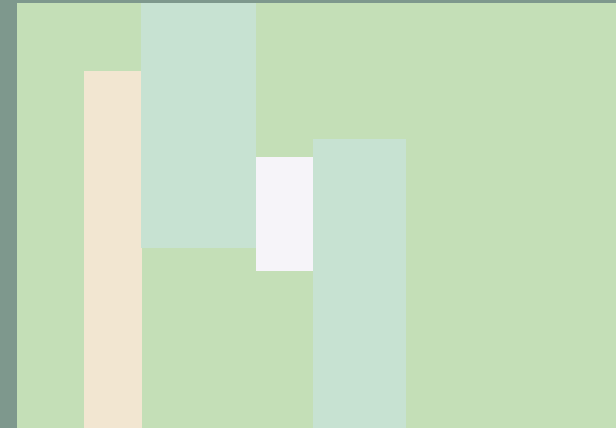


Trials in Absentia:

place in national justice in situation
of an armed conflict



Shortcomings in national legislation:

- the Code of Criminal Procedure (CCP) of Ukraine defines placing of a suspect on the international and/or interstate wanted list as a mandatory condition for in absentia proceedings. Interpol, rejects such requests from Ukrainian authorities as politically motivated;
- current criminal procedure legislation does not suggest solutions to the problems occurring at various stages of in absentia proceedings: placing of a suspect on the international and / or interstate wanted list, identifying a person during the preliminary court hearing, the possibility for the accused to appeal against a delivered judgment;
- in the event a person is evading justice and in absentia proceedings are needed, CCP of Ukraine does not prescribe how the person concerned should be informed about the procedural decisions passed or served the summons in the manner ensuring his/her proper notification;
- during trial of cases, courts are of the view that persons in the proceedings do not gain the status of a suspect in accordance with CCP of Ukraine. As a result, they disallow opening of special proceedings in the absence of the accused (in absentia).

What is the purpose of using procedure “in absentia”?

Main motive – statistics:

the need to deliver as many guilty verdicts as possible with regard to conflict-related crimes

Main motive – effective justice:

maintaining of a balance between interests of justice and right to a fair trial of the accused

Formal approach which will lead to a waste of resources (human time, efforts, and money) and, at the same time, to ineffective domestic justice processes

Substantive approach: efficient use of resources (human time and efforts, money), effective investigations and quality court trials

Violation of the right to a fair trial of the accused. As a result, increased appeals to international courts against Ukraine

Adherence to the rule of law standards, increased public confidence and trust in law enforcement authorities and courts, more efficient criminal justice system

PRINCIPLES UNDER INTERNATIONAL LAW

Interests of justice: the main task of each criminal trial is to do justice. Given that in Ukraine's in absentia trials are seen as an opportunity to bring to justice those responsible for grave crimes committed during armed conflict, legislation and developing jurisprudence must strive for a balance between a demand for justice and its quality.

Due notice: case law of the European Court of Human Rights (*Sanader v Croatia*, *Sejdovic v Italy*, *Stoyanov v Bulgaria*), the UN Human Rights Committee (*Mbenge v. Zaire*), the International Criminal Court (*case v. Saif Al-Islam Gaddafi*) determines that the State has the obligation to take all necessary steps to ensure that the person concerned has all of the information about the proceedings being conducted against him/her.

PROPOSED AMENDMENTS TO NATIONAL LEGISLATION

- 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 amend 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 placing a suspect on the wanted list with following: "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 turn up, without good reason, in response to the summons of an investigator or a public prosecutor provided that the person has been duly and properly notified of such summons, in such a case the investigator, the public prosecutor shall put this person on the wanted list."
- To supplement and/or expand the means and content of the notice of suspicion, summons to appear addressed to a suspect who absconds. 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 notice, notifying Russian authorities, 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 of the Russian Federation), as the State exercising effective control over a part of Ukraine's territory, with a relevant justification.
- To oblige individuals who participate in "prisoner swaps" to sign the document con-

firming that they have been duly informed about the suspicion/ criminal proceedings opened against them, and to provide the contact address and specify the method 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 open-ended list of effective ways of notification.

Fair trial: the right to a fair trial remains one of the fundamental human rights. As shown by the case law of the European Court of Human Rights, trials in absentia which do not allow implementing this right fully can potentially be perceived as a violation of article 6 of the ECHR. As additional guarantees of the fairness of trial, it is also worth noting the principle of final court judgment (*res judicata*) and provide for additional opportunities for review of the judgment delivered via in absentia proceedings.

- Amendments are needed to articles 42, 135 and 136 of CCP of Ukraine. In particular, art. 42 of Ukraine's CCP should include that a suspect may also be a person whose known place of residence is in the temporarily occupied or non-government controlled territory 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 include that a person who resides in the temporarily occupied or non-government controlled territory of Ukraine shall be deemed as duly notified of the content of the summons to appear the moment 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 means.
- 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 review of the guilty verdict delivered as a result of proceedings for those convicted persons

who can prove that they were not duly served with the summons to appear and they had no knowledge that criminal proceedings were instituted and/or a verdict was delivered against them, or where they knew but had valid for not appearing for the trial or to appeal against the court judgment within the time-limits established by domestic law in person or through the 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 to him/her of the copy of the sentence regardless of whether such an appeal was lodged earlier by a state-appointed defence lawyer, or whether there was 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; scope of the new criminal trial should be determined in advance);

No legal action instituted twice for the same cause (non bis in idem): when considering the question of responsibility for grave crimes at various levels (national and international), the International Criminal Court in its case law notes that the completeness and the quality of a trial at the national level, the appropriate qualification of acts and non-application of amnesty or pardons to the persons responsible for committing the most serious international crimes preclude the possibility that an international court may retry the same crimes against the same accused.

To ensure 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.