In Absentia Procedure:

the Concept of Amendments to National Legislation Ukraine

Problem Summary

The Code of Criminal Procedure of Ukraine provides for a special investigations procedure – trial at a court of law in the absence the accused (in absentia). Its legal regulation is ensured by part 2, article 7 of the Code and separate Chapter 24-1. The importance of this procedure and the need for its consolidation in Ukraine's national legislation focuses on the list of criminal offences which it may be applied to. Among such offences, the Code of Criminal Procedure (CCP) identifies those which fall within the competence of the Security Service of Ukraine, namely: crimes against territorial integrity and the state system of Ukraine, acts of terrorism and crimes related to terrorist activities, crimes against peace, security of mankind and international offenses [1].

For the law enforcement system of Ukraine's, special investigation is the opportunity to bring to justice the perpetrators responsible for crimes committed during armed conflict Ukraine. This was essentially the purpose of introducing these provisions into CCP of Ukraine in the first place.

However, there is a great number of problems which arise during its application:

- special investigation may be applied to the suspect who is absconding with the purpose of evading criminal responsibility and is on the interstate and/or international list of wanted persons. Before a request may be submitted to an investigating judge for sanctioning investigation in absentia, an investigator or a public prosecutor should ensure that the suspect has been placed on the international and/or interstate wanted list. Given that this procedure is not clearly regulated and national legislation of Ukraine does not expand on theconcept of "inter-state wanted list," there is no consistent practice applied by the domestic authorities based on common understanding and/or interpretation. As regards international wanted list, an investigator or a public prosecutor submits the request through the Department of Inter-Police Cooperation of the National Police of Ukraine to contact Interpol. At the stage when the request is reviewed by Interpol, national pretrial investigative bodies encounter the most difficult problem: requests for placing persons who are suspected of serious crimes in the territory of Crimea, Donetsk and Luhansk oblasts on the international wanted list are denied with reference

[1] Special investigation applies to: crimes falling under the jurisdiction of the Security Service of Ukraine (Art. 109, 110, 110-2, 111, 112, 113, 114, 114-1, 115, parts 2-5 of article 191 (in the case of abuse of office by an official), arts. 209, 255 258, 258-1, 258-2, 258-3, 258-4, 258-5, 348, 364, 365, 368, 3682, 379, 400, 436, 436-1,437, 438, 439, 440, 441, 442, 443, 444, 446, 447 of the Criminal Code of Ukraine).

to article 3 of the Constitution of Interpol [2] for the reason that such prosecution is politically motivated. Thus, if no confirmation is available that a person is on the international and/or interstate wanted list, in accordance with the provisions of Ukraine's CCP, in absentia proceedings may not be implemented in Ukraine. Other investigators only pass the ruling to put a person on the wanted list, and then go to an investigating judge. Therefore, the first problem is identified as the uncertainty of the procedure for placing a person on the interstate and/or international wanted list;

- in the period from 2016 to 2018, CCP provided for an alternative to placing a person on the wanted list. With the aim of implementing the provisions on in absentia criminal proceedings, amendments dated 12.05.2016 [3] introduced clause 20-1 of the Transitional Provisions of CCP of Ukraine. Special investigation was extended to proceedings against a suspect who had been absconding for over six months to evade criminal responsibility, and/or a suspect concerning whom it was known that he/she was outside of Ukraine, in the temporarily occupied territory of Ukraine or in the Operation of Joint Forces area. In such a case, a request for placing such a person on the interstate/international wanted list was not mandatory. The provisions set forth in the final sections of the Code meant that their application period was limited in time. According to cl. 20-1, the provisions were in force "not later than commencement of operation of the State Bureau of Investigations", namely before November 27, 2018. These provisions no longer apply and no alternative is envisaged by domestic legislation;

- regarding notification of a person, CCP of Ukraine prescribes serving a summons to the last known address or whereabouts, via publications in printed media and on the official portals of pre-trial investigation bodies. After the date on which the summons is published, the suspect is deemed to be appropriately informed of its contents. But given the category of cases and the fact that the majority of suspects is in the territory not controlled by Ukraine or in Russia, the problem arises as to whether this standard of informing the suspect may be deemed as legal. Besides, the situation becomes more complicated because of no postal communication with localities of the temporarily occupied territory of the Crimean Peninsula, since this

[2] The Constitution of the International Criminal Police Organization - Interpol 13.06.1956: https://zakon.rada.gov.ua/laws/show/995_142.

