Criminal proceedings *in absentia*

Comparative study of legislation and practices in selected member states of the Council of Europe

Bosnia and Herzegovina, Croatia, Georgia, Germany, Romania, Spain, the Netherlands, the Republic of Moldova, and the United Kingdom

The study was prepared under the Council of Europe project “Fostering Human Rights in the Criminal Justice System in Ukraine” implemented within the Council of Europe Action Plan for Ukraine “Resilience, Recovery and Reconstruction” 2023-2026.

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Contents

Executive Summary

This comparative study examined the legislation of nine Council of Europe member states regarding criminal proceedings *in absentia*. It analysed a variety of situations in which prosecutors and courts in the member states under comparison were legally empowered to conduct criminal proceedings in the absence of the accused.

In addition, the research aimed to collect and analyse information on trials *in absentia* in situations of emergency or armed conflicts, if the member state in question had encountered such circumstances. From this perspective, the research was carried out to support the Ukrainian authorities in their efforts to ensure justice in the context of an ongoing war of aggression waged by the Russian Federation.

The comparative study summarised international principles and compiled the research carried out by country experts. It addressed the key issues of interest to the Ukrainian authorities with a view to establishing best practices, inter alia, for the investigation of international crimes, consistent with human rights standards and principles if justice in the context of war.

I. INTRODUCTION

The Council of Europe Project "Fostering Human Rights in the Criminal Justice System in Ukraine" ('the Project')[1] assists the Ukrainian authorities in ensuring the effective functioning of the criminal justice system in Ukraine and its alignment with European human rights standards. The need to ensure adherence to human rights standards appears even more pertinent in the context of the Russian Federation's war of aggression against Ukraine.

In this framework, the Ukrainian authorities expressed an interest in a comparative study of legislation and good practices related to criminal proceedings *in absentia*. The following Council of Europe member states were selected as case studies: Bosnia and Herzegovina, Croatia, Georgia, Germany, Romania, Spain, the Netherlands, the Republic of Moldova, and the United Kingdom. Several country experts[2] contributed to the study through carrying out primary research to answer questions set out in Annex 1. The results of the primary research were compiled per country in Annex 2, and the overview of European standards regarding criminal proceedings *in absentia* were described in Annex 3.[3] Based on the primary research the comparative analysis was provided in the Chapters III-V of this study.

The main objective of the study was to describe and analyse how *in absentia* proceedings are regulated both by international law and by national legislation of the Council of Europe member states under comparison. Given the significant differences between these various legal regimes, *in absentia* proceedings were therefore analysed from two perspectives, i.e. international law and national legislation in the relevant countries.

II. *IN ABSENTIA* PROCEEDINGS IN INTERNATIONAL LAW

The possibility of conducting trials *in absentia* is still a controversial topic in international law. Discussions on this issue reflect the difficulty of striking a balance between the general interest in ensuring justice and the individual right to a fair trial. Scholarly opinions on this issue are divided, particularly with regard to criminal trials *in absentia*. Those in favour argue that such trials prevent justice to be thwarted, ensuring deterrence and fighting impunity of criminals who seek to take advantage of the legal system. On the other hand, opponents claim that trials *in absentia* deny the fundamental guarantee of being heard in person and defending oneself in court, eventually leading to denial of justice and arbitrary convictions.

Legal standards have been established for the situations in which trials *in absentia* could be accepted as legitimate. However, these situations and standards need to be analysed from two perspectives, - international and national. This is because international and national criminal proceedings differ, even though the situations of absence of the accused may be similar for both national and international tribunals. In addition, international courts apply *in absentia* principles differently in their own proceedings for the following reasons.

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[1] The Council of Europe Project "Fostering Human Rights in the Criminal Justice System in Ukraine" is implemented by the Co-operation Programmes Division, Department for the Implementation of Human Rights, Justice and Legal Cooperation Standards of the Directorate General Human Rights and Rule of Law (DGI), within the Council of Europe Action Plan for Ukraine "Resilience. Recovery. Reconstruction" 2023-2026.

[2] *Ms Anna Adamska-Gallant*, Lawyer specializing in international criminal law and human rights, elected Judge to the European Court of Human Rights, Poland, international consultant of the Council of Europe (operating under Gallant Consulting Ltd.), - for Bosnia and Herzegovina, Croatia and the Netherlands; *Dr. Lorena Bachmaier Winter*, Full Professor of Law, Justice Systems and Procedure, Complutense University Madrid, Spain, international consultant of the Council of Europe, - for Spain and Germany; *Mr Lilian Apostol*, International Legal Advisor, Cooperation Programmes Division*, DGI*, council of Europe, - for Georgia, Romania and the Republic of Moldova, and *Mr Ian Welch*, Lawyer in the criminal justice system, former Specialist Prosecutor at Crown Prosecution Service, Headquarters, London, the United Kingdom, international consultant of the Council of Europe, for the United Kingdom.

[3] Prepared by Mr Jeremy McBride, Barrister, the United Kingdom, international consultant of the Council of Europe.

First, international human rights courts and international criminal tribunals agree on the same standards governing proceedings *in absentia*. They require national courts to comply with these standards in the administration of justice at the national level. However, the procedures of international tribunals differ and cannot be assimilated to domestic proceedings. In fact, none of the international courts apply these standards to their own proceedings, which is not left without notice by the domestic courts.

Second, international courts play different roles in the administration of international justice. International human rights courts do not pass criminal sentences or decide on appeals against convictions *in absentia*. Their role is to establish and set out minimum standards for a fair trial, including in cases of trials *in absentia*. International criminal tribunals, on the other hand, convict persons for international crimes and, thus they are required to do so in accordance with fair trial guarantees. However, these tribunals could be prohibited or permitted to hold trials *in absentia* by the constituent states, thus limiting their judicial discretion in establishing their own rules of procedure.

In view of these particularities of international law jurisdictions, *in absentia* proceedings should be explained from the view international human rights law and international criminal law separately.

In absentia proceedings in international human rights law

International human rights treaties, including the European Convention on Human Rights ("the Convention"), require the presence of an accused at trial as part of the individual right to the defence.[4] However, this right is not absolute and could be limited in certain situations, provided that specific procedural guarantees of the fair trial are respected.

Accordingly, the question of whether or not to allow *in absentia* trials falls largely under the discretion of the member state that has signed the human rights treaty. If such a state chooses to prohibit *in absentia* proceedings, it must in any event ensure the presence of the accused at trial. If the state chooses to allow such proceedings, it should establish a legal basis to regulate all situations in which *in absentia* proceedings could be held and introduce a number of safeguards to ensure the fairness of such proceedings.[5] These safeguards may vary depending on the situation warranting the use of *in absentia* proceedings, but in general the requirements of international human rights law could be narrowed down to the following points:

- First, *in absentia* proceedings can be used only in specific situations demanding such proceedings, namely when the accused has
    - voluntarily waived the right to be present at court,
    - refused to appear or absconds the trial, or
    - been removed from the court hearings as a punishment for obstruction.
- Second, *in absentia* proceedings must be accompanied by procedural safeguards, which could be general and specific.
    - General safeguards require the accused to be
        - notified about criminal charges, including with summons to appear before the prosecution and courts;
        - represented by a defence lawyer, whether chosen or appointed, in all proceedings;
        - offered reasonable prospects of re-trial of the conviction rendered *in absentia*.

