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## **REOPENING OF PROCEEDINGS IN CASES OF TRIAL *IN ABSENTIA*: EUROPEAN LEGAL STANDARDS AND CROATIAN LAW\***

### **ABSTRACT**

*In contemporary criminal procedure, trial in absentia is considered an exception to the general principle that a person charged with a criminal offence is entitled to take part at the hearing. The case law of the European Court of Human Rights defined several rules on trial in absentia, as prerequisites of compliance with fair trial standards from Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). One of those rules concerns the possibility of retrial. Recently Croatia was condemned before in Sanader case, for violation of the right to a fair trial proclaimed in Article 6 ECHR, for the applicant's inability to obtain a rehearing after conviction in absentia, without prior surrendering to custody based on that conviction. The execution of Sanader judgment included legislative amendments, which were adopted in July 2017. The paper analyses to what extent the present regulation of reopening of proceedings in cases of trial in absentia in Croatian legislation and practice corresponds to the European legal standards. The paper contains theoretical and normative analysis, as well as the research of the jurisprudence of the European Court of Human Rights and of recent jurisprudence of the Supreme Court of the Republic of Croatia. It showed that in Croatian judicial practice there are doubts on the purpose of reopening of proceedings in case of trial in absentia, which should provide "a fresh determination of the merits of the charge" by a court in "full respect of defence rights". Finally, the paper contains recommendations for the improvement of Croatian legislation and practice of reopening of criminal proceedings in cases of trial in absentia, in order to fully comply with European legal standards.*

**Keywords:** *trial in absentia, retrial, reopening of criminal proceedings, fair trial*

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## 1. INTRODUCTORY REMARKS ON TRIAL IN *ABSENTIA* AS EXCEPTION TO THE RIGHT TO BE PRESENT AT THE HEARING

Trial *in absentia* is considered an exception to the general principle that a person charged with a criminal offence is entitled to take part at the hearing. Origins of the right to be present at own trial go back to the earliest days of common law,<sup>1</sup> when the presence of the accused was a prerequisite for the jurisdiction of the court.<sup>2</sup> Although legal orders of common-law tradition in rule do require presence of the accused on trial,<sup>3</sup> over the years, American courts acknowledged the possibility, if the accused waived his right to be present at trial by voluntarily absenting himself, to continue the trial *in absentia*.<sup>4</sup> Thereby the fact that the defendant's absence was "voluntary" had to be clearly determined before the trial continued.<sup>5</sup> On the other hand, in some European countries of continental legal tradition, proceedings conducted in contumacy originally were proceedings against the defendant who "refused to come before the court (*in contumaciam*)".<sup>6</sup> It implied that the defendant was considered a rebel who committed a serious criminal offence but refused to take responsibility before the court and the society.<sup>7</sup> Therefore in some European legal orders, such as French, Italian and Belgian, trial conducted in contumacy used to imply loss of particular rights of defendants.<sup>8</sup> At present, some European countries do not accept the possibility of trials *in absentia* at all, while other countries regulate it under different regimes,<sup>9</sup> under influence of the jurisprudence of the European Court of Human Rights.

The right to be present at the one's own trial is one of many aspects of the right to a fair trial, proclaimed in Art. 6(1) ECHR. Although not expressly mentioned, "the object and purpose of the Article taken as a whole shows that a person 'charged with a criminal offence' is entitled to take part in the hearing".<sup>10</sup> Article 6, "read as a whole, guarantees the right of an accused to participate effectively in a criminal

<sup>1</sup> Starkey, J. G., *Trial in absentia*, 53 St. John's Law Review, 1979, pp. 721-722

<sup>2</sup> *Ibid.*, p. 723

<sup>3</sup> Munivrana, M., *Univerzalna jurisdikcija*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 13, br. 1, 2006, p. 200

<sup>4</sup> Starkey, *op. cit.* note 1, p. 724

<sup>5</sup> *Trial, Circuit Note: Criminal*, The Georgetown Law Journal, vol. 59, 1971, p. 653

<sup>6</sup> *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 616

<sup>7</sup> Mauro, C., *Le défaut criminel Réflexions à propos du droit français et du droit comparé*, Revue de science criminelle et de droit pénal comparé, Janvier/Mars 2006, p. 35

<sup>8</sup> *Ibid.*

<sup>9</sup> Klip, A., *European Criminal Law An Integrative Approach*, Intersentia, 2016, p. 282

<sup>10</sup> ECHR, *Colozza v. Italy*, 9024/80, 12 February 1985, §27; and in ECHR, *Sanader v. Croatia*, 66408/12, 12 February 2015, §67

trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings”.<sup>11</sup> If the accused cannot exercise the right to be present at the trial, he or she can hardly exercise any other procedural rights, particularly minimum defence rights proclaimed in Art. 6(3) ECHR. Therefore the right to be present at the hearing may also be considered as an element of the right to defend oneself enshrined in Art. 6(3)c ECHR,<sup>12</sup> as well as an element of the right to question prosecution witnesses guaranteed in Art. 6(3)d ECHR.<sup>13</sup>