[3] Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine About Operation of the General Prosecutor's Office of Ukraine" dated 12.05.2016: https://zakon.rada.gov.ua/laws/show/1355-19#n9.

hinders the use of provisions of art. 42, 135, 278 of CCP of Ukraine; these territories are a part of Ukraine, and hence the mechanism of international legal assistance may not be applied; a highly probable threat to life, health and freedom of movement makes personal visits to the above – mentioned territories impossible;

- within the framework of court proceedings in a case, CCP of Ukraine envisages a preliminary hearing to address the issues related to organization of the process. However, current provisions on special investigation do not apply at the stage of the preliminary hearing, and therefore, in practical terms, law enforcement bodies encounter different approaches applied by courts of law with regard to this process. Part 2, article 314 of Ukrainian CCP prescribes that a preliminary hearing should be held with participation of the accused. Despite the fact that a trial may be held in the absence of the accused (part 3, article 323 of Ukrainian CCP), such a trial requires that a preliminary court hearing be held, and the latter is impossible without participation of the accused; article 335 of Ukrainian CCP contains a mandatory provision that in case the accused absconds, he/she should be put on the wanted list and the court proceedings should be stopped. This often becomes grounds to deny prosecutors' requests for special court proceedings;

- after the State Bureau of Investigation became operational, the inabsentia procedure is not available and the proceedings which had been commenced but not completed before expiration of the validity period of the Transitional Provisions may not be further continued due to the lack of proper regulation of the procedure at the preliminary hearing and other stages of court proceedings. At the practical level, as a consequence, courts disallow the use of pre-trial restrictions in criminal proceedings in cases of this category, and courts also do not permit special pre-trial investigation on the grounds that the persons concerned are not deemed suspects.

As a consequence of the above-mentioned problems which exist at the legislative level, in practical terms the in absentia procedure is available. Currently, courts only try cases which are consistent with the existing procedure and which were filed before 20 November 2018. Criminal proceedings with formal grounds for special investigation cannot progress further due to the shortcomings of CCP provisions.

International “In Absentia” Jurisprudence

European Court of Human Rights

In the context of exercise of the right to a fair trial, in absentia proceedings are turned to in the situations where no clear assurance is obtained that a person may attend the trial and fully defend him/herself, or where a person tries to evade justice. Furthermore, in the case of Sanader vs. Croatia[1] the ECHR determined that given the severity of the committed war crimes, strong public interest and the intention of the victims to achieve justice in such crimes, the use of in absentia court proceedings did not violate the right to a fair trial provided that at the same time the rights of the accused were not ignored. In its case-law, the ECHR analysed, in particular, what was meant by "due notice":

> "Informing a person about the prosecution commenced against him/her is such an important step that it should be made in accordance with procedural and legal requirements on the merits which can ensure effective exercise of the right of the accused; it is not enough to have a vague and informal knowledge"[2]

[1] http://hudoc.echr.coe.int/eng?i=001-151039

[2] Sejdovic v Italy, Application No. 56581/00, ECtHR (First Section), Judgement (Merits and Just Satisfaction) (2004); Stoyanov v Bulgaria, Application no. 25714/05 (2014)

UN Human Rights Committee

In 1983, the UN Human Rights Committee in the case of Mbenge v. Zaire noted that in absentia procedure is not illegal by itself because there is the presumption that the State takes all the steps to properly inform the accused about the proceedings against him:

> "Judgment in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial".

The UN Committee was of the view that the State did not implement proper steps to inform the accused appropriately, and that article 14 (3) of the International Covenant on Civil and Political Rights was violated by the fact that he learned about his trial in his absence from the media.[3]

[3] Communication No. 16/1977, (Reported at: 78 ILR 18, 19, UNHR Comm. 1983), para 14.1.

