Chapter 3. Challenges for Specific Fields of Law in the Context of Armed Conflicts and Emergencies

3.1. The Right of the Accused to Be Informed as a Condition for the Legality of Criminal Proceedings in Absentia in the Context of War Crimes and Crimes Against Humanity

3.1.1. Criminal Trials *in absentia:* Is This Still Relevant?

Trials *in absentia* are a hot topic in Ukrainian legal circles today (Vereshchak 2021, pp. 86, 88). Chapter 24–1 of the Code of Criminal Procedure (hereafter – the CCP) of Ukraine, entitled 'Specific Aspects of Special Pre-trial Investigation of Criminal Offences', deals with the specific features of this type of proceedings (the CCP of Ukraine has been supplemented with Chapter 24–1 in 2014 and amended in 2015, 2017, 2018) and applies in conjunction with the general provisions of the CCP (Art. 88 of the CCP). As indicated in these sources, 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 (Trials in absentia: a dilemma for Ukraine, pp. 1–14), and these changes sparked debate. However, it should be stressed that in the history of criminal justice, including international criminal justice, the concept of *in absentia* trials has always sparked active debate. International crimes committed against Ukraine and its population – which may be prosecuted both in the national courts of Ukraine and in other States, in the exercise of universal jurisdiction (KLUWEN 2017, pp. 7–38; Poels 2005, pp. 65–84; Colangelo 2005, pp. 537–604; Rabinovitch 2005, pp. 500–530), and in international judicial bodies – have re-activated legal discussions on the grounds and conditions of proceedings *in absentia*. Individuals accused of international crimes often refuse to appear in court or otherwise avoid criminal proceedings. In the meantime, instruments of international legal cooperation that could ensure the direct or remote participation of the accused person in court are also ineffective because, for example, the State of the accused's nationality not only refuses to extradite its national, but also fails to cooperate in other ways (e.g., Ruling of the Supreme Court of Lithuania in a criminal case no. 2K-7-39-1073/2022; Transcript of the MH17 judgment hearing 2022; Prosecution and trial (MH17 plane crash) 2022). In such a situation, it becomes problematic not only to gather evidence and make substantiated allegations of war crimes

or crimes against humanity, but also to properly inform the individual of the charges against them, as well as of the ongoing trial.

At present, this problem is also relevant in practice. According to the data of the UN Office of the High Commissioner for Human Rights (hereafter – the OHCHR), the total number of verdicts of trial courts of Ukraine in 'conflict-related cases' from 1 August 2022 to 31 January 2023 was 777, 71 of which were *in absentia* proceedings (Report on the Human Rights Situation in Ukraine 2023, p. 34). The OHCHR reports that they welcome the efforts of the Government of Ukraine to prosecute war crimes and uphold the rights of victims to truth and effective remedies, but have concerns about the overall fairness of certain proceedings, including trials *in absentia* (Report on the Human Rights Situation in Ukraine 2023, p. 33). Some researchers also state that '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' (In Absentia Procedure: the Concept of Amendments to National Legislation Ukraine). Another relevant issue is the right of a person convicted *in absentia* to a new trial. The CCP of Ukraine, as well as the criminal laws of many other States, provides for a rather limited possibility of a new trial after *in absentia* proceedings.

The relevance of analysis of this subject is also demonstrated by the fact that some countries – including Lithuania, Germany, France, Poland, Latvia, Estonia, Norway, Sweden, Slovakia, Switzerland, Spain, Canada, the USA, the UK, etc. – have launched pre-trial investigations into alleged war crimes in Ukraine in the exercise of universal jurisdiction (Universal Criminal Jurisdiction in Ukraine 2022; Germany investigating 'several hundred' possible Ukraine war crimes 2022). Without entering into deep doctrinal debates on universal jurisdiction and proceedings *in absentia* – as well as the difficulties of universal jurisdiction regarding *in absentia* proceedings in practice, including the suboptimal fulfilment of the objectives of criminal law, compromising the right of the accused not to be tried twice, and possibly destabilising international relations (KLUWEN 2017, pp. 28–34; Colangelo 2005, pp. 543–564; Poels 2005, p. 82) – this analysis considers that States asserting absolute universal jurisdiction when prosecuting international crimes do not violate international law (KLUWEN 2017, p. 26). Moreover, the application of universal jurisdiction in the prosecution of international crimes may reduce the impunity of those committing such crimes (KLUWEN 2017, p. 27; Colangelo 2005, pp. 564–578; Poels 2005, p. 78) if proceedings *in absentia* do not violate the right to a fair trial.

Thus, this research is aimed at one of the most problematic conditions of procedures *in absentia* – namely, the right to be informed, non-compliance with

which may lead to an infringement of the individual's right to a fair trial. The research raises the question of whether the fairly well-established interpretation of this right in supranational case-law strikes the correct balance between the right to due process of persons accused of international crimes (war crimes and crimes against humanity) and the expectations of victims, society, the State and the international community regarding substantive and procedural justice in such cases. The second problem of this scientific research concerns the legal consequences of a violation of the right of a person who is subject to proceedings *in absentia* to adequate information. The research then raises the question of whether such an infringement can be remedied by granting the individual an unlimited right to a new procedure. Finally, it is considered whether such a right of a person convicted *in absentia* who has not been properly informed of the proceedings can be subject to certain conditions.

This chapter aims to analyse the content of the right to be informed about the criminal procedure and possible peculiarities of ensuring this right in cases of war crimes and crimes against humanity.

The constitutional and international standards followed by national courts in criminal proceedings, including *in absentia* proceedings, form the basis for the application of national criminal procedural law. It is important to note that the right to be informed and the right to a new trial are subject to national regulatory discretion. Supranational courts only lay down certain criteria for securing this right on a case-by-case basis. Hence, this analysis is largely based on ICCPR, the UN Human Rights Committee (hereafter – the UNHRC), the ECHRand the case-law of the ECtHR, as the importance of the presence of the accused as a fundamental safeguard ensuring the fairness of the trial is broadly reflected in the aforementioned international treaties that Ukraine, and Lithuania, has signed. The study is also based on EU law and the case-law of the CJEU. This analysis, due to its limited scope, does not analyse the views of international tribunals on the *in absentia* process. However, the rules applied by international tribunals may be relevant: cases on international crimes dealt with in absentia by national courts may be related to cases which could potentially be dealt with at the ICC (Trials in absentia: a dilemma for Ukraine 2016). It also draws on scientific papers that analyse the *in absentia* process.

