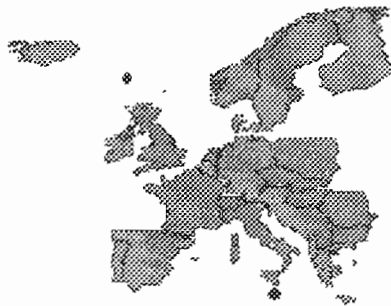


What are the Criteria for Trials in Absentia in Civil Law Systems?

Yugoslavia War Crimes Project



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1. Introduction and Summary of Conclusions

The people guilty of war crimes in the former Yugoslavia should not escape justice because they refuse to come to court. Should they remain unpunished merely because they can evade prosecution from an International Tribunal? This very issue has stirred up the idea of trials in absentia.

In their article for the Washington Post, authors Schwartz and Lloyd state that although up to now, the tribunal has chosen not to have trials in absentia, according to recent press reports, the tribunal's president is reconsidering the idea. The article continues to say the Bosnian Serb government, in its express commitment to the Dayton Accords, has not delivered the indicted Bosnian Serb leaders Radovan Karadzi and Ratko Mladic, and most likely will not do so.

Schwartz and Lloyd argue that a defendant has the right to be tried in his presence, but waives that right if he fails to appear for trial. They concede that although trials in absentia are not as satisfactory as with the accused present, their "advantages are substantial." A conviction is a formal proceeding for all the world to see, while the untried indictment is an "unproven charge."¹

In rebuttal to the Schwatz-Lloyd article, author Diane Orentlicher contends that trials in absentia is an idea whose time has not come. She states that trials in absentia can be justified, if at all, only as a last measure if the accused can not be arrested.

She goes on to state that; "But such an effort has not -- to put it politely -- been seriously attempted." The United Nations War Crimes Tribunal has no police force and must depend on national governments to secure the presence of the accused. Although compliance with the

Hague Tribunal's arrest warrants is mandated by the Dayton Accords, no accused has ever been turned over to the Tribunal.[2]

The controversy concerning the exclusion of in absentia trials has continued since the beginning of the tribunal and adoption of its statute. In its General Comment No. 13 (1984), the Human Rights Committee did not completely forbid the possibility of trials in absentia ("When for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary.")³

In an attempt to answer the question - "What are the criteria for trials in absentia in civil law systems?" - the answer appears to be - it depends. It depends on whether you look at the issue through the eyes of an international tribunal's or through the eyes of each individual country.

It also appears to depend whether one is looking at the issue from a "as a matter of principle" point of view, or if one examines the issue as what is actually practiced.⁴

The European Court of Human Rights will almost always void a trial that was held in absentia, based on Article 6 of the Convention, but did hint that it might allow a trial in absentia under certain conditions.

The Court stated that the impossibility of holding a trial by default may paralyze the criminal proceedings, in that it may lead to lost evidence, miscarriage of justice, and the expiration of time limits to prosecute. When domestic law permits trials in absentia, the accused, once he becomes aware of the proceedings, should be able to obtain a fresh determination of the merits of the charge. [5]

But if one looks at domestic cases from Italy, Netherlands, France, and Greece, one will see that each of these countries has allowed trials in the absence of the accused. What can be

"gleaned" from these cases is that trials in absentia are allowed in many domestic trials, but when the trial is held at the international level, a higher standard of the accused's rights are applied.

The decision to allow a trial in absentia domestically will almost always turn on whether there has been adequate notification to the accused and whether the accused has "willfully" evaded the execution of a warrant.

As discussed *infra* there are different opinions among the States of what constitutes adequate notification, some states holding that it must be an express, personal notification of the proceedings to the accused, while other states hold that it can be something from notification to a colleague, (see *Stamoulakatos v. Greece*, discussed *infra*), to a filing of the action in the appropriate court.

2. Legal Discussion

When U.N. Secretary-General Boutros Boutros-Ghali asked for suggestions for the Tribunal, the French suggested in absentia trials. In the French proposal, if a defendant was indicted by the prosecutor and the indictment was approved, the trial could proceed if the defendant refused to come to trial. If the defendant then voluntarily appeared or was later arrested, he would have the option of reopening the proceedings. ⁶

The Secretary-General decided against the French proposal stating that in absentia jurisdiction would violate article 14 of the International Covenant on Civil and Political Rights.

