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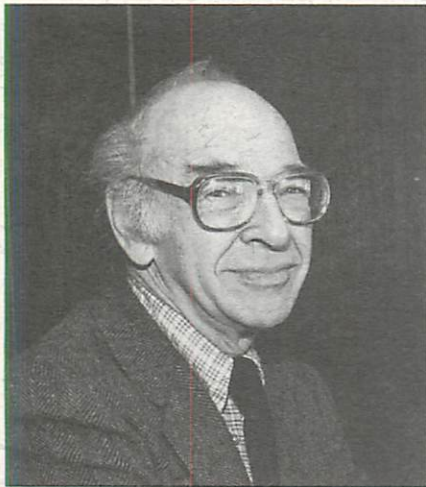
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POINT/COUNTERPOINT

Trials in Absentia

by Herman Schwartz

The International War Crimes Tribunal seems headed for frustration and disappointment in the former Yugoslavia. Serbs Radovan Karadžić and Ratko Mladić, and Croat Dario Kordić, who have been indicted for the Yugoslav atrocities, will probably successfully avoid being brought to justice. Despite numerous opportunities, the NATO Implementation Force (IFOR) has steadfastly refused to take them into custody. As recently as October 29, 1996, Republika Srpska President Biljana Plavšić declared that her government had no intention of turning Karadžić and Mladić over to the Tri-



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bunal. There is no sign that things will change.

The result is what one observer called, "an exercise in high cynicism," a repeated rhetoric of support for the Tribunal but a consistent pattern of obstruction.

The way to salvage something in this situation is to try these indicted war criminals *in absentia*, without their being physically present. Such trials are not uncommon in Europe, including the former Yugoslavia.

Indeed, in the Nuremberg War Trials, the models for the Yugoslav Tribunal, Hitler's secretary, Martin Bormann, was tried, convicted, and sentenced to death in his absence. There, the statute establishing the International Military Tribunal explicitly

Trials in Absentia in the Former Yugoslavia

by Nicole Clarke

Although the trials of war criminals from the war in the Balkans are now getting underway, the most crucial defendants remain at large. The new leaders of the former Yugoslavia refuse to comply with their responsibility under the Dayton Agreements and the perpetrators of the most inhuman acts of the war spurn the authority of the Tribunals.

There is disagreement among legal authorities over how best to counter the open defiance of indicted war criminals Ratko Mladić, Radovan Karadžić and Dario Kordić. Trials in absentia would demonstrate that the international community will no longer tolerate defiance of the law. Convictions would also greatly strengthen the pressure on leaders of former Yugoslav countries to turn over their criminals. On the other hand, arresting the indicted defendants, it is argued, would effectively end the public influence of these men.

Herman Schwartz, a leading advocate of civil liberties and prisoners' rights in the United States, is a Professor of Law at WCL and Co-Director of the Center for Human Rights and Humanitarian Law. This article is a revised and expanded version of an article he wrote in August for *The Washington Post* with Lloyd N. Cutler, former Counsel to Presidents Jimmy Carter and Bill Clinton.

Diane Orentlicher is also a Professor of Law at WCL and is Director of the War Crimes Research Office which assists the prosecution staff of the UN tribunals for the former Yugoslavia and Rwanda in the Hague. Her article combines part of an article she wrote for *The Washington Post* in response to that of Professor Schwartz and Lloyd Cutler, with another article previously published in *The L.A. Times*.

authorized such trials. Although the text of the statute establishing the Yugoslav Tribunal does not explicitly authorize trials *in absentia*, it does permit them. The latter statute gives the defendant the right to be "tried in his presence," but as with almost all rights, he can waive it, especially if he absconds or otherwise deliberately makes himself unavailable.

This view, admittedly, is not the prevailing one. Those who have commented on the issue, almost without exception, have said that the statute does not permit such trials. Those who take this view have relied almost entirely on the May 3, 1993 Report of the United Nations Secretary General pursuant to UN Resolution 808 in which he stated: "A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would be inconsistent 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."

As the excerpt makes clear, there is no doubt that the Secretary General

did not think trials *in absentia* are appropriate. His reasoning, however, is based on a mistaken understanding of the International Covenant. As far back as 1983, the Human Rights Committee, which applies the Convention, clearly stated that Article 14 does not present a bar to trials *in absentia*, saying: "Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice."