As it has been pointed, trial *in absentia* may be considered an exception to the principle that the accused has the right to be present at the trial. Although presence and participation of the accused in criminal proceedings are two different principles, as Summers points, “the presence requirement is inevitably connected to the benefits that the accused is said to derive from having the opportunity to participate in the proceedings”.<sup>14</sup> Conducting trial in absence of the accused seriously affects fundamental procedural rights. Even though the European Court of Human Rights makes clear distinction between a trial *in absentia* in cases when the accused deliberately decided not to appear, and cases when the absence of the accused was a result of circumstances beyond his control<sup>15</sup> (see *infra* 2.1.1.), in any case, the accused has a right to be effectively defended by a defense counsel.<sup>16</sup> In addition, any waiver of the right to be present at the trial “must be established in an unequivocal manner”.<sup>17</sup>

Though “generally undesirable”, according to Trechsel, trial *in absentia* may be justified with the need to avoid the statute of limitation, as well as the need to determine the charge while the evidence is still available.<sup>18</sup> The European Court of Human Rights acknowledged legitimacy to stated reasons,<sup>19</sup> and in principle, from the perspective of the right to a fair trial, a trial *in absentia* is not disputable

<sup>11</sup> ECHR, *Stanford v. United Kingdom*, 16757/90, 23 February 1994, § 26

<sup>12</sup> Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 251

<sup>13</sup> In the jurisprudence of the USA Supreme Court, the right to be present at the trial was considered within both the Due Process Clause and the Confrontation Clause. Shapiro, E. L., *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to be Present*, *Marquette Law Review*, Vol. 96, 2012, pp. 599–600

<sup>14</sup> Summers, S. J., *Fair Trials The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, 2007, p. 63

<sup>15</sup> Trechsel, *op. cit.* note 12, p. 255

<sup>16</sup> ECHR, *Sejdovic v. Italy*, GC, 56581/00, 1 March 2006, § 91

<sup>17</sup> ECHR, *Colozza v. Italy*, 9024/80, 12 February 1985, § 28. Trechsel, *op. cit.* note 12, p. 256

<sup>18</sup> *Ibid.*, p. 253

<sup>19</sup> ECHR, *Colozza v. Italy*, 9024/80, 12 February 1985, § 29, *Sanader v. Croatia*, 66408/12, 12 February 2015, §77

as long as there is a possibility for the convicted person to obtain a retrial either by asking it, or automatically.<sup>20</sup>

## 2. REOPENING OF CRIMINAL PROCEEDINGS IN CASES OF TRIAL *IN ABSENTIA* - LEGAL FRAMEWORK

### 2.1. European legal framework

#### 2.1.1. *Jurisprudence of the European Court of Human Rights*

“When domestic law permits a trial to be held notwithstanding the absence of a person ‘charged with a criminal offence’...“ that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge”.<sup>21</sup> The need for retrial however depends on whether the accused contributed to conducting the proceedings *in absentia*. On one side, in *Medenica v. Switzerland*, the domestic court dismissed the applicant’s application to have the conviction quashed on the ground of failure “to show good cause for his absence”, as domestic legislation required, “and that there was nothing in the case file to warrant finding that he had been absent for reasons beyond his control...”.<sup>22</sup> The European Court of Human Rights considered “that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the Geneva Assize Court”.<sup>23</sup> Having that in mind, and since the applicant as a defendant received the summons to appear before the domestic court, and he was not denied the assistance of a lawyer, the Court considered that the applicant’s conviction *in absentia* and the refusal to grant him a retrial did not amount to a disproportionate penalty.<sup>24</sup>

On the other side, in *Sejdovic v. Italy*, it has not been shown that the applicant, who was tried *in absentia*, had sufficient knowledge of his prosecution and of the charges against him so the Court was “unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court...”.<sup>25</sup> The applicant “did not have opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence

<sup>20</sup> Trechsel, *op. cit.* note 12, p. 254

<sup>21</sup> ECHR, *Colozza v. Italy*, 9024/80, 12 February 1985, § 29, *Krombach v. France*, 29731/96, 13 February 2001, § 85. Also in *Sanader v. Croatia*, 66408/12, 12 February 2015, § 68

<sup>22</sup> ECHR, *Medenica v. Switzerland*, 20491/92, 14 June 2001, § 57

<sup>23</sup> *Ibid.*, § 58

<sup>24</sup> *Ibid.*, § 59

<sup>25</sup> ECHR, *Sejdovic v. Italy*, GC, 56581/00, 1 March 2006, § 101

rights”, and that amounted to a violation of Art. 6 ECHR.<sup>26</sup> There were similar findings of the Court in *Sanader v. Croatia* judgment (*infra* 3.1.).<sup>27</sup>