It should be noted that any efforts to modify the law, especially criminal law and criminal procedure law, should bring it in line with both international standards and the constitutional and national legal framework. The concern that the provisions are incompatible with Ukrainian domestic law (Report on the Human Rights Situation in Ukraine 2023; Trials in absentia: a dilemma for Ukraine 2016; In Absentia Procedure: the Concept of Amendments to National Legislation

Ukraine; Vereshchak 2021, pp. 85–90) is important, but specific legislative proposals are outside the scope of this research. Therefore, this research deals only with international *in absentia* procedural standards relating to the exercise of the right to be informed.

3.1.2. The Right of the Accused Person to Be Present at the Trial: The Premise of Fair Criminal Proceedings

A defendant's right to be present during their trial is fundamental to due process. In the context of the present problem, it should be noted that the participation of the accused person in the trial (and more generally throughout the criminal proceedings) is not only an essential guarantee of their own procedural rights, but also a guarantee of the fairness of the overall hearing of the case. The participation of the accused person in court is important both for the court hearing the case, whose duty it is to qualitatively examine and evaluate the evidence, and for the other participants in the proceedings, in particular the victims.

This individual right is in particular encapsulated in Article 14 of the ICCPR, which provides that, in the determination of any criminal charge against them, everyone shall be entitled to the following minimum guarantees, in full equality: to be tried in their presence, and to defend themselves in person or through legal assistance of their own choosing (Art. 14(3)(d) of the ICCPR).

Article 6(3)(c) of the ECHR provides that any person accused of committing a crime has the right to defend themselves or with the assistance of a defence counsel. Although the text of the ECHR does not mention the right of a person to appear before a court, the case-law of the ECtHR has established that the right of the accused person to participate in the criminal proceedings in which they have been charged constitutes an essential guarantee of the defendant's rights of defence and of a fair trial, which in principle determines the possibility of exercising other procedural rights conferred on them (Sejdovic v. Italy [GC], paras.81, 84; Jelcovas v. Lithuania 2011, para.106).

This right of the accused is also enshrined in the EU legislation (e.g., Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereafter – the Directive 2016/343); Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, which strengthens the procedural rights of persons and promotes the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial). This right is also generally recognised in national law.

The value of this right has also been confirmed in many individual cases (KLUWEN 2017, p. 30): from *Hopt v. Utah* before the United States Supreme Court in 1884 (Hopt v. Utah, 110 U.S. 574 (1884), 579; KLUWEN 2017, p. 30; Donaldson 2016, pp. 16–17) to *Colozza v. Italy* at the ECtHR in 1985 (Colozza v. Italy 1985, para.29).

On the other hand, there is a broad consensus (e.g., Trials in absentia: a dilemma for Ukraine, 2016) that 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 (Mbenge v. Zaire 1990, para.14.1; Maleki v. Italy 1999, para.9.3; Colozza v. Italy 1985, para.27).

As noted in the literature, conducting a trial in the absence of an accused person is, in principle, at odds with the general requirements of due process and the right to participate in one's own defence set out in Article 14 of the ICCPR. Article 14 of the ICCPR does not invariably render proceedings *in absentia* as inadmissible (Parry 2021). General Comment No. 13 of the UNHRC states that 'the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary' (Human Rights Committee 1984, General comment No. 13, Article 14 (Administration of justice)). The Human Rights Committee has acknowledged that exceptional circumstances may apply allowing for trial *in absentia* to proceed in the interest of the proper administration of justice (Mbenge v. Zaire 1990; Maleki v. Italy 1999). The Human Rights Committee has emphasised that 'according to Article 14 (3) of the Covenant, everyone is entitled to be tried in his/her presence and to defend himself/herself in person or through legal assistance. This provision and other requirements of due process established in Article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible of the reasons for the accused person's absence' (Mbenge v. Zaire 1990, para.14.1).

The case-law of the ECtHR recognises that the impossibility of holding a trial in the absence of the accused person may paralyse criminal proceedings so that such an examination is not, in itself, incompatible with the requirements of the Convention, and forms the criterion of the right of the individual to participate in the trial on a case-by-case basis. The case-law of the ECtHR shows that neither the letter nor the spirit of Article 6 ECHR prevents a person from waiving – of their own free will, expressly or tacitly – the entitlement to the guarantees of a fair trial. In relation to proceedings in absentia in the context of the prosecution of international crimes, the ECtHR has noted that in

such cases, despite the absence of limitation periods, the public interest and the interest of victims in bringing justice are very important, which may also lead to proceedings in the absence of the accused person (Sanader v. Croatia 2015, para.77). Thus, according to the case-law of the ECtHR, a case may be heard in absentia if the defendant has waived their right to be present at the hearing. Such a refusal is subject to the usual requirements of the ECtHR rulings: a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. Furthermore, it must not run counter to any important public interest (Sejdovic v. Italy [GC] 2006, para.86; Vilches Coronado and others v. Spain 2018, para.36). Any waiver of the guarantees under Article 6 of the Convention must be in accordance with the test of 'informed and reasonable refusal' laid down in the case-law of the ECtHR (Sejdovic v. Italy [GC] 2006, paras.86–88).

The right to a fair trial is referred to in recital 47 of Directive 2016/343 and is laid down in Article 47 and Article 48 of the EU Charter, which, as stated in the Explanations relating to the EU Charter, corresponds to Article 6 ECHR (CJEU, C-688/18, TX, UW 2020, paras.34–35). Thus, EU law also recognises that, despite the fact that right of suspects and accused persons to be present at the trial is based on the right to a fair trial, 'under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right' (Recital 33 of Directive 2016/343).

