The Legal Regime Governing Criminal Trials in Absentia under Ethiopian Law: A Threat to the Right to a Fair Trial

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Abstract

Despite countervailing arguments as to trial in absentia, nations recognize it on exceptional grounds. The ICCPR under Article 14(5) unequivocally recognizes the right to presence of an accused before a trial. In civil law legal systems, trial in absentia takes place as an ordinary procedure, so long as the accused is informed and fails to appear. Whereas, the common law countries outlawed trial in absentia as a principle due to the fear that it endangers the right to fair trial. Overall, trial in absentia may be held exceptionally upon the fulfillment of justified grounds. This study explores the regulation of trial in absentia under the Ethiopian criminal law and controversies therein. To this end, the study employed a doctrinal legal research methodology. The study argues that although the criminal procedure code recognizes trial in absentia under article 160 and the following, the requirements are controversial in its practical application. Furthermore, the procedures to deliver summon for the accused are also vague. Moreover, in contrast to international jurisprudence, the Ethiopian law kept silent as to disruptive behavior of an accused and the effect of partial presence. Finally, the study explores that though the accused has the right to lodge an application to set aside a default judgment, the decision on the application is final and non-appealable. This may potentially undermine the accused's right to a retrial. In sum, the criminal procedure code controversially governs trial in absentia, and consequently may jeopardize the right to fair trial.

Keywords: *Trial in Absentia, Right to be Present and Defend, Right to Retrial*

Introduction

The right to presence is one of the fundamental principles of modern criminal procedure laws.[1] As an element of procedural due process, the court should adjudicate the case in the presence of the accused. This procedural element is a widely established principle in varying regimes of criminal jurisprudence. Reflecting this principle under international human right instruments, it is stipulated that, "upon accused of unlawful

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[1] Elizabeta Ivičević Karas, Decisions Rendered in Absentia as a Ground to Refuse the Execution of a European Arrest Warrant: European Legal Standards and Implementation in Croatian Law, EU and Comparative Law Issues and Challenges Series – Issue 3, p. 460.

acts, every citizen of states will be given an opportunity to share his/her side of the story and be heard by the court adjudicating the accusation."[2] As such, the right to be present has been recognized under international human rights instruments as a foundation of the right to a fair trial.[3]

While this principle is in place, scholars still question whether the defendant's presence before the trial is a right or it also imposes a corresponding duty to appear.[4] The issue begs this question because the principle suggests a bundle of legislative intents. Yet in exceptional circumstances, a trial might proceed in the absence of the accused.[5] Moreover, it is important to note that these legislative intents are tools of ensuring social justice while at the same time attaining the goals of the criminal justice system.[6] Turning to institutional practices, one would notice divergence as to the legality of trial in absentia in different legal systems. Particularly, the civil law and common law legal traditions hold different positions on trial in absentia. In some jurisdictions, trial in absentia is considered as an evil procedure while other jurisdictions apply it as a normal course of procedural due process.

The Constitution of Federal Democratic Republic of Ethiopian (hereinafterFDRE Constitution), under Article 20(4), sets forth the right to defend and cross-examination of evidence as basic fair trial rights of an accused.[7] Notwithstanding this, the criminal procedure code of Ethiopia recognizes trial in absentia in some exceptional circumstances.[8]

This article explores the legal gaps noticeable under the Ethiopian laws in connection with this right. Particularly, it examines the regulation of trial in absentia from the perspective of international law and its compatibility with the right to a fair trial.

[2] Rashid Jalali, Trial in Absentia: A Violation of the Right to a Fair Trial, *PCL Student Journal of Law*, Vol.2: No. 2, (2018), p.85.

[3] Universal Declaration of Human Rights (UDHR) *Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948*, art. 11(1), International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 16 Dec. 1966, art.14(3)(d), African Charter on Human and Peoples' Rights(ACHPR), OAU Doc. CAB/LEG/67/3 rev.5, 27 June 1981 art 7(1) (c).

[4] Mohammad Hadi Zakerhossein and Anne-Marie, Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals, *Criminal Law Forum springer*, Vol. 26, (2015), p.220.

[5] Id., p. 210.

[6] Maggie Gardner, Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, *George Washington International Law Review*, Vol. 43, (2011), p. 100.

[7] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 20. [Herein after FDRE Const.].

[8] Ethiopian Criminal Procedure Code, Proclamation No.185/1961, *Negarit Gazetta*, (1961) Article, 160. [Hereinafter Criminal Procedure Code].

1. Trial in Absentia and The Right to Presence

1.1. The Notion of Trial in Absentia: An Overview

Trial in absentia is one of the concepts crystalized in scholarly and legislative discourse of criminal law regime. Black's Law Dictionary defines the concept as "trial held without the accused being present."[9] In legislative documents, it is construed as a condition where one party usually the defendant is physically absent in criminal proceedings to present rebuttal, or confrontation against the charge.[10] The situation happens when the defendant absconds, disrupts the proceeding or for other stronger reasons.

Many scholars are against the policy of trial in absentia, arguing that it strongly undermines fundamental principles of the right to fair trial such as equality of arms, right to defend and others.[11] So long as the accused is not physically present before a court of law, one party will control the trial; hence, no defense will be forwarded. [12]

Nevertheless, a closer look into such policy suggests a number of concrete justifications for employing trial in absentia. First, it is one of the most important means to avoid delay of justice. As the maxim 'justice delayed is justice denied'[13] connotes, courts are duty-bound to adjudicate legal proceedings as fast as possible.[14] However, courts may be hindered from administering justice on time because the criminal suspect may be hided and it might be impossible to bring the accused before the court. In such circumstances, the court is not expected to wait until the accused appears in the trial as it will lead to the risk of losing the chance to do justice.[15] Particularly, the interest of the victim will be at stake.

Further, the accused should not profit from his wrongdoing.[16] Unless exceptions are set to this general principle (right to present), there is a tendency that the accused will not be tried at all. Moreover, in a course of time, the quality of evidence inevitably would depreciate, witnesses may die, memory fades, or physical exhibits may be lost.

[9] Black's Law Dictionary 1645 (9th ed. 2009), see also, Gardner and Maggie, "Reconsidering Trials in Absentia, p p. 99, (2011), *see also* Jalali, *supra* note 2, P. 83.
[10] Jalali, *supra* note 2, p. 85.
[11] Id. *See also* Zakerhossein and Marie, *supra* note 4.
[12] Karas, *supra* note 1, p. 463.
[13] Naomi Burstyner and Tania Sourdin, Justice Delayed is Justice Denied, *Victoria University Law and Justice Journal*, Vol. 4, (2014), p.49.
[14] Jalali, *supra* note 2, p. 86.
[15] Karas, *supra* note 1, p. 462.
[16] Id.

Consequently, the accused will go free because of his concealment and undermines the proper administration of justice.

1.2. Presence of an Accused: A right to Opt or an Obligation too?

The international human rights law has long recognized the right to be present for the accused as part of the right to a fair trial.[17] Yet, this stipulation is highly debated in criminal law literature, and begs a question like whether it is a right, a duty or both. For many scholars, the presence of an accused is a right and entails a duty at the same time. As a right, it constitutes a bundle of rights such as the right to be heard, the right to defend, and the right to cross-examination which are instrumental to attain the ends of fair trial.[18] While the accused is the main subject in the adjudication of the criminal trial, he may be duty bound to discharge his obligation to appear too. This duty mainly suggests the link between fair trial and public interest. As such, while the accused is entitled to those bundles of rights packed in the right to be present, he is obliged to appear in the trial where the ends of public interest so requires. To this effect, the court may require the presence of the accused for interrogation and to examine his or personal wellbeing as a way to make viable investigation.[19] Moreover, every individual including the accused has to co-operate with the justice system for its effectiveness.