[4] International Covenant on Civil and Political Rights, Article 14(3)(d); European Convention on Human Rights, Article 6(3)(c); American Convention on Human Rights, Article 8(2)(d). The last two treaties provide for the right to defence, which implies the right to be present at the trial.

[5] See among many other authorities, UN Human Rights Committee in the cases of *Daniel Monguya Mbenge v. Zaire* and *Karttunen v. Finland*, or the European Court in the cases of *Ekbatani v. Sweden* and *Kremzow v. Austria*.

- Special safeguards are required in specific situations, namely in the case of
  - waiving the right to be present, the will of the accused must be established in an unequivocal manner. The waiver should be voluntary and based on an informed choice and expressed clearly. The accused should reasonably be able to foresee the consequences which his or her conduct would entail and must not run counter to any important public interest.
  - removal from the court room for obstruction, the decision to hold trial *in absentia* must be corresponding to the gravity of the behaviour of the accused. It also must be based on the assumption that the accused could have reasonably foreseen the consequences of his/her conduct prior to the decision to remove him or her from the courtroom.

These points are normally adduced as an argument to address the concerns about the fairness of *in absentia* trials, which could be considered as already well-established standards set out by human rights courts and treaty bodies. Among many of these international human rights jurisdictions, the European Court has developed the richest body of jurisprudence on trials *in absentia* and the proceedings related thereto. It includes these and other standards applicable to criminal proceedings *in absentia.* In view of its importance and given the particular interest of the Ukrainian authorities in the European Court's case-law, the present study includes an overview of the European standards regarding criminal proceedings held *in absentia* trials, which addresses the standards under the Convention in more detail (see Annex 3).

In absentia proceedings in international criminal law

The Nuremberg International Tribunal was the first and the only international criminal tribunal that held a trial and convicted a defendant *in absentia*, who was subsequently found to be dead at the time of the trial. According to the compendium of the customary law, after the Nuremberg trial there was an observable trend in international criminal law to move against trials *in absentia*.[6] Statutes of the International Criminal Court, of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone did not allow such trials, despite of high stakes of international criminal justice.[7]

There has been a notable exception to this trend in the case a hybrid Special International Criminal Tribunal for Lebanon, that held trials *in absentia,* for which it was both criticised[8] and commended[9] by scholars. However, the Lebanon Tribunal's jurisdiction was limited to prosecute suspects who were already beyond its reach at the time of its establishment. For this reason, trials *in absentia* could be considered an inherent part of the purpose for which this Tribunal was constituted.

In the context of the war in Ukraine the discussions on feasibility of proceedings *in absentia* in criminal international law have resurfaced.[10] It appears that the trend is shifting towards the

[6] J.-M. Henckaerts et al. (eds.), Customary International Humanitarian Law (2005), available at www.cambridge.org/9780521005289; ICRC, Rule 100. Fair Trial Guarantees, Customary IHL.

[7] ICC Statute, Article 63(1) and Article 67(1)(d); ICTY Statute, Article 21(4)(d); ICTR Statute, Article 20(4)(d); Statute of the Special Court for Sierra Leone, Article 17(4)(d).

[8] Jordash and Parker, 'Trials in absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law', 8 Journal of International Criminal Justice (2010) 487.

[9] Salehi and Khosrowshahi, 'Trials in absentia at the Special Tribunal for Lebanon on the Basis of the International Human Rights', 14 Criminal Law Doctrines (2018) 119; Gaeta, 'Trial In absentia Before the Special Tribunal for Lebanon', in A. Alamuddin, N. N. Jurdi and D. Tolbert (eds.), The Special Tribunal for Lebanon: Law and Practice (2014) 0; Gardner, 'Reconsidering Trials in absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence', Cornell Law Faculty Publications (2011) , available at https://scholarship.law.cornell.edu/facpub/1530.

[10] Global Rights Compliance LLP, 'Trials in absentia', , available at https://www.asser.nl/media/795064/grc-trials-in absentia-

acceptance of such proceedings in criminal international law, at least at the pre-trial stage, including at the International Criminal Court[11], in order to avoid impunity for perpetrators of international crimes.

Thus far, the Parliamentary Assembly of the Council of Europe considered opportune to recommend the possibility of holding *in absentia* pre-trial proceedings at the foreseen special tribunal for the crime of aggression against Ukraine.[12] The Ministers of Justice of the Council of Europe expressed their willingness to discuss further the need to introduce of *in absentia* trials as a means of ensuring accountability for international crimes committed in Ukraine.[13] In the context of the same Ministerial Declaration, both the Secretary General and the Commissioner for Human Rights of the Council of Europe pledged their support to the idea of such trials provided that the authorities would guarantee minimum safeguards of a fairness in accordance with international human rights law.[14]

III. *IN ABSENTIA* PROCEEDINGS IN THE NATIONAL LAW OF THE COUNCIL OF EUROPE MEMBER STATES UNDER COMPARISON

States retain a wide margin of appreciation as to whether accept *in absentia* criminal proceedings in their national legal systems. If they decide to prohibit, in full or in part, *in absentia* proceedings, they must ensure the presence of the accused. On the contrary, once they have decided to allow such proceedings, states must comply with international human rights law, which requires specific procedural safeguards to ensure the fairness of a trial *in absentia*.

First, states should put in place proper systems of notification of criminal charges, otherwise any criminal proceedings *in absentia* would be arbitrary. From the perspective of international human rights law, no procedural safeguard can compensate for the absence of such notification. Second, states must ensure specific procedural safeguards for the defence in the situations of *in absentia*, such as the mandatory presence of a defence lawyer and the unfettered waiver of the right of the accused to be present at the hearings. And third, states

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english.pdf (last visited 10 July 2024]; International Nuremberg Principles Academy, In absentia Trials and International Standards: A Comparative Analysis, International Nuremberg Principles Academy, available at https://www.nurembergacademy.org/projects/detail/f71c668cba07590185e6636692d5f381/

[11] Massimino, 'ESIL Reflection- The ICC and *in absentia* Proceedings – Finding a Response to the Difficulties of Executing Arrest Warrants – European Society of International Law | Société Européenne de Droit International', 13 *ESIL Reflections* (2024) , available at https://esil-sedi.eu/esil-reflection-the-icc-and-*in absentia*-proceedings-finding-a-response-to-the-difficulties-of-executing-arrest-warrants/; Klip, 'The Right to Be Present Online', (2024) , available at https://brill.com/view/journals/eccl/32/1/article-p1_001.xml (last visited 4 June 2024].

