member. Proceedings involving mere adjournment of cases or issue of bail when the prosecutor did not oppose bail may also proceed without the accused appearing in person but via teleconferencing.[74]

Among continental European countries, Armenia, Bosnia and Herzegovina, Ireland and Spain prohibit trial *in absentia*.[75] In Finland and Norway, trial *in absentia* is possible in minor crimes punishable with imprisonment not exceeding six months and one year respectively if an effectively summoned accused fails to appear. In Norway, trial *in absentia* is also possible upon the consent of the accused or if the case may result in the acquittal of the accused,

[71] According to the Kenyan law, felony offices are those declared as felonies by law or although not declared as felony those offences punishable with death or imprisonment for three or more years offences which are not felonies are misdemeanor offences. See "The Penal Code", National Council for Law Reporting (209) *Laws of Kenya* (Rev. Ed.), sec. 4.

[72] Solomon Locham *v* Republic [2015] eKLR (Case No. 718 of 2013), <http://kenyalaw.org/caselaw/cases/view/115899/>, accessed on 20 December 2023.

[73] 'Criminal Procedure Code' National Council for Law Reporting, *Laws of Kenya* (rev ed, (2017), sec 99(1), sec 194, sec 205(1), sec 206(1), (2) & (4) and sec. 354(4) & (5).

[74] Criminal Procedure Act 51 of 1977, *supra* note 15, sec 158, sec 159(1) & (2) and sec 159A (2).

[75] European Committee on Crime Problems, *supra* note 20, pp. 12, 13, 20 & 26.

the case's dismissal or if the charge involves imprisonment not exceeding one year.[76] In Austria, trial *in absentia* is, in principle, impossible if the accused flees or is assumed to have absconded from justice, and the case has to be suspended until the accused is apprehended. However, trial *in absentia* is possible for crimes punishable with a fine or imprisonment up to three years maximum or both where the accused absented after s/he was formally interrogated as accused and instructed about their rights and personally served with the summons.[77]

3.3 Crime control model to trial *in absentia*: France

In this category, we have countries –such as France– that prioritize community security and recognize trial *in absentia* irrespective of the gravity of crimes, and in some cases, proof of summons to the accused may not be required. France's approach seems to be based on the view that "the rights and freedoms of the individual are no longer protected by the provision of due process rights, but through the repression of criminal conduct" and ensuring security "as a 'fundamental right and the most important freedom'".[78]

In France, a trial *in absentia* is possible under three scenarios. The *first* context –known as judgment by default– refers to cases where the summons issued did not reach the accused and the accused did not appear at the trial or is not represented by defense counsel. In such cases, a trial *in absentia* is held without any proof of notice to the accused. If an accused convicted in such cases requests retrial, the judgment in default is deemed non-existent. An accused who was initially present at the trial cannot declare to have been judged by default and claim retrial unless s/he submits good cause for their absence.

The second scenario, "[j]udgment by repeated default" occurs where an accused convicted in a judgment by default applies for retrial but fails to appear on the date fixed for rehearing after s/he was notified. In such cases, the application to set aside the judgment *in absentia* is declared void and the judgment is confirmed. However, the court may amend the judgment by default, for reasons to be recorded; but it cannot impose severe penalties.[79]

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[76] Id., pp. 16 and 22

[77] Id., p. 12

[78] Jacqueline Hodgson (2005). *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing), p. 45.

[79] European Committee on Crime Problems, *supra* note 20, pp. 16-17; French Code of Criminal Procedure (with amendments up to April 2006), Articles 412, 413, 487 489 and 494.

The third type involves "[j]udgment by adversarial hearing subject to notification" and it leans more to the crime control model. It occurs when an accused who has received the summons personally or assumed to have known the summons absented or did not provide good cause for their absence. If the summons was delivered at the residence of the accused as stated by him/her at the interrogation stage or to the bailiff, or if a defense counsel appears to represent the accused, it is assumed that the summons was delivered to the accused in person. In such cases, the accused is tried as if present without the possibility of retrial.[80]

3.4 Examples regarding the balancing model to trial *in absentia*

Various jurisdictions try to balance the crime control model with caveats of due process such as requiring strict summons procedure, allowing representation by defense counsel and possibilities for immediate retrial. For example, in the Czech Republic, there are four scenarios for trial *in absentia*. The *first* setting relates to a trial against a fugitive who avoids appearance by staying abroad or by hiding, where a summons is served to the defense counsel, if any or to be appointed by the court and posted in the court's notice board or in the accused's permanent residence in the Czech Republic. An accused so convicted, if apprehended, may claim immediate retrial. The court cannot disallow retrial. In the retrial, all prosecution evidence is reheard, if possible, or the records are read/re-played out for the accused and s/he comments on them. In the retrial, the court cannot convict them for a serious crime than the original trial *in absentia* nor can it impose a severe penalty.

The *second* scenario relates to cases of criminal orders involving offences punishable with imprisonment not exceeding five years. This enables decisions in summary without personal appearance and hearing of the accused if the facts are well established by the evidence collected in the pre-trial process. The possible punishments in like cases can only be imprisonment up to one year, fine, community service, confiscation of property and up to five years prohibition from social events. If the accused files a protest against the criminal order a full trial is held, but s/he may face conviction for a serious crime or a severe penalty than the original order.

The *third* context involves judgment by default where the accused did not present sufficient cause for their absence and is assumed to have implicitly waived their right to be present. This applies to simple and felonious offences alike if the accused was served with the indictment and summoned to the trial,

[80] European Committee on Crime Problems, *supra* note 20, p. 17; French Code of Criminal Procedure Id., Articles 410 and 412.

has been interviewed by the police or public prosecutor in the pre-trial proceedings and at the end of the investigation s/he was invited to study the file and to propose evidence not gathered. The *fourth* scenario occurs where the accused requests to be tried *in absentia* and all their defense rights are exercised by the defense counsel. In the third and fourth cases, the accused may appeal against the judgment but cannot claim retrial.[81]

In Greece, trial *in absentia* is possible in misdemeanor offences if the accused has been duly notified about the charge and trial. In felonious offences trial *in absentia* is impossible unless the accused is represented by defense counsel. An absentee accused has the right to be represented by a defense lawyer who exercises all defense rights and remedies on their behalf. Code of Criminal Procedure of Greece requires the default judgment to be notified to the accused even if s/he is represented by a defense counsel. Retrial is possible in misdemeanor offences. In felonious offences representation of the accused by defense lawyer makes the trial as if it was conducted in the presence of the accused.[82]

In Germany, trial *in absentia* can be allowed only under exceptional circumstances. These are *first*, where the accused was examined in the indictment stage but absented or intentionally made themselves in an abnormal state of mind and unfit to stand trial in continued hearing and the court did not consider their presence indispensable. The *second* exception relates to minor crimes punishable only with fine, a warning with sentence deferred, a driving ban, or the forfeiture, destruction or making unusable of an item. In like cases, the accused may also request excusal from continuous appearance. The *third* exception involves appeal cases which do not require new evidence, renewed hearing or getting the impression of the accused.