Consistent with these underlying set of rationale, article 63(1) of the ICC statute expressly requires the accused to appear in a criminal trial where his case is in hearing. Evidencing this express obligation, the provision reads, "the accused shall be present during the trial.'[20] The attendant provisions of this stipulation also suggest that[21] once the accused has been informed of the indictment, he has to be present before the trial and defend himself.[22] The court is equally required to sufficiently inform the accused of the indictment, the trial date, and avenue of trial. Yet, if the accused refuses to do so, after a sufficient notice, proceeding in absentia would take place.[23]

[17] *See*, Art. 10 and 11 of UDHR, Art, 14 of ICCPR, Art. 7 of ACHPR, art. 11 of Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, Entered Into Force Dec. 7, 2000, here in After ECHR.

[18] Caleb H. Wheeler, Right or Duty? Is the Accused's Presence at Trial a Right or a Duty Under International Criminal Law?, *Criminal Law Forum*, Vol. 28, (2017), p.1.

[19] Jalali, *supra* note 2 p.87.

[20] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 63(1).

[21] Zakerhossein and Marie, *supra* note 4.

[22] Id.

[23] Id.

Now we turn to the African human rights commission guideline on right to fair trial. This document, in principle, prohibits trial in absentia for accused persons.[24] Yet it states that if the accused waives his/her right to present or fails to appear without good cause, the trial may proceed in absentia.[25] In sum, the legislative intents and rationale underlying the doctrinal sources reviewed so far clearly show that the presence of an accused before the trial is a hybrid of rights and duties[26].

2. Trial in Absentia under International Human Right Instruments: An Overview

According to article 14(3) (d) of the ICCPR, the right of the accused to present in trial and defend his case is explicitly recognized. As such, this provision states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to [be] tried in his presence and to defend himself in person or through legal assistance of his choosing." [27]

From the wording of the convention, the right to be present is a fundamental entitlement for an accused person. Moreover, the convention entitles this right to the accused without an exception limiting its scope thereto. Therefore, one may argue that, as a rule, trial in absentia is not allowed under the ICCPR. Notwithstanding the above principle of the law, it is explained under General Comment No. 13 of (HRC)[28] that "… trials in absentia could be held for justified reasons. Yet this could be carried out under strict observance of the rights of the defense with the intent to protect the rights of the accused."[29] However, it is important to note that although the HRC provides an exception on the right to present, it leaves open as to what constitutes 'justified reasons'. Accordingly, the committee decides many cases through the unqualified use of justified reasons. For example, from the opinion of the court in Mbenge Vs Zaire, one could argue that trial in absentia is possible in cases where the accused unequivocally waived his right to appear in trial.[30] Hence, voluntarily relinquishment is a ground for trial in absentia. The committee further explained the condition of such

[24] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human & Peoples' Rights, Banjul Gambia (hereinafter African Fair Trial Guideline).
[25] Id.
[26] Id.
[27] ICCPR, *supra* note 3, Article 14.
[28] UN Human rights committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 04/13/1984, para 11;[hereinafter General comment, 13].
[29] Id.
[30] *Daniel Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 (1990), p. 76.

a waiver in Maleki vs Italy.[31] In the latter case, the committee urges that an absent trial is possible where the court has discharged its obligation to notify the accused and need to be certain that the summons has reached the defendant duly. The absence of such proof, in the eyes of the HRC, constitutes a breach of the right to present.[32]

3. Trial in Absentia under the African Human Right System

Almost all regional instruments had recognized the right to fair trial and its components in detailed and explicit terms.[33] Unfortunately, the African Charter on human and people's rights does not expressly recognize the right to present in a criminal trial; rather it stipulates some rights which can be exercised with presence before the trial.[34] It considers the right to present as implied rights of an accused since other rights are exercised in the presence of an accused person.[35] In addition, the Charter also guarantees authoritative interpretation to the African Commission in line with other human rights instruments under article 60.[36] This provision enables the Commission to interpret article 7 of the charter and article 14 of the ICCPR. The Charter also empowered the Commission to 'formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation.'[37] Accordingly, the commission enacted a guideline,[38] which comprehensively addresses matters related to the right to be present and conditions of trial in absentia.

The guideline in the relevant sections provides:

(i) In criminal proceedings, the accused has the right to be tried in his or her presence.

[31] U.N. Human Rights Comm. [HRC], Communication No. 699/1996: Views of the Human Rights Committee under Article 5, Paragraph4, of the Optional Protocol to the International Covenant on Civil and Political Protections, *see also*, (Maleki v. Italy), I 7(b), U.N. Doc. CCPR/C/66/D/699/1996 (Sept. 13, 1999).

[32] Alexander Schwarz, The legacy of the Kenyatta case: Trials in absentia at the International Criminal Court and their compatibility with human rights, *African Human Rights Law Journal*, Vol.16, (2016), P.105.

[33] Charter of Fundamental Rights of the European Union (ECHR), 2000 O.J. (C 364) 1, Entered Into Force Dec. 7, 2000. Art. 47 see also American Convention on Human Rights (ACHR), Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, art. 8(2)(d).

[34] ACHPR, *supra* note 3, Article 7.

[35] Schwarz, *supra* note 32, p. 106, see also, *Alex Thomas v. The United Republic of Tanzania*, Communication No. 005/2013, African Court on Human And Peoples' Rights, (November 2015), para 91.

[36] ACHPR, *supra* note 3, Article 60.

[37] Ibid Article. 45(b).

[38] African Fair Trial Guideline, *supra* note 24.

(ii) The accused has the right to appear in person before the judicial body. The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon showing that inadequate notice is given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.

(iii) The accused may voluntarily wave the right to appear at a hearing, but such a waiver shall be established unequivocally and preferably in writing.

A closer look into these provisions shows that the guideline, unlike other human rights instruments such as the ICCPR and ECHR,[39] constitutes fundamental and elaborate rules which make trial in absentia an exception. Of course, the guideline, unlike the ICCPR and ECHR, is not binding on member states and its impact to practical protection of this right may be limited. Yet it would lend substantial insights to the formulation of national laws on the protection of this right.

Furthermore, the African Court on Human and Peoples Right reflected the same position in its binding judgment in Thomas v Tanzania[40]. The facts of the case show that the Tanzanian court held trial in absentia as the applicant was hospitalized at the time of the trial. In an appeal to a competent court, the applicant moved to explain his absence on grounds of good cause. Yet the court denied him the claim. Then the African Court, which entertained this case as a next appellate court, invoked article 7 of the charter and article 14 (3)(d) of ICCPR to render a decision to the effect that the applicant has the right to appear during the trial and also the right to be represented by a counsel.[41] However, the lower court neither considered the serious illness of the accused nor allows representation by a legal counsel. Finally, this appellate court concluded that the Tanzanian court had violated the right to be present stipulated under article 7(3) (C) of the charter.[42]

3. The Jurisprudence of Trial in Absentia in Different Jurisdictions

As far as the recognition of trial in absentia is concerned, there are divergent approaches in different jurisdictions. In countries with civil law traditions, trial in

[39] Schwarz, *supra* note 32, p. 107-108.
[40] Thomas v.Tanzania, *supra* note 35.
[41] Id.
[42] Id.

absentia is recognized as one of the major principles of criminal procedure.[43] This is because 'trials in absentia are necessary for the effective running of the criminal justice system.'[44] It is also believed that, in absentia, proceedings require less investigatory work by police, little time for trial, and low-economic costs.[45] In addition, trial in absentia is essential for the rights of victims to have the accused brought to justice with limited difficulties related to obtaining/preserving evidence for the case where the accused cannot be caught within a reasonable period.[46] Furthermore, civil law traditions follow the inquisitorial system and the role of the judge is pivotal in fact-finding. In other words, though the accused was absent from the trial, his right will be protected through the active involvement of judges.[47]

These justifications, along with the features of criminal procedure rules, are largely visible in prototypical civil law jurisdictions such as the French legal system. The French criminal procedure code allows trial in absentia for all crimes including felony cases. While this is allowed in principle, the defendant, upon capture, is entitled to retrial.[48] However, at this junction, one would question the relevance of trial in absentia; given the fact that the defendant has the right to retrial upon his capture. Still another surprising point in the French criminal legal system is the discretionary power of courts. The courts may adjudicate any case in absentia irrespective of its gravity.

