



Trials *in absentia*

Introduction

Trials *in absentia* are a hot topic in Ukrainian legal circles today. Whilst they have always been allowed under the Criminal Procedure Code of Ukraine, in May 2016, with the prospect of a trial against former President Yanakovic looming in the background, new transitional provisions were brought in that modified the law on *in absentia* pre-trial investigation and, to a lesser extent, *in absentia* trial proceedings. As a result, the topic of trials *in absentia* has been thrown into the spotlight and the new provisions have come under fire.

It is not possible to address the many and varied views on this subject that are currently circulating amongst Ukrainian legal commentators. Concerns that the provisions are incompatible with Ukrainian domestic law, for instance, are outside the scope of this article. Further, perhaps inevitably, many of the questions being raised about the wisdom of these provisions drift into the political realm and are best avoided by foreign lawyers. With that in mind, this piece looks at the international legal issues that appear to be at the heart of many of the critiques, namely whether trials *in absentia* violate international human rights law and whether holding them in Ukraine will impact on the prospects of the same cases being tried at the International Criminal Court (ICC).

The problem with *in absentia* proceedings

At the outset it must be remembered that the primary – and overriding – duty of a criminal court is to conduct a fair trial. The defendant is, and must always be, the central figure. The trial is the *accused's* opportunity to challenge evidence against him *and* to present his account. It is his opportunity to tell his version of the story. To

conduct a trial without the accused is like trying to stage Hamlet without Hamlet. The story of Hamlet cannot be fully told without the Prince himself on stage. It would not be the same play. Without the accused (even with the best supporting cast of judges, prosecutors and witnesses) the trial is not the same trial.

For this reason, international law is cautious about *in absentia* proceedings and they have generally been absent from the international arena since the post - World War II, Nuremberg International Military Tribunal. Trials *in absentia* were prohibited in the modern international tribunals such as the International Criminal Tribunal for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and also the ICC. Uniquely, they were allowed at the Special Tribunal for Lebanon that opened in 2009 and have been a source of considerable controversy.

The approaches of national jurisdictions to *in absentia* proceedings vary. The majority of common law states outlaw them almost entirely. In South Africa, for instance, the only exception is the removal of an accused during a trial due to misconduct. In such a case a trial may proceed only if the removed accused is still legally represented by a defence lawyer. No further exceptions or derogations are allowed even in times of emergency.¹ The approach of civil law countries is more flexible but cautious nonetheless. For example, Austria and Germany allow for *in absentia* proceedings in their criminal codes but the range of sentencing options in such cases is restricted. In Austria, the maximum penalty that may be imposed following *in absentia* proceedings is three years imprisonment²; in Germany no custodial sentence can be imposed at all following a trial in absence.³

¹ Constitution of the Republic of South Africa, Article 37.

² Section 427 of the Austrian Code of Criminal Procedure

³ Article 232 of the German Criminal Procedure Code states that the following penalties can be imposed *in absentia*: “a fine up to 180 daily units, a warning with sentence reserved, a driving ban, forfeiture, confiscation, destroying or making an item unusable, or a combination. Withdrawal of permission to drive shall be admissible if the defendant has been made aware of this possibility in the summons. A higher penalty or a measure of reform and prevention may not be imposed in these proceedings.”

The importance of the presence of the accused as a fundamental safeguard ensuring the fairness of the trial is reflected in various international treaties that Ukraine has signed. For instance, Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), provides that a person facing a criminal charge has the right to be informed of the charges and tried *in his own presence*. These rights are a *minimum guarantee* of fairness and apply at all stages of the proceedings.⁴ The ICCPR also provides, as a minimum guarantee, the right to a defence, either in person or through a defence lawyer.