Thus, an analysis of research and case-law suggests that criminal proceedings in absentia are an exceptional procedural form. Trials *in absentia* inevitably entail a certain restriction of the rights of the defendant who is absent, of the other participants in the proceedings and of the procedural possibilities of the court hearing the case. Thus, criminal proceedings in the absence of the accused person may be heard only where the interests of justice so require, and when the procedural requirements to protect the rights of a defendant who is not present and the fairness of the proceedings have been fulfilled. Both UNHRC and ECtHR jurisprudence provide almost identical safeguards: (I) the accused must have notice of the proceedings; (II) the accused must be legally represented in the proceedings and have effective assistance of counsel; and (III) the accused should have the right to retrial or an *ex novo* trial in their presence (IBA Report on the 'Experts' Roundtable on trials in absentia in international criminal justice 2016, p. 5; Human Rights Committee, General Comment No. 32 2007, para.36; Article 6 (3) of the ECHR; Colozza v. Italy 1985; Goddi v. Italy 1984; VanGeyseghem v. Belgium 1999; Lala v. Netherlands 1994; Sejdovic v. Italy [GC] 2006). The recent case-law of the ECtHR and the CJEU, as will be analysed

further, suggests that the right to retrial or an *ex novo* trial in the presence of the accused should be guaranteed only in certain cases – that is to say, those three conditions are not cumulative.

Moreover, there is general consensus internationally that the right of an accused to be present at their trial is not absolute and may be subject to certain limited exceptions. However, as regards the national regulation of criminal proceedings *in absentia*, the meaning of the right to be heard can be understood in the context of two distinct legal traditions: namely, the common and civil law systems. The doctrine of criminal proceedings has often highlighted the classic difference between common and civil law: it is argued that, for historical reasons, an *in absentia* court in the former is practically impossible, while in the latter it is possible (Pradel 2001, p. 478; Rabinovitch 2005, p. 526; Karas 2018, p. 292). According to the literature, it is widely accepted that the prohibition of *in absentia* trials is a feature of the adversarial/accusatorial system as a legal tradition of common law regimes (Zakerhossein and De Brouwer 2015, pp. 205–206). On the contrary, the civil law approach tolerates *in absentia* trials to a greater extent. For these jurisdictions, there are two arguments in favour of *in absentia* trials. First, it has been held that in the context of civil law systems the interests of justice may prevail over the interests of the accused. The second argument is related to the issue of the truth: in the context of this system, the primarily responsibility of judges is to establish the truth (Zakerhossein and De Brouwer 2015, p. 206).

However, it has long been observed in comparative law literature that such a distinction is rather artificial, since neither model can ever be found in its pure form anywhere and they must be studied only as ideal types (Pradel 2001, p. 478; Zakerhossein and De Brouwer 2015, p. 205). Modern legal regulation of criminal proceedings, despite the existence of historical models, is largely influenced by international and constitutional human rights standards (Ažubalytė 2010, pp. 281–296). This is because, at present, some European countries do not accept the possibility of trials *in absentia* at all, while other countries regulate them under different regimes (Klip 2016, p. 282) under the influence of the jurisprudence of the ECtHR. According to an analysis of the case-law of the U.S. Supreme Court, in certain exceptional cases a defendant may also waive the right to their presence in the trial (Donaldson 2016, p. 44; Starkey 1979, pp. 733–745).

It should be noted that both the International Military Tribunals (hereafter – IMTs) in Nuremberg and Tokyo recognised total *in absentia* trials. However, this permissive approach to *in absentia* trials changed over time, and other international criminal tribunals and courts – i.e., the ICTY, the ICTR, the Special Court for Sierra Leone (hereafter – SCSL), the Special Panel for Serious Crimes (East Timor) (hereafter – SPSC), the Extra-ordinary Chambers in the Courts

for Cambodia (hereafter – ECCC) and the ICC – therefore adopted the opposite approach, holding that *in absentia* trials are not consistent with the accused's fair trial rights and thus are not allowed. Nonetheless, the Special Tribunal for Lebanon (hereafter – STL), reintroduced the concept of *in absentia* trials as a means to preclude suspects of international crimes from avoiding justice (Zakerhossein and De Brouwer 2015, pp. 181–182). In this case, the *in absentia* conditions essentially coincided with the requirements of the case-law of the UNHRC and the case-law of the ECtHR regarding *in absentia* proceedings (Herath 2014, p. 9). However, the latter possibility of prosecution *in absentia* is also criticised in the literature as being in breach of the principles of fair procedure, at least because, as an *ad hoc* institution, the STL cannot and does not effectively guarantee a retrial (Jordash and Parker 2010, pp. 487–510). On the other hand, the ICC concept of not recognising the *in absentia* process is also subject to criticism and suggestions to reinterpret it (Parry 2021), or to change regulation (Shaw 2012, pp. 107–140). The abovementioned different approaches to *in absentia* trials in international criminal justice are actively reflected in the abovementioned works and in other legal research. However, as mentioned above, this legal regulation does not have a direct impact on national criminal procedural law and is therefore not subject to further discussion.

Before examining the conditions of proceedings *in absentia*, it is necessary to define that the expression of an *in absentia* trial includes two instances. In the first instance, it can refer to a total *in absentia* trial, in which the accused is completely absent from the criminal proceedings. This is also called 'trial by default' (Gaeta 2007, pp. 1165, 1169, cited in Zakerhossein and De Brouwer 2015, p. 183). In the second, it can refer to a partial *in absentia* trial, where the accused is absent in one or some specific hearings while they are still under the control of the court in order to receive a sentence, if found guilty. Here, the reasons for the absence of the accused can be various. The accused may waive their right to be present at trial, may be removed from the courtroom due to their disruptive behaviour, or the health status of the accused may impede their presence in the courtroom (Zakerhossein and De Brouwer 2015, p. 183). This analysis supports the scientific position that, in spite of this conceptual distinction, the legal literature tends to group different types of *in absentia* trials together and study them from a normative perspective. This leads to some incoherence and misunderstanding as to the phenomenon (Zakerhossein and De Brouwer 2015, p. 183). This research recognises, however, the above distinction of total and partial *in absentia* trials. The doctrine of *semel preasens simper praesens* (to be once present is to be present always) that is applied by a number of jurisdictions allows trials to continue in case the accused disappears during the proceedings (Zakerhossein and De

Brouwer 2015, pp. 207–208). If the accused person has participated in the proceedings (or part of the proceedings) and is subsequently excluded from the proceedings due to their abuse of rights or no longer participates in the proceedings, their right to be informed is usually perceived to have already been exercised. This study analyses different situations wherein proceedings *in absentia* are conducted on the ground that the accused person has waived their right to participate in the proceedings and therefore did not participate in the proceedings at all. Therefore, one of the conditions of total *in absentia* proceedings – the right of a person to be informed of the proceedings before them – becomes essential.