As for the position of the International Criminal Court with regard to this issue, presently the main source of guidance are the two decisions in Saif Al-Islam Gaddafi case[4]. The Pre-trial Chamber noted that it was not up to the Chamber to challenge the correctness, nature or qualification of judgments passed by national courts of States, unless there were compelling reasons to do so. During in absentia trial, the court should grant the accused the whole range of procedural rights and guarantees, and in case the accused turns in during the trial or even after the verdict is delivered in absentia – the accused should have the opportunity for a review of his case in court. Furthermore, in the above-mentioned case and in the case v. Jean-Pierre Bemba Gombo [5] ICC separately emphasized 'the core of determining an admissibility challenge based on the principle of ne bis in idem/non bis in idem, in so far as the interpretation provided is consistent with internationally recognized human rights'. The formulation 'a trial by the Court is not permitted under article 20, paragraph 3' suggests that the person has been the subject of a completed trial with a final conviction or acquittal and not merely a trial 'with a verdict on the merits' or a mere 'decision on conviction or acquittal by a trial court'. In other words, what is required, as the OPCV correctly pointed out, is a judgment which acquired a res judicata effect[6].

The most recent decision of ICC which considers in absentia trial at the national level was the position of the Court's Appeals Chamber[7]. Thus, the Court noted that despite the fact that Mr. Gaddafi attended a number of hearings via video-link and that his counsel attended some hearings, this trial may not have been regarded as held in the presence of the accused. This was also the Libyan Government's position. At the same time, the judgment rendered by the trial court under Libya's legislation may not be considered final since according to the procedural laws Mr. Gaddafi has the right to a review of the sentence delivered in absentia. To confirm the correctness of bringing a person to justice, for ICC it is important that the trial against this person is fair and this person has the opportunity to appeal against the judgment to a higher court.

[4] https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF
[5] https://www.icc-cpi.int/CourtRecords/CR2010_04399.PDF
[6] https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF, § 36.
[7] https://www.icc-cpi.int/CourtRecords/CR2020_00904.PDF

The Council of Europe

There is an exemplary resolution adopted by the Committee of Ministers of the Council of Europe, Resolution (75)11 of January 19, 1973 "On the Criteria Governing Proceedings Held in the Absence of the Accused" dated 19.01.1973. This Resolution is a document of soft law, however, it confirms the presence of European consensus in the matters of establishing the validity of charges under in absentia procedure. The Resolution sets forth the standards regarding the content of the summons, the opportunities for the accused to exercise his/her rights in the proceedings and additional guarantees of retrial of the case [8].

[8] 1. The accused should be served with a summons to appear in court which enables him to prepare his defense.
2. The summons must state the consequences of any failure by the accused to appear at the trial (also about commencement of in absentia proceedings as a consequence of his failure to appear).
3. Where the court finds that an accused person who fails to appear at the trial has been served with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.
4. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.
5. Where the accused is tried in his absence, evidence must be taken in the usual manner and the defense must have the right to intervene.
6. A judgment passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgment so notified, unless it is established that he has deliberately sought to evade justice.
7. Any person tried in his absence must be able to appeal against the judgment by whatever means of recourse would have been open to him, had he been present.
8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the case retried in terms of law and in terms of fact.
9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

States' “In Absentia” Related Jurisprudence

Such countries as Denmark, the Netherlands, Germany, Sweden and others allow trials in absence of the accused under the following conditions: the accused has been properly notified about the trial; the sentence he/she can get does not exceed 3 years (this is the maximum sentence in the said countries and concerns Austria); the charges are mostly about financial crimes or crimes against property; she/he is guaranteed the right to defence; he/she is guaranteed the right to retrial. In some cases, the demand for justice is of public interest if the case is of a political nature or is a high-profile one, such as, for example, trial in the case of MH-17 shootdown in 2014. There are currently 5 accused in this case: 4 Russians and 1 Ukrainian. Russia refuses to cooperate with the investigation and extradite its citizens to the Netherlands, where the trial is held in the absence of the accused. In this case, where there is a very high public demand for administration of justice, an adjournment of the trial and sentence would mean a disregard for relatives of the 298 victims in that plane crash. Furthermore, depending on what evidence will be provided by the investigation, it is likely that they will demonstrate not only personal responsibility of individual citizens but also the responsibility of Russia as a State, and this may lead to other consequences: international trials, for example, at the UN International Court of Justice on state responsibility, economic sanctions etc. [1]

The proceedings in the case of MH17 crash are held in absentia. According to national law of the Netherlands, this means that the accused are aware that the proceedings are underway, they have the right to attend but deliberately do not do so, and they may waive their right to the defence. To this end, for example, it has been agreed with Ukraine that the accused, who is a citizen Ukraine, has the right to give testimony via video-link during the proceedings, and Russia requested to secure the right to defence for its accused. The notifications sent to the accused during the proceedings, along with the information relative to the proceedings, also elaborates on their rights and status [2]. Given the nature of in absentia proceedings, the prosecution took all possible measures to notify the accused not only via official mail, but also using notification by phone, electronic mail and social media.