The European Convention on Human Rights (ECHR), which Ukraine is a party to, contains similar provisions. Among other minimum fair trial rights, Article 6(3) ECHR provides for the right of a person to be notified, promptly, in a language he understands and in detail, of the nature and cause of the accusation against him and to defend himself in person or through legal assistance. In the case of *Colozza v Italy*, the European Court of Human Rights (ECtHR) stated that the object and purpose of Article 6 as a whole demonstrated “that a person ‘charged with a criminal offence’ is entitled to take part in the hearing”.⁵

Nonetheless, despite the apparently mandatory language of the ICCPR and ECHR, no international or regional human rights treaty explicitly prohibits holding proceedings in the absence of the accused.⁶ Moreover, there is general consensus internationally that the right of an accused to be present at his or her trial is not absolute and may be subject to certain, limited, exceptions which are discussed in more detail below.

⁴ Article 14(3) of the ICCPR.

⁵ *Colozza v. Italy*, application No. 9024/80, ECtHR, reported at (1985) 7 EHHR 516, para 27.

⁶ Communication No. 16/1977, (Reported at: 78 ILR 18, 19, UNHR Comm. 1983), para 14.1; Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Routledge, Taylor & Francis Group, 2010) footnote 239 at p. 438
<https://books.google.com.ua/books?id=P2cGDAAAQBAJ&pg=PA671&lpg=PA671&dq=rome+statute+travaux+preparatoires+trial+in+absentia&source=bl&ots=yoUlt2cswT&sig=RYyX1ilGVVNZWNyx9Gl8MVMeCr4&hl=en&sa=X&ved=0ahUKEwjsjtWfp7TPAhUEfywKHeBrDbIQ6AEIQDAH#v=onepage&q=absentia&f=false>.

Why have *in absentia* proceedings at all?

The justification for *in absentia* proceedings at State level can largely be explained by policy. In cases of a political nature there may well be (undue) pressure to 'get results'. Within the international sphere, donor countries will have an understandable expectation of seeing trials (and, truth be told, convictions) within a reasonable timeframe. The weight of these pressures may confront the prosecuting authority, and indeed the court itself, with a great temptation to proceed in the absence of the accused.

In all jurisdictions, whether a country is at war or not or whether politics enter the fray, there are undoubtedly some attractive arguments for allowing trials to go ahead "in absence". If the suspect or accused absconds during trial or declines to attend at all, there is a risk that justice will never be done. Witnesses and victims have a legitimate expectation of having their day in court; that expectation cannot be undermined by an accused who simply decides not to attend. Lengthy delays can cause real damage to the administration of justice. Not only does the rescheduling of hearings waste public time, resources and money, but victims and indeed any co-accused who have been waiting for their trial (often whilst in custody), will be adversely affected. Delay can also have a negative impact on the trial itself; the quality of evidence inevitably depreciates over time: witnesses die, memory fades, and physical exhibits are lost. Justice delayed can be justice denied.

It is perhaps not surprising then that some exceptions to the general rule that an accused is entitled to attend his own trial have been allowed under international law.

When are *in absentia* proceedings lawful?

There are two general scenarios where an accused will be absent from his trial: i) where the accused is removed from court for disrupting proceedings and the prosecution or court decide to continue in his absence; and ii) where the accused does not show up at trial (or ceases to attend midway through) and the prosecution or court decide to continue in his absence.

In the first scenario, the disruptive accused is removed because he has *abused* his right to be present. In a case against the United Kingdom, the European Commission on Human Rights held that the right contained in Article 14(3)(d) ICCPR (to be present), probably does not include the right to filibuster ones' own trial⁷. The rights of others, such as the victims, to see the trial through to a conclusion must also be given due consideration. In such circumstances, to continue a trial in the absence of the accused is lawful.

The second scenario arises where the accused does not appear at trial. It is this scenario that is the most relevant to Ukraine's current legal landscape. In this case, a decision to continue in absence will only be lawful if the prosecution can demonstrate that the accused *waived* his right to be present.

The question of what constitutes a legitimate waiver and what evidence the State must produce to demonstrate that waiver is the subject of most of the jurisprudence surrounding *in absentia* proceedings. The ECtHR, in a series of cases looked at in more detail below, has essentially held that it must be shown the accused unequivocally decided to avoid trial. At a minimum, this requires that the Prosecution demonstrate the accused actually *knew* about the trial. Knowledge may be inferred, for instance, where the accused received a summons, or otherwise indicated his knowledge of the trial, for example, where he instructed lawyers to attend on his behalf. But a mere assumption that an accused was aware of his trial, say for example, because the trial was widely publicized in the media, will not be sufficient.