Stan Starygin, one of the scholars examining the procedural practices of the courts, observes that "if the accused has been properly summoned and fails to appear, courts have the discretion to proceed in his absence".[49] However, if the court doubts about the service of the summons, a second one will be issued. Other European countries, such as Belgium, Italy, Spain, and the Netherlands also allow trials in absentia while Germany prohibits such practice despite its long-standing civil law tradition.[50] The prohibition is justified on the ground that judges have to find facts through

[43] Gardner, *supra* note 6, p. 103, *see also* Zakerhossein and Marie, *supra* note 4, p. 185.
[44] Id.
[45] Evert F. Stamhuis, Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal System, *Victoria University of Wellington Law Review*, Vol. 32, (2001), p. 720,
[46] Id.
[47] International Bar Association(IBA), International Criminal Court and International Criminal Law Program Report on the 'Experts' Roundtable on trials in absentia in international criminal justice at p. 3.
[48] France code of criminal procedure, (2006), chapter VIII, Art.379. [hereinafter, France Criminal Procedure Code]
[49] Stan Starygin and Johanna Selth, Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies*, Vol.170, (2017), p. 4, *see also* article 487 of the French criminal procedure code.
[50] The German Code of Criminal Procedure, Federal Law Gazette Part I, Act of 23.4.2014, art. 230(1), (hereinafter Germany criminal procedure code.)

interrogation and from the defendant's behavior within a courtroom.[51] This, in effect, means the presence of the accused is a primary condition for fact-finding mechanisms of interrogation and examination. In sum, with limited exceptions, the civil law tradition adopts the principle of trial in absentia on reasoned grounds of balancing the interest of the individual and public policy.

Turning to the common law jurisdictions, in contrast to the civil law, trial in absentia had been outlawed as a principle.[52] This is justified on the ground that the presence of the accused before the trial ensures the fairness of the trial, allowing the accused to confront the case and to cross-examine witnesses. However, exceptionally, the right to be present is waived where the accused absconds from custody or escapes while on bail.[53] Because the presumption is the accused upon being notified of the trial date may intentionally hide from the reach of justice.

In the USA, one of the long-standing common law jurisdictions, the right to be present is codified in the Constitution. Accordingly, the accused must present before the trial to confront the allegation.[54] In addition, if the accused is absent in the pretrial stage or absconds before the trial has begun, trial in absentia is not possible.[55] The only exception to this rule is a situation where the defendant is unequivocally and voluntarily absent after the trial has begun and due to his/her disruptive behavior.[56] Under such situations, the court repudiates the obligation not to hold trial in absentia. The effect of such a move would entail the completion of the trial and sentencing in the defendant's absence.[57]

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[51] Starygin and Selth, *supra* note 49.
[52] Id.
[53] Id.
[54] USA Constitution, amendment VI, U.S. House of Representatives, (1978), http://www.house.gov/Constitution/Amend.html (last accessed 12/1/20)
[55] USA Federal Rules of Criminal Procedure, House of Representatives, (1994), rule 43(a) (1), https://www.legislationline.org/download/id/8744/file/USA_Criminal_procedure_1944_am2020_en.pdf, (accessed 11/19/20.) This provision provides that, *…the defendant must be present at:*
(1) the initial appearance, the initial arraignment, and the plea;
(2) every trial stage, including jury impanelment and the return of the verdict; and
(3) sentencing
[56] Rule 43(C) of the US federal rules of criminal procedure provides an exception to the right to be present as;-
(1) (…)A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during the trial;
(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
[57] Id. Article 43(2).

4. Trial in Absentia under Ethiopian Legal system

Ethiopia is a party to major fundamental human rights instruments such as the UDHR, ICCPR, and ICCSER which are required to be integrated to the domestic laws of the land.[58] The principle of integrating such instruments to domestic ones dictates that once a state ratifies an international instrument, it is obligated to enforce the provisions of the treaty with due concern and diligence. To this end, the next sections of the paper examine the position of Ethiopian laws vis-à-vis these instruments on the issue at hand.

4.1. The FDRE Constitution

The FDRE Constitution under Articles 19 and 20 guarantees several rights related to fair trial. These bundles of rights include the right to bail, the right to remain silent, habeas corpus, the right to counsel, the right to presumption of innocence, and the right to appeal.[59]

Looking closely into the contents of these constitutional provisions, one could observe that the Constitution failed to expressly mention the right to be present. Rather, it tries to set forth rights the exercise of which mandatorily requires the presence of the accused in trial.[60] Thus, we can argue that the Constitution has recognized the right to be present at least indirectly. This is because the fruits of all these sets of rights is unlikely to be achieved without exercising the right to be present in trial. Thus, from these stipulations, one can argue that the right to presence is one of the fundamental rights recognized under the FDRE Constitution.

In addition to this, the right to be tried in one's presence is provided as one component of the right to a fair trial under Article 14(3)(d) of the ICCPR . The FDRE constitution under Article 9(4) also states that '[a]ll international agreements ratified by Ethiopia are … integral part of the law of the land.'[61] Furthermore, Article 13(2) of the constitution urges that 'fundamental rights and freedoms specified under Chapter three shall be interpreted in a manner conforming to International Covenants and

[58] UN Office of High Commission of human rights, Ratification Status of Ethiopia, available at, http://tbinternet.ohchr.org/-layouts/15/treatyBodyExternal/Treaty.aspx?countryID=59&Lang=EN . Since Ethiopia has ratified these international instruments, it has to implement the provision provided therein by virtue of art 9(4) cum. 13(2) of the constitution. The right to be present before the trial as well as to defend has been recognized under art, 14 of the ICCPR and Ethiopian courts have to take judicial notice of this provision.

[59] FDRE const., *supra* note 7, Article 9.

60.Id.

[61] FDRE const. *supra* note 7, Article 9(4).

instruments adopted by Ethiopia.'[62] In so doing, the provisions that address the rights of the accused person shall be interpreted in line with the wording and intention of the ICCPR and other international instruments to which Ethiopia is a party. Consistent with this stipulation, the UNHRC has set out ample authoritative General comments on the application and limitation of rights specified under the ICCPR. Although General Comments are not as such legally binding instruments, they are highly authoritative interpretations of individual human rights or the legal nature of human rights obligations enshrined in the Convention.[63] Therefore, Ethiopian courts are expected, in due course, to use these instruments as an authoritative interpretive document, though not legally obligated to take judicial notice of these comments.

The question worth pondering here is why the constitution is silent as to the possibility or otherwise of trial in absentia and whether it is possible to limit such natural and constitutional rights through subsidiary procedural laws. As we can infer from article 20 of the constitution, the accused person has the right to defend any allegation against him and there is no limiting clause provided therein. Unlike other provisions of the constitution, it fails to provide limitation clause on the right to presence of an accused.[64] This in turn begs a question as to whether a trial in absentia is unconstitutional.

The author would argue that although the constitution failed to provide an exception, it does not prohibit trial in absentia too. Further, the purpose of the law is to attain justice and to inhibit a person from profiting out of his misconduct. As such, through the application of trial in absentia, we can protect the interest of the victim to the minimum. The victim's satisfaction also mainly depends on the administration of justice against the wrongdoer. Apart from such grounds underlying the constitutional intent regarding this right, the HRC general comment exceptionally recognizes trial in absentia under circumstances where there is a ground that serves the interest of justice.[65]

[62] Id., Article 13(2).

[63] Stig Langvad, 'The Purpose and Use of UN Treaty Body General Comments,' European Network on Independent Living, 2018, https://enil.eu/news/the-purpose-and-use-of-un-treaty-body-general-comments/,
[last accessed, 11/20/20.]