### 2.1.2. Other instruments within the Council of Europe

Within the Council of Europe, the right to the new hearing of the case, when the person was convicted *in absentia*, is explicitly proclaimed in the European Convention on the International Validity of Criminal Judgments (Art. 24 - 26).<sup>28</sup> Under the Second Additional Protocol to the European Convention on Extradition,<sup>29</sup> “the right to a retrial which safeguards the rights of defence” excludes one of provided grounds for refusing extradition – if the proceedings leading to the judgment did not satisfy the minimum defence rights (Art. 3). Finally, the Committee of Ministers Resolution (75)11 on the criteria governing proceedings held in the absence of the accused provides that a person tried *in absentia* should have a remedy enabling him or her to have the judgement annulled (para 8).<sup>30</sup>

### 2.1.3. Instruments of the European Union

Within the European Union, even before the Lisbon Treaty, proceedings *in absentia* was considered as a major obstacle to efficient judicial cooperation between member states.<sup>31</sup> The jurisprudence of the European Court of Human Rights did not provide the desired level of harmonization of national laws, which led to legislative efforts in the European Union.<sup>32</sup> The Council Framework Decision 2009/299/JHA of 26 February 2009,<sup>33</sup> introduced new legal standards regarding the right of the person tried *in absentia* to reopening the proceedings. According to the Amendments to Framework Decision 2002/584/JHA, the fact that the

<sup>26</sup> *Ibid.*, § 105–106

<sup>27</sup> ECHR, *Sanader v. Croatia*, 66408/12, 12 February 2015, § 95

<sup>28</sup> European Convention on the International Validity of Criminal Judgments of 28 May 1970, ETS No. 70

<sup>29</sup> Second Additional Protocol to the European Convention on Extradition of 17 March 1978, ETS No. 98

<sup>30</sup> Committee of Ministers Resolution (75)11 of 21 May 1975 on the criteria governing proceedings held in the absence of the accused

<sup>31</sup> Mauro, *op. cit.* note 7, p. 36

32 *Ibid.*, p. 36

<sup>33</sup> The 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, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, Official Journal of the European Union L 81, 27.03.2009

person was tried *in absentia* may be a ground for refusal to execute the European arrest warrant, unless it states that the person, “after being served with the decision expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly stated that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable time frame;...” (Art. 4a(1) c)). If the person was not personally served with the decision, the European arrest warrant should state that the person will be served with it and informed of the rights mentioned above, as well as of the time frame within which he or she has to request a retrial or appeal (Art. 4a(1)d). The Court of Justice confirmed that the new provision of Art. 4a(1) of the Framework decision actually restricts the opportunities for refusing to execute a European Arrest Warrant, in conformity with the mutual recognition objectives of EU law.<sup>34</sup> Although the definition of *in absentia* formally applies in the context of international cooperation, the concept will lead to harmonization of the manner of summoning an accused.<sup>35</sup>

Finally, Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings<sup>36</sup> provides exceptions to the right of suspects and accused persons to be present at the trial (Art. 8(2)). If a suspect or accused person, tried *in absentia*, was not informed, in due time, of the trial and of the consequences of non-appearance, or was not represented by a mandated lawyer (Art. 8(2)), they have “the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, which may lead to the original decision being reversed” (Art. 9). States must assure that those suspects and accused persons in the new trial “have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise rights of the defence” (Art. 9).

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<sup>34</sup> CJ Case C-399/11, Melloni v Ministerio Fiscal, judgment 26.2.2013., para 41 and 43. Mitsilegas, V., *EU Criminal Law after Lisbon*, Hart Publishing, 2016, p.133

<sup>35</sup> Klip, *op. cit.* note 9, p. 282

<sup>36</sup> 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, OJEU L 65, 11.3.2016

## 2.2. Croatian constitutional and legislative framework

The Constitution of the Republic of Croatia,<sup>37</sup> within provisions proclaiming the right to fair trial, provides that the suspect, defendant or accused, in respect of any criminal charge brought against him, has the right “to be present at the trial, if he is available to the court” (Art. 29). Though the right to be present at the trial is a fundamental right,<sup>38</sup> it is conditioned by the accused’s availability to the court, which opens the possibility of trial *in absentia*, which is considered as an exception to adversarial principle.<sup>39</sup> The trial, as well as rights of the person tried *in absentia* to request reopening of criminal proceedings, are regulated in detail in the Criminal procedure Act (CPA).<sup>40</sup>