Where there is any doubt regarding the accused's knowledge of proceedings, the State must, if it goes ahead with a trial in absence, offer the right of a retrial once/if the accused is obtained. Anything less will violate the ECtHR's law on the right to a fair

⁷ X v. United Kingdom, European Commission on Human Rights, Application No. 8386/78. (Reported at 21 DR 126).

trial.

Notification requirements and fair trial rights

As discussed above, international human rights recognises the fundamental right of a person to be present in the proceedings against him. In practice this requires an accused be properly *notified* about the proceedings in the first place. The right to attend a trial that an accused has no idea is happening is, in reality, no right at all.

The notification requirement (enshrined in both the ICCPR and ECHR cited above) is at the heart of the legality of *in absentia* proceedings. In 1983 the UN Human Rights Committee, in the case of *Mbenge v. Zaire*, stated that *in absentia* proceedings were not *per se* unlawful precisely because of the presumption that States take necessary steps to inform the accused of the proceedings against him: “Judgement *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 and to request his attendance”.⁸ In that case the Committee ruled that the State’s failure to take proper steps to notify the accused, and the fact that he had learnt of an *in absentia* judgement against him via mass media, was a breach of ICCPR Article 14(3).

The UN Human Rights Council (the successor of the Committee) went even further in the subsequent case of *Maleki v. Italy* where it held that a State bore an actual burden of proof in demonstrating that the accused had been “summoned in a timely manner” and “informed of the proceedings against him”.⁹ The Committee reasoned that it is the obligation of a respective domestic court to verify that the accused had *actual* knowledge about a case before commencing a *trial in absentia*.¹⁰ Merely taking steps to

⁸ Communication No. 16/1977, (Reported at: 78 ILR 18, 19, UNHR Comm. 1983), para 14.1.

⁹ *Maleki v. Italy*: Communication No. 699/1996 27/09/99, para 9.4.

¹⁰ *Maleki v. Italy*: Communication No. 699/1996 27/09/99, para 9.4

inform an accused and assuming, in light of those steps, that the accused has acquired actual knowledge of the proceedings against him is insufficient.¹¹

The ECtHR has similarly held that “to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice”. Where, for example, an accused has not been informed of charges against him because he is untraceable, the State is not entitled to assume that he is a fugitive from justice and has therefore waived his right to be present at his trial¹².

In the case of *Stoyanov v Bulgaria*, the government of Bulgaria argued that the authorities had tried to establish Stoyanov’s whereabouts to no avail and that he was obviously hiding from the authorities, as he had married a Georgian national and changed his surname. Further, trials regarding “financial pyramids” (which Stoyanov was charged with) attracted broad media attention and were notorious in Bulgaria at the time. None of these arguments were successful. The Court reiterated its decision in *Sejdovic v Italy* (discussed below) that “the mere absence of the applicant [accused] from his usual place of residence and the fact that he was untraceable does not necessarily mean that he had knowledge of the trial against him”. It found that the State had not discharged its burden of demonstrating Stoyanov had *actual knowledge* of the trial and had unequivocally waived his right to attend.

Specific knowledge about the charges faced by an accused in any proceedings is a necessary pre-requisite for a decision by the accused to either take part in the proceedings or withdraw from them. In *Colozza v. Italy*, *Sejdovic v. Italy* and *Poitrimol v. France*,¹³ the ECtHR held that “even supposing that the applicant was indirectly aware

¹¹ *Maleki v. Italy*: Communication No. 699/1996 27/09/99, para 9.4

¹² *Sejdovic v Italy* Application No. 56581/00, ECtHR (First Section), Judgement (Merits and Just Satisfaction) (2004); *Stoyanov v Bulgaria*, Application no. 25714/05 (2014)

¹³ *Poitrimol v. France*, Application No. 14032/88, ECtHR, Judgement (1993), para 31.

that criminal proceedings had been opened against him, it cannot be inferred that he unequivocally waived his right to appear at his trial.”¹⁴

The ECtHR has acknowledged that there may be cases where, even in the absence of an official notification being received by the accused, it may nonetheless still be possible to establish that they have unequivocally waived their right to be present. Examples given by the court include cases “where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest ... or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces”¹⁵.