[12] Resolution 2556 (2024) Legal and human rights aspects of the Russian Federation's aggression against Ukraine, p. 13.9.7.

[13] "*7. Fully respecting fair trial guarantees and emphasising the undisputable advantages of in-person trials, we acknowledge that, under certain conditions and where the applicable law so permits, certain procedural steps in absentia in the prosecution of international crimes may serve the interest of justice, and we perceive the merit for further discussions on this matter.*
'Declaration of the Ministers of Justice of the Council of Europe on the Occasion of the Informal Conference "Towards Accountability for International Crimes Committed in Ukraine", 5 September 2024, Vilnius, Lithuania' (2024)

[14] "*…And the standards required for trials in absentia – Which must of course be fair and in line with international human rights law.*" 'Speech of the Secretary General at the Informal Conference of the Ministers of Justice of the Council of Europe "Towards Accountability for International Crimes Committed in Ukraine", 5 September 2024, Vilnius, Lithuania' (2024)' https://www.coe.int/en/web/secretary-general/-/informal-conference-of-the-ministers-of-justice-of-the-council-of-europe-towards-accountability-for-international-crimes-committed-in-ukraine-
"*In the context of the aggression against Ukraine, if it were to be concluded that in absentia trials might be permissible it would of course be essential to address the guarantees identified by the European Court of Human Rights and the United Nations Human Rights Committee. At a minimum, these require:*
- To ensure that every reasonable effort is made to bring the proceedings to the attention of the accused persons.
- That defendants due process rights are assiduously protected, including rights of appeal.
- That, in cases where the defendant was unable to participate, that later retrial opportunities are provided. In this regard, the European Court of Human Rights found that 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, is a "flagrant denial of justice".
''Speech by Michael O'Flaherty Council of Europe Commissioner for Human Rights (CommHR(2024)37)' https://rm.coe.int/speech-at-the-informal-conference-of-council-of-europe-ministers-of-ju/1680b178af

must guarantee effective procedural possibilities for the accused to appeal and obtain a re-trial of *in absentia* conviction.

These are the essential requirements for the legitimacy of any trial *in absentia*, where states' discretion is limited. In other words, states may have discretion whether to allow trials *in absentia* into their legal systems, but they do not have discretion to decide on whether to introduce procedural safeguards or not, once such trials take place. However, if they accept such proceedings, states can choose how to introduce procedural safeguards into their legal systems and how to apply them in practice. In this latter sense, procedural legislation and practice vary considerably.

Given such discretion and the diversity of legal systems among the Council of Europe member states under comparison, the analysis had to be limited to certain relevant issues, particularly for the Ukrainian authorities, who requested this study. These issues were defined as follows:

- The study sought to find the extent of the **states' discretion** to decide whether to allow *in absentia* proceedings, in which situations and at which stages of criminal proceedings.
- It researched the means for the **notification of criminal charges**, including summoning and the measures to ensure the presence of the accused person at the pre-trial and trial stages, including through the use of international cooperation.
- The study looked at the **procedural safeguards** to ensure the overall fairness of *in absentia* proceedings by securing the right of defence and legal representation, full disclosure of evidence and the possibility of a re-trial in the event of a conviction *in absentia*.
- The study also examined the applicability of *in absentia* proceedings in **special contexts**, such as emergencies or the prosecution of international crimes during or in the aftermath of armed conflict, if the member state concerned had experienced such situations.

States' discretion

All the countries surveyed allow trials *in absentia*, albeit to a greater or lesser extent. Bosnia and Herzegovina and Germany allow *in absentia* proceedings only partially and in very limited situations. The legal systems of the Netherlands and the United Kingdom are more open and flexible to *in absentia* proceedings, which are seen as a legitimate response to the defendant's waiver of the right to be present at trial. It could be argued that *in absentia* proceedings are most widely permitted in Croatia and Georgia, with minor exceptions relating to extradition and transfer of criminal proceedings. Croatian and Georgian legislations are less detailed than in other countries and, therefore, open to wide interpretation. By comparison, Spain, Romania and the Republic of Moldova regulate *in absentia* proceedings in a detailed and comprehensive manner, limiting them to certain types of proceedings (Spain), crimes (Spain, the Republic of Moldova, Croatia) or offenders (only adults in the Republic of Moldova).

In nearly all countries compared, with the slight exceptions of Bosnia and Herzegovina and Germany, trials *in absentia* can be held in cases where a defendant either expressly waives the right to be present or simply refuses to comply with summons. In all countries, without exception, a trial *in absentia* can be held if the defendant absconds after being formally notified of the criminal charges or if his or her whereabouts are unknown. The Republic of Moldova, Croatia and Georgia are notable exceptions, as they are the only countries that allow proceedings to continue *in absentia* if the defendant's whereabouts are known but he or she is beyond the reach of the authorities in cases of refusal of extradition or impossibility of transfer of the criminal proceedings, or rejection of rogatory letters (the Republic of Moldova only).

Some countries provide for specific situations justifying *in absentia* proceedings, such as

forcible removal from the courtroom as a punishment for contempt (the Republic of Moldova, Romania) or the detainee's refusal to be brought to court hearings (Bosnia and Herzegovina, Georgia, Romania, the Republic of Moldova).

Notification and summoning

From this point of view, the legislation and practice of all the states under comparison are extremely diverse. In many of them, the procedural legislation lays down numerous formalities for notifying and summoning the accused, such as informing about criminal accusation or suspicion by issuing either minutes of arrest (the Republic of Moldova) or a separate decision of investigator or prosecutor (Georgia, the Republic of Moldova), or by ordering a preventive measure non-privative of liberty (the Republic of Moldova), or sending summons with brief information about the accusations (Romania), etc. Each legislation defines differently the status of suspect, accused, or defendant depending on the type of notification acts (the Republic of Moldova, Romania, Bosnia and Herzegovina, Spain) or stages of criminal proceedings (the Republic of Moldova and Romania). Other legislations are less formal and restrictive, giving the prosecution more discretion in summoning, informing, and bringing charges (the United Kingdom, Netherlands, Georgia) in order to comply with the notification requirements.

In any case, the common feature of all countries is that no trial can be held *in absentia* unless the accused has been duly notified of the charges in the manner prescribed by domestic law. If the formalities of notification are not complied with, the legitimacy of the entire trial *in absentia* is called into question.