According to the CPA, the accused may be tried in his absence only provided that particularly important reasons exist to try him and if the trial is not possible in a foreign country, or the extradition is not possible, or the accused is on the run or inaccessible to the state authorities (Art. 402(3) CPA). Trial *in absentia* implies mandatory defence by appointed defence counsel (Art. 66(1)6 CPA). In rule, a person who was tried and convicted *in absentia* may claim reopening of proceedings on two bases. On one side, person tried and sentenced in absence, or his or her defence counsel, may request reopening if there is a possibility of retrial in his or her presence (Art. 497(3) CPA). The convicted person must be available to Croatian judicial authorities, which means that the request must contain the address of the convicted person and a promise that he or she will respond to the court’s summons. In addition, the request must be submitted within a term of one year from the day the convicted person became aware of the final judgment. The first instance court, that brought the judgment *in absentia*, decides on the request. The Supreme Court of the Republic of Croatia (VSRH) stated that, from the cited provision it is clear that “the reopening of criminal proceedings is mandatory by the termination of reasons for which the defendant was tried *in absentia*”.<sup>41</sup> It can be considered as “automatic” or even “privileged”<sup>42</sup> reopening of proceedings, since the convicted person does not have to present new facts or evidence in order

<sup>37</sup> Constitution of the Republic of Croatia, Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14

<sup>38</sup> Đurđević, Z., *Rasprava*, in: Kazneno procesno pravo Primjerovnik, Narodne novine, Zagreb, 2017, p. 153

<sup>39</sup> Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, Zagreb, 2015, p. 168

<sup>40</sup> Criminal Procedure Act, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

<sup>41</sup> VSRH, I Kž 873/12-4, 1 October 2014

<sup>42</sup> Grubiša, M., *Krivični postupak Postupak o pravnim lijekovima*, Informator, Zagreb, 1987, p. 373

to justify the claim for reopening, but simply file the request. If the formal prerequisites are met, the court must grant the reopening of proceedings.<sup>43</sup>

On the other side, the reopening of criminal proceedings terminated by a final judgment is allowed, regardless the fact that the convicted person is not present in proceedings and available to Croatian judicial authorities, if new evidence or new facts appear, that could lead to acquittal or more lenient sentence (Art. 501(1)3 CPA). In that case, however, the panel of the court which rendered the decision at first instance may reject a request if the facts and evidence presented are clearly inadequate to allow the reopening (Art. 506(1) CPA), or dismiss the request if the new evidence does not warrant the reopening of proceedings (Art. 507(1) CPA). So, unlike the “automatic” reopening of proceedings under Art. 497(3) CPA, the reopening of criminal proceedings based on new facts or new evidence depends on the first instance court preliminary assessment of the new facts and evidence and therefore the right to reopening of proceedings is rather restricted and obviously not guaranteed to all persons convicted *in absentia*.

There is also a possibility to request reopening of criminal proceedings on the ground of the decision of the Constitutional Court of the Republic of Croatia (Art. 502(1) CPA), or on the ground of the final judgment of the European Court of Human Rights, under conditions prescribed by CPA and within a term of 30 days since the judgment became final (Art. 502(2) and (3) CPA). In addition, a final judgment may be revised even without reopening of criminal proceedings if, after the judgment became final, new circumstances appeared which were not there or which were unknown to the court at the time of the judgment, and that would obviously have led to a more lenient sentence (Art. 498(1)4 CPA). According to the Supreme Court, new circumstances related to the decision on punishment can be evaluated within the reopening of proceedings under Art. 498(1)4 CPA.<sup>44</sup> If the court in the reopened proceedings conducted in presence of the defendant, “establishes the same facts [as in previous proceedings] that are relevant for the conviction, the court is not authorized to change the type or duration of the final prison sentence”, only to put one part of the judgment, the one on the punishment, out of the force.<sup>45</sup>

<sup>43</sup> See Garačić, A., *Obnova kaznenog postupka kod suđenja u odsutnosti*, Hrvatska pravna revija, vol. 9, br. 7-8, 2009., p. 107

<sup>44</sup> VSRH, I Kž 58/17-4, 9 February 2017

<sup>45</sup> *Ibid.*



### 3. REOPENING OF CRIMINAL PROCEEDINGS PROVIDING “FRESH DETERMINATION OF THE MERITS OF THE CHARGES” BY A COURT IN “FULL RESPECT OF DEFENCE RIGHTS”

#### 3.1. Judgment *Sanader v. Croatia*

In *Sanader* case, the applicant was tried *in absentia* and convicted for war crimes against prisoners of war committed in 1992. He was sentenced to 20 years’ imprisonment and the judgment became final in 2004, though the applicant had only learned of it in 2009. His request to reopen the proceedings was dismissed due to the fact that, living in Serbia, he was not available to Croatian authorities. The applicant complained before the European Court of Human Rights that he had not been able to obtain a rehearing after his conviction *in absentia* and that he had not been effectively represented by a legal-aid lawyer during the proceedings conducted in his absence, relying on Art. 6(1) and (3)c ECHR.<sup>46</sup>