[64] The Constitution provides, specific limitation clause on some rights of an accused as well as an arrested person under Articles 19 and 20. Rights like the right to bail, physical release, and others have an exception. However, the constitution lefts no room to limit the right to be present under Article 20.

[65] Although the HRC leaves open what 'Justified grounds' are, in the case *Mbenge vs. Zair*e, to say there is a justified reason, the accused must be informed of the charge against him, the date fixed for hearing and the consequences of his absence. After all these procedures if the accused voluntarily waves his right to present, trial in absentia can be justified.

4.2. The Criminal Procedure Code

The Ethiopian criminal procedure code was enacted back in the 1960s, remotely preceding the current constitution. The drafting history of the Code revealed that it was adapted from Malaysia and India, which are proponents of the common law legal system.[66] Countries are not the same in their stand regarding the issue of trial in absentia and the view varies across legal systems. The civil law jurisdictions largely follow the inquisitorial system in which the role of judges is pivotal.[67] As such this system is the main proponent of trial in absentia with the belief that though the accused is absent from a proceeding, the judges have an active role in fact-finding, and hence, can safeguard the rights of the accused.[68] Common law jurisdictions, on the other hand, adhere to the adversarial system which takes the trial as 'a duel' between two parties, namely the Prosecutor and the accused. Therefore, it requires the presence of both sides at a proceeding.

As the Ethiopian criminal procedure code draws its source from the countries that the followers of the adversarial system,[69] one would conjecture that trial in absentia is not allowed in the code as a principle.[70] Yet the Ethiopian code does not, at least, directly adopt this position of common law legal systems such as the Indian code. Evidencing this fact, the code under article 160 provides:

1. *The provisions of this Chapter shall apply where the accused fails to appear whether the prosecution is public or private but shall not apply to young offenders.*
2. *Where the accused does not appear on the date fixed for the trial and no representative appears satisfactorily to explain his absence, the court shall issue a warrant for his arrest.*[71]

[66] Aderajew Teklu and Kedir Mohammed, History of Ethiopian Criminal Procedure, Abyssinia Law blog, (June 2018), https://www.abyssinialaw.com/online-resources/study-on-line/item/442-history-of-ethiopian-criminal-procedure, (accessed 11/21/20).

[67] Adele, Justice, Comparative Analysis between Adversarial and Inquisitorial Legal Systems (2017), SSRN: https://ssrn.com/abstract=3077365, or http://dx.doi.org/10.2139/ssrn.3077365, (accessed December, 2020)

[68] Starygin and Selth, *supra* note 49.

[69] Teklu and Mohammed, *supra* note 66.

[70] Zakerhossein and Marie, *supra* note 4, p .224.

[71] The Amharic and English version of the code has some differences on this sub-article. The English version says *"... the date fixed for trial* " and the Amharic version says "…ነገሩን ለመስማት በተቀጠረበት ቀን ካልቀረበ). The Amharic version refers first hearing and the English version refers to the trial date, which is the main stage of the proceeding.

3. *Where the warrant cannot be executed, the court shall consider trying the accused in his absence. Where an order to this effect is made the provisions of the following articles shall apply.*

From the wording of this provision, one may argue that trial in absentia is justified as a principle. However, the provisions of the code, i.e., articles 160 and 161 must be construed cumulatively. This reading makes it clear that trial in absentia is an exception to the right to be present.

Accordingly, trial in absentia takes place where either of the two conditions provided under article 161(2) of the criminal procedure Code is satisfied. The first condition requires evidences showing that the offense is punishable with not less than twelve (12) years. Alternatively, in the second exception, it shall be established that the alleged crime is committed against the fiscal and economic interests of the State and punishable with rigorous imprisonment or fine not exceeding five thousand birr. Thus, courts can proceed with default hearings where either of the requirements is met. Yet, looking into this principle of trial in absentia under Article 160 of the code, one would notice contradictions with those enshrined in international human rights instruments. For example, under article 14(3) (d) of the ICCPR, the right to be present had been prescribed as one component of the right to a fair trial. Accordingly, it is in narrow and exceptional circumstances that trial in absentia can be entertained. This is particularly justified under the UNHRC general comment 13 and in the decision rendered on Mabeng vs. Zair.

Be this as it may, as per article 161(1) of the criminal procedure code, trial in absentia is possible where the accused fails to appear on the date fixed for hearing. At this point one may notice some confusion with Article 160(2) and 161(1) of the code. As per Article 160(2) of the code, if the accused fails to appear on the date fixed for hearing, the court may issue an arrest warrant. In a similar vein Article 161(1) of this same provision states that, if the accused fails to appear on the date fixed for hearing, the court may direct default proceeding.

The question here is whether it is a mandatory requirement to issue an arrest warrant before commencing default proceeding, or it would be possible for the court to simply proceed with default hearing. Concerning this issue, the author would hold the view that the court has to first issue an arrest warrant to effect his presence. This is mainly because his presence primarily benefits the accused himself to defend his case. In addition, trial in absentia is an exception. Hence, it must be construed narrowly, and be

applied as a last resort to administer justice.[72] Therefore, the court, before making a default hearing, shall exhaust all mechanisms that enable it to bring the accused before the trial. The court can commence trial in absentia only, where it is established that the accused absconds or a competent body is unable to arrest him.

Apart from these underlying rules in the criminal procedure code, one can also understand from the provisions of the constitution that trial in absentia is an exception to the right to be present. Particularly, the constitution under article 20(4) dictates that accused persons have the right to access any evidence presented against them, to cross-examine, to adduce or to have evidence produced in their defense. These sets of rights would get effect only when the accused is present at the trial.

5. Major Legal Gaps under Ethiopian Law and Their Consequences

While different sets of legislative intents underlie the stipulations regarding the right to be present, one can still notice caveats of ambiguity and inconsistency among the different legislative sources for this right. Particularly, the Ethiopian criminal procedure code suffers clarity as far as trial in absentia is concerned. This, in effect, is causing many practical problems such as inconsistent decision by judges and erosion of the uniform application of the law. The next section examines the major contentions over this issue pervading the practice world and the scholarly discourse.

A. Summoning the accused and practical problems

To effect the presence of the accused, due notification about the allegations is a mandatory requirement.[73] The human rights committee under General Comment 13 urges that trial in absentia can be held exceptionally with strict observance of the rights of the accused.[74] Furthermore, the HRC in Maliki case also reminds that trial in absentia is permissible only when the court has discharged its obligations with respect to the procedures for summoning and informing the defendants. To this end, the court is obligated to ensure that the summons to appear has in fact reached to the accused.[75] Any failure to deliver summons duly to the accused constitutes a violation of the ICCPR.[76]

[72] Karas, *supra* note 1, p. 461-465.
[73] Chris Jenks, Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?, *Fordham International Law Journal*, Vol. 33, Issue 1, (2009), p.77.
[74] General Comment 13, *supra* note 28.
[75] Schwarz, *supra* note 32, p. 105.
[76] Id.