3.1.3. Proper Notification of the Accused Person – A Condition for the Legality of Criminal Proceedings *in absentia*

The notification requirement (enshrined in both the ICCPR and ECHR) is at the heart of the legality of *in absentia* proceedings (Trials in absentia: a dilemma for Ukraine 2016, p. 6). If a person is duly informed but has waived their right to appear in court, proceedings *in absentia* can take place with effective legal representation and do not in themselves constitute unfair proceedings. If a person has been misinformed or not informed, it is decided what other procedural safeguards can counterbalance the organisation of national criminal proceedings. As a rule, this takes the form of a guarantee of the right to a new criminal procedure, which will be discussed later. Thus, on the basis of scientific research and both international and national case-law, the content and form of the right to be informed is further analysed.

The ECtHR has held that 'to inform someone of a prosecution brought against him/her 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' (Sejdovic v. Italy [GC] 2006, para.99). The case-law of the ECtHR sets out the essential elements of a person's right to be informed: this is to inform them of the ongoing proceedings and of the accusations made. The ECtHR states that: 'a waiver may be found where it is established that the accused person has been informed of the existence of the criminal proceedings against him or her, is aware of the nature and the cause of the accusation, and does not intend to take part in the trial or wishes to escape prosecution' (Sejdovic v Italy [GC] 2006, para.99; Kounov v. Bulgaria 2006, para.48). In essence, the CJEU shares this view, while emphasising the need to inform the person concerned of the consequences of non-appearance, which means, in particular, informing that person, in due time, 'that a decision might be handed down if he or she does not appear

at the trial' (CJEU, C 569/20, IR 2022). The content of the information does not give rise to any major debate, so further analysis of the means of informing the individual or the form of information is carried out.

Article 6 (1) cannot be construed as conferring on litigants the right to obtain a specific form of service of court documents, such as by registered post (Kolegovy v. Russia 2012, para.40; Perihan and Mezopotamya Basın Yayın A.Ş. v. Turkey 2014, para.39; Avotiņš v. Latvia [GC] 2016, para.119). Nonetheless, the Court considers that in the interests of the administration of justice, a litigant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare their case and to attend the court hearing (Kolegovy v. Russia 2012, para.40, Aždajić v. Slovenia 2015, para.48, Korchagin v. Russia 2018, para.65).

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 (Poitrimol v. France 1993, para.31). The ECtHR held that even supposing that the applicant was indirectly aware that criminal proceedings had been opened against them, it cannot be inferred that they unequivocally waived their right to appear at their trial (Colozza v. Italy 1985, paras.27, 29; Poitrimol v. France 1993, para 31). The ECtHR has also held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from their status as a 'fugitive' (*latitante*), which was founded on a presumption with an insufficient factual basis, that they had waived the right to appear at the trial and defend themselves (Colozza v. Italy 1985, para.28; Sejdovic v. Italy [GC] 2006, para.87; Sanader v. Croatia 2015, para.73). In any event, objective factors need to be shown to conclude that an accused could have been deemed to have had effective knowledge of the proceedings against them (Yeğer v. Turkey 2022, para.33).

On the other hand, 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. As the ECtHR stated, 'this may be the case, for example, 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 (Iavarazzo v. Italy 2001), 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' (Sejdovic v. Italy [GC] 2006, para.99).

In this context, it should be stressed that according to the CJEU case-law, 'considering whether the way in which the information is provided is sufficient

to ensure the person's awareness of the trial, particular attention should be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive that information' (CJEU, C-569/20, IR 2022, para.50). The CJEU has also stated that 'where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that that person may be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it. Such precise and objective indicia may, for example, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated' (CJEU, C-569/20, IR 2022, paras.48, 49).

The case-law of the UNHRC also suggests that informing a person is recognised as one of the essential preconditions for the legality of proceedings *in absentia.* When a trial *in absentia* is necessary for the proper administration of justice, the prosecution must show that all due steps have been taken to inform the accused of the charges and proceedings. The UNHRC states that 'proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e., when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with Article 14 (3) (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance' (Mbenge v. Zaire 1990, para.14.1; Maleki v. Italy 1999, para.9.3). According to the UNHRC, 'otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (Art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (Art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (Art. 14 (3) (e))' (Mbenge v. Zaire 1990, para.14.1). In the case of *Mbenge v. Zaire*, the UNHRC acknowledged 'that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused' (para.14.1).

Summarising the requirement of the manner (form) of notification, it must be concluded that adequate information on ongoing criminal proceedings may be represented by any action of the State (the public prosecutor or the court)

which demonstrates that the accused actually knows about the trial. Thus, cases in which a person is informed personally, including by serving procedural documents or by informing the person through a lawyer, are well established, and in practice are no longer disputed as ways of properly informing the person. Knowledge can also be established if it is clear from other circumstances (e.g., from the person's own statements) that the person is aware of the process, and this may not necessarily be from official sources – e.g., they were informed by an adult family member, etc.

In order for the accused person to be regarded as having implicitly waived their right to be present at the trial and to defend themselves, it also must be established that they could reasonably have foreseen the legal consequences of their own conduct (Chong Coronado c. Andorre 2020, para.30). Whether a person is to be regarded as having waived the right to participate in the proceedings or as evading the proceedings is, in principle, assessed in the light of the circumstances in which they were informed of the proceedings, the results of that communication, and the subsequent conduct of the person after receiving the relevant information.