Regarding the alleged inability of the applicant to obtain a rehearing after his conviction *in absentia*, the Court pointed that “there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention, for that would entail making the exercise of the right to a fair hearing conditional on the accused offering up his or her physical liberty as a form of guarantee...”<sup>47</sup> The Court reminded that “the duty 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”<sup>48</sup> and that “accordingly, the refusal to reopen proceedings conducted in the accused’s absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a “flagrant denial of justice” rendering the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein”...”<sup>49</sup>

Regarding the facts of the concrete case, the Court first noted that there was no evidence, nor any of parties argued that the applicant was ever notified of criminal proceedings against him, or that the reason for his absence was to escape trial.<sup>50</sup> Even though the domestic law did permit automatic reopening of criminal pro-

<sup>46</sup> ECHR, *Sanader v. Croatia*, 66408/12, 12 February 2015, §54

<sup>47</sup> *Ibid.* § 70, § 87

<sup>48</sup> ECHR, *Stoichkov v. Bulgaria*, 9808/02, 24 March 2005, §56; *Sanader v. Croatia*, 66408/12, 12 February 2015, § 71

<sup>49</sup> *Ibid.*

<sup>50</sup> ECHR, *Sanader v. Croatia*, 66408/12, 12 February 2015, § 76

ceedings, at that time according to Art. 497(2) CPA, the possibility of reopening “has been interpreted in the case-law of the domestic courts to mean that a person convicted *in absentia* must appear before the domestic authorities to request a retrial and provide an address of residence in Croatia during the criminal proceedings”.<sup>51</sup> Hence a convicted person who was not under the jurisdiction of Croatian authorities could not apply for reopening of proceedings based on Art. 497(2) CPA.<sup>52</sup> The Court found particularly disputable the requirement that convicted persons had to present themselves to the Croatian judicial authorities, in order to apply for automatic reopening of the proceedings, since it would in ordinary course of action imply deprivation of liberty until the decision on reopening of proceedings became final, which in practice could even take more than a month.<sup>53</sup> The Court added that the obligation of an individual tried *in absentia* to appear before the domestic authorities and provide an address of residence in Croatia was “unreasonable and disproportionate from a procedural point of view”, since the mere reopening of proceedings does not affect substantive validity of the judgment, which actually remains in force until the end of the trial.<sup>54</sup> The Court concluded that Croatian authorities created a disproportionate obstacle for the applicant to the use of remedy provided under Article 497(2) CPA, “restricting the exercise of his right to obtain a retrial in such a way or to such extent that the very essence of the right is impaired...”<sup>55</sup>

Regarding the remedy under Art. 501(1)3 CPA, which leads to “regular” reopening of proceedings, the Court stated that, even though it does not require physical presence of the convicted person, it “is applicable only to a restricted category of cases tried *in absentia* since the condition for its use is the existence of new evidence of facts capable of leading to acquittal or resentencing under a more lenient provision”, adding that it is “of a secondary and subsidiary nature for those tried *in absentia*”.<sup>56</sup> The Court stressed that the applicant should have been given “an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him”<sup>57</sup> and exercise defence rights from Article 6 of the Convention.

The Court concluded that the applicant “was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges

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<sup>51</sup> *Ibid.*, § 81

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, § 85

<sup>54</sup> *Ibid.*, § 90

<sup>55</sup> *Ibid.*, § 91

<sup>56</sup> *Ibid.*, § 92

<sup>57</sup> *Ibid.*, § 93

against him by a court in full respect of defence rights”<sup>58</sup> and it amounted to violation of Art. 6(1) of the Convention.<sup>59</sup> Regarding the alleged deficiency of the applicant’s legal representation, the Court held that it was unnecessary to examine these allegations, in view of the Court’s findings concerning the applicant’s inability to obtain a rehearing.<sup>60</sup>

### 3.2. Execution of Sanader judgment

Execution of Sanader judgment implied that the State should take individual measures to remedy the established violation of the right to a fair trial from Art 6(1) ECHR, and general measures to prevent possible future violations.<sup>61</sup> The individual measure of execution of Sanader judgment included not only paying the non-pecuniary damage and costs and expenses awarded to the applicant by the European Court of Human Rights,<sup>62</sup> but also providing for the convicted person the possibility to claim reopening of proceedings. In the concrete case, the applicant, as convicted person, did request reopening of proceedings under Art. 502 (2) CPA, on the ground of the Sanader judgment, but only after the prescribed deadline of 30 days from the day that the judgment became final expired. The request was dismissed by the Supreme Court as delayed.<sup>63</sup>

Regarding general measures of execution of Sanader judgment, the amendment of CPA was passed in July 2017,<sup>64</sup> redefining conditions for person convicted *in absentia* to claim automatic reopening of proceedings. The requirement of “availability” of the convicted person to domestic judicial authorities has been redefined in a way that it now provides the possibility to file the request for automatic reopening of proceedings even from abroad (*supra* 2.2.). Yet, since Sanader judgment, another disputable issue appeared in practice and it concerns the purpose of reopening of criminal proceedings against a person convicted *in absentia*.