Certain procedural provisions in the Tribunal's statute do seem to contemplate the defendant's personal appearance, but similar provisions in the Italian and other procedural codes have not been seen as bars to *in absentia* trials of absconding defendants.

In sum, the language of the statute does permit such trials, and under the circumstances, there is no reason to go behind that language and limit the Tribunal, especially because that same history indicates that at least some members of the Security Council wanted such proceedings. Otherwise, it will be

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necessary to amend the statute, and that could be very difficult at this time.

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Even the half-way measure adopted by the Tribunal — a preliminary examination of the evidence under Rule 61 to determine whether there is enough evidence to issue an arrest warrant — will only serve to make the world aware that there is some evidence to support the allegations. The outcome of such a proceeding is still only a set of charges and not a final conclusion of culpability. Any country that wants to avoid its responsibilities toward the Tribunal will be able to rely on that distinction. Many already seem to want to do so, and as time passes there will be more, as nations have a remarkable capacity to accommodate themselves to evils perpetrated by other countries. A judgment of conviction arrived at in accordance with conventional, generally acceptable procedures, backed by the prestige and status of the Security Council, is much harder to ignore, particularly in Europe, where it is most important. It is in Europe, after all, where most of the activities of Serbia, Bosnia and the rump Serbian Republic will take place.

Institutions like the Council of Europe and the Organization on Security and Cooperation in Europe are also more likely to lend their support to a formal judgment, and it will be far easier for the Security Council and the

Council of Europe to take enforcement measures.

Claims of unfairness for being convicted in their absence would lie particularly poorly in the mouths of Karadžić, Mladić, and the others. They have voluntarily chosen to absent themselves, in defiance of their obligations under international law and the Dayton Agreements, of which Karadžić, at least, implicitly approved by authorizing Yugoslav President Slobodan Milosević to negotiate for him. Moreover, they are not unfamiliar with trials *in absentia*, for they are well-established in the former Yugoslavia and its successor states. Such trials were recently held in Croatia and are not infrequently held in France, Italy and other countries in Europe.

Even the United States allows trials in the absence of the accused if he is disruptive or absconds, as long as he was present at the initiation of proceedings. Rule 43(b) of the Federal Rules of Criminal Procedure allows a trial to take place “and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present, (1) is voluntarily absent after the trial has commenced.” The “initial presence” requirement — which many courts had dispensed with prior to a Supreme Court decision in 1993 — is

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designed to ensure that the accused has notice of the charges and proceedings. The “initial presence” requirement is not constitutional, but only required by the Federal Rules of Criminal Procedure, and therefore, American state courts need not require it. In fact, some state courts have gone ahead with trials *in absentia* despite the defendant not having been initially present, when there was no doubt that the defendant had made an “intelligent and knowing waiver” of the right to be present. Because there is no doubt about the

Yugoslav and Croatian defendants' awareness of the charges, there is no reason to insist on the formality of an initial appearance where proceedings before the Tribunal are concerned.

Indeed, Karadžić already has American lawyers present at the proceedings and they have raised some substantive defenses. The Tribunal would certainly be willing to allow them to participate fully if trials *in absentia* were held. Fur-

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thermore, modern communications make it possible for the lawyers to communicate instantaneously with the defendants any time they find it necessary. And if these defendants ever become available for trial, according to conventional practice, the judgments will be set aside and a new trial held.

Obviously, trials *in absentia* are not what we would prefer, though it is likely that in a civil law system, the prosecution suffers disadvantages from such a proceeding as much if not more than the defendant, because the prosecution's case often relies heavily on testimony by the defendant himself. If the attitudes of the states involved change and those indicted are somehow brought before the Tribunal, there will be no need for such trials. Unless and until that happens, however, trials *in absentia* are better than ignoring the defendants' defiance. Otherwise, the impunity successfully achieved by Karadžić and the others may provide a reason for the former Yugoslav countries to refuse to turn over those who might be available.

The Tribunal was established by the world community to serve as a step in the process of bringing an anarchic world community under the rule of law. If the Tribunal needlessly allows the perpetrators of some of the worst crimes of this bloody century to thumb their noses at it, it will have done both world peace and international justice far more harm than good. ☹