In all cases, the accused must receive a summons with warning about possible trial *in absentia* and be represented by a defense counsel with written power of attorney. However, courts may order the personal appearance of the accused including the issuance of an arrest warrant.[83] The court may also temporarily remove the accused from the courtroom if s/he persists in disturbing the proceedings and may continue the hearing *in absentia*.[84] In relation to procedural requirement, an important provision in Section 232(2) of the German Code of Criminal Procedure is that it requires personal

[81] European Committee on Crime Problems, *supra* note 20, pp. 13-15, 34, 72 and 77.
[82] Id., pp. 20, 37, 73 and 85.
[83] Id., pp. 17-19 & 36; German Code of Criminal Procedure (as recently amended in April 2014), secs 230-236.
[84] German Code of Criminal Procedure, Id., Article 231b.

summons by prohibiting trial *in absentia* "if the summons was effected by publication."

In the USA, while the accused has the right to be present at trial and sentencing hearing, s/he is assumed to have waived her/his right if s/he initially appears but absents in continued hearing. Trial *in absentia* is impossible on the ground that the accused absconds during the pretrial process.[85] Before conducting a trial *in absentia*, courts are also required to question whether the accused absents voluntary, and this includes appointing defense counsel for the accused to invoke reasonable doubts.[86] A decision to conduct the trial *in absentia* can be reviewed by appeal if the trial court did not take precautions by appointing a defense lawyer or disregarded reasonable grounds for the absence of the accused,[87] or it erred clearly in concluding that the accused absented voluntarily.[88] Sentencing is considered as a post-conviction procedure in the USA and not as part of the trial.[89] The right to be present at the sentencing hearing is guaranteed. However, if the accused absented voluntarily the court sentences them *in absentia*.[90]

The presence of the accused is not required under a few circumstances. The *first* setting refers to an accused organization represented by a defence counsel. The *second* context involves cases of misdemeanor offences punishable with a fine or imprisonment not exceeding one year or both if the accused requested in writing to be tried *in absentia.* The *third* and *fourth* conditions respectively refer to hearings involving only issues of law and cases involving corrections to reduce sentences.[91] Where the defendant persists in disturbing the proceedings despite warning the trial court may also remove the accused from the courtroom.[92] The right to be present at one's trial and the exceptions to it also apply to appeal cases.[93] Another important point

[85] Starygin & Selth, *supra* note 1, p. 173; US Federal Rules of Criminal Procedure, *supra* note 15, Rule 43(c)(1).

[86] *United States v Achbani*, 507 F. 3d 598, 601 (7th Cir. 2007); *United States v Watkins*, 983 F. 2d 1413, 1419 (7th Cir. 1993)

[87] *United States v. Marotta*, 518 F.2d 681, 684 (9th Cir. 1975)

[88] *United States v. Houtchens*, 926 F.2d 824, 827 (9th Cir. 1991)

[89] *Betterman v Montana*, 578 U.S., (2016); US Federal Rules of Criminal Procedure, *supra* note 15, Rule 32ff.

[90] *United States v Ornelas*, D.C. No. 3: 13-cr-03313-JAH-3 (9th Cir. 2016); US Federal Rules of Criminal Procedure, *supra* note 15, Rule 43(a)(3) & 43(c)(2).

[91] US Federal Rules of Criminal Procedure, *supra* note 15, Rule 43(b).

[92] Id., Rule 43(c)(1)(1).

[93] Id., Rule 1(a)(1).

is that a video link may be arranged for the appearance of the accused upon their consent.[94]

4. Trial *in Absentia* in Ethiopia: Substantive and Procedural Requirements

Ethiopia's federal Constitution recognizes the rights of the accused to a fair trial. This encompasses rights to public trial within a reasonable time, to be informed of the particulars of the charge and to receive it in writing, to be presumed innocent and to protection against self-incrimination, to access all evidence against them, to cross-examine prosecution witnesses, to present defence evidence or to have them presented upon court order, to representation by defence counsel of their choice or to free legal aid if they cannot afford one, to appeal and to assistance by an interpreter if they do not understand the language of the proceedings.[95]

A joint reading of the above provisions with Article 14(3)(d) of the ICCPR leads to the conclusion that presence at one's trial is a constitutional right. Similarly, the Ethiopian Criminal Procedure recognizes presence at trial as a right and provides that "[t]he accused shall appear personally to be informed of the charge and to defend himself."[96] However, as the right to defend one's case in person may be waived by the accused or limited by law, the Criminal Procedure has regulated the details of trial *in absentia*.

4.1 Overview of the substantive dimension

The substantive dimension in Ethiopia's approach leans more towards the crime control model. Trial *in absentia* is possible for crimes punishable with rigorous imprisonment of "not less than twelve years" or economic crimes punishable with "rigorous imprisonment or fine exceeding five thousand" Birr.[97] It is impossible in cases of private prosecution or crimes punishable upon private complaint.[98] Whether the phrase "not less than twelve years" refers to the minimum or the maximum penalty is controversial.[99] For

[94] Id., Rule 5(f) and 10(c)
[95] Constitution, Article 20(1)-(7).
[96] Criminal Procedure Code, Article 127(1).
[97] Id., Article 161(2)
[98] Id., Article 166, 44 and 47
[99] See generally Simeneh Kiros Assefa (2009), *Criminal Procedure Law: Principles, Rules and Practice*, p. 415; Mohammed Seid (June 2021), "The Legal Regime Governing Criminal Trials in Absentia under Ethiopian Law: A Threat to the Right to a Fair Trial", *Bahir Dar University Journal of Law*, Vol. 11, No. 2, p. 185; Tadesse

example, Tadesse argues that taking the minimum penalty leads to allowing trial *in absentia* for aggravated homicide but not for international crimes such as genocide, crimes against humanity and war crimes incorporated into the Criminal Code.[100]

In *Niguse's case*,[101] the petitioner was convicted *in absentia* for aggravated theft under Article 669(3)(b) of the Criminal Code, a crime punishable with simple imprisonment not less than one year or rigorous imprisonment not exceeding fifteen years, and was sentenced to four years imprisonment. The Cassation Division held that the phrase "not less than twelve years" refers to crimes punishable with a minimum of twelve years rigorous imprisonment. It reversed the conviction on the ground that the punishment can be simple imprisonment or rigorous imprisonment of less than twelve years. This benchmark case excludes crimes with less than twelve years of rigorous imprisonment (as a minimum threshold) from trial *in absentia* even if the maximum threshold may be twenty years or a life sentence.