Another feature common to all legal systems is the similarity in the way in which defendants are summoned, through the handling of the summons, through postal services or special summoning agents, etc. Most states have already adopted the concept of digital summons (the Netherlands, the United Kingdom, Romania, the Republic of Moldova, etc.), while others remain more conservative (Bosnia and Herzegovina). In a few states, summoning is accepted through legal representatives or defence lawyers (Georgia, partially in Romania). In all states, the prosecution requires proof of receipt, which can be either a report drawn by summoning agents and police officers acting as a summoning agent, or a postal certificate, or a witness statement (Romania), or even prosecutor's affidavit about the summoning via phone conversation (in the Republic of Moldova). Such a receipt is required in every country, otherwise the obligation to notify is not met.

However, proof of receipt of a summons in itself does not satisfy the notification requirement in all states. The difference lies in the effect of the summons in different jurisdictions. In some states, a summons can be equated with a notification of criminal charges and, if the notified person does not comply, it can justify a trial *in absentia* (the United Kingdom, the Netherlands). In other states, a summons may only justify special restrictive measures, such as arrest warrants or search for wanted persons, but cannot be qualified as a formal act of notification of criminal charges (the Republic of Moldova, Romania, Bosnia and Herzegovina, Germany, Spain).

The same reasoning applies to the procedure for disclosure of evidence, which is mandatory in all states before the beginning of a trial. It is also a common practice in all states to disclose evidence to a defence lawyer instead of an absent defendant (Georgia, Romania, the Republic of Moldova).

All states have specific rules for notification and summons when international assistance is required in criminal matters. In all countries, the rules on international cooperation, summons and notification are complex and vary. However, in almost all states it is common for the public prosecutor's office or the ministry of justice to initiate international cooperation procedures for the summoning and enforcement of detention orders issued *in absentia*. Notification of criminal

charges is still considered a sovereign prerogative or the country and its prosecutors, which is rarely delegated to foreign jurisdictions through international cooperation mechanisms; for example, Romania prohibits the notification of criminal charges through letters rogatory. The Republic of Moldova seems to be the only notable example among the surveyed states to have recently amended its legislation thereby allowing remote notification of criminal charges by means of letters rogatory. Other countries do not have such provisions, at least not specifically for remote notifications and summons intended to justify proceedings *in absentia*.

Anyhow, it is difficult to categorise the practices and legal provisions relating to notification and summons in all the countries, as there are too many variables, and they must be observed on case-by-case basis (see Annex 2). This approach also applies to practices and rules of international cooperation in areas related to proceedings *in absentia*, including but not limited to searches for wanted persons, extradition, transfer of criminal proceedings or execution of arrest warrants.

Procedural safeguards

In contrast to diverse rules and practices on summons and notification of criminal charges, the states provision almost similar procedural safeguards for trials *in absentia*. In all surveyed states, procedural safeguards include the right of the absent person to be represented by a defence lawyer, the right to request a review of the conviction rendered *in absentia*, and the right to judicial review of the decision to conduct a trial *in absentia*.

The first guarantee is indisputable. All states recognise the presence of a defence lawyer at the trial and any other action requiring the attendance of the accused as unconditional requirement for *in absentia* proceedings. Some even allow the absent defendant to be represented by his or her lawyer for the purposes of notification and summons (Georgia and Romania). In all states, a defence lawyer may appeal against a conviction *in absentia* on behalf of a defendant.

Judicial review of the decision to proceed *in absentia* varies from country to country. Some states provide for a special guarantee of judicial review of investigative measures taken *in absentia* during the pre-trial investigation. The Republic of Moldova, for example, requires a judicial authorisation for a case to proceed to trial if charges have been brought in the absence of the accused. Romania requires each case to be heard by a pre-trial chamber in order to authorise a trial *in absentia*. In the Netherlands, the United Kingdom, Germany and Spain, only the courts can decide whether to allow the prosecution to continue without a defendant being present at the trial. Croatian and Georgian legislation are less explicit on pre-trial proceedings *in absentia*, allowing only judges at the trial stage to decide on the possibility of continuing the judicial inquiry in the absence of the accused.

Guarantees in cases of expressing waiver of the right to be present at the trial vary. For example, some countries (Bosnia and Herzegovina, Georgia) do not allow the right to be waived for detained persons or require a special procedure to confirm such a waiver. Other countries prohibit the waiver of the right in trials for serious crimes (Spain, the Republic of Moldova) or in trials under special procedures (Germany). In the Netherlands and the United Kingdom, the waiver is not limited, but is subject to the decision of a judge, who can decide whether to accept such a waiver.

While some of the guarantees of fairness in trials *in absentia* are unconditional, the requirement for a review of a conviction *in absentia* is more or less discretionary. For example, the Netherlands and the United Kingdom provide for an almost unlimited right of appeal and re-trial of such convictions. Similarly, appeals in the Republic of Moldova and Romania are subject to more sophisticated rules that impose a number of conditions and options for defendants convicted *in absentia* to seek a re-trial. In Croatia and Georgia, the means of requesting such a re-trial are limited to ordinary appeals and stricter conditions for a leave to

appeal.

In all states, appeal procedures may overlap, but in general, defendants convicted *in absentia* have the following avenues available to them: an ordinary appeal against the sentence through a lawyer of their choice within the statutory appeal period, or a request to restore the statutory appeal time-limit if they can demonstrate good cause for the delay; in some states, defendants may request a full re-trial under special provisions for reopening *in absentia* proceedings, provided that they have complied with the statutory time-limits for requesting such a re-trial. In some states (the Republic of Moldova, Romania, Spain) these procedures overlap, while in others (Croatia, Georgia) the legislation imposes significant restrictions on the possibility to appeal or request a re-trial. The legislation of the Netherlands, the United Kingdom, Germany and Spain is more liberal in allowing defendants to request and obtain a re-trial. In any event, all states compared in the present study provide for time limits to appeal or request a re-trial, which always start to run from the day a person convicted in absentia learns about the judgment**.**

Special context

Through the modern history, a number of the states have experienced either an emergency situation or an armed conflict within their territory or under their jurisdiction. The United Kingdom was engaged in the conflict in Northern Ireland from the late 1960s to 1998. Bosnia and Herzegovina and Croatia suffered consequences of a series of armed conflicts between 1991 and 1995 following the dissolution of Yugoslavia. Romania passed through the turbulent periods of civil unrests beginning with the revolution in 1989 and continuing with the miners' massive protests in 1990s, violent general strikes and constitutional crises in 2000s and 2010s. Spain has experienced violence by the today dismantled terrorist group ETA between 1968-2011, violence in the Canary Islands in the 1970s, and an independentist challenge in Catalonia in 2017-2018. The Republic of Moldova and Georgia continue to be affected by the occupation of parts of their sovereign territories following the armed conflicts in the Transnistrian region in 1990s and in South Ossetia and Abkhazia in 2008, respectively.

None of the states surveyed, however, adapted or modified criminal procedure legislation for the sole purpose of introducing *in absentia* procedures in response to these specific events or emergencies. Indeed, changes of criminal legislation relevant to the topic have taken place, but it can hardly be said that the above-described emergences and armed conflicts led to specific changes in criminal legislations or practices with regard to *in absentia* proceedings.