#### 3.2.1. New standard of “availability” of the convicted person

In the jurisprudence of the Supreme Court of the Republic of Croatia, before Sanader judgment, the fact that the defendant, who requested reopening of crimi-

<sup>58</sup> *Ibid.*, § 95

<sup>59</sup> *Ibid.*, § 96

<sup>60</sup> *Ibid.*, § 98

<sup>61</sup> See Konforta, M., *Implementacija presuda Europskog suda za ljudska prava*, Hrvatski ljetopis za kaznene znanosti i praksu, vol. 24, br. 2, 2017, p. 276

<sup>62</sup> ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 104, § 107

<sup>63</sup> See VSRH, I Kž 644/15-6, 21 January 2016

<sup>64</sup> Official gazette 70/17

nal proceedings, lived abroad was sufficient to conclude that he or she was unavailable for the judicial authorities of the Republic of Croatia in terms of art 497(3) CPA.<sup>65</sup> The Supreme Court clearly stated that it was not sufficient for the defendant to “only show willingness to respond to the court hearing and the desire to be tried in the presence” to conclude that the defendant is available to Croatian judicial authorities.<sup>66</sup> Execution of Sanader judgment clearly implied change of such reasoning. Though, previous provisions of the CPA could have been interpreted in a way that “availability” requirement would not necessarily mean deprivation of liberty and placement into pre-trial detention, the legislator decided to intervene into legislative framework, in order to make it more precise and clear. But even before the legislative amendment, the Supreme Court referred to Sanader judgment and directly applied legal standards specified in that decision, accepting the appeal of the person convicted *in absentia* and living abroad, against decision of the first instance court denying the request for reopening of proceedings.<sup>67</sup>

Current provision stipulates that criminal proceedings shall be reopened under Art 497(3) CPA, if there is a possibility of a re-trial in presence of the accused, also beyond the conditions provided for in Art. 498 and Art. 501 CPA, if the convicted person or his counsel submits a request for the reopening of the proceedings within a period of one year from the day the convicted person learned about the final judgment. It should be added that, according to the Supreme court, the very fact that the judgment has not yet become final does not disallow the convicted person to file the request for automatic reopening under Art. 497(3).<sup>68</sup> In case there are difficulties with determining when the convicted person learned about the judgment, the rule *in dubio pro reo* should be applied.<sup>69</sup> The request must state the address at which the convicted person can be delivered writings and the convicted person must promise to respond to a court summons. If those conditions are fulfilled, the court shall postpone the execution of the previous judgment and shall notify the judge of execution of sentences so that he withdraws the arrest warrant (Art. 507 (4) CPA). If the accused person, who requested the reopening of proceedings, does not fulfil the obligation to be available to the court, the court

<sup>65</sup> VSRH, I Kž 588/13-6, 23 September 2014. Also I Kž 805/10-4 19 January 2011, I Kž 640/12-4 2 October 2012. See also Garačić, A., *Prava i nepravna obnova kaznenoga postupka*, Hrvatska pravna revija, Vol. 5, No. 3., 2005, p. 118, and Mršić, G., *Obnova kaznenog postupka – sudska praksa o nekim pitanjima ovog izvanrednog pravnog lijeka*, Hrvatska pravna revija, Vol. 4, No. 5, 2004, pp. 110–111

<sup>66</sup> VSRH, I Kž 283/14-4, 29 May 2014

<sup>67</sup> VSRH, I Kž 13/16-4, 13 April 2016

<sup>68</sup> VSRH, I Kž 709/11-5, 20 December 2011. Grubiša was of the same opinion – see Grubiša, *op. cit.* note 42, p. 373. Also see Garačić, A., *Zakon o kaznenom postupku Pravni lijekovi*, Organizator, Zagreb, 2010, p. 544 and Garačić, *op. cit.* note 65, p. 118

<sup>69</sup> Grubiša, *op. cit.* note 42, p. 374

shall put out of force the decision granting reopening of proceedings and delaying the execution of the judgment (Art. 598(3) CPA). If the accused person abused the right to automatic reopening of proceedings guaranteed in Art. 497(3) CPA, in a way that he or she became unavailable to the court without justified reason (Art. 508(3) CPA), there is no possibility for that accused to use the same legal remedy in the same proceedings twice (Art. 506(1) CPA).