However, as already mentioned, in the investigation and handling of cases of war crimes and crimes against humanity, the abovementioned ways of informing the individual may be ineffective and the courts have to address the dilemma as to whether persons tried *in absentia* are aware of the proceedings. According to the ECtHR, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings in that it may lead to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice (Colozza v. Italy 1985, para.29; Sanader v. Croatia 2015, para.77). On the other hand, as pointed out by the ECtHR in *Sanader v. Croatia*, concerning war crimes, 'in the particular circumstances of the case, given the gravity of the crime at issue which, although not susceptible to statutory limitation periods, was commensurate with great public interest and the interest of the victims to see the justice being done, the Court accepts that holding a hearing in the applicant's absence was not itself contrary to Article 6' (Sanader v. Croatia 2015, para.77).

In 2019, Lithuania issued a judgment in a case where 67 persons in total were convicted *in absentia* for crimes against humanity and war crimes committed in 1991 in Vilnius (Vilnius Regional Court pronounced the judgement in the case of the events of January 1991). In the present case, one of the questions raised by the Supreme Court of Lithuania concerned appropriate informing of defendants who are not citizens of the Republic of Lithuania (Ruling of the Supreme Court of Lithuania in a criminal case no. 2K-7-39-1073/2022). The Supreme Court, in response to arguments of the defence concerning the incorrect informing of the

sentenced persons, formed certain peculiarities of the State's positive obligation to inform a person about criminal proceedings in cases in which nationals of other States are accused or tried for international crimes (Ruling of the Supreme Court of Lithuania in a criminal case no. 2K-7-39-1073/2022). The Supreme Court, when assessing the efforts of State institutions to inform the defendants, stated, *inter alia*, that 'in such a case, the State has limited possibilities to act actively in the territories of other States – from a procedural point of view, its obligation to take measures to properly inform the person ends by informing the competent authorities of another State under international or bilateral agreements, transferring to them the power to inform about the ongoing criminal proceedings against their nationals (e.g., Art. 66, Art. 218(9) of the Lithuanian CCP). Therefore, in such cases, when assessing the appropriateness of compliance with the obligation to provide information, it is important to determine whether the persons who committed the act have been identified, whether their nationality has been established, their possible place of residence, other personal data necessary to form reports, and whether appropriate channels for the transmission of information have been used to ensure that another State is properly informed of the ongoing prosecution of its citizens or residents' (Ruling of the Supreme Court of Lithuania in a criminal case no. 2K-7-39-1073/2022).

It should be noted that, in the present case, there were other circumstantial indications that the accused were aware of the proceedings, including the defendants having been informed through the media of their countries of nationality and residence, which, taken together, enabled the courts to find that the accused were aware of the ongoing proceedings (Ruling of the Supreme Court of Lithuania in a criminal case no. 2K-7-39-1073/2022). Informing participants or other interested persons about legal proceedings through the media, including social media, is one of the procedural features that apply in civil proceedings as well as in criminal proceedings, e.g., by informing victims of proceedings which do not constitute substantive claims in the case. However, publicising information on criminal proceedings, in particular in the media or on the websites of the authorities, is not generally considered sufficient and appropriate as a method informing a person of criminal proceedings against them.

According to Article 297^5 (1) of the CCP of Ukraine, in an *in absentia* case, e.g., when conducting a special pre-trial investigation, the summons shall be sent to the last known address of residence or temporary residence of the suspect, and shall be published in the national mass media and on the official websites of the agencies conducting pre-trial investigation. The suspect shall be deemed to have been properly informed about the summons content from the moment of its publishing in national mass media. Article 297^5 (2) of the CCP prescribes that

copies of the procedural documents to be delivered to the suspect shall be sent to the defence counsel.

Thus, international organisations rightly fear that in cases where, according to the CCP of Ukraine, the courts and prosecutors summon defendants by simply publishing a notice in Ukrainian media or on the courts' websites may constitute insufficient proof that the defendants were notified of trial dates and thus waived their right to be present (Report on the Human Rights Situation in Ukraine 2023, p. 33). This position is also supported by other sources stating that the major assumption that an accused is aware of their trial because the trial is widely publicised in the media is not sufficient (Trials in absentia: a dilemma for Ukraine 2016, p. 5); 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 obligation to prove that the accused has actual knowledge of the proceedings (Trials in absentia: a dilemma for Ukraine 2016, p. 11). It is therefore to be considered that courts hearing cases in the context of such regulation of pre-trial investigations *in absentia* should take additional measures to inform defendants. This is important because, as will be shown later, the Ukrainian CCP provides for a rather limited right to a new process.

In addition to the content and form of elements of the informing of the defendant, international judicial authorities form a procedural rule that a person may not be subject to the burden of proving that they have not been informed. The ECtHR points out that a person charged with a criminal offence must not be left with the burden of proving that they were not seeking to evade justice, or that their absence was due to *force majeure* (Colozza v. Italy 1985, para.30; Sanader v. Croatia 2015, para.74). At the same time, it is open to the national authorities to assess whether the accused showed good cause for their absence or whether there was anything in the case file to warrant a finding that they had been absent for reasons beyond their control (Medenica v. Switzerland 2001, para.57; Sanader v. Croatia 2015, para.74). In the *Dworzecki* case, the CJEU also pointed out that 'the issuing judicial authority must provide evidence showing that the person concerned was actually aware of that information' (CJEU, C-108/16 PPU, Pawel Dworzecki 2016, para.41). Thus, if a summons was not served directly to the person concerned, but on an adult resident of the same household who undertook to pass it on to the person concerned, and if it cannot be ascertained from the European Arrest Warrant (hereafter – EAW) if and when an adult really passed the summons on, then the conditions set out in Article 4a(1)(a)(i) FD 2002/584 are not satisfied (CJEU, C-108/16 PPU, Pawel Dworzecki 2016, para.54). This means that it is permitted for the executing authority to refuse the execution of the EAW if none of the other guarantees of Article 4a(1) have been complied

with (Karas 2019, p. 469). In the case of *Maleki v. Italy*, the UNHRC also stated that the State had to prove that the person was duly informed: 'the State party […] has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him' (Maleki v. Italy 1999, para.9.4). The UNHRC reasoned that it is the obligation of a domestic court to verify that the accused had actual knowledge about a case before commencing a trial *in absentia* (Report on the Human Rights Situation in Ukraine 2023, p. 33).