For example, in the context of the recent global emergency related to COVID pandemic, states may have introduced some minor changes in their criminal procedure, which may be relevant for the purpose of *in absentia* proceedings. Almost all surveyed states reported using digital tools such as videoconferencing or written communication as alternatives to physical court hearings during the COVID-related emergency. However, not all these proceedings can be considered *in absentia*, as the defendants usually participate in the hearings remotely.

The same argument could be made for cases related to national security or closed hearings to protect confidentiality. In these cases, states reported that defendants can be banned from attending court hearings, but this would not be considered a trial *in absentia*.

Only the Republic of Moldova could serve as an example of a state that has adapted its legislation for a specific purpose related to the subject of this study. However, although based on the specific purpose of prosecuting fugitives in high-profile cases, the amendments to the Moldovan criminal procedure code were not determined by an emergency situation nor by an armed conflict.

High-profile cases decided *in absentia* were found in each of the countries compared. Some of these cases reached the European Court, which highlighted shortcomings in the way trials

were conducted *in absentia* in the country concerned. For example, Georgia and Croatia were criticised for excessively restricting the right to apply for a review of a conviction *in absentia*,[15] while the Republic of Moldova and Romania were criticised for failing to comply with notification requirements in relation to trials *in absentia*.[16]

Concerning prosecution of international crimes, only Romania and Croatia reported cases of conviction *in absentia* of war criminals; the Albert Wass case of 1946 (refused to be reopened in 2008)[17] and the Sanader case of 1992 (examined by the European Court)[18]. On the contrary, the United Kingdom prohibited *in absentia* trials in the war context.[19]

In summary on in absentia proceedings in the surveyed member states

Bosnia and Herzegovina

Bosnia and Herzegovina prohibits trials in the absence of the accused. A criminal investigation can be conducted in the absence of an accused person, but an indictment cannot be issued, and the person cannot be committed to trial if he or she has not been questioned. Decisions on detention on remand can be taken in the absence of the accused and only in the case of absconding.

Croatia

In Croatia, a trial *in absentia* can take place in cases of absconding when neither the transfer of the criminal proceedings nor extradition is possible. Trials *in absentia* may be held regardless of the seriousness of the criminal charges or punishments, but the courts must always consider whether there are 'particularly important reasons for [such] a trial'. It is a legal requirement entailing broad interpretation, which in practice has been applied to the investigations and trials of particularly serious economic and property crimes and those against the state budget.

Georgia

Georgia permits *in absentia* proceedings but prohibits trials in the absence of the accused in cases when the criminal prosecutions could be transferred to foreign jurisdictions where the fugitive resides. Trials *in absentia* are allowed in the situations of non-appearance before the court or contempt of the court sanctioned by forcible removal of the accused from the court room. In this sense, the legislation refers only to the possibility of holding judicial hearings *in absentia* and contains no special provisions regulating pre-trial investigation in the absence of the accused.

Germany

Germany allows trials *in absentia* in the case of minor offences and in some exceptional

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[15] E.g. *Lobzhanidze and Peradze v Georgia* nos. 21447/11, 35839/11 (27 February 2020); *Sanader v Croatia,* no. 66408/12 (12 February 2015)

[16] E.g. *Coniac v. Romania*, no. 4941/07 (6 October 2015); *Giuliani v. the Republic of Moldova* (dec), friendly settlement, (23 November 2007), Toma v. the Republic of Moldova, no. 64399/11 (communicated on 7 June 2017); *Negru v. the Republic of Moldova*, no. 7336/11, 27 June 2023

[17] 'Report of the International Commission on the Holocaust in Romania', chapter 12 on Trials of War criminals; available at: https://www.yadvashem.org/docs/international-commission-on-romania-holocaust.html or for an official copy of refusal to reopen the proceedings see '*Odioasele masacre ungurești de acum 84 de ani. Familia preotului Bojor din Mureșenii de Câmpie măcuită în noaptea de 23 spre 24 septembrie 1940 la ordinele grofului Wass Albert. Interviu cu profesorul Ovidiu Bojor, supraviețuitor al măcelului*', ActiveNews - Știri necenzurate, available at: https://www.activenews.ro/stiri/Odioasele-masacre-unguresti-de-acum-84-de-ani.-Familia-preotului-Bojor-din-Muresenii-de-Campie-hacuita-in-noaptea-de-23-spre-24-septembrie-1940-la-ordinele-grofului-Wass-Albert.-Interviu-cu-profesorul-Ovidiu-Bojor-supravietuitor-al-macelului-162810

[18] See above

[19] War Crimes Act 1991 (legislation.gov.uk), available at https://www.legislation.gov.uk/ukpga/1991/13

circumstances, when the defendant is seen unfit to be present at the court hearings or he or she is out of reach of the authorities. The trial can proceed without the presence of the defendant in the circumstances when he or she did not appear despite the obligation to attend and when the law allows him or her to decide whether to attend or not. In both situations, the defendant should have been summoned and informed about the consequences of not attending the trial, otherwise the rules of *in absentia* proceedings are not applicable. When the accused absconds without being officially notified the trial is rather suspended for an undetermined period.

Romania

Romania allows pre-trial investigations and trials *in absentia* in certain situations prescribed by law. These situations include the person's refusal to appear without justification after being properly summoned or after official notification about criminal charges. Trials *in absentia* can be conducted if the defendant absconds, disappears, changes the residence without informing the court and his or her whereabouts are unknown, or waives the right to be present at court hearings.

Spain

Spain allows trials *in absentia*, except for very serious offences punishable by imprisonment form for more than nine years. In other cases, a trial may be held *in absentia* if the defendant absconds after being notified of the charges, or if he or she has been found in contempt of court and removed from the courtroom, or if his extradition has been refused. Spanish law also provides for a trial *in absentia* if the accused person voluntarily waives his or her right to be present at the trial for an offence punishable by a fine or less than two years' imprisonment.

Netherlands

The Netherlands allow for trials *in absentia* under certain conditions and only if the accused is deemed to have waived his right to be present. The waiver includes the cases where the accused absconds and refuses to appear, or where he or she authorises a defence counsel to appear at the trial instead. The Dutch legislation also provides for the possibility of prosecuting a person *in absentia* in cases of universal jurisdiction, but this possibility is considered undesirable. In special situations, conducting a trial in the absence of the accused could be considered as an option to prevent the breach of the reasonable time requirement for the trial and thus to avoid the loss of the privilege of prosecution.