In the words of the Secretary-General, "[T]here is a widespread perception that...this would not be consistent with Article 14 of the International Covenant on Civil and Political rights, which provides that the accused shall be entitled to be tried in his presence." ⁷

Although the Statute of the International Tribunal explicitly states the accused has a right to be tried in his presence, it does not explicitly prohibit trials in absentia.⁸

The second annual report of the International Tribunal indicates that the Tribunal broke ground when it found a solution to problems created by its decision not to allow trials in absentia by creating a special procedure, --the Rule 61 proceedings. "Rule 61 proceedings" would allow the full Trial Chamber to confirm an indictment against accused persons that have not been placed under arrest.⁹

Rule 61 of the tribunal's code of criminal procedure is the common and civil law's compromise to trials in absentia. It permits the prosecutor, after trying and failing to get jurisdiction over an indictee, to put on the case against that suspect, in public, before the tribunal. Witnesses may be called and evidence entered. If there are reasonable grounds for concluding that the accused committed the crimes indicated, the tribunal says so and issues an international arrest warrant.¹⁰

If a U.N. member state refuses to turn over the subject of the arrest warrant, the matter is referred to the Security Council, which may consider imposing sanctions against the offending state.¹¹

The net effect of Rule 61 is to air allegations and, more importantly, to restrict the accused to their own country. If they travel to or through any of the 185 U.N. member states, they are subject to arrest. "Sooner or later we will [get custody of more alleged war criminals]," says Minna Schrag, the American prosecutor. "Because we keep getting information on people who travel."¹²

A. International Tribunal for the Former Yugoslavia

In their book "The International Tribunal for the Former Yugoslavia", the authors state that there were many reasons for prohibiting trials in absentia. There is a strong belief among the participating states that such trials would violate the accused's rights to participate under Article 14 of the International Covenant on Civil and Political Rights.¹³

However, there are various interpretations of what would constitute a violation of Article 14 among the States. Some states would allow trials in absentia if the accused was given personal notice of the indictment and escaped during the trial. Other states favored trials in absentia if the accused voluntarily waived his right to be present at the trial, while others wanted to prohibit it completely.¹⁴

The ideal of an accused's rights have grown significantly since the Nuremberg Tribunal, where the Nazi Martin Bormann was tried in absentia, convicted and sentenced to death. Article 6 of the Nuremberg Charter authorized such trials if the accused could not be brought into custody.¹⁵

With respect to international trials held in absentia the prevailing view among States today is that they should not be permitted. The States fear that in absentia "trials would become the rule, not the exception".¹⁶ The States not in favor of in absentia trials argued that it would cause the Tribunal "to become a paper tiger used only as a forum for show trials" which undermine the credibility of the United Nations Security Council.¹⁷

B. Countries that have allowed trials in absentia

1. Italy

a. Colozza v. Italy

Colozza v. Italy (1985) 7 EHRR 516, is the seminal case in respect to trials in absentia and the rights of the absent within the European Court of Human Rights.¹⁸

On 20 June 1972, Mr. Colozza was reported to the Rome public prosecutor's office for fraud and other various alleged offenses.

In an attempt to notify Mr. Colozza of the start of the proceedings the investigating judge issued a judicial notification “comunicazione giudiziaria”. The police state they tried to deliver it to his last known address, but failed because Mr. Colozza had not informed City Hall of his change of address, as required by law.¹⁹

After an accused is declared untraceable “irreperibile” by the investigating judge, a defense counsel may be appointed for the accused, after which all papers which have to be served upon the applicant will be lodged in the registry of the investigating judge. The defense lawyer will be notified in each instance.²⁰ This was done for Mr. Colozza on 12 November 1973.

After three failed attempts to arrest Mr. Colozza on November 1974, 30 May, and 3 June 1975, the court declared him as “latitante” (‘a person who is willfully evading the execution of a warrant by the court.’).²¹ Mr. Colozza, now being represented by his fourth appointed lawyer, (because of failure of the previous court-appointed lawyers to appear), was committed to trial, and consequently sentenced to six years imprisonment on 9 August 1976.²²

On 20 May 1977, Mr. Colozza was arrested at his home and consequently died in prison on 2 December 1983 serving this sentence.²³ His widow was recognized by the Court as an injured party to bring this claim on an equitable basis. (Art 50)²⁴

1. Relevant domestic law

a. notice

The Court of Cassation has consistently declared when there has been adequate searches by the criminal investigating police which have been unsuccessful, that there may be a presumption of an intent to evade arrest.²⁵ This presumption of intent will exist even if the person who is being sought has not made any "special subterfuges" to avoid arrest.²⁶

b. trial by default "contumacia"

A trial by default may be heard when the accused after being "duly" summoned, does not appear at his hearing and neither requests nor agrees that it proceeds in his absence.²⁷

The accused who does not appear under Italian law has the same rights as an accused who is present. For instance, he is entitled to be defended by a lawyer, one will be appointed for him if he does not appoint one himself.²⁸

2. European Court of Human Rights Ruling

The European Court of Human Rights held that in the determination of any criminal charge against him, everyone is entitled to a fair....hearing...by [a] tribunal. The issue before the court was whether the procedures for notifying people who are untraceable "irreperibile" and the procedure for holding a trial by default deprived Mr. Colozza of the rights guaranteed under Article 6.²⁹