Trial *in absentia* is limited to cases where the accused absents totally or before prosecution witnesses are heard. The Cassation Division has limited the definition of trial *in absentia* to cases where the accused absents before the prosecution witnesses are heard. In *Ermiyas's* and *Fetiya's* cases,[102] the Cassation Division excluded cases from the definition of trial *in absentia* where the accused absents after prosecution and defense evidence were heard or in the sentencing hearing. Similarly, in *Biniyam's* and *Andualem's* cases[103] it excluded cases where the accused failed to appear at court after prosecution evidence was heard and after the court ordered the accused to defend the case.

In *Ermiyas*, the petitioner was charged with aggravated homicide under Article 522(1)(a) of the 1957 Penal Code, a crime punishable with rigorous imprisonment for life or death, before the Federal High Court (FHC). He absented after prosecution and defense evidence was heard, and the FHC convicted and sentenced him in his absence. Similarly, in *Fetiya*, the petitioner was charged under Article 18(2) of the Private Employment Agency

Simie Metekia (2021), *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards* (Koninklijke Brill), pp. 175-176

[100] For example, genocide and war crimes are punishable with rigorous imprisonment from five to twenty-five years whereas aggravated homicide is punishable rigorous imprisonment for life or with death. See Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Article 539(1) 269 and 270

[101] *Niguse's Case, supra* note 9.

[102] *Ermiyas's* Case and *Fetiya*'s Case, *supra* note 8.

[103] *Biniyam's* Case and *Andualeme*'s Case, *supra* note 8.

Proclamation.[104] The crime was punishable "with imprisonment up to two years or a fine up to Birr 10,000 (ten thousand Birr)." The petitioner absented after prosecution and defense evidence was heard. The FHC convicted and sentenced her in her absence. The controversy occurred when she petitioned to set aside the sentence imposed without her presence claiming that she was abroad and her child's illness delayed her return journey.

In *Biniyam's case*, the respondent was accused of grave willful bodily injury under Article 555(c) of the 2004 Criminal Code, a crime punishable "with rigorous imprisonment not exceeding fifteen years, or with simple imprisonment for not less than one year." He absented after prosecution evidence was heard and after the court ordered the accused to open his defense. The issue arose because the Federal First Instance discontinued the case on the ground that the crime could not be tried *in absentia,* and the FHC dismissed the petitioner's appeal. Similarly, in *Andualem's case*, the respondent was accused of grave willful bodily injury under Article 555(b) of the Criminal Code and he absented after the hearing of prosecution evidence and court order to open his defense.

According to the binding statutory provision interpretations of the Federal Supreme Court Cassation Division in *Erimiyas's* and *Fetiya's* cases, even persons accused of crimes that do not meet the substantive requirements for trial *in absentia* will face sentence in their absence (at the phase of sentencing after their conviction) without exercising their right to challenge prosecutor's arguments for aggravation and to plead for mitigation of sentences as per Article 149(3) & (4) of the Criminal Procedure. These binding interpretations ignore the fact that aggravation claims by the prosecutor and the subsequent mitigation claims by the accused –and other facts that can affect the sentence, if disputed– have to be proved, and this requires a hearing. The fairness of the hearing before imposing a sentence against the convict should not be lesser than the pre-conviction hearing of the prosecution and defense evidence.[105]

Similarly, according to the binding interpretations in *Biniyam's* and *Andualem's* cases, even persons accused of crimes that do not meet the substantive requirements for a trial *in absentia* will face conviction under a possibly non-rebuttable presumption that they have waived their right to defense. While the justification behind holding a trial *in absentia* is the rebuttable presumption that the accused has waived her defense rights, the

[104] Private Employment Agency Proclamation No. 140/1998, Article 18(2), (now repealed).

[105] Andrew Ashworth (2010), *Sentencing and Criminal Justice* (5th ed., Cambridge University Press), pp. 372, 376 & 380-381; Simeneh, *supra* note 99, pp. 394-395

Cassation Division creates binding interpretations for trial *in absentia* with a non-rebuttable presumption of waiver of the right to defense by the accused.

4.2 Gaps relating to provisions on procedure

In continuously narrowing the definition of trial *in absentia* in the above cases, the Cassation Division particularly relied on one of the provisions that deal with trial *in absentia*, Article 163(2) of the Criminal Procedure Code which reads, "The prosecution witnesses shall be heard and the public prosecutor shall make his final submissions." Similarly, it relied on the provisions of the Criminal Procedure about setting aside judgment *in absentia* that are silent about sentences *in absentia*.[106] However, because these provisions are silent about cases where the accused absented after the hearing of prosecution evidence and at the sentencing hearing, they cannot help to define trial *in absentia* in a comprehensive way.

The Criminal Procedure Code provides that after the court fixes "the date of trial," it calls the parties. It also provides about a trial *in absentia* if the accused defaults "… on the date fixed for the trial".[107] However, examination of files and evidence may consume a long duration and adjournments.[108] The trial passes through various phases beginning from the initial appearance of the accused and decision on preliminary objections as she may invoke against the charge, recording her plea, hearing prosecution evidences, examination of defense evidences and finally sentencing, if the accused is convicted.[109]

The decisions of the Cassation Division indicated in the preceding paragraphs seem to be concerned that the accused may escape justice by absenting if prosecution evidence establishes a case against them or if s/he evaluates that the defense evidence does not, at least, establish reasonable doubt against the charge and prosecution evidence. However, if this problem cannot be solved by a strong police system to arrest absconders, expansive interpretation to trial *in absentia* without limiting it to grave crimes and cases of absconding after prosecution evidence was heard –and a case was established against the accused– can adversely affect the criminal justice system. Due caution is also necessary to allow sentencing *in absentia* if the accused absents in the sentencing hearing. However, if this has to be done, it

[106] Criminal Procedure Code, Article 164, 197-202.
[107] Id., Articles 123, 124 & 160(2).
[108] Id., Article 94 (2)(l).
[109] *See* Leake Mekonen Tesfay (2019). "Understanding the Constitutional Right to Defense and Trials in Absentia in Criminal Cases in Ethiopia: A Case Based Analysis", *Scholars Internal Journal of Law Crime and Justice*, Vol. 2(2): 22-25.

has to be by a clear law with the possibility of a retrial if the accused absented for good cause.