3.1.4. The Legal Consequences of Failure to Inform the Accused of the Criminal Proceedings Against Them

As already mentioned, in international criminal cases, a situation where a person charged with such crimes cannot be properly informed despite the efforts of the State often arises. In such a case, national CCPs often provide for the possibility of trial *in absentia*. In *Sanader v. Croatia*, the ECtHR held that 'there is no evidence before the Court, nor was it argued by the parties, that the applicant was ever notified of these proceedings, or that the reason for his absence was to escape trial. Indeed, given the conditions of the escalating war in Croatia at the time and the fact that the applicant lived on territory which was outside the control of the domestic authorities it was impossible for them to notify him of the criminal proceedings or to secure his presence, and it was highly improbable that he could have had knowledge of the proceedings and that reason for his absence from Sisak (Croatia) at the time was not being tried. In such circumstances, it was possible under the relevant domestic law to hold a hearing *in absentia* if there were highly important reasons for doing so (Art. 290 of the CCP). In the case at issue these reasons were associated with the need to effectively prosecute the serious war crimes' (Sanader v. Croatia 2015, para.76).

Once a case has been examined *in absentia* and it is established that the convicted person was not aware of the proceedings against them – in other words, there is no reliable indication that they were duly informed and voluntarily waived the right to be present – national courts are normally required to decide which procedural measures may be applied. The right to the new hearing of a case in which a person was convicted *in absentia* is explicitly proclaimed in some instruments within the Council of Europe (European Convention on the International Validity of Criminal Judgments, Art. 24–26; the Second Additional Protocol to the European Convention on Extradition, the Committee of Ministers Resolution (75)11 on the criteria governing proceedings held in the absence of the accused, para. 8). However, this study relies mainly on ECtHR case-law, as well as on the practice of applying the relevant EU regulation. Thus, the case-law

of the ECtHR and the CJEU allow a distinction to be drawn between certain criteria for determining whether such a person had an effective opportunity to assert the right to a fair trial.

First of all, it should be noted that neither the Covenant, nor the Convention, nor other international treaties are intended to unify national criminal procedural law. According to the ECtHR, the Convention leaves the Contracting States with wide discretion as regards the choice of the means put in place that ensure that their legal systems are in compliance with the requirements of Article 6 (Medenica v. Switzerland 2001, para.55; Somogyi v. Italy 2004, para.67, Sanader v. Croatia 2015, para.69). In the context of assessing the legality of proceedings *in absentia*, it is noted that 'in particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor seek to escape trial' (Medenica v. Switzerland 2001, para.55; Somogyi v. Italy 2004, para.67, Sanader v. Croatia 2015, para.69). The EU rules on the guarantees of *in absentia* proceedings are interpreted, in essence, in the same way. It is acceptable that the CJEU indeed has repeatedly pointed out that the purpose of the legislation was not to harmonise trial *in absentia* in Member States in general (Karas 2019, p. 470), 'but only to lay down common grounds for refusal as regards decisions delivered *in absentia* in criminal matters' (CJEU, C-108/16 PPU, Pawel Dworzecki 2016, para.14; CJEU, (Grand Chamber) C-399/11, Stefano Melloni 2013, para.43). Detailed rules of that kind laid down by national law cannot undermine the aim of safeguarding the fairness of the proceedings, and thus of enabling the person concerned to be present at their trial, which requires that they have the ability to prepare their defence (CJEU, C-564/19, IS 2021, para.128; CJEU, C-569/20, IR 2022). On the other hand, it can be accepted that although the definition of *in absentia* formally applies in the context of international cooperation, this concept will lead to harmonisation in the manner of summoning an accused (Klip 2016, p. 282; Karas 2018, pp. 294–296).

As already mentioned, the duty of the State to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or at a retrial – ranks as one of the essential requirements of Article 6 of the ECHR (Stoichkov v. Bulgaria 2005, para.56; Sanader v. Croatia 2015, para.71). Accordingly, the refusal to reopen proceedings conducted in the accused's absence without any indication that the accused has waived their right to be present during the trial has been found to be a 'flagrant denial of justice' (Stoichkov v. Bulgaria 2005, paras.54–58; Sanader v. Croatia 2015, para.71). Thus, according to ECtHR case-law, a denial of justice undoubtedly occurs where a such a person convicted *in absentia* is subsequently unable to obtain from the

court a fresh determination of the merits of the charge, in respect of both law and fact (Sejdovic v. Italy [GC] 2006, para.82, Sanader v. Croatia 2015, para.68). The jurisprudence of the ECtHR leads to the conclusion that the basic conditions for such a right to arise are that it has not been unequivocally established that the person has waived their right to appear and to defend themselves (Colozza v. Italy 1985, para.29; Einhorn v. France 2001, para.33; Krombach v. France 2001, para.85; Somogyi v. Italy 2004, para.66)), or that they intended to escape trial (Medenica v. Switzerland 2001, para.55).

The CJEU formulates a similar position: 'an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information about his or her trial may be tried and convicted *in absentia*, but must be able, after notification of the conviction, to rely directly on the right to secure the reopening of the proceedings or access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case' (CJEU, C-569/20, IR 2022). Persons who were aware of the proceedings and did not participate in the proceedings in the absence of valid reasons cannot benefit from this guarantee in accordance with Article 6 of the Convention (Mihelj v. Slovenia 2015; Atanasova c. Bulgarie 2017, para.44). According to CJEU case-law, a person may be denied that right if it is apparent from precise and objective indicia that they received sufficient information to know that they were going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing them officially of that trial (CJEU, C-569/20, IR 2022). However, it may also be found in the national regulation that the sentenced person is given the possibility to request a new trial automatically (without any conditions) after proceedings *in absentia* (e.g., Art. 438 of the CCP of the Republic of Lithuania provides for the possibility for the sentenced person to lodge an appeal without time-limits, and to require a fresh investigation of all evidence and the resolution of all questions of law).

Hence, according to ECtHR case-law, when domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence', that person should, once they become aware of the proceedings, be able to obtain from a court a fresh determination of the merits of the charge, in respect of both law and fact (Colozza v. Italy 1985, paras.27, 29, Sanader v. Croatia 2015, para.78). The domestic legislation should afford the applicant with sufficient certainty regarding the opportunity to appear at a new trial (Sejdovic v. Italy [GC] 2006, para.101, Sanader v. Croatia 2015, para.78).