A guaranteed right to a retrial

Where there is any ambiguity surrounding an accused’s knowledge of proceedings and a trial *in absentia* results in a conviction, the state *must guarantee* a retrial in the event that the defendant is apprehended. Otherwise the trial *in absentia* will be unlawful¹⁶

This is particularly important in the context of extradition. The right to refuse extradition in situations where a state does not guarantee a retrial for defendants convicted *in absentia* is provided for by Article 3 of the Second Additional Protocol to the European Convention on Extradition of the Council of Europe. What this means in practical terms is that if Ukraine’s *in absentia* provisions do not guarantee the right to a retrial and a perpetrator, who has been convicted in absence in Ukraine, is subsequently apprehended in another State that is party to the Convention, that State will not extradite the perpetrator to Ukraine.

¹⁴ *Sejdovic v. Italy*, Application No. 56581/00, ECtHR (First Section), Judgement (Merits and Just Satisfaction) (2004), para 35.

¹⁵ *Sejdovic v. Italy*, Application No. 56581/00, ECtHR (GC), Judgement (2006), para 99.

¹⁶ *B. v. France*, Application No. 10291/82, reported at (1994) 16 EHRR 1.

For example, in the case of *Sejdovic*¹⁷, the defendant was convicted *in absence* of the murder of a man in a traveler's encampment in Rome. At the start of proceedings, when initial witness statements pointed to Sejdovic being one of the culprits, the investigating judge in Italy made an order for him to be held in custody pending trial. The order could not be executed as Sejdovic had become untraceable. The domestic courts inferred that Sejdovic, having apparently disappeared, was a fugitive from justice and proceeded with a trial in absence. Since the Italian authorities could not contact the accused to invite him to instruct a lawyer of his choice, one was appointed for him by the court. Defence counsel attended trial and played an active part in the proceedings. Sejdovic was convicted in absence and sentenced to twenty-one years and eight months' imprisonment. Some two years after the judgement became final, he was arrested in Hamburg, Germany under a European Arrest Warrant. Germany refused to extradite him to Italy on the grounds that he had been tried in absence and had no guaranteed right to a retrial. The government of Italy argued before the ECtHR that i) Sejdovic was a fugitive from justice and had waived his right to attend trial; ii) his rights had been protected by defence counsel who played an active part in the trial; and iii) he had a right under Italian law to make representations regarding his failure to attend trial which *might* result in the granting of a retrial by the domestic courts.

The ECtHR was not persuaded by these arguments and found a violation of Article 6 ECHR. It considered that Sejdovic, who had never been officially informed of the proceedings against him, could not be said to have unequivocally waived his right to appear at his trial. The presence of a court appointed lawyer, in these circumstances, was no replacement for his right to attend the trial himself nor was it sufficient to satisfy his right to be defended by a lawyer of his choice. The Italian domestic legislation did not guarantee, with sufficient certainty, a retrial. In all of the circumstances there had been a violation of Article 6 ECHR and Germany was entitled to refuse the extradition of Sejdovic to Italy.

¹⁷ *Sejdovic v. Italy*, Application No. 56581/00, ECtHR (Grand Chamber), Judgement (2006)

The ECtHR distinguished this case from *Medenica v Switzerland*¹⁸ where the defendant had been informed of his trial, had instructed his own counsel who attended the trial and was largely himself responsible for bringing about the situation that prevented him from attending his trial. In that case the defendant had obtained a restraining order in the USA which prevented him leaving the country and attending his trial in Switzerland. He had obtained the order himself, by misleading the American court regarding his irreplaceability as a doctor in the US and providing misleading statements about the Swiss criminal procedure system. In those circumstances the ECtHR held that Switzerland was entitled to conclude that the defendant had actual knowledge of the proceedings against him and had unequivocally waived his right to be there. There was therefore no breach of Article 6 and no obligation on the State to provide a retrial.

