



**Information note of the Council of Europe expert advisory group
to the Office of the Prosecutor General of Ukraine
on the ‘Trials *In Absentia* in War Crimes Proceedings:
Compliance with Article 6 of ECHR’**

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Investigating gross human rights violations in the context of the ongoing military aggression by the Russian Federation in Ukraine aims to lead to the establishment of facts and, where appropriate, the identification and punishment of those responsible. In this process, it is important to observe the fair-trial guarantees enshrined in Article 6 of the European Convention on Human Rights (ECHR), which apply to all criminal proceedings, irrespective of the type of an offence at issue. Furthermore, the public interest in the investigation and punishment of particular offences at stake may be taken into consideration when assessing the overall fairness of the proceedings. However, public interest considerations cannot justify measures which extinguish the very essence of defence rights.

In the current context in Ukraine, the inaccessibility of those suspected of war crimes and other offences committed by the adversary army's representatives unavoidably necessitates the use of trials *in absentia*, which are permissible by the ECHR under certain circumstances.¹ If proper procedural guarantees are not afforded, an *in absentia* trial will amount to the flagrant denial of justice contrary to the principles embodied in Article 6 of the ECHR undermining the domestic proceedings. As conducting a trial in the absence of an accused seriously affects fundamental procedural rights and is considered as an exception to the general principle, *in absentia* trials are subject to particularly strict scrutiny from the European Court of Human Rights (the Court). Only a handful of cases on this subject were found to comply with the ECHR standards.

A. The right to presence at the trial

Article 6 § 1 of the ECHR: in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The public character of proceedings is one of the main guarantees of rights under Article 6 of the ECHR. The right of a criminal defendant to take part in the hearing is considered to be one of the essential requirements of a fair trial, without which the rights guaranteed under Article 6 § 3 (c), (d) and (e) of the ECHR, such as the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court” cannot be exercised. Participation in the proceedings via video link is compatible with the fair trial guarantees.

Nonetheless, authorities can resort to trials *in absentia* where (1) an accused is aware of the proceedings against her/him but either waives her/his right to take part in a trial or chooses to evade justice or and (2) where she/he is not aware of the proceedings. However, in the latter case, compatibility with the ECHR can only be secured by providing an opportunity to have the proceedings re-opened once s/he becomes aware of them.

¹ Minimum standards related to trials in absentia are also outlined in the Resolution (75) 11 of the Committee of Ministers of the Council of Europe “On the criteria governing proceedings held in the absence of the accused”, available at: <https://rm.coe.int/09000016804f7581>

(a) Trials in absentia due to a waiver of the right to appear and to defend oneself

Any waiver of the right to take part in the trial should be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. A waiver must not run counter to any important public interest, it should be voluntary, knowing and intelligent and the consequences of such a waiver must be clearly understood.

***Chernega and Others v. Ukraine*, no. 74768/10, 18 June 2019**

***Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II**

***Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003**

A person charged with a criminal offence must apprise himself/herself of the date of the hearing and the steps to be taken in order to take part in it, so that a waiver can be effective for ECHR purposes. A notification of charge must be carried out in accordance with procedural and substantive requirements of the national law capable of guaranteeing the effective exercise of the rights of the accused. An accused should be notified about the charges and date of the trial. No specific form of notification is required.

***Hermi v. Italy* [GC], no.181114/02, § 82, ECHR 2006-XII**

***Einhorn v. France* (dec.), no. 71555/01, ECHR 2001-XI**

***Krombach v. France*, no. 29731/96, ECHR 2001-II**

All efforts that could reasonably be expected should be made to secure an accused's participation in the proceedings. The domestic authorities must act diligently in ensuring that an accused is duly and fully informed about the charges and the hearing at which s/he is to be tried.

***Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II**

Thus, the Court considered that, in order to secure the accused's appearance at her trial, the authorities had taken all reasonable necessary steps when they had first sought to summon the accused at the address which she had given to them and which she had left without warning; they had then sought to establish the applicant's other known addresses; tried to locate her in the penitentiary establishments and made sure that she had not left the territory of the country.

***Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017**

A waiver was considered valid under the circumstances, when the domestic authorities had taken all the necessary steps to find and inform the accused (who, being aware of proceedings against him, had emigrated without leaving details about his new address) about the scheduled hearings at his last known address and via his lawyer and his mother.

***Boyarcheko v. Ukraine* (dec.), no. 31338/04, 25 November 2008**

To learn about the proceedings through a journalist or from the local press does not suffice.

***Somogyi v. Italy*, no. 67972/01**

The same concerns exist regarding vague and informal knowledge about the proceedings.

***T. v. Italy* (judgments of 9 April 1984, Series A no. 76)**

***Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012**

The mere absence from home is insufficient to consider that a person charged with a crime was aware of the proceedings and escaped.

***Zunic v. Italy*, no. 14405/05, 21 December 2006**

The fact that an accused was defended by a counsel appointed by her/his family member does not indicate that s/he had sufficient knowledge of pending legal proceedings, or a family member acted under her/his instructions.

***Shkalla v. Albania*, no. 26866/05, 10 May 2011**

However, authorities cannot be held responsible when an accused person fails to take necessary steps in order to ensure receipt of a notification of prosecution. This was the situation when the accused did not obtain a key to his letterbox in order to have access to a written notification about the deposit of a letter received at a post office from the Prosecutor's Office.

***Hennings v. Germany*, 16 December 1992, Series A, no. 251-A**

The fact that an accused is untraceable is not sufficient for her/him to be declared as "a fugitive" or to presume that s/he had waived her/his right to appear at the trial and defend herself/himself.

***Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II**

***Colozza v. Italy*, 12 February 1985, Series A no. 89**

The waiver of a right to appear at the trial and defend herself/himself is not valid when an accused is informed about the proceedings but is unable to attend because s/he is detained in another country. A similar consequence may occur when constraint might be on leaving a particular territory or on disregarding obligations that arise from military service.

***F.C.B. v. Italy*, judgment of 28 August 1991, Series A no. 208-B**

***Hokkeling v. the Netherlands*, no. 30749/12, 14 February 2017**

(b) Trials in absentia due to the accused's intention to evade justice

Certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal charges against her/him, and yet either does not intend to take part in the proceedings or intends to escape prosecution. This occurred when an accused had been duly informed of the existence of criminal proceedings against her, had acknowledged the offences and expressed her willingness to negotiate the sentencing conditions. In these circumstances, the authorities were correct in the assessment that the accused had intended to evade justice and thus, knowingly and validly waived her right to appear in person before the courts.

***Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017**

Likewise, an accused, having been informed about proceedings against him, had intended to evade justice in the case in which he had deliberately helped to create a situation that prevented him from appearing in the courts. More specifically, he had misled the American court by making equivocal and even knowingly inaccurate statements about Swiss procedure with the aim of securing a decision that would make it impossible for him to attend his trial.

***Medenica v. Switzerland*, no. 20491/92, ECHR 2001-VI**

Furthermore, an accused intends to evade justice where s/he states publicly or in writing that s/he does not intend to respond to summonses of which s/he has become aware through sources other than the authorities. Likewise, if s/he succeeds in evading an attempted arrest, or other materials unequivocally show that s/he is aware of the proceedings pending against her/him and of the charges s/he faces.

***Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001**

By contrast, there is no evasion of justice, when the authorities have not made sufficient efforts to establish the proper address of an accused and inform her/him about the proceedings. Thus, the authorities erred when considering that the accused had waived his right to appear and defend himself.