The retrial offered by the domestic authorities, regardless of its procedural form, should comply with the requirement of effectiveness (Medenica

v. Switzerland 2001, para.55, Sanader v. Croatia 2015, para.78). The right to fresh determination of the case can be realised as a new trial at the same instance as an appeal: the point is that a person can effectively challenge both the facts and the applicable law. A retrial based on new facts and evidence may also be an opportunity to re-examine the case following *in absentia* proceedings. However, this is a general legal avenue for seeking a retrial after a decision convicting a defendant has become final and enforceable, and is open to both those tried *in absentia* and those tried in their presence. Despite this, this remedy is applicable only to a restricted category of cases since the condition for its use is the existence of new evidence or facts usually capable of leading to acquittal or resentencing under a more lenient provision (e.g., Art. 444 of the CCP of Lithuania, Art. 501 (1)(3) of the CCP of Croatia). Those proceedings cannot therefore be regarded as a specific procedural guarantee of the right to due process of a person convicted via *in absentia* proceedings.

Thus, in assessing whether the right to a new procedure is an effective instrument, the case-law of the ECtHR and the CJEU allow the following main criteria to be distinguished: a person is not obliged to appear before the domestic authorities and is entitled to demand a new assessment of the charges, both in fact and in law.

A person who has requested a new hearing must not surrender to the law enforcement authorities, especially when they have been sentenced to imprisonment during *in absentia* proceedings. The requirement of the person's presence under the jurisdiction of the domestic authorities is a very strict condition. The ECtHR has considered that 'the requirement that an individual tried *in absentia*, who has not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, has to appear before the domestic authorities and provide an address of residence in the State during the criminal proceedings in order to be able to request a retrial, appears disproportionate' (Sanader v. Croatia 2015, para.84). In the case of *Sanader v. Croatia*, the ECtHR stated that this requirement essentially provides that individuals sentenced *in absentia* to imprisonment who do not live in the territory of the State cannot apply for the automatic reopening of the proceedings unless they present themselves to the judicial authorities, which would, in the ordinary course of action, mean that they would be deprived of their liberty based on their conviction (Sanader v. Croatia 2015, para.85). The ECtHR also pointed out that 'even taking into account the particular circumstances of the present case, which concerns serious charges of war crimes, the Court considers that the obligation that an individual tried *in absentia* has to appear before the domestic authorities and provide an address of residence in Croatia during

the criminal proceedings in order to be able to request a retrial, is unreasonable and disproportionate' (Sanader v. Croatia 2015, para.89). It follows that an accused cannot be obliged to surrender to custody in order to secure the right to be retried (Sanader v. Croatia 2015, para.87).

At the same time, the State has the right, in the fresh proceedings, to apply all measures envisaged under the relevant domestic law, including detention (Khalfaoui v. France 1999, para.44, Sanader v. Croatia 2015, para.88). However, that would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue, and the existence of 'relevant and sufficient reasons' for their detention (Kudła v. Poland [GC] 2000, para.111; Dragin v. Croatia 2014, para.110; Sanader v. Croatia 2015, para.88).

Another important aspect of the first condition is that a person who has the opportunity to seek a retrial without bearing them to a situation where they would trade that opportunity with their liberty also acquires the responsibility to participate effectively and diligently in the fresh proceedings. The person's failure to do so legitimately has previously led to the discontinuation of the new proceedings (Sanader v. Croatia 2015, para.90).

The second important condition is that a person is entitled to claim a fresh factual and legal determination of the criminal charge. The essence of this requirement is that, in the course of proceedings *in absentia*, the person concerned was unable to exercise the rights of the accused in adversarial proceedings, including the right to present evidence and challenge the evidence of the prosecution, and to express their position on legal issues. According to CJEU case-law, the fresh determination of the merits of the case may lead to the original decision being reversed: 'the Member States must ensure that, where a trial *in absentia* is conducted the person concerned has the right "to a new trial", or to another legal remedy, which allows a fresh determination of the merits of the case and which may lead to the original decision being reversed ("right to a new trial")' (CJEU, C-569/20, IR 2022, para.27).

It should be noted that a number of jurisdictions provide, after a new examination, for ordinary appeals against this decision.

Researchers argue that the scope of human rights protection in the execution of an EAW, in cases of trials *in absentia*, does not seem to fully comply with the guarantees provided in the jurisprudence of the ECtHR (Karas 2018, p. 464; Stan 2020, p. 657). As numerous researchers have pointed out, in the *Melloni* judgment (CJEU, (Grand Chamber) C-399/11 Stefano Melloni 2013, para.41), two guarantees – that the person was informed of the trial and that they were represented and effectively defended by two counsels that they appointed – were sufficient, and actually precluded any additional condition, including the conviction

rendered *in absentia*, from being open to review in the presence of the convicted person (Cavallone 2014, p. 30; Karas 2019, p. 464; CJEU, (Grand Chamber) C-399/11 Stefano Melloni 2013, paras 40, 46). According to the aforementioned authors, it seems that the ECtHR (Sejdovic v. Italy [GC] 2006, para.81; Colloza v. Italy 1985, para.29; Hermi v. Italy 2006, para.58) requires that both of these requirements – the right to be represented by a lawyer and the possibility to claim a retrial – be met cumulatively in order to comply with guarantees of the right to fair trial (Cavallone 2014, p. 32; Karas 2019, p. 464). This study takes the view that ensuring the legal representation of a person who does not know about proceedings against them in those same proceedings by the State or family members is not recognised as compensating for the person's absence and denying their right to a new trial. On the other hand, that does not call into question the benefits of such representation in safeguarding the fairness of the proceedings and the rights to defence of the defendant who is not present. Moreover, we take the view that *in absentia* proceedings against a person who is unaware of such proceedings can take place only in the presence of a lawyer (despite the difficulties of the defence, especially in cases where the defendant has no connection with the defender (IBA Report on the 'Experts' Roundtable on trials in absentia in international criminal justice 2016, p. 9)), so that this discussion is not continued.

As already stated, the other possibility of compensating a person convicted *in absentia* is the broadening of the limits on the lodging of an appeal and its handling. The ECtHR has also held that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in a court of appeal and to request the admission of new evidence, entails the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (Jones v. UK 2003, Sejdovic v. Italy [GC] 2006, para.85; Atanasova c. Bulgarie 2017, para.44).