### **3.3. Doubts in jurisprudence of the Supreme Court - what is the purpose of reopening of proceedings in case of trial *in absentia*?**

In Sanader judgment, the European Court of Human Rights stated that the applicant, “who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges against him by a court in full respect of his defence rights...”.<sup>70</sup> What “fresh determination of the merits of the charge” by a court and “full respect of his defence rights” actually imply? Do those standards imply the possibility for the accused to actively participate in presentation of all evidence that is relevant for the decision of the court, and not only the new evidence proposed for the reopened proceedings? The applicant should be given “an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him”<sup>71</sup> and exercise defence rights. If there would be possibility to discuss only newly presented facts and evidence that would hardly lead to fresh determination of the merits of the charge. Yet, it seems that the jurisprudence of domestic courts still does not differentiate the purpose of automatic reopening of proceedings in cases of trials *in absentia*, regulated under Art. 497(3) CPA, and regular reopening of proceedings under Art. 501(1) CPA, in cases where the accused was present at the trial and had the opportunity to actively participate in the proceedings and use all defence rights.

On one side, according to the Supreme Court, the purpose of reopening of criminal proceedings, on the ground of Art 497(3) CPA, “is to give the convicted person, who was deprived of one of fundamental procedural rights, and that is the right to defend himself before the court, the opportunity to reopen the trial in his presence”.<sup>72</sup> In the jurisprudence of the Supreme Court it is clear that under Art.

<sup>70</sup> ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 95. See also Colozza v. Italy, 9024/80, 12 February 1985, § 29, Krombach v. France, 29731/96, 13 February 2001, § 85, and Sejdovic v. Italy, GC, 56581/00, 1 March 2006, §101, § 105

<sup>71</sup> ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 93

<sup>72</sup> VSRH, I Kž 873/12-4, 1 October 2014

497(3) CPA, it is not necessary to supply the request for reopening of proceedings with new facts or new evidence,<sup>73</sup> and that the reopened proceedings must be conducted in compliance with requirements of a fair trial guarantees.<sup>74</sup> It is also possible for the person convicted *in absentia* to file request for “regular” reopening of proceedings based on Art. 501(1)3 CPA, notwithstanding his or her presence, under condition that the request is based on new facts or new evidence, that are per se or in relation with previous evidence, suitable to lead to acquittal or more lenient sentence.<sup>75</sup> In this case, the convicted person must supply the request for reopening of proceedings with new fact or new evidence. So, obviously, the Supreme Court acknowledges the distinction between two models of reopening of proceedings.

Yet, on the other side, according to the Supreme Court, there is no “substantive difference” between the automatic reopening of proceedings in cases of trial *in absentia* (Art. 497 (3) CPA) and the regular reopening of proceedings (Art. 501 (1) 3 CPA), since in both cases the reopened proceedings has “for the goal to re-examine facts that have been established in the final judgment under condition that there are new facts or new evidence that would, those evidence alone or in relation with previous evidence, lead to acquittal of previously convicted person, or to conviction of that person based on more lenient law”.<sup>76</sup> “Thereby, the goal of the new proceedings is not testing and eventual removal of previous procedural violations, nor to review the validity of previously established facts on the ground of the same evidence that was at the disposal of the court in previous proceedings.”<sup>77</sup> The Supreme Court clarified that, even in case of automatic reopening of proceedings under Art. 497(3) CPA, if the accused does not succeed in efforts to put to doubt the previously established facts, either through changing previously presented defence or through new evidence, the reopening of proceeding will not succeed and the court may leave the previous final judgment, in a whole, in force.<sup>78</sup> According to the Supreme Court, “in the reopened proceedings, the court should not re-examine the evidence that have already been examined, but establish whether, in the context of defence, there are some new facts or evidence that could lead to acquittal or more lenient sentence.”<sup>79</sup> Such attitude of the Supreme Court does not comply with basic purpose of automatic reopening of criminal proceedings

<sup>73</sup> See the reasoning of VSRH in I Kž 248/10-3, 30 June 2010

<sup>74</sup> VSRH, I Kž – Us 94/14-4, 2 September 2014

<sup>75</sup> VSRH, I Kž 283/14-4, 29 May 2014

<sup>76</sup> VSRH, I Kž 104/2017-9, 8 June 2017

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* See also Garačić, *op. cit.* note 43, p. 107

<sup>79</sup> VSRH, I Kž 104/2017-9, 8 June 2017

in a case of conviction *in absentia*, and that is, as the European Court of Human Rights pointed, to provide “fresh determination of the merits of the charge” by the court and “full respect of defence rights”. The same requires the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Art. 9). The accused should be given an opportunity to defend himself before the court and to have a hearing where he could challenge the evidence against him.<sup>80</sup> After all, the European Court of Human Rights in Sanader judgment, regarding the applicant’s allegations of his deficient legal representation, reasoned that it was unnecessary to examine these allegations in view of the Court’s findings concerning the applicant’s inability to obtain a rehearing.<sup>81</sup> In other words, when the accused obtains a rehearing, he should be provided with an adequate legal representation throughout the entire reopened proceedings, including examination of all relevant evidence. Different reasoning would actually disable remedying possibly deficient legal representation at the trial *in absentia*.