Coming back to the national law, the Ethiopian Criminal Procedure Code provides controversial provisions regarding issuance of summons. One of the sources of such contentions is the semantic discrepancy between the Amharic and English versions under article 162 of the criminal procedure code.[77] The Amharic version, which is the authoritative one, provides that 'when the accused fails to appear in the trial, the court shall issue a summons in a newspaper' as a principle. However, this provision does not take into account the current reality of Ethiopia,[78] where most of the population is resides in rural areas inaccessible to newspapers.[79] Moreover, Ethiopians do not have a well-developed culture to read and follow newspapers.[80] Illiteracy is also one of the basic problems for most rural communities who cannot read and understand the contents of newspaper even if it is accessible. Given such problems, it is futile to issue a summons in newspapers and it is unjust to conduct trial in absentia by the mere fact that the accused is being summoned.[81]

The other problem worth mentioning in this respect is the lack of specificity on the type of newspaper in which the summons is to be issued. The provisions in the code do not make it clear whether the summons should be published only in a government-owned newspaper or includes private newspapers. At this point, it is important to note that the draft criminal procedure and evidence code order another modality of summoning in cases where it is impossible to address in person.[82] The new code, under Article 223, ensures that summon may be pronounced via newspaper or television, where it is impossible to address in person. Despite this progressive move, this draft, too, fails to consider the realities of rural life by including television as one of the media of issuing summons. Given the economic conditions of most rural

[77] The English version provides only the court will publicize the summon and shall state as if the trial will be held in the absence of the accused if he fails to appear. However, the Amharic version contains two sub provisions and states that፡

ሀ) ተከሳሹ የተከሰሰበት የወንጀል ዝርዝር፣ ነገሩ እንድሰማ የተቀጠረበት ቀን፣ተከሳሹ ሳይቀርብ ቢቀር በሌለበት የሚፈረድ መሆኑን የሚገልፅ ማስታወቂያ በጋዜጣ እንድወጣ ያዛል

ለ)ለተከሳሹ የሚደርስ መስሎ ከታየው ፍርድ ቤቱ መጥሪያውየሚደርስበትን ሌላ መንገድ ሊያዝ ይችላል

[78] World Bank Report on Ethiopian Rural Population 1960-2019, (hereinafter World bank report) available at, <ahref='https://www.macrotrends.net/countries/ETH/Ethiopia/rural population>Ethiopia Rural Population 1960 2021. www.macrotrends.net. Retrieved 2021-06-19. According to this report, in Ethiopia, more than 78% of the total population are living in the countryside. Having this fact, it is difficult to presume that, the accused will be summoned via television broadcast.

[79] Zewege Abate, Understanding the Local Media Environment and International Media as Sources for Local News: Five Newspapers in Focus, MA Thesis, University of Oslo, 2010 p. 61.

[80] Abiy Hailu, The Dying Reading Culture in Ethiopia, The Ethiopian Herald Newspaper, March 21, 2018

[81] Once the summon was issued under a newspaper, it is immaterial for the court, whether the accused accessed the newspaper and aware of the allegation against him, to conduct trial in absentia. Such presumption may strongly affect the right to defend of an accused and may be taken as a violation of the ICCPR and the constitutional rights of an accused.

[82] The Federal Democratic Republic of Ethiopia, Draft Criminal Procedure and Evidence Law, art. 223 (1)

communities, the state of electric supply to use this device, and the status of road accessibility to supply television and newspapers, it is still unjust for such communities to be subject to such rules.[83] The author would hold that radio services, which is relatively accessible to such communities, should be the most binding medium to issue summons.

B. Conditions to effect trial in absentia and controversies

One of the perspectives of examining the contents of the criminal procedure code is its connection to sister substantive criminal laws. Article 162 of the code, stating one of the qualifications of trial in absentia, makes cross reference to provisions of the old penal code. The penal code in the relevant section provides:

No accused person may be tried in his absence under the provisions of this Section unless he is charged with: (a) an offense punishable with rigorous imprisonment for not less than twelve years;[84] or (b) an offense under Art.354-365 Penal Code punishable with rigorous imprisonment or a fine exceeding five thousand dollars.[85]

Looking into this provision, one could see that the stipulations in the procedure code were procedural instruments formulated to enforce substantive rules of the old penal code. In addition, it is important to note that this penal code was repealed in 2004.Yet the procedure code, enacted furthest before the coming into force of the current FDRE criminal code, is still in force. Moreover, it is employed to enforce the rules of trial in absentia through a cumulative reading of conditions set out in the old penal code, the current FDRE constitution, and the procedure code itself. This combined use of repealed laws with others, this author argues, would open a room for unconstitutional legislative interpretation and law enforcement. The next sections explicate the questions and controversy surrounding the substantive elements of these grounds through which the code justifies trial in absentia.

I. Offenses punishable with more than 12 years: examining manner of operation

One of the major grounds for trial in absentia explicitly indicated in the code is the existence of a situation where the alleged crime is punishable with more than 12

[83] World Bank report, *supra* note 78.
[84] Ethiopian criminal procedure code, *supra* note 8.
[85] Id.

years.[86] However, this ground is quite controversial as far as its practical application is concerned and one would ask: what about crimes that is punishable with less than 12 years? And is its maximum limit higher than 12 years? For instance, according to article 540 of the FDRE Criminal Code, a person who commits ordinary homicide is punishable with five to twenty years of rigorous imprisonment. In this instance, the threshold is five years and the maximum limit is twenty years of rigorous imprisonment. The 12 Years requirement set by the code is in the middle of this range. Therefore, whether courts can direct trial in absentia in such scenario is unclear from the wording of the code.

Further, evidences from the practice world suggest divergent positions held by Ethiopian courts over this issue. The first position holds that the twelve years requirement is determined depending on the maximum years of punishment.[87] Hence, although the initial years of punishment are lower than 12 years, it does not matter to proceed with the trial in absentia, as the sealing punishment is above 12 years.[88] However, the accused might be punished with term of less than 12 years since the initial punishment is lower than the 12 years requirement as provided under article 540 of the criminal code.

The second position advances the argument that the 12 years requirement is the minimum and mandatory threshold. The law under article 162 of the code makes it clear that the 12 years requirement is nonnegotiable.[89] Thus, a crime with initial punishment of less than 12 years cannot be entertained in the absence of the accused. According to this position, in the above scenario trial in absentia is not possible since the initial punishment is below 12 years.

This debate from the two camps has been alive for a long period and different courts have been advancing divergent positions. The Federal Supreme Court Cassation Division gives an authoritative decision on this issue under file no.179416.[90] The history of the case demonstrates that the accused was charged under article 669(3) (b)

[86] According to the draft, Ethiopian criminal procedure and evidence law the offence must be punishable with more than seven years and above punishments in its article 227(1). However, this requirement may strongly affect the right to defend of an accused hence; there is a tendency for many crimes to be tried in the absence. When a new law is enacted, it should give a better place for human rights than the former law but it reduces from 12 to 7 years requirements.

[87] *Amanuel Getachew, and Sentayehu Ayelew V. prosecutor,* Bahir Dar Area High Court, File No. 04170, May 9/2009.

[88] Interview with, Ergo Sirage, and Tadele Belayneh, Judges, Bahir Dar Area High Court, (June 2019)

[89] Interview with Benyam Babu, judge and president, Bench Shoko Zone High court, (SNNPR) (June 2020)

[90] *Haleka Negusa Abereha v. Tigray region justice bureau*. Federal supreme court Cassation Division, File no. 179416, June 22, 2012, E.C.

of FDRE criminal code for the crime of aggravated theft, which is punishable with simple imprisonment not less than one year and rigorous imprisonment not exceeding fifteen years. The court decided that 'the provision contains optional punishments, and hence, the accused may be punished with simple imprisonment less than twelve years or with more than 12 years rigorous imprisonment where he is convicted.[91] In such circumstances, the court should presume that the accused will be punished with terms of less than 12 years and trial in absentia is not possible.[92] This is because if the court initially presumed as if the accused will be punished with more than 12 years imprisonment, it may affect the constitutional rights of the accused to be present and defend himself.[93]

The decision of the cassation court is justifiable from the view that trial in absentia is an exception to the fundamental right to be present. Thus, exceptions must be interpreted narrowly and in a manner not hampering the purpose of the underlying rights.[94] Furthermore, in the case of ambiguities, criminal law must be interpreted in a manner which is more favorable to the accused.[95] The problem at this juncture is the fairness of allowing trial in absentia for more serious crimes, which lead to more than 12 years up to life imprisonment and death penalty. This makes the Procedure Code deviant from the adversary system in which trial in absentia is allowed for less serious crimes.[96] The Code was adapted from the common law legal system, which prohibits trial in absentia and allow exceptionally for less serious crimes. However, the criminal procedure code as well as the cassation court upholds the position of civil law countries particularly that of France, where trial in absentia is allowed for grave cases. This, in effect, means the court may decide death penalty without the accused being present and duly defend his case.