The Draft Criminal Procedure and Evidence Code lacks provisions that can address the controversy in defining trial *in absentia*. It allows trial *in absentia* if the accused absents despite due summons and arresting the accused was impossible. It also deals with application for retrial.[110] However, the definition of trial *in absentia* in the Draft Code does not accommodate cases where the accused was initially present at the court hearing. The Draft extends trial *in absentia* to crimes possibly punishable with seven years or more imprisonment without regard to the minimum penalty.[111] The need to extend or restrict trial *in absentia* may be an issue in itself. However, it does not provide solutions to problems relating to an accused who absconds after prosecution evidence has established a case.

Procedurally, if the accused absents and a representative does not appear to explain the cause for their absence and ask for an adjournment, the court issues an arrest warrant against the accused. If the arrest warrant fails, the court considers whether to hold the trial *in absentia*.[112] If the court decides to conduct trial *in absentia*, it orders to publicize the summons in a newspaper or other means fit to reach the accused indicating the date fixed for trial and warning about trial *in absentia* if s/he fails to appear.[113] One wonders whether personal service of summons for the accused is a requirement for trial *in absentia*. Simeneh argues it is not.[114]

It can be argued that Criminal Procedure Code tries to accommodate the due process model by requiring personal service. First, according to Article 160(2) and (3), trial *in absentia* is held if the accused absents without good cause and arresting them is found impossible. Unless personally summoned, it is a good cause for the accused not to appear for trial because s/he may not know it. Second, a bench warrant is issued if the accused absents while s/he "has been duly summoned and there is proof of service of such summons."[115] There is no reason to arrest the accused or to assume that s/he waives her defense rights unless personally summoned. There are arguments that the

[110] Amharic Draft (2015 E.C.), Article 217(2), 218, 326 and 327
[111] Id., Article 217(1)
[112] Criminal Procedure, Article 160(2) & (3).
[113] Id., Article 162.
[114] Simeneh, *supra* note 99, p. 417.
[115] Criminal Procedure, Article 125.

publication of summons does not prove that the accused receives notice[116] because the accused may not read the publication.

Personal summons is also a requirement in most jurisdictions. Germany, for example, does not allow trial *in absentia* upon publication of summons. In Kenya and the USA, if an accused is not found, a summons may be served by delivering it to their residence or a family member or servant of suitable age residing with them or to their employer.[117] However, in like cases, trial *in absentia* is possible only if the accused confirms receipt of the summons by appearing initially at the trial but absents in continued adjournments.

If the accused intentionally makes personal summons impossible, publishing or posting it may be the last resort. This is not to inform the accused about the charge from which s/he escapes but to warn them that s/he will face trial *in absentia*. According to the Amharic version of Article 162(a) what the court publicizes is "ተከሳሹ የተከሰሰበት ወንጀል ዝርዝር ነገሩ እንዲሰማ በተቀጠረበት ቀን ተከሳሹ ሳይቀርብ ቢቀር በሌለበት የሚፈረድ መሆኑን የሚገልጽ የመጥሪያ ማስታወቂያ". This would roughly be translated as, "a summons notice stating that if the accused absents on the day fixed for the hearing of the details of the charge against him, he will be judged *in absentia*".

This provision is different from summoning the accused "to appear on the date and at the time fixed by the court" for trial in accordance with Article 123 of the Criminal Procedure Code. One may even argue from the joint reading of Articles 162(a) and 94(2)(g) that publishing a summons applies only if the accused was initially present but absents after the case was adjourned before hearing the *details of the charge* ("ዝርዝር ነገሩ"). This may happen if s/he was not "served with a copy of the charge or [was] served [within] too short a time before the trial".

In this connection, according to Article 42(1)(b) of the Criminal Procedure Code, the public prosecutor decides not to institute a charge if "there is no possibility of finding the accused and the case is one which may not be tried in his absence." This relates to cases where the police have not yet interrogated the suspect who, for example, flees abroad or commits a crime outside the Ethiopian territory for which the Ethiopian state can assume jurisdiction.[118]

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[116] Tadesse, *supra* note 99, p. 183; Mohammed, *supra* note 99, pp. 183-184

[117] Kenyan Criminal Procedure Code, *supra* note 73, secs 92 and 93; US Federal Rules of Criminal Procedure, *supra* note 15, Rule 4(c)(3)(B) and Rule 9(c)(1).

[118] For the principles of International Law establishing state jurisdiction in criminal cases, see Malcolm N. Shaw (2008) *International Law* (6th ed., Cambridge University Press), pp. 652-673; Anthony Aust (2010), *Handbook of International Law* (2nd ed, Cambridge University Press), pp. 43-46. For an analysis of cases upon which the Ethiopia State

Its purpose is not to regulate trial *in absentia* but to direct the prosecutor on what to do after receipt of police investigation files without interrogation of the accused. In crimes that allow trial *in absentia*, the prosecutor institutes a charge even if the police have not yet interrogated the suspect. Such crimes are of special gravity requiring the involvement of other government departments beyond the tripartite interplay between courts, prosecution and police. One expects maximum efforts to summon the accused overseas or to extradite them to Ethiopia.[119]

This provision does not allow trial *in absentia* without summons service requirements duly observed for the mere fact that an accused cannot be traced or resides/flees abroad. Commenting about trials *in absentia* in the red terror trials against former *Dergue* officials, Marshet postulates that those who fled abroad were "deliberately trying to evade justice" and assumed to have "chosen not to stand trial".[120] However, one doubts whether they escaped war that they were determinately losing to the then Ethiopian Peoples' Revolutionary Democratic Front or against the trials that followed.

The Draft Criminal Procedure and Evidence Code makes a distinction between personal and constructive summonses. Article 217(2) of the 2015 E.C. Draft Code refers to trial *in absentia* relating to the accused who absents after having received a summons. Article 217(3) provides that in grave crimes or economic/fiscal crimes, publicity of summons through gazette or radio having wider coverage, or through television suffices for trial *in absentia* if personal service is impossible. According to Article 2(15) of the Draft Code, grave crimes include crimes that may be punished with more than 15 years of imprisonment without regard to the initial punishment. The draft does not render clarity to trial *in absentia* commensurate with the gaps and issues that need to be addressed in this regard.

One of the issues that requires due attention in Ethiopia is whether courts should temporarily remove the accused for their disruptive behavior and continue the proceedings *in absentia*. As noted earlier, there is a similar experience in the ICC Statute and in jurisdictions like the USA, Germany and South Africa. However, the Criminal Procedure Code in Ethiopia does not

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can assume jurisdiction, *see* Bebizuh Mulugeta Menkir (2018), "Delegation of Criminal Jurisdiction between Ethiopia and Other Countries: Choice of Applicable Criminal Law"*, Haramaya Law Review*, Vo. 7, pp. 6-7.