The European Court of Human Rights held that sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 guarantee to everyone charged with a criminal offense, is entitled to take part in the hearing, to defend himself in person, and to examine the witnesses. The European Court of Human Rights concluded; "it is difficult to see how he could exercise these rights without being present".³⁰

The Court unanimously decided that there had been a violation of Article 6(1), and because of this violation ordered the respondent State to pay Mr. Colozza's widow six million lire by way of just satisfaction.³¹

In *Colozza*, (citing its prior holding in *Deweere v. Belgium*, 2 EHRR 439, at para 49), the Court stated that it is not the Court's function to produce a general theory when to allow a trial in absentia. Although the impossibility of holding a trial by default may paralyze the criminal proceedings, such as the loss of evidence, miscarriage of justice, or the expiration of time limits for prosecution, the circumstances in *Colozza* did not justify a "complete and irreparable loss of the entitlement to take part in the hearing.

When domestic law permits trials in absentia, the accused, once he becomes aware of the proceedings, should be able to obtain a new determination on the merits of the case. [32]

b. Rubinat v. Italy

Mr. Rubinat, a Spanish sailor fatally wounded a Nicaraguan sailor in a boarding house in Genoa on 27 April 1982, after which he fled abroad.

The next day the Italian authorities issued an arrest warrant, but he could not be found. On 23 May 1982, the police stated that the searches for him were unsuccessful "vane ricerche" and Mr. Rubinat was thereafter treated as 'latitante' (a person willfully evading a warrant issued by the court) (Art 268, Code of Criminal Procedure).³³

Mr. Rubinat was convicted and sentenced in absentia on 25 November 1974 to 21 years imprisonment for murder (Arts 497-501).³⁴ On 29 October 1976, Mr. Rubinat was arrested in France in connection with charges being brought against him there, and the Italian authorities requested his extradition, which took place on 27 May 1977.

On 12 May 1983, after the President of the Italian Republic granted a pardon for the murder conviction, Mr. Rubinat went abroad.³⁵

Mr. Rubinat complained on 21 July 1978 that he had not received a fair trial in accordance with Article 6 of the Convention, and the Commission unanimously agreed, relying on Article 6 which guarantees of the accused's right to take part in the proceedings.³⁶

c. Brozicek v. Italy

Even though Mr. Brozicek was notified of the proceedings and subsequently charged with offenses of resisting the police, assault and wounding, the European Court of Human Rights declared that his trial in absentia was in violation of Article 6 because the notifications were in a language that he could not understand.

Mr. Brozicek was arrested by the police on 13 August 1975 after he had torn down some small ornamental flags in connection with a fete organized by a political party. Because he did not have any identification papers on him, the police took him into custody, and this is where he wounded one of the police officers.³⁷

On 23 February 1976 Mr. Brozicek was notified of the charges and proceedings pending against him. He was also notified of the right to court appointed defense lawyer.

Mr. Brozicek returned this notification on 1 March 1976 stating that he did not understand Italian and requested that either the "mother tongue" of the person charged be used or one of the international languages of the United Nations be used to avoid any "misunderstandings."

The Public Prosecutor's Office received his letter on 3 March 1976. It did not comply with the accused's request for translation, nor did it send a reply. On 17 November 1976 the Public Prosecutor's Office sent a registered letter requiring a second "judicial notification" and requested

that Mr. Brozicek provide an address for service in Italy. This letter was returned by the German postal authorities marked "unclaimed" on 5 December 1978.³⁸

At this point it was determined that Mr. Brozicek could not be located, the trial took place on 1 July 1981, where he was convicted in absentia and sentenced to 5 months imprisonment.³⁹

1. Relevant domestic law and the European Court of Human Right's Ruling

Where the accused's whereabouts can not be determined or otherwise notification can not be given because the address given to the prosecutor is insufficient, the judge or prosecutor shall make the order "decreto" provided for in Article 170.⁴⁰

The ECHR held by a vote of 15-5 that there had been a violation of Article 6(1). "The right to participate in the trial, although not expressly mentioned in Article 6(1), is nevertheless recognized by the 'object and purpose of the Article taken as a whole.'" There was no evidence that Mr. Brozicek waived this right.⁴¹

The Court based its ruling that there had been a violation of Article 6 because Mr. Brozicek did not understand the language of the notifications, which was evidenced when he requested that the notifications be translated from Italian to his "mother tongue." The Court went further and stated that it was the duty of the of the judicial authorities to ensure observance of Article 6(3)(a), unless they could establish that Mr. Brozicek could understand Italian. [42]

2. France

The ban on trials in absentia is not an absolute one in civil law systems. The French allow absentia trials within their system, even for felonies.⁴³

However, if proper notice was not received of the trial date or felony charges are involved, the defendant in some circumstances may request a default judgment and re-litigate all the issues determined in his absence.⁴⁴

Frase states that although there are no published statistics of trials in absentia, he was able to observe several trials of this kind during his trips to the city of Lyon in 1982 and 1986.⁴⁵ Published statistics group most non-voidable trials in absentia together with those when the defendant is present, but separate figures are supplied for the following: (1) Voidable "default" judgments (defendant not properly notified), (2) rehearings of such default judgments; and (3) repeated default judgments (failure to appear at rehearing).