II. Offenses against the fiscal and economic interests of the state[97]

The other condition set forth under the code to proceed with trial in absentia is concerned with offenses committed against the economic and financial interest of the

[91] Id.
[92] Id.
[93] Id.
[94] Katherine Hutchison, That's the Ticket: Arguing for A Narrower Interpretation of the Exceptions Clause in the Driver's Privacy Protection Act, *Seventh Circuit Review*, Vol. 7, Issue 2, (2012), p. 128-129.
[95] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Addis Ababa Ethiopia,(9th of May, 2005), Article 2 cum 6. [here in after FDRE criminal code]
[96] In the common law legal system, particularly in the USA trial in absentia is not possible except for disruptive behavior of the accused.
[97] These offenses are provided under art, 354-365 of the old penal code, which is already repealed. Under the current criminal code, the applicable provision for this requirement is from art. 343-354

state. This requirement of the Procedure Code (cross-referring to the provisions of the old penal code) roughly corresponds to provisions ranging from article 343-354 of the current criminal code of Ethiopia.

A closer look into article 162(2) (B) of the Procedure Code suggests that to commence default hearing first the alleged crime should lie within the ambit of article 343-354 of the criminal code. It should also be established that the crime is punishable with rigorous imprisonment or a fine exceeding five hundred Birr.[98] In other words, without considering the twelve years requirement, it is possible to commence default proceedings once the alleged offense lies under these provisions, and it is at a level of gravity punishable with rigorous imprisonment or a fine exceeding 500 birr.

Yet, the absence of either requirement will prohibit trial in absentia. The underlining rationale behind this exception is to give more priority and preferences for government and state interest. Since the state is duty-bound to fulfill public goods, it's economic and financial interest needs special protection. However, this condition may open a discretionary space for courts to employ trial in absentia as an ordinary procedure, unduly justifying that the crime is committed in the monetary interest of the state. As such, allowing trial in absentia on all crimes committed against the financial interest of the state will invite courts to apply it in principle and it may substantially narrow the defendant's right to be present and defend his case.

C. Disruptive behavior of the accused

Under international jurisprudence, disruptive behavior of the accused can be a major ground for carrying on a trial in absentia.[99] As one of such evidences, the ICC in prosecutor Vs. Ruto and Sang implicitly repudiated the right to be present for 'the continuously disruptive behavior of the accused'.[100] As such, an accused's continuous disturbance amounts to court contempt that damages institutional hounour and efficiency in the administration of justice.[101]

While this room of exception for trial in absentia is recognized, courts are required to ensure that it does not infringe the interest of justice. To this effect, courts must

[98] Ethiopian Criminal Procedure Code, *supra* note 8, Article 162(2)(B)

[99] Serena Quattrocolo and Stefano Ruggei, personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe, *Legal Studies in International, European and Comparative Criminal Law series*, vol. 2, (2019) p. 72. See also, ICC Statute, *supra* note 21, art. 63

[100] *Prosecutor v. Ruto and Sang*, International Criminal court, file No. ICC-01/09-01/11 OA5, (18 June 2013).

[101] Zakerhossein and Marie, *supra* note 4.

sufficiently establish elements of such behavior. The ICC particularly notes that a 'repeated or continuous disruption must exist to conduct trial in absentia'. Further, this room of exception must not be used as a 'tool to muzzle defendants in circumstances where they challenge the charges.'[102] Thus, courts must take into account the interest of the defendant to attend the proceeding through technological tools.[103] Finally, courts are given the discretion to determine the elements of such behavior on a case-by-case basis. Accordingly, any physical as well as verbal intimidations or misbehaviors disturbing the proceeding or prevents the court from administering justice amounts to disruptive behavior.[104]

Turning to the contents of the Ethiopian legislative sources, one observes that they provide insufficient considerations and the code mentions nothing about disruptive behavior of the accused. The FDRE criminal code under article 449 considers contempt of court as a crime where the accused or any party insults, disturbs, ridicules, or in any other manner disrupts the activities of the Court.[105] Yet the code, other than providing a penalty for contempt of court, states nothing as to whether the accused should attend the trial or it could be conducted in his absence. This, in turn, begs such question as what if the accused repeatedly disrupts the atmosphere of the court. Should the court remove the accused from the courtroom and deny the right to be present or should it tolerate the disruptive behavior of the accused? In this regard, the criminal procedure code remains silent and fails to consider the behavior of the accused as a ground for trial in absentia.

In other jurisdictions, particularly in Germany, disruptive behavior of the accused is the prominent ground to administer trial in absentia.[106] As pointed out earlier, Germany is not a proponent of trial in absentia, yet it makes the accused's disruptive behavior an exception to conduct trial in absentia. Also, in the common law legal system, particularly in the USA, persistent disruptive behavior of an accused amounts to a voluntary waiver of the right to be present.[107] Apart from such practices, other human right documents such as the Amnesty International fair trial guideline restricts

[102] Id, *see also*, W. A. Schabas, International Criminal Court: A Commentary on the Rome Statute, *New York, Oxford University Press*, (2010), p. 755.
[103] ICC Statute, *supra* note 20, Article 63.
[104] Quattrocolo and Ruggei, *supra* note 99, p. 460.
[105] FDRE Criminal Code, *supra* note 95, Article. 449 *ff*.
[106] The German Code of Criminal Procedure, *supra* note 50, Section 231 b.
[107] James G. Starkey, Trial in Absentia, *St. John's Law Review*, Vol. 53:No.4, (1979), p.741. According Rule 43(C) of the USA federal rules of criminal procedure 'when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom' *see also*, Zakerhossein and Marie, *supra* note 4 p.183.

the right to presence temporally in cases where the accused repeatedly disrupts the proceedings to such an extent that the court deems it impractical for the trial to continue with the accused's presence.[108] In such circumstances, the court can remove the accused with strict observance of the accused's right to defend his case.[109] Particularly, the court, while it may conduct the trial in absentia, must ensure the accused to observe the trial and access confidential counsel instruction from outside of the courtroom.'[110]

Finally, looking into the stipulations in the Ethiopian legislative sources vis-à-vis the international practice we can observe a considerable disparity as to whether it is possible to conduct trial in absentia in cases where the accused disturbs the proceeding. To mention an illustrative example for such disparities, the ICC in Prosecutor Vs Ruto, unlike the case in the Ethiopian sources, makes it clear that disruptive behavior of an accused can be a ground to precede trial in absentia.[111] The court bases its decision on article 63(2) of its statute and states disruptive behavior of the accused as the only ground to direct default proceeding.[112] Furthermore, it can be presumed that the accused is abusing and having an intention to waive his right to present, where he repeatedly disrupts the courtroom.[113] From this, it is tenable to argue that disruptive behavior of an accused must be regulated as a ground to effect trial in absentia under Ethiopian law as it would be difficult to administer justice while the accused is disrupting the trial.[114]

D. The fate of partial trial in absentia

As its name suggests, partial trial in absentia refers to a situation where the defendant appears before the court at some stage of the trial. The defendant may appear initially and may waive his right to appear or initially abscond and appear in person at the middle or final stage of the trial.[115] In this scenario, if the defendant initially appears before the trial and failed to appear in the next proceedings, the court may commence a

[108] Amnesty International, Fair Trial Manuel, Amnesty International Publications, 2nd ed., Easton Street, London WC1X 0DW, United Kingdom, (2014), p. 157.
[109] Id.
[110] W. Jordash and T. Parker, Trials in Absentia at the Special Tribunal for Lebanon', *Journal of International Criminal Justice*, Vol. 8, (2010) p. 507.
[111] Prosecutor v. Ruto and Sang), supra note 100.
[112] Zakerhossein and Marie, *supra* note 4, p.210.
[113] Jordash W. and Parker T. Trials in Absentia at the Special Tribunal for Lebanon', *Journal of International Criminal Justice*, vol.8, (2010), p.490.
[114] Id., *see also*, Zakerhossein and Marie, *supra* note,4
[115] Id.

default hearing as the defendant already has the knowledge of the indictment and is sufficiently informed of the case.