***Colozza v. Italy*, 12 February 1985, Series A no. 89**

It is for the authorities to prove that an accused intended to evade justice. A person charged with a criminal offence must not be left with the burden of proving that s/he was not seeking to evade justice or that her/his absence was due to a force majeure. The authorities are entitled to assess whether an accused had provided a good reason for her/his absence or whether there was anything in the case file to warrant finding that s/he had been absent for reasons beyond her/his control. These standards illustrate that the authorities should be diligent in carefully assessing in each case that the accused had intended to evade justice in order to be in line with the Court's case-law.

***Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II**
***Stamoulakatos v. Greece*, 20 May 1992, Series A no. 271**

B. Legal representation

The right of a person charged with a criminal offence to be effectively defended by a lawyer is a fundamental feature of Article 6 of the ECHR. The presence of an accused at the trial is immaterial to the realization of this right.

***Van Geyseghe v. Belgium* [GC], no. 26103/95, ECHR 1999-I**

The failure of a person convicted *in absentia* to comply with an arrest warrant does not justify her/him being deprived of the right to legal assistance.

***Karatas and Sari v. France*, no. 38396/97, 16 May 2002**

The right of defence by a lawyer of one's own choosing should be respected.

***Lobzhanidze and Peradze v. Georgia*, nos. 21447/11 and 35839/11, 27 February 2020**

Relevant and sufficient reasons are needed to justify the denial of access to a lawyer of one's own choice. If not, the Court will proceed with the evaluation of the overall fairness of the proceedings.

***Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015**

C. The right to a retrial

A conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge will lead to a violation of Article 6 of the ECHR if it has not been unequivocally established that a person charged with a criminal offence has waived her/his right to appear and to defend herself/ himself, or that s/he intended to escape trial.

***Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A**

***Stoichkov v. Bulgaria*, no. 9808/02, 24 March 2005**

A retrial is considered obligatory in the case of a conviction *in absentia* of war crimes when the authorities are unable to notify an accused of the proceedings or to secure her/his presence. Nonetheless, a trial in the absence of the convict itself is not contrary to the Convention as the gravity of an alleged crime and the public interest in effectively prosecuting war crimes in the situation of escalating war, and the fact that a person lives in a territory outside of the authorities' control justifies why the authorities would have been unable to notify an accused of the proceedings or to secure her/his presence.

***Sanader v. Croatia*, no. 66408/12, 12 February 2015**

The accused should not have to surrender in order to benefit from the right to a retrial.

***Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A**

***Krombach v. France*, no. 29731/96, ECHR 2001-II**

***Sanader v. Croatia*, no. 66408/12, 12 February 2015**

No obligation exists to grant a retrial in a case where an accused, who was evading justice, was defended by two lawyers of his own choosing.

***Medenica v. Switzerland*, no. 20491/92, ECHR 2001-VI**

Or when an accused, evading justice, was represented by a legal aid lawyer.

***Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017**

When a person convicted *in absentia* is unable to obtain a retrial, and this constitutes a breach of Article 6 of the ECHR, the Court includes retrial clauses in the judgments. Thus, the Court indicates to governments that a retrial or the reopening of proceedings would be an appropriate way of redressing violations found in respect of persons convicted *in absentia*.

***Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II**

***Zunic v. Italy*, no. 14405/05, 21 December 2006**

***Kollcaku v. Italy*, no. 25701/03, 8 February 2007**

All the issues raised by the case remain open during the re-opened proceedings, meaning that all the evidence should be examined in adversarial proceedings in the presence of an accused.

***Idalov v. Russia* ([GC], no. 5826/03, 22 May 2012**

An accused should be able to examine, or have examined, the witnesses testifying against her/him in the re-opened proceedings. In general, the authorities are expected to do everything reasonable to secure the presence of a witness. A problem may occur if a witness who was interrogated in the trial conducted *in absentia* dies before the re-opening of the proceedings. For the case-law concerning the admissibility of evidence from absent witnesses, see, for example:

***Palchik v. Ukraine*, no. 16980/06, 2 March 2017**

***Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011.**

***Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015**