Those requirements must not only be provided for by law, but, in order to ensure the effective right to a new examination, they must accordingly have been interpreted in the case-law of the domestic courts.

The case-law of international courts presupposes a rather broad discretion of States in regulating the right to retrial. On the other hand, we can agree with the view that it is difficult to assimilate the situation of one who did not actually know about the criminal proceedings pending against them with one who knew it, but avoided the criminal procedure. This is one of the reasons why states provide some filter criteria for retrial procedure which, in some cases, are difficult to fulfil (Stan 2020, p. 667). As can be seen from the provisions of criminal procedure

in some States, the right of a person convicted *in absentia* to a review of the case is regulated in very different ways, from an unconditional re-examination to the introduction of certain conditions for a new trial. For example: a person has to make such a request within certain deadlines; the person must provide information that they have not been informed of the criminal proceedings against them; before demanding a new examination, the person must exercise the right of appeal, etc. (Stan 2020, pp. 658–667; Karas 2018, pp. 299–307).

In the context of the Ukrainian legal system, there is a concern that *in absentia* proceedings in Ukraine do not comply with international human rights standards (OHCHR, Report on the human rights situation in Ukraine 16 May to 15 August 2018, para.63). At the same time, various sources suggest solutions that include both substantial and rather technical, albeit very important, regulatory changes in this institute (In Absentia Procedure: the Concept of Amendments to National Legislation Ukraine). The main thread of these approaches, which also responds to the recommendations of international organisations, is to provide for the right of the individual to request a new trial under certain conditions. There are opinions which suggest that the rule which only allows for a retrial if the verdict has not yet been delivered is contrary to the international standards that retrial should be available for defendants at any time after initial proceedings *in absentia* (Views of the Human Rights Committee under Article 5 (4), of the Optional Protocol to the International Covenant on Civil and Political Rights, paras.9.4–9.5). The OHCHR notes that this non-compliance with international human rights standards may lead to rejections of future extradition requests (Report on the human rights situation in Ukraine (16 November 2019–15 February 2020), p. 19). For States participating in the EAW system, non-compliance with the conditions governing the legality of proceedings *in absentia* may also lead to non-transfer of a person (Karas 2019, pp. 459–475). The OHCHR recommended that the CCP of Ukraine be amended to allow for a full retrial of those tried *in absentia* upon their request at any time before or after the verdict in their cases has been delivered (Report on the human rights situation in Ukraine (16 November 2019–15 February 2020). A similar suggestion is to supplement the CCP of the Republic of Ukraine with a special norm for the review of decisions made in the course of *in absentia* proceedings, which is expressed in other sources (In Absentia Procedure: the Concept of Amendments to National Legislation Ukraine; Hloviuk 2015, p. 22).

3.1.5. Interim findings

Criminal proceedings in the absence of the accused person may be heard only where the interests of justice so require, and the procedural requirements for

the protection of the rights of the absent defendant and of the fairness of the proceedings have been fulfilled. The right of a person to appear in court is not absolute, but its refusal must meet certain conditions, the fundamental tenet of which is the right to be duly informed of the proceedings.

Total *in absentia* proceedings are based on the fact that the accused person has waived their right to participate in the proceedings and therefore did not participate in the proceedings at all. Whether a person is to be regarded as having waived their right to participate in the proceedings or as evading the proceedings is assessed in the light of the circumstances in which they were informed of the proceedings, the results of that communication, and the subsequent conduct of the person after receiving the relevant information.

The elements of the content of the right to be informed are essentially formed. It is the duty of the State to ensure that the person against whom proceedings are pending is informed in a timely manner of the time and place of the proceedings, of the charges, and of the legal consequences of the person's failure to appear before the court.

The method of notification is not precisely defined; therefore, national courts and law enforcement authorities must constantly decide whether the way in which they choose to inform the person is compliant with the requirements of fair proceedings.

Considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive that information.

Informing a person by serving procedural documents, either personally or through a lawyer who is authorised by the person, are well established ways to properly inform the person, but they are not always effective in cases of international crimes. Therefore, properly informing the defendant is a situation in which it can also be established from other circumstances of the case that the person is aware of the proceedings. Public information about criminal proceedings in the media or on the websites of the law enforcement authorities shall not be considered as adequate information about the criminal proceedings against the accused person.

Along with the requirements of the content and form of informing the accused person, the case-law has established a procedural rule according to which the proper information of a person is an obligation of the State and the burden cannot be placed on the person of proving that they have not been properly informed of the proceedings.

In the interests of justice, criminal proceedings *in absentia,* including cases of war crimes and crimes against humanity, may also take place against an uninformed person, in which case the individual must be guaranteed an effective right to a new trial.

The individual's right to request new proceedings can be guaranteed both in the context of new judicial proceedings and with broad appeal possibilities.

In assessing whether the right to a new procedure is an effective remedy, the case-law of the ECtHR and the CJEU allows the following main requirements to be distinguished: a person is not required to appear before the domestic authorities, and they are entitled to request a new assessment of the charges in terms of fact and law.

3.2. Should Ecocide Be an International Crime?

3.2.1. Background

Critical environmental impacts both during and in the aftermath of conflict can take decades to restore. Climate change, biodiversity and wellbeing are affected by wars. Thus, practical and legal instruments should be used to reduce their environmental impact. Nevertheless, the environment does not feature as part of the main international conventions on the law of war, such as the Hague Conventions of 1899 (Convention for the pacific settlement of international disputes 1899) and 1907 (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907) or the GC of 1949. In fact, the word 'environment' does not even appear in these treaties. International law does, however, recognise that parties to a conflict are responsible for protecting the environment and minimising harm to it. This obligation is codified in a few international legal instruments, including the additional protocols to the GC of 1949 and the Protection of Victims of International Armed Conflicts (Protocol I) of 1977, which address the protection of the natural environment during armed conflict.[9]

9 'Article 55 – Protection of the natural environment:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.'

Lyra Jakulevičienė / Patrick R. Hugg /
Dmytro Luchenko (eds.)

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