Yet, a problem arises when the defendant does not initially appear but comes in the middle of the trial. Under such circumstances, the court would face two difficult options: to entertain the case again from the beginning or to continue with what been progressing. Let's say, the defendant appears after the public prosecutor presents its evidences. Now whether the court should quash the prosecutor's evidence and entertain the case again or continues its judgment is not made clear under the procedure code.[116] Consequently, courts hold different positions, some courts retrying the case again to protect the rights of the defendant, while others continue with the case as it was.[117]

The author takes the view that the issue must be interpreted in favor of the defendant.[118] Accordingly, in the case where the defendant appears in the middle of the proceeding, it is better to retry the case and open a room for the defendant to duly defend his case. This option can further be rationalized on the ground that the right to be present is one of the fundamental human rights of an accused, which must be interpreted consistent with their object and purpose. [119]

E. The right to re-trial under the code: issues worth considering

The right to retrial is a vital chance for the accused to exercise his right to defend where his charge has been decided in his absence.[120] The UN Human Rights Committee under general comment No, 32 recognizes the right to retrial of a person convicted in absentia.[121] The Ethiopian Criminal Procedure Code under article 199 states that, if the defendant is not duly summoned or he was prevented by force majeure from appearing in person, he can claim retrial of judgment.[122]

Two strong justifications underlie this principle. First, it is to reduce the risk of trial in absentia where the defendant is unaware of the charge as well as the accusation

[116] The criminal procedure code is silent on this issue and it may create a problem in its practical application. Some courts retried the case again and others.
[117] Phone Interview with, Germa Debasu, judge, Federal High Court, Addis Ababa, (September 2020).
[118] Shon Hopwood, Restoring The Historical Rule of Lenity As a Canon, *New York University Law Review*, Vol. 95, (2020), p.918.
[119] Vienna Convention on the law of Treaties (VCLT), United Nations, Treaty Series, Vol. 1155, (1969), article. 31 (1).
[120] International Bar Association Report, *supra* note, 54, p.6.
[121] UN Human rights committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial): Geneva, (9 to 27 July 2007), para 54 ;[hereinafter General comment, 32].
[122] Ethiopian Criminal procedure code, *supra* note *8*, article,199.

presented against him[123]. Secondly, though the person knows the trial as well as the elements of the charge, he may be hindered to appear due to force majeure and it is not rational to affirm the decision rendered in the defendant's absence that occurred due to good cause.[124]

To strike a balance between these two competing interests, the law allows retrial of a criminal proceeding. To this effect, the criminal procedure code, under article 197, stipulates that the person who is sentenced in his absence has the right to apply to set aside a judgment to a court that rendered the decision.[125] This application must be made within thirty days from the date on which the applicant becomes aware of the judgment.[126] Now, it is important to note that this time limit is different from that set for an appeal, period of limitation of which, runs from the date on which the accused is aware of the judgment.[127]

Practically, public prosecutors are facing problems on such issues due to potential bad faith defendants who claim retrial contrary to its objectives.[128] A defendant may come and claim retrial after a long period by presenting good cause.[129] In such a scenario, as time goes by, the witness of the prosecutor may die or be unavailable, memories may fade, and documentary evidence may be destroyed. Thus, one would ponder: how can the prosecutor prove its charge against the defendant under such circumstances?[130] Further, there are defendants who intentionally hide for a long time to escape punishment or for other reasons and the case may be adjudicated in their absence. If such a defendant claims retrial, let's say after 10 or 15 years, it is difficult for the prosecutor to prove the allegation again. Yet the law, over the last decades, fails to provide a mechanism to deal with such challenges.[131]

[123] Elizabeta Ivičević Karas: Reopening of Proceedings in Cases of Trial in Absentia, EU and Comparative Law Issues and Challenges Series – Issue 2, p. 294. [here in after Elizabeta on retrial]
[124] Id.
[125] Ethiopian Criminal procedure code *supra* note 8, Article 197.
[126] Id.
[127] According to article 187(1) of the criminal procedure code, the time limit given to lodge an appeal is within 15 days after the judgment has been given. However, the application to set aside a default judgment is within thirty days after the accused knows the judgment.
[128] Phone Interview with, kal'ab, Public Prosecutor at Amhara region Attorney General bureau, on problems in a default proceeding June 2021. (herein After interview with Kal'ab) and interview with, Tadele Belayneh, judges at Bahir Dar area high court, *on conditions to commence absence trial in Ethiopia and the practice*, 19 June 2018,(hereinafter Interview with, judge Tadele Belayneh)].
[129] Interview with public Prosecutor Kal'ab.
[130] Id.
[131] Id .

The practice demonstrates that public prosecutors are using two mechanisms to fill this gap.[132] Firstly, prosecutors use evidence gathered during the preliminary inquiry,[133]Particularly, in situations where the accused is charged with aggravated homicide or aggravated robbery.[134] As such, public prosecutors can attach the result of preliminary inquiry as evidence where the judgment was given in default and the accused claims retrial.[135] Secondly, for crimes which are not eligible for preliminary inquiry, prosecutors may reuse the evidence of prior proceeding. However, this may affect other rights of the accused such as the right to cross-examination.[136] Yet it is important to note that, accessing evidence and proving an accusation is not an easy task in such situations where the accused claims retrial after a long period, opening a space for the defendant to evade justice. In sum, this gap in the law alerts courts to follow strict observance on the intention of the defendant, while they consider the grounds of absence as force majeure.[137]

F. Retrial and the right to appeal

The right to appeal is one of the constitutional rights on all decisions or judgments rendered by lower courts.[138] Yet the criminal procedure code constitutes a contentious clause (article 202(3) related to an appeal against a ruling on retrial. As outlined above, if the summons to appear is not adequately address to the defendant, or the accused hindered to appear due to force majeure application to retrial is possible.[139]

However, the law fails to define what conditions constitute force majeure, and it leaves a room for courts to decide on a case-by-case basis. Overall, where the defendant fails to prove either of the grounds, the application to set aside the judgment would be

[132] Id .
[133] Interview with Masresha, public prosecutor at Bench Shoko zone Justice Department, June 2021. (hereinafter interview with public prosecutor Maseresha).
[134] Ethiopian Criminal Procedure Code, *supra* note, *8* Article 80(1).
[135] Interview with public prosecutor Maseresha, *supra* note 133.
[136] As prosecutors inform that, sometimes the defendant may claim re-trial after a long time in which, all pieces of evidence are quashed through natural or manmade reason. A personal witness may die, documentary evidence will destroy, and to collect forensic examination the victim may die or materials may be lost.
[137] Elizabeta Ivičević Karas *supra* note, 1, p. 463-68. at 460.
[138] FDRE Constitution, art. 20 (6). This provision provides that, the accused person has the right to appeal against an order or judgment rendered against him. This fundamental and constitutional right is construed freeform an exception.
[139] Ethiopian Criminal Procedure Code, *supra* note 8, article 199(a &b).

dismissed.[140] This is because under such circumstances, a convicted person is presumed to have moved to evade justice.[141]

These issues prompt further examination of the possibility or otherwise of the right to appeal on dismissal of an application to set aside a judgment rendered in the absence of the defendant. The criminal procedure code in its article 202(3) provides that '[no] appeal shall lie against a decision dismissing the application for retrial …' However, this will not prevent the accused from submitting an appeal against the sentence or penalties of the court.[142] This provision is the most debatable and contrary to the inherent rights of the accused to claim the right to appeal because of two grounds.