Repeated default has the same binding effect as trial in absentia, since the defendant, when he has requested such a rehearing, is held to have proper notice of the trial date.⁴⁶ In 1978, from all convictions for felony, delict, and contraventions of the fifth class, 21% were voidable defaults, 4% were rehearings of defaults, and 2% were repeated defaults.⁴⁷

a. French Code of Criminal Procedure

If the accused refuses to appear, a summons shall be made to him in the name of the law.⁴⁸ If the accused refuses to comply with the summons, a public reading will be made of his resistance, the trial shall continue and the judgment will be as binding as if the defendant had been present.⁴⁹

The French have also allowed a trial in absentia to continue when the accused has disrupted the proceedings.⁵⁰ After his removal from the court, the accused shall be held at the disposal of the court under guard until the end of the trial.⁵¹

b. Poitrimol v. France

In *Poitrimol v. France*, not only was a trial in absentia allowed, the Court of Appeals and the Court of Cassation also refused to allow Mr. Poitrimol's lawyer to represent him in his absence.

Mr. Poitrimol was convicted in absentia for absconding with his children, in breach of a custody order. He was allowed to be represented by defense counsel at the trial of first instance, (under Article 411 of the Code of Criminal Procedure) but when he appealed to the Court of Appeals and the Court of Cassation, both times he was not allowed representation by defense counsel in his absence.⁵²

Article 410 of the Code of Criminal Procedure states if the accused has been properly summoned and fails to appear and has not been excused from doing so, will be tried in his absence, "as if he were there."⁵³

The European Court of Human Rights held that even though Mr. Poitrimol was notified of each hearing and decided on his own not to appear, the Court ruled by a vote of 5-4 that there had been a breach of Article 6(1).⁵⁴

3. Greece

a. Stamoulakatos v. Greece

In a domestic trial in Greece, Mr. Stamoulakatos was tried, convicted and sentenced to two years imprisonment, all in absentia.⁵⁵ He had an extensive criminal record up to that point, which included forgery, fraud, insulting the authorities, defamation, misappropriation, and causing bodily harm.

An investigating judge had started an investigation into Stamoulakatos, after the latter sent defamatory letters to many public figures, including the Greek President. These letters were all signed by Stamoulakatos, and included his professional address.⁵⁶

The first time the Athens Criminal Court tried to summons Stamoulakatos, they were forced to serve it to Mr. Masson, a lawyer and colleague of Mr. Stamoulakatos. (pursuant to Art 155 of the Code of Criminal Procedure). Mr. Stamoulakatos confirmed receipt of the summons by telegram, but did not appear for the hearing.⁵⁷

After ruling that Mr. Stamoulakatos had been properly given notice, the Criminal Court (under Art 340(3) of the Code of Criminal Procedure) tried, convicted and sentenced Stamoulakatos to two year's imprisonment.⁵⁸

What the Indictment Division relied upon in denying Mr. Stamoulakatos' appeals, was their opinion that Mr. Stamoulakatos was given sufficient notice; therefore the accused's trial in absentia which followed was not contrary to the European Court of Human Right's judgment of the Colozza case.⁵⁹

The Commission held against the Indictment division mentioning that although the accused's right to participate in the defense is not expressly mentioned in Article 6, and the Convention does not expressly prohibit trials in absentia, Article 6 "taken as a whole" shows that a person charged with a criminal offense has the right to be present and defend himself.⁶⁰

Although the Court stated charged with a criminal offense does have the right to represent himself, it refused to hear the case, because the dates of the offenses were before the 'critical' date of 19 November 1985 when the competence of the European Commission to receive petitions based on the rights set forth in Convention.[61]

4. Netherlands

a. *Pelladoah v. Netherlands*

Although Mr. Pelladoah did attend his trial at the Haarlem Regional Court “arrondissementsrechtbank” when he was convicted of bringing heroin into the country, and consequently expelled from the country, he was subsequently tried in absentia, and not allowed defense counsel to represent him, when he appealed the decision.

Because he was found not to have intent to distribute and that he already had spent six months in prison, he was immediately released and expelled from the country before his appeals could be heard.