Grubiša clearly pointed the difference between purposes of regular reopening of proceedings, based on new facts and new evidence, and automatic reopening of proceedings in cases of conviction *in absentia*.<sup>82</sup> He explained that in proceedings that have been reopened automatically on the request of person convicted *in absentia*, “both the parties and the court are in almost the same procedural positions as they would have been in a new main hearing after the judgment had been quashed by the higher court”.<sup>83</sup> That is logical since the purpose of reopening of proceedings is to give the accused “the opportunity that the trial is repeated in his presence”.<sup>84</sup> Since the prohibition of *reformatio in peius* applies (Art. 508(6) CPA), possibility for the prosecution and for the court to present evidence is narrowed, but there is practically no limitation for the defence to present evidence that have previously been examined, as well as new evidence.<sup>85</sup> The presence of the accused person is not per se the purpose of retrial, but the possibility to actively participate in the proceedings through exercising his or her procedural rights.

Finally, the Constitutional Court of the Republic of Croatia, in the context of reopening of proceedings, stressed that the fair trial implies equality of arms of parties in proceedings,<sup>86</sup> which includes the rights of parties concerning choice

<sup>80</sup> ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 93

<sup>81</sup> ECHR, Sanader v. Croatia, 66408/12, 12 February 2015, § 98

<sup>82</sup> Grubiša, *op. cit.* note 42, p. 376

<sup>83</sup> *Ibid.*, p. 377

<sup>84</sup> *Ibid.*, p. 373

<sup>85</sup> *Ibid.*, pp. 377 – 378

<sup>86</sup> USRH, U-III-7227/2014, 15 January 2015, point 8

and presentation of evidence.<sup>87</sup> In the concrete case, in the reopened criminal proceedings (under Art. 497, 498 and 501 CPA), the Constitutional Court found no violation of equality of arms, notwithstanding the fact that the court refused the proposal of the defence to question two witnesses, since reopened proceedings included a detailed evidentiary proceedings that included questioning of witnesses, injured parties, expert witnesses etc.<sup>88</sup>

#### 4. CONCLUSION – DEFINING THE PURPOSE OF REOPENING OF PROCEEDINGS IN CASE OF TRIAL *IN ABSENTIA*

Execution of Sanader judgment resulted in amendment of the CPA provisions regulating reopening of proceedings in cases of conviction *in absentia*, and in the new standards of “availability” of the accused before Croatian judicial authorities. Yet, it is possible to conclude that the Supreme Court of the Republic of Croatia actually overlooks important distinction between automatic reopening of proceedings under Art. 497(3) CPA and regular reopening of proceedings under Art. 501(1) CPA. In case of regular reopening of proceedings, the defendant was in a position to actively participate in the proceedings that resulted in a conviction, so there is no ground for automatic re-examination of evidence and facts that have already been established in the final judgment. The reopening of proceedings is conditioned with presenting new facts and new evidence that will be examined before the court. On the other hand, the proceedings reopened “automatically” under Art. 497(3) CPA naturally imply re-examination of the same facts and evidence that have already been presented in the previous trial that resulted with conviction *in absentia*,<sup>89</sup> in full respect of defence rights. Prescribing such purpose of reopening of proceedings under Art. 497(3) CPA could be considered as a possible solution *de lege ferenda*.

Regarding the right to reopening of the proceedings, or a new trial, unlike Croatian law, both European Court of Human Rights and the Directive on the presumption of innocence do make distinction between accused persons who have been shown to have sought to escape trial or to have unequivocally waived their right to appear in court, and those who have not. The possibility to make distinction between those two procedural positions of the accused could be considered within solutions *de lege ferenda*, having in mind that the accused must not be re-

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, point 3, 8.1

<sup>89</sup> Grubiša, *op. cit.* note 42, pp. 376–377



quested to prove that he did not seek to evade justice or that his absence was due to force majeure.<sup>90</sup>

It is possible to conclude that, after execution of Sanader judgment, Croatian law still does not fully comply with European legal standards regulating reopening of criminal proceedings in cases of trial *in absentia*. New interpretation of “availability” requirement is only a step forward, and it is on the jurisprudence, or on the legislator in a future legislative amendment, to remove doubts on the purpose of reopening of proceedings that still exist in practice.

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<sup>90</sup> ECHR, *Colozza v. Italy*, 9024/80, 12 February 1985, §30

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