[119] Criminal Code, Article 11(3); Criminal Procedure, Article 161(3)(Amharic version); Tadesse, *supra* note 99, pp. 177-178.

[120] Marshet Tadesse Tessema (2018), *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (Berlin: Springer, Asser Press), pp. 244 & 246.

include the accused person's disruptive behaviors as a ground for their removal from the courtroom and to continue the proceedings *in absentia*, even temporarily.[121] Instead, Ethiopian law criminalizes the disruptive behaviors of the accused as court contempt.[122] This can be criticized for failing to incorporate the disruptive behaviors of the accused as a ground for trial *in absentia*.[123] However, this author is in favor of a minimalist approach for trial *in absentia* and argues that criminal liability for court contempt, implemented in the context of fair procedure suffices to regulate the disruptive behavior of the accused.

5. Appeal and Setting Aside Judgment *in Absentia*

The Criminal Procedure Code seems to be silent about appeal as an option to challenge default judgment. Yet, since it does not expressly prohibit appeal, the provision in Article 181(1) about appeal in general applies to judgments *in absentia*. Article 20(6) of the Constitution also guarantees appeal without distinction. Hence, an accused person who is convicted and sentenced *in absentia* has the right to appeal against the merits of the judgment. In this regard, we can refer to a decision by the ECtHR relating to a case in France.[124] In the French Code of Criminal Procedure, an accused judged *in absentia* could not appeal on issues of law.[125] However, the ECtHR declared that the prohibition contravenes the right to appeal provided in Article 2 of Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms.[126] In tandem with this decision, France repealed the prohibition.[127]

5.1 Conditions for appeal against a default judgment

There are two impediments to appeal from a default judgment. First, the Criminal Procedure Code requires a notice of appeal to the trial court within fifteen days from the date of judgment.[128] An accused tried *in absentia* may

[121] For more on this issue, see Mohammed, *supra* note 99, pp. 187-89.
[122] The crime of court contempt is punishable with simple imprisonment not exceeding one year or fine not exceeding three thousand Ethiopian Birr if committed in an open court or a simple imprisonment not exceeding six months or fine not exceeding one thousand Ethiopian Birr if committed where the judge was carrying out his judicial duties not in an open court. *See* Criminal Code, Article 449.
[123] For example, see Mohammed, *supra* note 99, pp. 187-89.
[124] *Krombach v France* (Application no. 29731/96) (Decision of 13 February 2001).
[125] Article 636, cited in Krombach, Id., p. 11.
[126] Cited in *Krombach v France*, *supra* note 124.
[127] French Code of Criminal Procedure, *supra* note 79, Articles from 628-641 omitted.
[128] Criminal Procedure, Article 187(1).

not know the default judgment before the lapse of fifteen days from the date of judgment. Second, s/he can only claim review of what is recorded in the default judgment and may not present new evidence before the appellate court unless the latter so orders upon its motion according to Article 194 of the Criminal Procedure Code.

Hence, the appeal may not help the accused unless the trial court grossly erred in weighing prosecution evidence and/or interpreting the relevant law(s). Unless trial *in absentia* is prohibited except for cases where the accused is personally summoned, the timeframe of fifteen days should run from the time the accused knows the default judgment. There is a similar experience in the Dutch legal system, where sentences imposed in trials *in absentia* become enforceable "unless an appeal is lodged" after fourteen days from the day the accused becomes aware of being sentenced if s/he did not know the trial.[129]

Another issue is whether Article 202(3) of the Criminal Procedure Code prohibits appeal by a defaulting accused. The provision prohibits appeal "against a decision dismissing the application [to set aside the default judgment]" and provides "nothing shall prevent the applicant from appealing against sentence only within fifteen days of the dismissal of the application." This does not prohibit appeal against the merits of the default judgment; it only prohibits appeal against denial of retrial.

The provision also carries something beneficial to the defaulting accused as it allows an appeal against the sentence even after the plea for retrial is rejected. Yet, this provision restricts the right to appeal,[130] because it denies the accused the right to take the grounds of their absence for review before an appellate court. Article 331(3) of the Draft Criminal Procedure and Evidence Code provides that an accused who did not succeed in their application for retrial may appeal against the conviction or sentence. However, the Draft retains the restriction on appeal against denial of retrial. Unless rectified in further revisions, this contradicts the constitutional right to appeal.

Another option that is available for an accused person to challenge default judgment is an application to set aside the judgment if the application is presented within thirty days from the date the accused knew the default judgment and if s/he was not summoned for the trial or was prevented from

[129] Evert F Stamhuis (2001), '*In Absentia* Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System' 32 *VUWLR* 715, p. 716.

[130] Simeneh, *supra* note 99, p. 423.

appearing in person or through an advocate by a *force majeure*.[131] This may arguably be considered a manifestation of the due process model in the Criminal Procedure Code. The *first condition* is fulfilled if the court conducted the trial *in absentia* believing that the accused was duly summoned but later discovers a problem in the process. What is important to note is that the phrase "has not received a summons to appear" in Article 199(a) refers to a summons served in person and precludes courts from denying retrial on the ground that the summons was published in a newspaper or was posted at the residence of the accused.

The Cassation Division of the Federal Supreme Court held that publishing summons without due effort to deliver it to the accused at their permanent residence is insufficient for trial *in absentia*, leading to setting aside the default judgment.[132] Similarly, it held that posting the summons in the local administration where the accused and their relatives reside is an insufficient way of summoning the accused while the law requires publication in a newspaper.[133] In these binding interpretations, the Cassation Division made it clear that utmost effort should be made to serve summons in person at the residence of the accused, otherwise leading to setting aside the default judgment. However, there are still gaps in due process because the decision states that if the accused is not found the summons will be publicized. This implies a negative assumption as if the mere fact that the accused is not found in his/her residence shows intent to evade justice or to make personal summons impossible while these need proof beyond mere assumption.

The second condition for application for retrial seems more demanding and impossible for the accused to satisfy.[134] The accused might be unable to appear in person. An issue is whether courts should decline the application for retrial on the ground that the accused could have sent their advocate, if any, a family member or any representative to state the reasons for their absence and ask for an adjournment.[135] However, it is unjust to deny retrial on these grounds.