[1] Pillai P., Accountability for Flight MH-17, A long and Winding Road: https://www.lowyinstitute.org/the-interpreter/accountability-flight-mh17-long-winding-road

[2] https://www.prosecutionservice.nl/topics/mh17-plane-crash/documents/publications/mh17/map/map/charges-against-suspects-downing-mh17

Proposals and Recommendations

Along with a number of issues as to their implementation in practice, it should be noted that current provisions of CCP are not consistent with the case-law standards of ECHR, UN HRC and ICC which would secure the right of the accused to a fair trial. In such a form, they pose potential risks of human rights violations in practice. And, accordingly, proceedings which may be held can be unacceptable for international courts and/or tribubals.

On the one hand, the priority task for any legal system is always to ensure the effective processes of justice starting from commencement of pre-trial investigation all the way to the final court judgment; on the other hand, an essential part of effective justice are the guaranteed procedural rights to all parties to the proceedings. National legislation regarding in absentia proceedings should always strive for a balance between the standards of the right to a fair trial and the interests of justice, particularly so in cases pertaining to an armed conflict. European countries have a rather consistent practice of careful and limited application of such processes. So, Ukraine should adopt the international best practices into its national legislation.

With a view to achieving appropriate regulation of in absentia proceedings in criminal procedure legislation of Ukraine, changes should be introduced in respect of the following:

1. Procedure for notifying a person that he/she is under suspicion – if it is established that the person's place of registration and the actual whereabouts are in the occupied/uncontrolled territories, investigators and prosecutors are unable to effect proper notification about suspicion and summon the person to appear.

Proposals:

- to supplement and/or expand the means and content of the notice about suspicion, summons to appear [1] addressed to a suspect who evades investigation. Alternatively - to create a single information portal with the aim of giving the public generally accessible information about the content, procedure and consequences of pre-trial and court proceedings with regard to the armed conflict, and also with the aim of making it possible to obtain a more detailed non-public information about an individual in such proceedings after the person concerned completes an appropriate online verification (EDS, Bank ID, etc.);
  - as a possible option of notification, communication with Russia may be considered, for example, by sending the summons by registered mail to a Russian competent authority which is responsible for registration of the place of residence or whereabouts of a person (Ministry of Internal Affairs), as the State exercising effective control over a part of Ukraine's territory, with a relevant justification;
  - to compel prisoners who are being swapped to sign the document confirming that they were informed about the suspicion/ criminal proceedings opened against them, and to provide the address and specify the means of communication before they are released;
  - to expand the list of the ways for sending the summons to appear as provided for in article 297-5, part 3 of article 323 of Ukraine's CCP by supplementing it with the non-exhaustive list of effective ways of notification. Summoning of the suspect/the accused by sending the notification to the last known place of residence/whereabouts, along with publication in the media, for instance in the ECtHR may be deemed insufficient.

[1] Pursuant to the recommendations of the Resolution of the Committee of Ministers of the Council of Europe, Resolution (75)11 of January 19, 1973, to provide for communication of information about the use of s in absentia proceedings if a person evades appearing before an investigator/court; see as an example the contents of the summons in the case of Boeing flight MH-17 shootdown: https://www.prosecutionservice.nl/topics/mh17-plane-crash/documents/publications/mh17/map/map/charges-against-suspects-downing-mh17

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Unambiguous regulation of the conditions under which special investigation may be applied – if there is no confirmation that a person is put on the international and/or interstate wanted list, the provisions of Ukraine's CCP do not provide for implementation of in absentia proceedings and trial in Ukraine.