Republic of Moldova

The Republic of Moldova allows both prosecution and trial *in absentia*, seeing it as an exception to the rule of mandatory presence of the accused. However, persons cannot be prosecuted and tried *in absentia* at the pre-trial stage unless they are accused of at least one serious offence. At the trial the seriousness of the offence no longer plays a role, and the accused may be tried and sentenced *in absentia* regardless of the classification of the crime of which they were accused of. Moldovan law provides for trials *in absentia* in cases of absconding and unknown whereabouts, or where the person has been notified of criminal charges but resides abroad and refuses to appear, where the prosecution cannot formally notify a person residing abroad of the charges, and where the detained defendant refuses to be accompanied to court hearings or waives the right to be present in court.

United Kingdom

The United Kingdom has three different criminal justice jurisdictions, which all accept *in absentia* proceedings based on various practices and criteria. The fundamental rule for a trial *in absentia* is common for all jurisdictions, which provides that unless a suspect has been notified about criminal charges or summoned to court, a trial cannot take place in his or her

absence. In general, for any situation justifying *in absentia* proceedings the national courts must be satisfied that the defendant has waived the right to attend, and the trial is going to be fair despite the defendant's absence. Some specific criteria might apply, such as the nature and circumstances of the defendant's behaviour revealing the waiver of the right, his or her wish to be legally represented or special instructions to the legal representative, or the disadvantage of the defendant in not being able to give rejoinder. A trial cannot be held if the defendant's cause for non-attendance is reasonable, or it runs contrary to justice interests.

IV. ANALISIS OF THE ISSUES OF RELEVANCE FOR UKRAINE AND BEYOND

Criminal proceedings *in absentia* in the context of the Russian war of aggression against Ukraine raise a number of legal and practical issues that seem to have no clear solutions at the moment. The present comparative analysis may serve as a source of inspiration for the Ukrainian authorities in particular, as well as for other countries in their search for legislative and/or practical solutions to these issues. The present study, however, is not meant to be used to copy legislation and/or practices from the countries under the research without taking due account of the specific national context, as well as the ongoing war in Ukraine. In any case, the study delineated the following issues of relevance for the national authorities:

- Whether and to what extent the national authorities may exercise their discretion to regulate *in absentia* proceedings for the prosecution of international crimes?
- How to ensure proper notification of criminal charges in the context of war? and
- What are the limits, if any, of the guarantee to review a conviction for international crimes, which was rendered *in absentia*?

Discretion of introducing *in absentia* proceedings

The national authorities retain wide discretion to allow or prohibit trials *in absentia*, partially or at certain stages of the proceedings, for all procedural measures or only for selected ones, etc. The discretion is limited in the sense that the authorities must ensure the fairness of such trials by providing specific procedural guarantees that would compensate for the disadvantage of the defendant not being present at the trial. These guarantees should include, at the very least, mandatory notification of the accused of the criminal charges, the mandatory presence of the defence lawyer at all proceedings, and the right to a review of the conviction *in absentia*, which should be reasonably accessible and effective (see for details compilation of the European standards in Annex 3).

Notification of criminal charges in the context of an armed conflict

If the person accused of any crime has not been properly informed of the charges, then any trial *in absentia* becomes arbitrary. This standard applies whether the crime was committed in times of peace or war.

In the specific context of the war of aggression in Ukraine, the requirement of effective notification of criminal charges appears to be the most problematic to be applied in practice. This requirement becomes even more remote in cases of prosecution of international crimes and serious violations of humanitarian law attributed to the belligerent forces of the Russian Federation. It is also a challenge for the Ukrainian prosecutor's office to notify persons of criminal charges who are on the territories under occupation or on which Ukraine has lost effective control due to ongoing hostilities. The comparative study does not provide solutions to this challenge but describes some practices that could be a source of inspiration in the search for solutions.

The Republic of Moldova, for example, has recently amended its legislation to ensure the notification of criminal offences in cases of known whereabouts in so-called "safe havens". Its

legislation allows for remote notification of charges through letters rogatory to wanted persons whose whereabouts are known and who cannot be reached by the authorities. However, this option raises another challenge for Ukraine. Because of the disruption of international cooperation with the Russian Federation due to severed diplomatic relations[20] such remote notifications of criminal charges, via rogatory letters, are highly improbable to be implemented in practice.

In this latter sense, the study was unable to inquire from public sources whether a severance of diplomatic relations between countries has had in any way affected criminal proceedings in the countries under the comparison. Of all the countries covered in this study, only Georgia broke off diplomatic relations with the Russian Federation in 2008, and 'intergovernmental co-operation [between these countries] since 2010 has been practically frozen nearly in all directions'[21]. According to the desk research, it remains unclear whether Georgia and Russia have continued to cooperate in criminal matters at the prosecutorial and judicial levels in the situation of severed diplomatic relations between the executive branches, and if so, how and through what mechanisms they may have cooperated.

This is indeed a difficult situation for the prosecution and judicial authorities in any country, as they cannot be sure that notifications of criminal charges have reached the accused located outside of their jurisdiction.

The answer to this situation could be sought in other areas of present research. For example, Georgian, Croatian and Moldovan legislations provide that a trial *in absentia* may be justified in the event of extradition refusal, absence of a response to letters rogatory (only for the Republic of Moldova) or impossibility of transferring the criminal prosecution. This could be an answer to the dilemma of engaging in international cooperation with Russia for the purpose of notification of criminal charges in the context of the war of aggression, but it still does not seem to be a viable solution as it may raise further questions about the fairness of the process as a whole.

This option could be used arbitrarily by the prosecution, since in the context of severed diplomatic relations, it becomes obvious that any request for international assistance would be rejected. In the end, such proceedings *in absentia* would be based on a simple formality to send a request for international assistance and having no answer to the letters rogatory from the hostile authorities. It would not be then a trial *in absentia* based on the special circumstances in which the accused knowingly waived the right to be present at that trial. It would then be contrary to the requirement of fairness and therefore unlikely to comply with the standards of human rights law.

Another potential option could be explored. An authority, intermediary with a neutral status (a state(s), an international organisation or a special multilateral mechanism) may serve the purpose of ensuring international cooperation, send notifications and summons and facilitate legal assistance for the purpose of criminal investigations of international crimes. This would be in accordance with international customary rules, under which 'States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects'[22]. However, this option would require further research. A follow-up study in the field of international cooperation practices is needed to conceptualise this option, in particular in the realities of an open armed conflict.

[20] Ministry of Foreign Affairs of Ukraine. 'Statement by the Ministry of Foreign Affairs of Ukraine Regarding the Severance of Diplomatic Relations with the Russian Federation', 24 February 2022. https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-regarding-severance-diplomatic-relations-russian-federation.

[21] Ministry of Foreign Affairs of Georgia (mfa.gov.ge), available at https://mfa.gov.ge/en/bilateral-relations/ru

[22] See for example Customary IHL - Rule 161. International Cooperation in Criminal Proceedings

Review of criminal conviction rendered *in absentia*

It is a problem in some states under comparison, and it seems to be an issue emerging in Ukraine. Some countries draw limits for requesting a re-trial of conviction *in absentia* (Georgia, Croatia, and Bosnia and Herzegovina); other states allow almost unrestricted appeals of such convictions (the Netherlands, the United Kingdom). In other states (the Republic of Moldova, Romania, Germany, and Spain), the rules for re-trial of the conviction *in absentia* overlap with the procedures for ordinary appeals and reopening of the criminal proceedings carried out in the presence of the defendant.