Both the defendant and the prosecution appealed against the Regional Court's judgment. Due to his absence Mr. Pelladoah was declared to be in default. His lawyer was not allowed to conduct the defense because the Court of Appeals found no compelling reason had become apparent to allow it, ‘klemmende reden.’⁶²

Relevant domestic law and practice

a. *trial in absentia*

If the accused after having been properly summoned still does not appear at the hearing, the court will declare him to be in default “verstek verlenen” and go forward with its case in his absence. (“see the judgments of the Supreme Court of 28 February 1985, NJ (Nederlandse Jurisprudentie, Netherlands Law Reports) 1985, 567”).⁶³

b. *Rights of the defense in the absence of the accused.*

The accused may be represented in his absence in certain cases. This possibility exists only if the act which the accused is charged, does not carry a prison sentence. But, the representative must state that he has been given the power to act as such “bepaaldelijk daartoe gevolmachtigd”. (§ 270 of the Code of Criminal Procedure). If representation is allowed at the first instance, then

it is to be allowed on appeal before the Court of Appeal. (§ 415 of the Code of Criminal Procedure).⁶⁴

The Supreme Court has held consistently that a defendant who has been declared in default is not entitled to have his defense conducted by his lawyer, except in the one instance where the defendant can prove that there were compelling reasons for his absence.⁶⁵

The Commission held that the position taken by Dutch law, that an accused loses his right to representation if he does not attend the trial, is not compatible with "fundamental guarantees" with which everyone charged with a crime should enjoy.⁶⁶ In its decision, the ECHR stated; 3. everyone charged with a criminal offense has the following minimum rights; ... (c) to defend himself in person or through legal assistance...⁶⁷ The ECHR concluded that there had been a violation of Article 6 § 1.

b. *Lala v. Netherlands*

In *Lala v. Netherlands*, the European Court of Human Rights,⁶⁸ the defendant Mr. Lala was tried and convicted in absentia of the indictable offense "misdrijf" of forgery "valsheid in geschrifte" by the Hague Regional Court "arrondissementsrechtbank". Although he did appeal this decision, he did not appear at the hearing in fear that he would be arrested for failure to pay a previous fine. In his absence the Hague Court of Appeal "gerechtshof" refused to allow his counsel to conduct defense. Although the Court of Appeal overturned the decision on technical grounds, it still convicted him, but reduced his sentence to two years. Then Mr. Lala appealed to the Supreme Court with no success.⁶⁹

Mr. Lala was convicted of concealing income from work while he was collecting social security benefits and was sentenced to four weeks' imprisonment "gevangenisstraf", two weeks

which were suspended for a probationary period of three years, given that he co-operate in repaying the excess.⁷⁰

When Mr. Lala filed with the Supreme Court (Hoge Road), he had two complaints which were of relevance here; (1) The Appellate Council did not allow defense to speak last as required by law; and (2) [not only had the Court of Appeal not allow Mr. Lala's lawyer to conduct a defense, even though his lawyer showed he wished to do so by his presence there, but it did not decide on the issue first of whether Mr. Lala had a "compelling and legitimate reason not to do appear, in which case his counsel should have been entitled to conduct the defense in his client's absence".⁷¹

The Supreme Court held that the mere presence of counsel for Mr. Lala at the hearing did not constitute his intention of acting in that capacity and it should not be assumed that he desired to. Consequently, the Court of Appeals was not obliged to allow counsel to represent the absent Mr. Lala.⁷²

1. Relevant domestic law and practice

a. trial in absentia

In general, if the accused is not a juvenile, (§ 500h of the Code of Criminal Procedure (Welboek van Strafvordering)), he is under no obligation to appear at the hearing. If he was properly summoned and still refuses to appear, the court will declare him in default (verstek verlenen) and proceed in his absence. Also the Supreme Court has consistently decided that imprisonment is not a compelling and legitimate reason to not appear.⁷³

b. rights of the defense in the absence of the accused, representation

The accused only has the right to be defended in his absence if the criminal offense with which the accused is charged does not carry a prison sentence. In cases that it is allowed, the

representative must be a lawyer who must state that he has been specifically empowered to act as such “bepaaldelijk dartoe gevolmachtigd”.⁷⁴

European Court of Human Rights

The European Court of Human Rights did not agree. It held by an 8-1 vote that there had been a violation of Article 6(1) of the Convention taken with Article (3)(c).⁷⁵

The commission recalls that the "right of an accused to participate in person in the trial is a fundamental element of a fair trial and States must assure that this right is enjoyed in an effective manner."⁷⁶

Interestingly Judge Matscher in his dissent stated that only in criminal cases of some seriousness that the interests of justice require that the accused be present or represented.⁷⁷

5. Germany

The German Court System will allow a trial held in absentia only if no punishment other than detention or fine is provided for in the act which constitutes the subject matter of the investigation.⁷⁸ The accused must have been given some form of notification of the proceedings, [§ 279], and if the summons can not be served on the accused personally, it may be given to relatives or others known to be close to him.⁷⁹

Finally, if it appears that a judgment of guilty or innocence can not be obtained in the accused's absence the court discontinues the proceedings.⁸⁰

6. United States

Even though the United States is not a civil law system, in fact because it is a system that holds the right of the accused to be present at trial fundamental, it is helpful and informative to look briefly into United States' precedent regarding trials in absentia.