In this regard, Article 218(2) of the Draft Criminal Procedure and Evidence Code has omitted the requirement of the accused to prove her inability to appear through an advocate. With regard to the degree of proof lessons can be drawn from the ECtHR which decided that the accused should not be

[131] Criminal Procedure, Article 198 and 199.
[132] *G/Medhin*'s Case, *supra* note 9.
[133] *Zewde*'s Case, *supra* note 9.
[134] Simeneh, *supra* note 99, p. 420.
[135] Ibid; Criminal Procedure, Article 94 (2)(a), 160(2) and 199(b).

burdened to prove that s/he absented due to *force majeure*.[136] It suffices if the accused presents evidence showing circumstances that may have reasonably prevented personal appearance, i.e., creating reasonable doubt whether their nonappearance implies an intention to waive the right to be present. The prosecution should carry the burden of disproof if it so alleges.

5.2 Scope of retrial and potential issues relating to interpretation

If the trial court accepts the application to set aside the default judgment, a retrial is held. The Criminal Procedure lacks clarity on the scope of retrial. Article 202(1) provides that "the public prosecutor shall file the charge in a court having jurisdiction." As noted earlier, this refers to cases where the accused did not appear for trial at all and is silent about cases where the accused was initially present. This seems to have contributed to the Cassation Division's conclusion that the definition of trial *in absentia* excludes cases where the accused absented after the hearing of prosecution and/or defense evidence.

However, this provision should apply, *mutatis mutandis*, to cases where the accused was initially present.[137] If the accused absented before the hearing of prosecution evidence, retrial includes a hearing of prosecution evidence. If the accused absented after prosecution evidence was heard, retrial is limited to allowing the accused to present their defense. If the case only involves the absence of the accused during the sentencing hearing, the retrial has to be limited to allowing the accused to challenge the grounds for aggravation of penalty, if any, and to plead for any mitigating circumstance that was not taken into consideration.

Whether the *mutatis mutandis* interpretation to bridge gaps in the provisions of the Criminal Procedure pertinent to trial *in absentia* contravenes the principle of legality may be an issue. However, the principle of legality, as understood in criminal law, has two rules. The first, known in the Latin expression *nullum crimen sine lege* (no crime without law) requires the non-retroactivity and clarity of the criminal law. The second, known in the Latin expression *nulla poena sine lege* (no penalty without law) requires that the penalties an accused may face are only those prescribed in advance in relation to criminal prohibitions.[138]

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[136] *Colloza v Italy*, *supra* note 4, p. 11.

[137] Leake Mekonen Tesfay (2019), *supra* note 109, p. 26.

[138] Robert Cryer *et al*, (2010), *An Introduction to International Criminal Law and Procedure* (2nd ed., Cambridge University Press), pp. 17-20. *See* also Peter Westen (2007), "Two Rules of Legality in Criminal Law", *Law and Philosophy*, Vol. 26, No. 3, pp. 229-305.

The gaps in the Criminal Procedure Code may be bridged through the incorporation of express provisions in the Draft Criminal Procedure and Evidence Code. Yet, the principle of legality does not preclude interpretation generally and the *mutatis mutandis* interpretation particularly when they are needed in procedural issues.[139] Indeed, the *mutatis mutandis* interpretation respects the rights of the accused as is required in the interpretation of human rights provisions.[140]

Issues may arise whether courts have to accept an application for retrial without asking whether the accused has possible defenses against the merits of the charge. This issue may be important especially if the accused was personally summoned but absents totally or initially appears but absented after prosecution evidence was heard and established a case against her. In such cases, it seems wise to suspect whether the accused absented because s/he does not have defenses and if judged *in absentia,* s/he may try to set aside the default judgment without having possible defenses.

Hence, it seems wise to require the accused to show her possible defenses against the charge, similar to the Kenyan experience, or mitigation circumstances not considered in determining the sentence. As the Criminal Procedure does not embody such a requirement, it seems appropriate to incorporate this in the draft law.

An issue may also arise whether a defaulting accused may concurrently submit an appeal against a judgment based on the merits of the case and application to set aside the default judgment on the ground of her absence. If she is confident that the trial court will set aside the default judgment, s/he may not need to appeal and vice versa. If s/he is in a dilemma, s/he may want to try both. Nothing in the law seems to prohibit this.

The Cassation Division held that if the accused tried *in absentia* appeals within thirty days from the day the default judgment was delivered, this interrupts the thirty-day period for application to set aside the default judgment. It stated that this enables the accused to switch from appeal to application for a retrial pending the appeal even after the lapse of the thirty

[139] What is prohibited according to the principle of legality as recognized in the Ethiopian Criminal Caw is treating acts not criminalized by law as crimes through interpretation generally and by analogy particularly and imposing penalty not prescribed by law. See Criminal Code, Article 2(2) & (3).

[140] Office of the High Commissioner for Human Rights and International Bar Association (2003). *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York and Geneva: United Nations), p. 8.

days limit to demand a retrial.[141] This interpretation widens retrial. However, the Cassation Division did not examine the possibility of concurrent appeal against the judgment and application to set aside the default judgment. The petitioners switched to application for retrial pending their appeal from the same default judgment, implying their (mis)understanding that they could not use both.

6. Respondent's Absence in Prosecution Appeals

Where an appeal is admitted and the hearing day fixed, the parties should be notified.[142] However, if the respondent absents, the appeal proceeds *in absentia*.[143] In this connection, it seems possible to draw a difference between first instance trials and appeals regarding summons. In first-instance trials, as noted earlier, Article 125 of the Criminal Procedure Code requires proof of service of summons to the accused. There is no similar requirement in appeal.

A respondent's presence in appeal cases is not as important as in first-instance trials because in most cases appellate courts examine the records of first instance courts. Hence, in appeals by the prosecution, it is possible to argue that a summons publicized in any way or delivered to or posted in the respondent's residence or business place may suffice unless the appellate court upon application by the prosecutor or upon its motion hears new evidence according to Article 194 of the Criminal Procedure Code. In the latter case, the respondent should be summoned to comment on and challenge the new evidence, whether they are relevant as to conviction or sentencing.

An issue that arises is whether a respondent tried *in absentia* in an appeal by the prosecutor may apply to set aside the judgment. Although the Criminal Procedure Code is silent on this issue, the literature and comparative experience reviewed earlier show that allowing/disallowing retrial in appeal cases should depend on three factors: (i) whether the respondent was present at first-instance trial; (ii) whether the appellate court considered new evidence; and (iii) whether the accused was acquitted at first instance trial and convicted in appeal. If the accused was convicted *in absentia* in the first instance trial without room for retrial, the only opportunity for them to challenge the charge and prosecution evidence is filing an appeal.