The right to a defence through legal counsel

The ECtHR has firmly established that even in cases where a defendant genuinely and unequivocally waives his right to attend trial, he will still retain the right to be represented by counsel. The Court has repeatedly stressed that “although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, was one of the fundamental features of a fair trial. A person charged with a criminal offence did not lose the benefit of this right merely on account of not being present at the trial.”¹⁹ This applies to both first instance trials and appellant proceedings. If defence counsel attends trial on an absent defendant’s behalf the court cannot refuse to allow counsel to act. Clearly national courts must be able to impose sanctions on a defendant who deliberately absconds from his trial but these sanctions must be proportionate; they cannot affect the fairness of the trial. In most jurisdictions the Courts will impose a fine or a separate term of imprisonment for deliberately absconding from proceedings. A refusal to allow defence counsel to defend an absent accused will be a breach of Article 6 ECHR.

¹⁸ *Medenica v Switzerland* Application no. 20491/92 (2001)

¹⁹ *Neziraj v Germany*, Application no. 30804/07, (2012), para 50; see also *Van Geyseghem v. Belgium* [GC], no. 26103/95, ECHR 1999-I;

The Ukrainian Code

The *in absentia* provisions in the Ukrainian Criminal Procedure Code (“The Code”) contain a number of Articles that appear to be aimed at complying with obligations under international law to preserve fair trial rights. For example, paragraph 2 of Article 7 of the Code obliges the prosecution to “use all available means to ensure respect for the rights of suspects and accused of *in absentia* proceedings”. Paragraph 1 of Article 297-1 of the Code provides that “*in absentia* pre-trial investigation may be held in cases of those who went into hiding from investigation and court in order to avoid criminal responsibility”. This *could* be interpreted as an obligation by the State to demonstrate that a suspect has actual knowledge about the proceedings against him and has deliberately chosen to flee. Paragraph 5 of Article 374 of the Code obliges a court to “comment on whether the prosecution used all available options to ensure the rights of a suspect or accused in the “absent” proceedings”.

However, the Ukrainian legislation has a number serious problems. According to Article 42 of the Code, a suspect is defined as a “person in whose regard a notice of suspicion has been compiled but it has not been delivered because of a failure to establish the whereabouts of the person”. Paragraph 5 of Article 297-5 of the Code prescribes that in an *in absentia* case summons must be sent to “the last known address” of a suspect and “be published in the country-wide mass media and on official websites of authorities conducting pre-trial investigation.” It continues with “(a)s soon as a summons is published in a country-wide mass media, a suspect is considered to be properly introduced to the contents of such summons”. The publication of a summons in mass media is no guarantee at all of a suspect reading it and falls far short of meeting the State’s burden to prove an accused had actual knowledge of the proceedings. Further, it appears that the transitional provision 20-1 of the Code permits *in absentia* proceedings simply on the basis that the accused is abroad or in occupied/ ATO area.

None of these thresholds require proof that the suspect or accused actually knew of the prospective proceedings and none appear to guarantee the right to a re-trial if *in absentia* proceedings are initiated on these bases. This means that the provisions as they stand may well violate international law.

Unrealistic time limits within the *in absentia* provisions may also be problematic. Complex cases require proper time for investigation in order to do fairness to both the prosecution and defence. Proper collection of evidence, including exculpatory evidence (i.e. evidence that may assist the defence) is key to a fair trial. This is particularly relevant in light of the recent judgements of the EU General Court lifting EU sanctions on Ukraine's ex-officials Azarov, Kliuiev and Stavytskyi. The Court, in lifting the sanctions, noted that the EU Council had not had a sufficient evidential basis that the persons under sanction were responsible (for, the appropriation of state funds). Similarly, in the case of Artur Emilianov, a Judge of the Highest Commercial Court of Ukraine, Lichtenstein unfroze the official's company account because it lacked proper evidence of wrongdoing from Ukraine. Ukraine has indicted that, in this case, it had had difficulties obtaining all the relevant evidence in such a short time.²⁰ These cases illustrate the consequences of insufficient time to properly investigate. If the time limits in the *in absentia* proceedings are too restrictive they will inevitably impact the ability of Ukraine to secure relevant evidence and conduct a fair trial.