The right to be present at trial in the United States can be associated with the Sixth Amendment's right of due process and confrontation, U.S. CONST. amend VI.⁸¹ The only time the Supreme Court of the United States will uphold a trial in absentia is when the defendant failed to return to the trial in progress.⁸²

The Supreme Court in Taylor did not require a showing that the defendant had been notified of his right to be present and that the trial would continue in his absence. The court stated that it was "wholly incredible" that a defendant who had been at the start of his trial would have any doubts of his rights to be present.⁸³

The ideal of the accused's right to be present at trial were recently tested to its limit.⁸⁴ Due to the defendant's and/or accused's counsel's voluntary failure to be present at trial, after being present for the arraignment, the proceedings were rescheduled 10 times over a period of three years. The Commonwealth of Puerto Rico argued that Armando Vargas Rio waived his right to be present during the trial proceedings because he voluntarily excused himself.⁸⁵ The United States District Court, D. Puerto Rico rejected the Commonwealth's argument that the accused was voluntarily absent and granted the defendant's request for habeas corpus relief. In its reasoning it held "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence."⁸⁶

Finally, because the proceedings had already gone on for ten years, making the trial near impossible to hold, the Court gave the Commonwealth ninety days to start a new trial or have Mr. Vargas Rios released from imprisonment.⁸⁷

7. *International Criminal Court*

In contrast with the ad-hoc tribunal for the Former Yugoslavia, the proposed International Criminal Court appears to be shifting its position on in absentia trials. This can be attributed to the acknowledgment of several states of the impossibility of procuring custody of powerful figures and its hindsight of the International Tribunal for the Former Yugoslavia difficulty in prosecuting war criminals.

In its second session, the Preparatory Committee for an International Criminal Court noted that many representatives proposed limiting trials in absentia to those accused individuals who refused to appear before the court. They cited the need to balance the internationally recognized right of the accused to self-defense with the serious nature of the crime.⁸⁸

In its press release of August 14 and 16, 1996, the Preparatory Committee acknowledged that many delegations were still in favor of trials in absentia. The main reason for their favor was "the willful and deliberate refusal of accused persons to appear before a proposed international criminal court would be sufficient grounds for initiating a trial in absentia." The delegations in favor spoke of the need to balance the internationally recognized right of self-defense with the "exceptionally serious, international nature of the crimes."

a. Delegations in Favor of Trials in Absentia

The representative of Egypt stated that although the right to self-defense was fundamental, the international court would be passing judgments on very powerful people, people who could easily evade justice. Egypt felt that trials in absentia were necessary because in the majority of cases, these powerful figures, the accused, would most likely be absent.

Japan agreed with Egypt, that the trials should be carried out when the accused deliberately refused to appear, but stipulated that strict guidelines must be employed to ensure that the refusal was both "willful and deliberate". Argentina, much like Japan, called for criteria under which in absentia trials would be allowed. New Zealand called for terms when the court might be flexible in respect to in absentia trials, when the accused has escaped or broken bail.

France, the biggest supporter of absentia trials, appearing now to soften its stand on absentia trials, stated that when an accused person refused to come to trial, the international court could go forward, under strict guidelines, and render a verdict as a "moral condemnation", rather than an actual conviction. If that person in the future was placed under arrest, France stated that a retrial would be appropriate.

Agreeing with France's view, the Netherlands said that the court should be able to render judgments in absentia when the accused was represented by duly appointed representative. Furthermore, the Netherlands delegate pointed out, the Nuremberg Tribunal had proceeded with the trial against the fugitive Nazi Martin Bormann in absentia to protect evidence.

b. Delegations Not in Favor of Absentia Trials

Many delegates stated that absentee trials would undermine the credibility of the proposed court, and urged the court to follow the "highest international standards". Lesotho, Mexico, Singapore and Israel said that in absentia trials should not be allowed, stating that the presence of the accused was "a fundamental aspect of due process", while other delegations said that definitive pronouncements of guilt or innocence must be made in the presence of the accused.

Addressing the elements of the proposed statute that would allow in absentia trials when the accused was in ill-health, or by their disruption of the proceedings, the delegates of China, Austria and South Africa stated that ill-health should only postpone the proceedings. The United

States asserted when the accused disrupted the proceedings, "means should be found to restore order". Australia suggested that when the accused was removed from the chambers for contempt, the accused should retain the right to monitor the proceedings through counsel.

Italy noted two equally serious risks that the court faced, 1) that the court would be reduced to only issuing declamatory judgments, and 2) that of defendants being able to stop the proceedings by refusing to appear.