If the prosecutor appeals from the default judgment and if the respondent also absents in the hearing of the appeal because of good cause, fairness

[141] *Adamu, Shibabaw and Hailu*'s Case, *supra* note 10.
[142] Criminal Procedure Code, Article 192.
[143] Id., Article 193(2).

requires allowing the rehearing of the appeal. The same applies if the appellate court considers new evidence that affects its decision in convicting the respondent or imposing an aggravated sentence than in the first instance trial and where the respondent was acquitted in the first instance trial but convicted in appeal. In such cases, the provisions in Article 197-202 of the Criminal Procedure about setting aside default judgments apply, *mutatis mutandis*, to appeal cases.

Semahegn's case,[144] involved a charge of negligent homicide under Article 526(1) of the 1957 Penal Code. The FHC discharged the accused. In appeal, the FSC remanded the case with an order to hear defense evidence. After the remand of the case to the FHC, the respondent pleaded to amend the charge to intentional homicide. The FHC rejected the plea, convicted the petitioner for negligent homicide and fined him 3,000 Birr. The respondent appealed against the denial of the plea to amend the charge. The petitioner absented after the FSC remanded the case to the FHC again with an order for trial according to an amended charge. However, the FHC acquitted him according to Article 163(3) of the Criminal Procedure citing that prosecution evidence did not establish intentional homicide as per Article 522(1)(a) of the 1957 Penal Code. Then, the respondent appealed to the FSC, which resulted in the conviction for negligent homicide and a sentence of four years simple imprisonment in the absence of the accused. He submitted a cassation petition to the Cassation Division after the FSC declined his application to set aside the conviction where he claimed that he had been abroad and was not summoned.

The majority opinion (three judges) of the Federal Supreme Court Cassation Bench held that a respondent judged *in absentia* in appeal by the prosecution may apply to set aside the decisions. However, if the appellate court declines to hear the application, the accused may not petition for cassation review because s/he is considered a convict who absconds from justice having waived their fair trial rights. The majority decision seems to have focused on the case's facts rather than the interpretation of law.

The petitioner was present in all proceedings, and he absented only after the respondent's plea to amend the charge to intentional homicide was accepted. Although he was acquitted by the Federal High Court, the Federal Supreme Court (upon appeal by the prosecutor) convicted him of negligent homicide in his absence and later rejected his plea to set aside the conviction. It is not clear whether the petitioner absconded purposely before an amended charge was lodged. The mere fact that the petitioner knew that the respondent

[144] *Supra* note 11.

was allowed to amend the charge may not enable us to conclude that he knew the trial date. Rejecting the petitioner's application for rehearing, the FSC stated that the petitioner did not deny the respondent's argument that because he was hiding his wife attended the trial in the FHC. This might have tempted the majority to conclude that the petitioner escaped purposely from justice.

The minority opinion (two judges) dissented stating that a respondent tried *in absentia* in appeal by the prosecution may appeal to the next appellate court or demand cassation review but cannot apply for rehearing. However, this is prohibitive too. For example, if we consider *Semahegn's case* from this perspective he could appeal to nowhere from the FSC and his petition for cassation review could fail as involving more issues of fact than fundamental error of law. To avoid such controversy, one expects the Draft Criminal Procedure and Evidence Code to come up with a provision about setting aside a judgment at least in appeal cases that involve (i) issues of fact, (ii) the hearing of new evidence, or (iii) appeal cases where the accused was acquitted at the lower court but convicted by the appellate court. Article 342(1)(b) of the Draft Code provides for the appeal to be heard *ex parte* if the respondent defaulted despite due summons. However, it does not have any provision about setting aside a default judgment in appeal cases.

7. Representation by Defense Counsel in Trial *in Absentia*

Article 127(1) of the Criminal Procedure Code requires the personal appearance of the accused and provides, "When he is assisted by an advocate the advocate shall appear with him." *Fetiya's case*[145] reflects court practice in disallowing an advocate from representing a defaulting accused at first instance trial. The court seems to have considered the conduct of the accused as an exercise of defense rights through defense counsel while hiding to escape a possible sentence.

The Criminal Procedure does not require the personal appearance of the accused in appeal cases. Article 189(2) requires both the appellant and the accused's advocate, if any, to sign the memorandum of appeal. Similarly, Article 192 deals with the hearing procedure of appeals stating that after the appellant speaks, the respondent replies and the appellant may counter-reply. Neither of these provisions requires the personal appearance of the accused as either appellant or respondent.

[145] *Fetiya's case*, *supra* note 8.

The trend of courts seems to allow the accused to appeal through her advocate, as in *Ermiyas's case*.[146] Although the FSC dismissed his appeal on the ground that he should apply first to set aside the default judgment, it did not deny representation by defense counsel. With respect to legal persons, the Cassation Division has given an interpretation that has the effect of allowing representation by defense counsel.[147] In this case, the petitioner objected to the representation of the respondents with a defense counsel while their managers absented from trial in the same case. The FHC rejected the objection and the FSC dismissed the appeal as an interlocutory matter under Article 184 of the Criminal Procedure Code. The Cassation Division confirmed the decisions, in effect allowing the respondents' representation by their defense counsel. We have no similar experience regarding natural persons.

Commenting on Article 127(1), Simeneh argues that "[t]he advocate is there to assist the accused and not to replace [the accused] in any way; they are distinct persons in the eye of the law in criminal cases unlike in civil cases."[148] The argument is not about interpreting the letter of the law, but about the general issue of whether the accused has to stand trial as a right or as a duty. As far as international human rights instruments are concerned, we simply speak about the right to defense and the right to be present at trial, not duty. However, there is an argument that the accused has not only the right but also the duty to stand trial because if "the accused [is] found to be guilty of the offence …, the sentence can be executed only if s/he is personally present."[149]

Some also argue that the accused has an obligation to appear for trial and assist the inquisitorial search of truth by the court.[150] This perception has led to an argument that a defense counsel cannot represent an accused in a trial *in absentia*. However, this argument seems to be untenable on three grounds. *First*, it is inconsistent with Article 127(1) of the Criminal Procedure which

[146] *Ermiyas's case*, *supra* note 8.

[147] *Federal Public Prosecutor v Dubai Auto Gallery LLC and World International Free Zone Company* (File No. 120762, Yekatit 25, 2008 E.C.), *Federal Supreme Court Cassation Decisions*, Vol. 19, pp. 276-281

[148] Simeneh, *supra* note 99, p. 412.

[149] Id., p. 413. Similarly, in an earlier draft law prepared by the Federal Attorney General it was provided that the accused should be present at trial not only to defend herself, but also "የተጠያቂነት ግዴታውን እንዲወጣ ለማስቻል [to bear his duty of accountability.]" see Federal Attorney General (2009 E.C.), *The Criminal Procedure Code and Evidence Law of the Federal Democratic Republic of Ethiopia* (Amharic Draft, in document with the author), Article 240(1)(a). This has been omitted from the later revised versions.