That is not to argue that a trial *in absentia* must inevitably be unfair. As discussed above, there can be no presumption that they violate human rights, do not deliver judgments that accurately reflect the evidence, or otherwise do not meet international standards of due process. However, procedural safeguards are everything.

In the Ukrainian context, the challenge of turning Article 7(2) of the Criminal Procedure Code (to use all available means to ensure respect for the rights of suspects and accused of *in absentia* proceedings) and Paragraph 5 of Article 374 of the Code (obliging a court

²⁰ <http://www.dw.com/uk/ліхтенштейн-розморозив-мільйони-українського-судді/a-19403108>.

to comment on whether the prosecution used all available options to ensure the rights of an absent suspect or accused) into a practical process that safeguards rights is key to ensuring compliance with international standards.

Specialist expertise is required to ensure fairness and fair result. It is not going to work simply to proceed in the usual way. The process must be modified to ensure that the trial remains fair. At the very least, this requires the instruction of defence counsel and enhanced efforts from the Prosecutor and judiciary to defend the absent accused's rights and ensure proper balance between the parties. Hamlet's role must still be enacted and be at the centre of the play, even if he does not appear on the stage. This will demand distinct processes and practical and proactive measures designed to ensure the fullness of his role.

ICC admissibility and Ukraine

Whilst the Ukrainian judiciary should ensure it has relevant expertise and processes fit for purpose, the conduct of *in absentia* investigations and trials will not impact the work of the ICC. The ICC may consider a genocide, crimes against humanity, or war crimes case if Ukraine is not willing or *able* to investigate or prosecute the case itself.

Under Article 63 of the Rome Statute, the trial proceedings in the ICC may only take place if an accused is present. According to Art. 17.3 of the Rome Statute, if the state is "unable to obtain the accused", then the ICC will conclude that the state is "unable" to prosecute and insist on the case being tried at the ICC. The best evidence of an inability to obtain the accused is a trial *in absentia*, *i.e.* held in absence because the state does not have custody of the accused.

In the Libyan proceedings at the ICC, the failure of state authorities to obtain Mr. Gaddafi was fatal to their challenge to admissibility at the ICC. The Prosecutor in that case stressed that: "what is relevant is whether the State is unable *to obtain the*

accused and not whether or not a trial *in absentia* is possible.” The Pre-Trial Chamber ruled that Libya had not yet been able to secure the transfer of Mr. Gaddafi from his place of detention under the custody of the Zintan militia into state authority. The failure of state authorities to obtain the accused in this case proved the inability of Libya to conduct a proper investigation and prosecution of Mr. Gaddafi. This made his case admissible before the ICC.

The presence of an accused during a national trial is one of the essential elements demanded by the ICC when considering whether it seeks to retain jurisdiction. Although the *in absentia* proceedings in these cases may be evidence of a willingness to prosecute, they are also clear evidence of an inability to actually bring those responsible to justice. In other words, any *in absentia* proceedings will be the most cogent evidence Ukraine’s inability to conduct relevant investigations or trials. Rather than *in absentia* proceedings in Ukraine making it less likely that the ICC will step in, they in fact make it more likely.

In conclusion, Ukraine’s *in absentia* provisions are a brave step into a complex judicial arena with all manner of legal and factual hurdles that will require more than determination and willingness to negotiate and overcome if adverse ECHR findings are to be avoided. That is not reason not to try, but it is reason to advance cautiously and precisely to ensure that any judgment is the product of genuine adjudication respecting the presumption of innocence. At least as concerns senior leaders suspected of international crimes, if this goes wrong, Ukraine can rest assured that these cases will still be on the ICC’s radar and may eventually lead to convictions and the *enforcement* of sentences.