Canada, Austria, South Africa and several other states said that absentia trials should be limited to gathering evidence, (noting Germany's position that many war criminals in this century have escaped justice because of the loss of evidence), and that definitive verdicts of guilt or innocence should be allowed only in the presence of the accused.

Appendix 1

See;

- *Lebanon: Two Beirut Blast Suspects Sentenced to Death*, Reuter Textline, Reuter News Service - Middle East, June 3, 1995, *available in* Lexis, Nexis Library, ECNEWS (reporting the absentia trial in Lebanon of 2 alleged Israel agents who were sentenced in absentia to death for planting car bombs.);
- *Kuwait: Death Sentence in Absentia Passed on Puppet Prime Minister*, Reuter Textline - Middle East Economic Report, June 18, 1993, *available in* Lexis, Nexis Library, ECNEWS (reporting on the in absentia trial of Colonel Alaa Hussaina, the puppet prime minister of Kuwait after the invasion by Iraq, who was sentenced to death);
- *Dominican Republic: Blanco Gaoled*, Reuter Textline, Latin American Weekly Report, December 15, 1988, *available in* Lexis, Nexis Library, ECNEWS (reporting on the corruption trial held in absentia of the former president Salvador Jorge Blance, for which he was sentenced to twenty years imprisonment);
- *In Sicily Sig Michele Greco Who is Considered to be the Leader of the Whole of Sicily's Mafia has Been Arrested*, Reuter Textline, Corriere Della Seria, February 21, 1986, *available in* Lexis, Nexis Library, ECNEWS (reporting on the conviction of alleged Mafia member Sig Michele Greco, convicted for the murder of magistrate Judge Rocco Chinnici);
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- *Algeria - July 18 - AIS Leader Killed*, IAC (SM) Newsletter Database (TM) Arab Press Service Organization, APS Diplomatic Recorder, July 22, 1995, *available in* Lexis, Nexis Library, ECNEWS (reporting on conviction of Islamic Salvation Army (AIS) chief Ezzedine Baa, who was condemned to death in absentia by an "Islamic tribunal" for marrying and subsequently releasing 13 young girls);
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absentia trials of LeBon Bruce and Patricia Lee Walker, which they were sentenced to 24 years imprisonment for a real estate scam);

- *N.Y. Cocaine Arrest*, The Washington Post, July 4, 1980, Friday, Final Edition, *available in Lexis, Nexis Library, Papers* (reporting on the trial of Robert Wyler in absentia after he fled New York on the eve of his trial);
- *Greek Ex-Premier Papandreou Tried in Absentia*, The Washington Post, March 12, 1991, Tuesday, Final Edition, *available in Lexis, Nexis Library, Papers* (reporting on the absentia trial of the former premier Papandreou for taking bribes, because he refused to appear or be represented by counsel);
- *Palestinian Terrorist Linked to 1986 TWA Blast Fatal to 4*;
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- *Cambodia Tries Pol Pot in Absentia*, The Washington Post, August 19, 1979, Sunday, Final Edition, *available in Lexis, Nexis Library, Papers* (reporting that the Cambodian prosecutor demanded a death sentence for ousted leaders Pol Pot and Ieng Sary at their trial in absentia for genocide).

Footnotes

¹ Herman Scwhartz and Lloyd N. Cutler, *Try Them in Absentia*, Washington Post, August 27, 1996 *available in* Lexis, Nexis Library, Papers (discussing why trials in absentia should be allowed by the International War Crimes Tribunal). Herman Schwartz is a law professor at American University. Lloyed Cutler is a Washington lawyer and former White House counsel for President Clinton.

² Diane F. Orentlicher, *Arrest the War Criminals*, Washington Post, September 24, 1996 *available in* Lexis, Nexis Library, Papers (discussing the need to arrest international war criminals)

³ UN Doc. HRI/GEN/1 at 15 (1992).

⁴ see appendix 1

⁵ Colozza v. Italy (1992) 14 EHRR 909

⁶ see letter from the Permanent Representative of France to the United Nations addressed to Secretary General, P 108, U.N. Doc s/25266

⁷ Theodore Meron, War Crimes in Yugoslavia and the Development of International Law , 88 Am. J. Int'l L. 78, 83; also reproduced in 32 ILM 1159, 1192 (1993).

⁸ Meron at note 26. Article 21 4(d) "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

⁹ U.N. Doc A/50/365

¹⁰ Id

¹¹ Id

Footnotes

¹² Id

¹³ 1 Morris & Scharf at 214-15.

¹⁴ See the Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, U.N. Doc. A/48/10, at 305

¹⁵ "The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found of if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence." Nuremberg Charter, Article 6, reproduced in Morris and Scharf at note 572.

¹⁶ 1 Morris & Scharf at 215.