[150] Alexander Schwarz, *supra* note 14, p. 102.

provides: "The accused shall appear personally to be informed of the charge and to defend himself." Accordingly, the accused needs to appear before trial to exercise the right to defend their case, and not to ease the government's efforts to apprehend them. Moreover, this provision does not expressly prohibit the defense counsel from appearing to represent the defaulting accused. It is thus improper to impose restriction through interpretation.

The *second* point against the argument is that it is improper to make the right to defense counsel conditional upon the personal appearance of the accused at trial. These are two distinct rights under the umbrella right to defense. *Thirdly*, Article 20(5) of the Constitution expressly provides that persons accused have the right to be represented by legal counsel of their choice ("በመረጡት የሕግ ጠበቃ የመወከል ... መብት"). This provision manifests the accommodation of the due process model, and its joint interpretation with Article 14(3)(d) of the ICCPR reveals that presence at one's trial is a right that the accused may waive.

True, "the legislature must be able to discourage unjustified absences".[151] However, an accused may choose absence for different reasons. For example, the absence may be to avoid the possible risk of denial of bail and detention pending trial while s/he believes s/he has sufficient defense securing her acquittal. In minor crimes, s/he may also entrust her right to defense to a defense counsel to avoid repeated appearances for personal and business reasons.

As noted earlier, comparative experience also shows that courts are required to appoint a defense counsel if they decide to try the accused *in absentia*. Similarly, different jurisdictions also allow representation of the accused by a defense lawyer if the former does not want to appear. Particularly, the Ethiopian legal system may share the experience of the Netherlands and France. In the Dutch legal system, criminal trials are categorized as trials in the presence of the accused, called contradictory trials and trials *in absentia*. In trials *in absentia*, courts used to allow a defense counsel to represent the absentee accused if satisfied that a compelling reason prevented the accused while s/he was willing to appear. However, the ECtHR[152] ruled that the absence of the accused does not justify the denial of her right to be defended by a defense counsel. In an amendment to its criminal procedure law to incorporate this decision, the Netherlands allows attorneys

[151] *Krombach v France*, *supra* note 124, p. 20.
[152] *Lala v The Netherlands*, cited in Stamhuis, *supra* note 129.

with "explicit authorisation from their clients" to speak on behalf of their clients, but such cases are assumed as if the accused was present.[153]

Similarly, the French Code of Criminal Procedure had a provision prohibiting a defense counsel from representing an accused in trial *in absentia*.[154] However, the ECtHR decided that this contravenes the right to legal assistance stating that the right to a defense lawyer, including a lawyer officially assigned, where necessary, is fundamental. It noted that an accused "does not lose the benefit of this right merely on account of not being present at the trial. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance."[155] The ECtHR rejected the French Government's argument that "assistance" should not mean "'representation' in criminal trials. To incorporate this decision, France omitted the prohibition[156] and, as noted earlier, trials where a defense counsel represents the accused are considered as if the accused was present without the possibility of retrial.

Ethiopia's Constitution explicitly allows representation, and it does not make a distinction between "assistance" and "representation". Article 10(1) of the Draft Criminal Procedure and Evidence Code provides that an accused has the right to receive legal advice from or to be represented by a defense counsel of their choice. This seems to avoid any controversy about representation. A concern here can relate to an accused who pretends to make use of defense rights through a defense counsel, and meanwhile makes the arrangements for absconding if conviction and sentence would come. The concern is that this may defeat not only "the victim's desire",[157] but also the enforceability of proportional sentences imposed based on impartially settled principles.[158] However, although the law needs to balance the rights of the defendant with the interest of the victims[159] the protection of victims' interests should not "be translated into a reduction of the rights of the defendant".[160]

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[153] Stamhuis, *supra* note 129.

[154] Article 630, cited in *Krombach v France*, *supra* note 124

[155] *Krombach v France*, *supra* note 124, p. 20. The ECtHR relied on Article 6(3)(c) of the European Convention for Protection of Human Rights and Fundamental Freedoms that provides about the right to defence either in person through a defence counsel.

[156] French Code of Criminal Procedure, *supra* note 79, Arts. 628-641 have been omitted.

[157] Tyrone Kirchengast (2006), *The Victim in Criminal Law and Justice* (Palgrave), p. 204.

[158] Ashworth, *supra* note 105, p. 75.

[159] Kirchengast, *supra* note 157, p. 177.

[160] Mitja Gialuz (2015), "Victim's Protection in the Case Law of the European Court of Justice and the European Court of Human Rights", *in* Luca Lupária (ed.), *Victims and*

8. Conclusion

The Criminal Procedure Code restricts trial *in absentia* to crimes punishable with minimum of twelve years of rigorous imprisonment or fiscal crimes punishable with rigorous imprisonment or a fine above five thousand Birr. It has also procedures of summons and retrial for good cause. However, its lack of sufficient clarity has led to controversies and binding interpretations that expand trial *in absentia*. The silence of the Criminal Procedure Code about cases where the accused absents after the hearing of prosecution evidence or in the sentencing hearing has led the Cassation Division of the Federal Supreme Court to exclude like cases from the definition of trial *in absentia*. In effect, persons accused even of minor crimes will face conviction and sentence *in absentia* without the possibility of retrial. Moreover, the absence of express prohibition of trial *in absentia* unless the accused is personally summoned seems to have led to an interpretation by the Cassation Division that publication of summons suffices if the accused was not found at their permanent residence, and this can potentially preclude retrial.

The Criminal Procedure Code allows retrial for good cause. However, disallowing appeal against denial of retrial gives the discretion to trial courts in determining what amounts to 'good cause'. The Criminal Procedure Code allows trial *in absentia* in appeal cases. However, its silence on whether the procedure to set aside default judgment also applies to appeal cases has led to a controversy. In this regard, the Cassation Division has held that a respondent who absented during the hearing of the prosecution appeal may apply for rehearing. However, if the appellate court declines the application, the accused is considered as if s/he was evading justice having waived her right to be present. Moreover, there is the need to harmonize the requirement of personal appearance under the Criminal Procedure Code with the Constitutional provision that expressly allows representation. Fortunately, revision of the Criminal Procedure is underway

The problems examined in the preceding sections do not solely result from the law's insufficient clarity. The Cassation Division's failure to approach trial *in absentia* from perspectives that include the accused person's rights deprives the law of its due process elements. Therefore, the revision that is underway in the Draft Criminal Procedure and Evidence Code is expected to incorporate relevant provisions that can address the gaps in clarity and consistency relating to trial *in absentia* in Ethiopia. ■

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