In the absence of uniform regulations in all states, it remains for Ukraine to choose what system of reviewing convictions *in absentia* it may embrace. However, it is highly recommended to implement less restrictive ways for review and to make the appeal of convictions *in absentia* more accessible.

V. CONCLUSION

International human rights law does not explicitly prohibit trials *in absentia*, but rather prescribes their use in exceptional circumstances and with further procedural safeguards to ensure their fairness. If a state decides to allow proceedings *in absentia* in its legal system, whether at the trial or pre-trial stage, it should provide procedural safeguards to ensure that such proceedings are fair to the accused.

If international criminal tribunals were to accept *in absentia* proceedings, the same requirements would apply to international criminal proceedings. However, under the current regime of international criminal law, international criminal tribunals are not allowed to conduct *in absentia* proceedings, which might be a challenge to ensure accountability for international crimes including those committed in Ukraine. It appears that this challenge has given rise to discussions as to potential re-consideration of this position, at least as regards certain stages of international criminal procedures.

In national legal systems, trials *in absentia* have acquired a special, derogatory status. Although there are some minor differences determined by the specific characteristics of each legal system, the member states conduct criminal proceedings *in absentia* in a similar way. They all rely on the principle of *audi alteram partem* and consider trials *in absentia* as a departure from this rule. Therefore, trials *in absentia* are not ordinary occurrences, which means that criminal trials, as a rule, should be conducted in the presence of the accused and only in exceptional circumstances in his or her absence.

However, in view of this exceptional status, the underlying rationale for the rules governing absentia procedures may vary from one state to another. In some states, these procedures are considered to be a derogation from the rules of general criminal procedure and are therefore rarely applied. The Republic of Moldova, Romania, Germany and Spain are the most notable examples of such derogation. Croatia and Georgia accept trials *in absentia* as one among many situations in criminal proceedings that requires regulation, but not as detailed as in the former states. The United Kingdom and the Netherlands, in view of the characteristics of their legal systems, address *in absentia* trials as a consequence of the defendant's discretionary decision to waive his or her fundamental right to be present at the trial. Accordingly, *in absentia* in these states could cover many situations and thus appear to be more liberal.

The underlying reason for the regulation of *in absentia* proceedings is important and may be quite distinctive for the situation of the war of aggression and the need to deliver criminal justice in that context. As shown by the study, some areas, such as international cooperation for the purpose of notification of criminal charges within an open armed conflict, may require

further research and conceptualisation of practical mechanisms to overcome the realities of war. The present comparative analysis has demonstrated that states under the comparison regulate *in absentia* proceedings regardless of the context in which a trial *in absentia* takes place. The only basis for any *in absentia* proceedings is then the necessity of striking a balance between the requirements of justice and the individual interests of fairness.

***

ANNEX 1. RESEARCH QUESTIONS

General characteristics of the proceedings

1. Does criminal procedure in the member state allow, in principle, proceedings in the absence of the accused? If applicable, please quote the relevant legal provision(s).
2. Does the legislation explicitly, in absolute terms, prohibit any proceedings *in absentia*? If applicable, please quote the relevant legal provision(s).
3. Please specify, if applicable, whether the legislation or practice allows for *in absentia* proceedings only partially (e.g., during the investigation or prosecution stages, but prohibits trials, convictions, and sentencing in the absence of the accused).
4. If the legislation is silent on the matter or allows extensive interpretation, please specify whether criminal proceedings could be held *in absentia* based on precedent rather than on written legislation (e.g., by direct application of international law, by effect of the judgements of the European Court of Human Rights ('European Court'), or by case law). Please clarify the source of the law for such a practice, whether it is a written provision (e.g., secondary legislation, soft law) or the case law of the courts.
5. If there had been any amendment(s) to the criminal procedure legislation, specific to the purpose of regulating proceedings *in absentia*, please describe briefly when such amendments were introduced and for what reasons (e.g., a judgement of the European Court or UN treaty body, an emergency, or a high-profile case that implied changing of procedural legislation, etc.). Given the specific purposes of the present research, the period of reference for such amendments starts with the member state's ratification of the Convention. However, it would be prudent to consider the period following the Nuremberg trials, during which the conviction *in absentia* was considered acceptable.
6. If such changes originated in judicial or prosecutorial practice, please specify when and whether this practice could still be considered valid. Please refer to the same period as mentioned in the above question.

Specific features of the proceedings

Classification based on substantive grounds

7. Does legislation prohibit or, otherwise, allow *in absentia* proceedings in the cases of specific offences (e.g., only less serious offences allow *in absentia* proceedings)?
8. If there is a distinction based on other criteria, such as the seriousness of the offence, the gravity of punishment, or the type of crime (e.g., international crimes, violent crimes, etc.), please clarify these criteria.

Classification based on procedural grounds

9. Does legislation prohibit or, otherwise, allow specific decisions or measures to be taken *in absentia* (e.g., court hearings are allowed but conviction *in absentia* is prohibited; only remand proceedings could be held *in absentia*, while trial could not be, etc.)?
10. Please describe each measure or decision and their implications for the criminal proceedings as a whole (e.g., criminal proceedings are suspended indefinitely or adjourned for a certain period for review, etc.).

Situations

11. In which situations are *in absentia* proceedings allowed? Please describe the following situations if applicable:

- refusal to appear after having been properly summoned, including but not limited to various situations of summoning:
    - for official notification about criminal charges;
    - after the receival of such notifications;

    - in the cases not related to official notification of criminal charges (e.g., disclosure of evidence, additional statements, attendance to specific investigative measures such as experiments, cross-examination, etc.);
- absconding after having been notified about criminal charges;
- unknown whereabouts of the suspect;
- contempt of the court sanctioned by forcible removal of the accused from the court room;
- refusal to grant extradition request;
- other grounds (please describe).

Summons and notifications

12. In cases of refusal to appear, how do the authorities make sure that the accused has been properly summoned and received a notification?
13. What are the ways of summoning formally recognised by law as being legally valid (e.g., only via post, judicial officer, public announcement, etc.)? Can legislation be interpreted widely to allow other means of summoning and notifications (e.g., phone calls, e-mails, through neighbours, etc.)? If applicable, please quote the relevant legislation.
14. Does legislation or practice allow electronic summons or summons via representatives or a defence lawyer? If applicable, please quote the relevant legislation.
15. Does legislation or practice require formal summoning for each court hearing? Could it be implied that the accused has been notified about the court's schedule once attended one of the court sessions?
16. In cases of unknown whereabouts, does the procedure allow substitution of the accused for the purposes of notification (e.g., notification of certain procedural acts to his or her representatives, relatives, or defence lawyer, etc.)?