¹⁷ Id.

¹⁸ Pelladoah v. the Netherlands, (1995) 19 EHRR 81, Lala v. Netherlands, (1994) 18 EHRR 586, Poitrimol v. France, (1994) 18 EHRR 130, Stamoulakatos v. Greece, (1994) 17 EHRR 479, Brozicek v. Italy, (1990) 12 EHRR 371.

¹⁹ Colozza at para 10

²⁰ Colozza at para 12

²¹ Colozza at para 12

²² Colozza at para 13

²³ Colozza v. Italy (1992) 14 EHRR 909 at para 17

²⁴ Colozza at para 2.

²⁵ Colozza at para 20

²⁶ 3rd Criminal Chamber, 12 March 1973, no 559, Repertorio 1974 no 3440

²⁷ arts 497-501, Code of Criminal Procedure

²⁸ Colozza at para 21

Footnotes

²⁹ Id at para 26

³⁰ Id at para 38

³¹ Id at para 38

³² Id at para 29.

³³ Rubinat v. Italy (1985), 7 EHRR 512

³⁴ Id at para 8

³⁵ Id at para 12

³⁶ Id at para 13

³⁷ Brozicek v. Italy (1990), 12 EHRR 371

³⁸ Id

³⁹ Id at para 19

⁴⁰ Id at para 26

⁴¹ Id

⁴² Id at para 2.

⁴³ French Code of Criminal Procedure, [FCCP] arts. 317-322, (1988), Richard Frase, Introduction, *The French Code of Criminal Procedure* (1988); arts. 627-632].

⁴⁴ Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Calif. L. Rev. 542, 606. Mr. Frase is a Professor of Law at University of Minnesota; and also was a Visiting Professor, Faculty of Law, at the Universite Jean Moulin, Lyon, France, Spring 1982, 1986, 1990.

⁴⁵ Id at note 366

⁴⁶ Id at 606

⁴⁷ Id

Footnotes

- 48 FCCP art. 318
- 49 FCCP art. 320
- 50 FCCP art. 322 (1)
- 51 FCCP art. 322 (2).
- 52 *Poitrimol V. France* (1994) 18 EHRR 130
- 53 *Id* at para 23
- 54 *Id*
- 55 *Stamoulakatos v Greece*, 17 EHRR 479 at para 10.
- 56 *Id* at para 7
- 57 *Id* at para 8-9
- 58 *Id* at para 10
- 59 *Colozza v. Italy* 7 EHRR 516 at para 20
- 60 *Id* at para 56
- 61 *Stamoulakatos v Greece*, 17 EHRR 479 at para 33.
- 62 *Pelladoah v. The Netherlands* (1995), 18 EHRR 81
- 63 *Id* at para 21
- 64 *Id* at para 23
- 65 *Id* at para 26
- 66 *Id* at para 59
- 67 *Id* at para 32
- 68 *Lala v. Netherlands* (1994), 18 EHRR 586 at para. 9
- 69 *Id* at para 11
- 70 *Id* at para 9

Footnotes

⁷¹ Id at para 12

⁷² Id at 13

⁷³ Id at para 20

⁷⁴ § 270 of the Code of Criminal Procedure.

⁷⁵ Article 6(1), Right to a Fair Trial; right to defend oneself through legal assistance. Article 6(1)(b) states; "In the interests of a fair trial and just criminal process it is of capital importance that the accused should appear at his trial....However, it is also of crucial importance for the fairness of the criminal justice system that the accused should be adequately defended, both at first instance and on appeal.....Consequently, the fact that the defendant, in spite of having been properly summoned, does not appear, cannot---even in the absence of an excuse---justify depriving him of his right to be defended by counsel.

⁷⁶ *Colozza v. Italy* (A/89): (1985) 7 EHRR 516, para 25.

⁷⁷ *Kremzow v. Austria* (A/268-B): (1994) 17 EHRR 322, paras 65-69.

⁷⁸ German Code of Criminal Procedure, § 277 (II) (1966).

⁷⁹ § 280 (III)

⁸⁰ § 282

⁸¹ *United States v. Latham*, 874 F.2d 852, 856 (1st Cir. 1989)

⁸² *Taylor v. United States*, 414 U.S. 17 (1973), *Crosby v. United States*, 113 S.Ct 748 (1993).

⁸³ Id

⁸⁴ *Armando VARGAS RIOS v. Jose CRESPO VARGAS*, 1996 WL 361598 (D.Puerto Rico)

⁸⁵ *Armando VARGAS RIOS v. Jose CRESPO VARGAS*, 1996 WL 361598 (D.Puerto

Footnotes

Rico)

⁸⁶ Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S.Ct 330, 332-33 (1934).

⁸⁷ Vargas Rios at 7

Preparatory Committee for International Criminal Court, Second Session, U.N. Doc. I/2813, (1996).