First, force majeure/ good cause is one of the grounds to apply for retrial of a judgment given in absence. Here, courts have the discretion to decide whether an act that prevents the accused to appear constitutes force majeure. However, such discretion is vulnerable to subjective interpretations of courts. Consequently, an act, which is force majeure for someone, may not constitute as such for others. Therefore, a judge may arbitrarily or for other reasons dismiss the accused's application presented for a retrial. This may, in turn, create procedural irregularities and strongly hamper the rights of the accused. Yet appeal is an essential procedural tool to rectify such kind of procedural as well as substantive irregularities. The criminal procedure code limits the appeal rights of an accused only on the penalty part. Thus, the defendant has no chance to challenge the case or to cross-examine, to be heard, and to defend. Limiting the right to appeal only on penalties and prohibiting appeal on an application for re-trial strongly affects the accused's right to a fair trial. The federal cassation court in Semahegn Belew Vs. the prosecutor decided that dismissal of an application for retrial is not a final judgment and not appealable.[143] However, the provision undermines the defendant from appealing against the conviction.

Secondly, as recognized under article 20(6) of the constitution, the right to appeal is possible against an order or a judgment rendered by a court. Most importantly, there is no exception set forth to limit the right to appeal under the constitution or international

[140] Id, Art. 202.

[141] Federal supreme court Cassation Division, Semahegn Belew vs Federal prosecutor, File No. 57632 December 25, 2003, E.C.

[142] FDRE constitution, *supra* note *7*, Article 20(3).

[143] FSCCD, Semahegn Belew Vs Prosecutor. According to the ruling of the court, it states that " … በወ/መ/ሕ/ሥ/ሥ/ቁ. 202 መሠረት በጥፋተኝነቱ ውሣኔ የይግባኝ መብት አይኖረውም በሚል መደንገጉ ከላይ ከተቀመጠው ምክንያት አንፃር የመከራከር መብቱን የነፈገ እንጂ በዚህ ድንጋጌ መሠረት የይግባኝ አቤቱታ ማቅረብ አይቻልም መባሉ ፍርዱን የመጨረሻ አድርጎታል የሚል ትርጉም መስጠት የሚቻል አይሆንም።

human rights instruments.[144] Pursuant to article14 (5) of the ICCPR, 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' Accordingly, the defendant has the right to lodge an appeal against the conviction as well as the sentences by virtue of this provision. However, the criminal procedure code disregards this principle and prohibits the right to appeal against a conviction rendered in the absence of the defendant.

Accordingly, the stipulation in the code is against the right to appeal to the defendant, which is guaranteed under international human rights law. [145] Moreover, in the absence of any constitutional exception, it is not justified to limit this fundamental right, and the limit set by procedure code remains a point of contention.[146]

Conclusion

The right to presence has been recognized under international human right instruments and the FDRE constitution. This right is the foundation of fair trial rights, such as the right to be heard, to defend a case, and to cross-examine witnesses. While the foundation of this bundle of rights in some exceptional and justified reasons, a trial may proceed in the absence of the defendant.

The primary rationale behind trial in absentia is to protect the victims' right to access justice and to avoid delay of justice for several reasons. While the civil law legal system used it as part of a regular proceeding, the common law system prohibits this practice in principle with the exception of the accused's disruptive behaviour.

Under the Ethiopian legal system, trial in absentia has been recognized under the criminal procedure code with a proviso of some conditions. However, the conditions provided under article 161 of the code are so contentious, prompting a lot of controversy in the scholarly discourse and the practice world. One of the major elements of this contention is related to the determination of whether a certain crime should or shouldn't be tried in the absence of the defendant. The criminal procedure

[144] The FDRE constitution under art 20(6) and ICCPR under art. 14(5) too, did not provide any exception thereto.

[145] The right to appeal is recognized against the final conviction or a sentence given by the court according to the ICCPR. However, the criminal Procedure Code limits the right to appeal only on the sentences which are rendered in the absence of the defendant and the defendant cannot appeal against the convection.

[146] ICCPR, *supra* note *3*, art. 14(5).

code, under article 161(2), stipulates that a person may not be tried in his absence unless the crime is punishable with not less than twelve years rigorous imprisonment.

Yet this rule poses difficulties when it comes to its application for crime with penalties of a different range such as 5-15 years of rigorous imprisonment. Where the defendant fails to appear in a trial of an alleged crime punishable within such range, the court would face a difficulty to proceed in the absence of the defendant. As such, adjudication of such cases has long been a source of controversy resulting in inconsistent rulings. Given such problems, one would expect legislative actions or authoritative decision of the federal cassation court that fills this void in the law.

Yet, no such significant move is visible in the recent past. Of course, the federal cassation court, under file No. 179416, rendered an authoritative decision in which it urges that the twelve years requirement is non-negotiable, and it refers to crimes, which have more than twelve years of initial punishment. Looking into the contents of the ruling, one could see that it does not fully resolve the contention while it obliges courts to employ trial in absentia for crimes punishable with more than twelve years of rigorous imprisonment.

The other apparent problem of the code is its failure to govern disruptive behaviors of an accused as a condition for a default hearing. Under international experiences, particularly in common law jurisdictions, disruptive behaviour of an accused with in the courtroom is the only exception to direct trial in absentia. Also, in civil law countries, particularly in Germany, trial in absentia is not possible unless the presence of the accused disrupts the courtroom. However, the Ethiopian criminal procedure code is unclear as to whether it is possible to remove the accused under such circumstances. Thus, unless it is properly regulated, it might create a problem on the proper administration of justice.

The third problem of the law lies in the summoning procedure to inform an accused. The wider international practice shows that the accused has the right to be informed about the contents of his case. As one of such representative evidences the General Comment No.32 of the commeettee on civil and political rights unequivocally requires ‘all due steps to be taken to inform accused persons of the charges and to notify them of the proceedings before trial in absentia’

However, the Ethiopian criminal procedure code lacks clear and sufficient stipulations regarding a summoning procedure. The only procedure provided under the code is the publication of summons on the “official gazette”. As such, the code fails to provide

other alternatives to serve summons for the accused. Evidences from the practice world show that police officers are not diligent to search the accused or to deliver summon. They rather simply publicize summons on a gazette without making due effort to deliver it to the accused. Further, the code, in considering Gazzatte as channel of summoning, fails to consider the accessibility of the gazette, literacy rate and reading culture of the community. Besides, the term "Gazette" is not clear as to whether it refers to the public (official gazette) only or it includes a private gazette as well. As a way to fill this gap, the author contends, the code should have also incorporated other media such as radio, and other social media, which are more accessible to the community.

In addition, it is aptly indicated in previous sections of this paper that, the defendant has the right to apply to set aside a judgment rendered in his absence. The criminal procedure code also recognizes the same, depending on the conditions provided under article 199. Yet it is important to note that the decision of the court on the application to set aside the judgment is not appealable. The author holds the view that such restriction may adversely affect the rights of the defendant to claim an appeal. The code allows an appeal only on the penalty and it is impossible to appeal on the conviction, too. Thus, this provision locks the rights of the defendant to appeal as well as to defend his case.

Finally, in some instances, the accused may appear after the default hearing has been started. Yet the code is silent whether the trial would continue in default or it should be retried again under such circumstnces. Procedural laws in other jurisdictions such as France, if the accused comes in the middle of the trial, the court will investigate and try the case again. In contrast, no mechanism is available in the Ethiopian case and this can apparently cause procedural irregularities.

In summary, these varying forms of gaps pertaining to trial in absentia, if left unadressed, would continue to threaten the fundamental right to fair trial. Thus, the legislature bodies, the judiciary, and law enforcement organs in this country are expected to make a concerted move to devise a lasting solution to the contentions, irregularities, and inconsistencies of court decisions regarding this right. The review made in this article suggests that these bodies can draw considerably useful input from the international experience and human right documents pertinent to the issue in question.