Proposals:

- to leave only the requirement for placing a suspect on the wanted list, if his/her whereabouts are unknown or, where this is known, if there are no effective mechanisms for notification of the person concerned, and to change the time-limits to be applied if the person is on the wanted list;

- to supplement article 281 of Ukraine's CCP with regard to search of the suspect: "If during the pre-trial investigation the suspect's whereabouts are unknown or if this person is outside of Ukraine, or in the temporarily uncontrolled territories, and does not appear, without good reason, in response to the summons of an investigator or a public prosecutor provided that the person has been properly notified of such summons, in such a case the investigator, the public prosecutor shall place this person on the wanted list".

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Regulation of the procedural aspects of in absentia proceedings – Ukraine's CCP does not ensure sufficient regulation of the procedure of special court proceedings because it does not prescribe the procedure for summoning to court of the accused against whom special pre-trial investigation was conducted, and does not envisage the possibility of holding a preliminary hearing without the accused being present. CCP does not provide for the right to retrial in the event the accused eventually learns about the sentence delivered against him/her, which also constitutes a breach of the right to a fair trial. Furthermore, legislation does not guarantee protection against legal action instituted twice for the same cause of action, and there is no mechanism that can ensure this right.

Proposals:

- amendments are needed to articles 42, 135 and 136 of CCP of Ukraine. In particular, art. 42 of Ukraine's CCP should prescribe that a suspect may also be a person whose known place of residence is in the temporarily occupied/uncontrolled territory of Ukraine. Furthermore, article 135 of Ukraine's CCP should be supplemented with the following: "in case of criminal proceedings on charges with offences specified by part 2 of article 297-1 of Ukraine's CCP, the summons to appear addressed to a person residing abroad shall be served in the manner provided for by the first part of article 297-5 of Ukraine's CCP, and the person concerned may also be informed by any other possible ways." Article 136 of Ukraine's CCP should prescribe that a person who resides in the temporarily occupied territory of Ukraine shall be deemed properly informed of the content of the summons to appear once it is served according to the procedure set forth by the first part of article 297-5 of Ukraine's CCP, as well as by any other possible ways;
- part 3 of article 323 of Ukraine's CCP should be supplemented with the words "preliminary hearing" before the words "the trial";
- to provide for additional guarantees of the right to annulment of the sentence and retrial of the case according to the common procedure, or to provide for judicial review [1] of the guilty verdict delivered using in absentia proceedings for those convicted persons who can prove that they have not been properly served with the summons to appear and they had no knowledge of the criminal proceedings instituted and/or a verdict delivered against them, or where they knew but had valid reasons for failing to attend trial or to appeal against the court judgment within the time-limits prescribed by law in person or with the help of defence lawyer. This can be implemented by exercising the right to lodge an appeal or a cassation appeal within a certain period of time running from the time of receiving or becoming aware of the sentence, or from the actual detention of the convicted person and serving him/her copy of the sentence regardless of whether such an appeal has been lodged earlier by a defence lawyer engaged by the State, or whether there has been a special procedure similar to review of the sentence based on newly discovered or exceptional circumstances (consideration of the request for review of the sentence following which the court disallows the request or allows it and overturns the guilty verdict, and schedules a new criminal trial in full or with regard to a particular part thereof; new criminal trial in the scope determined at the prior stage);

- to provide for additional guarantees securing that no legal action may be instituted twice for the same cause of action against a person who has already been sentenced via in absentia proceedings if the sentence has become final and binding.

[1] If without resorting to retrial under the common procedure (for the reason of the circumstances of the case) the suspect/the accused is able to exercise the guarantees of procedural justice formulated in cl. 1, article 6 of the Convention, in connection with the special guarantees under sub-causes "C" - "E" of cl. 3, article 6 of the Convention.

The conceptual approach to the changes meant to regulate the in absentia procedure should rest upon the answer to the question: what is the purpose of using the in absentia procedure (especially in the event of the occupied/non-government territories)? If the answer merely implies the need for delivering as many as possible guilty verdicts purely for statistical purposes, such processes demonstrate obvious risks of an excessively formal approach to justice, especially concerning the most serious crimes. Secondly, it is highly probable that the persons who were sentenced in absentia with a violation of the right of the accused to a fair trial will be able to apply to international courts/tribunals and obtain positive decisions against Ukraine thereby further undermining credibility of the domestic justice system.