Criminal charges

17. Please describe, briefly, the procedure for laying criminal charges in cases of refusal to appear or unknown whereabouts of the accused.
18. Can a prosecution casefile be sent to trial without the formal procedure of laying criminal charges during the pre-trial stage? (n.b., in some jurisdictions, the prosecution cannot commit a person or send a case to trial without a formal laying of charges.)
19. Can criminal charges be laid at the trial stage (n.b., arraignments in common law)?
20. Can charges be notified remotely (e.g., via post, by paper, online, etc.)? (n.b., in some jurisdictions, the procedure of notification of charges requires exclusive physical presence.)
21. How does the prosecution ensure that charges have been notified and received by the accused (e.g., post office records, signatures, witnesses, confirmation by the defence lawyer, etc.)?

Disclosure

22. Please describe, briefly, the procedure for disclosure of evidence and criminal casefile materials in cases of refusal to appear, absconding, or unknown whereabouts of the accused.
23. Can the non-disclosure affect the progression of criminal proceedings in the case where the accused was notified about criminal charges? (n.b., in some jurisdictions, disclosure is a prerequisite to committing a person to trial.)

International cooperation

Institutional aspects

24. Please describe, briefly, the organisation and the institutional means of international cooperation in criminal matters, for exchanging summons and notifications (e.g., special divisions within the prosecution offices or ministry of exteriors, or ministry of

justice, etc.).

25. Do courts, judicial police, and prosecution offices include their own special administrative divisions for international cooperation? Can they cooperate directly with other foreign law enforcement bodies, prosecution offices, and the judiciary?

Exchange of summons and notifications

26. Has the member state experienced issuing summons and notifications of persons fled to countries with which it severed diplomatic ties? Please explain, if applicable, whether and how such summons and notifications have been enforced.
27. Has the member state experienced receiving summons and notifications from such countries? Please explain, if applicable, whether and how it managed to enforce such summons and notifications.
28. Does legislation or practice allow for the summons or notification of the accused persons via foreign missions or diplomatic cable?

Searching for wanted persons

29. Please briefly describe the procedure to declare a person wanted and announce him/her in an international search. In particular, please focus on the following questions:
    a. Is an arrest warrant required for all international search announcements?
    b. Could a person be announced as wanted for notification of criminal charges if his/her whereabouts are known to be in the country with severed diplomatic ties?
30. In this context, please describe, specifically the domestic procedure to
    a. issue red notices
    b. issue search warrants
    c. interact with the international mechanisms of cooperation in criminal matters (e.g Interpol, Europol, etc.).

Guarantees

31. What procedural guarantees does the legislation provide to ensure the right to defence in the case of in-absence proceedings (e.g., mandatory participation of a lawyer chosen by the accused or his or her representatives, appointed by the state, etc.)?

Waiving

32. Can the accused waive his or her right to be present?
33. If yes, then under what conditions can such a waiver be accepted? Please describe the procedure (e.g., only by authorization of the court or investigating judge, only written, and made in the presence of the defence lawyer, etc.).
34. Can the waiver be partial (e.g., valid for investigation measures, disclosure, or a specific period of court hearings but invalid for the court session rendering the judgement)?
35. How and in what conditions can the waiver be rescinded?
36. Does the waiver of being present imply the waiver of the right to appeal?

Re-determination of criminal charges

37. Can a person who has been convicted *in absentia* request a re-trial of his or her case? If so, under what conditions?
38. Does this re-trial imply full rehearing of the case, with re-examination of evidence and the facts (n.b., in some jurisdictions, the re-trial is limited to formal announcement of the sentence and checking whether the person would exercise the right to appeal)?
39. Can a person appeal the sentence rendered *in absentia*?
40. How the time for appeal is being calculated (e.g., from the formal receipt of notification, from the day of arrest, from the formal announcement of the sentence in court

hearings, etc.)

41. Does the appeal presuppose full re-hearing of the case, or is it limited to examining only the grounds of the appeal?
42. Is there a procedure for leave to appeal in these cases? (n.b., in some jurisdictions, sentences rendered *in absentia* are left to appeal by operation of law.)
43. What are the admissibility criteria for an appeal?

Alternatives to physical presence of the accused

44. What are the alternatives to proceedings requiring the physical presence of the accused?
    - Online hearings;
    - Written proceedings;
    - Sole presence of the defence lawyer (e.g., in the case of minor offences);
    - Other (please specify).
1. Please describe conditions for each of these situations.

Emergency situation

45. Has the member state concerned experienced an emergency situation requiring it to accommodate criminal proceedings *in absentia*, such as
    - an armed conflict; whether non-international or international in character
    - natural disasters, mass disorders, coup d'etat, separatist movements; etc.
    - A COVID-related emergency could be referred to if it eventually led to *in absentia* criminal proceedings and convictions.
46. Does the law expressly prohibit or imply that *in absentia* proceedings cannot be held or the accused cannot be convicted *in absentia* in the following situations related to:
    - secret or closed hearings (e.g., confidential informants, state secrets, etc.);
    - core international crimes, according to the Rome statute (e.g., war crimes, crimes against humanity, genocide, and aggression) or other offences that domestic legislation classifies as international or transborder crimes (e.g., terrorism, torture, piracy, human trafficking, etc.);
    - other specific crimes (please enumerate);
47. Do the domestic courts retain the discretion to refuse to hold *in absentia* proceedings even if all conditions for such proceedings are fulfilled?
48. Please provide a summary of some leading criminal cases, if any, held *in absentia* in the context of emergency situations.

ANNEX 2. COMPILATION OF ANSWERS TO THE QUESTIONNAIRE

Bosnia and Herzegovina

Research by Ms Anna Adamska-Gallant and Gallant Consulting Ltd

General characteristics of the proceedings

1. The Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), in principle, does partially allow proceedings in the absence of the accused.

> *Article 77 CPC BIH (Basic Rules on Questioning)*
>
> *(1) The suspect under investigation shall be questioned by the Prosecutor or an authorised official. (2) The questioning of the suspect must be done with full respect to the personal integrity of the suspect. During questioning of the suspect it shall be forbidden to use force, threat, fraud, narcotics or other means that may affect the freedom of decision-making and expression of will while giving a statement or confession. (3) If actions were taken contrary to the provision of Paragraph (2) of this Article, the decision of the Court may not be based on the statement of the suspect.*
>
> *Article 78 CPC BIH (Instructing the Suspect on His Rights)*
>
> *(1) At the **first questioning the suspect** shall be asked the following questions: his name and surname; nickname if he has one; name and surname of his parents; maiden name of his mother; place of birth; place of residence; date, month and year of birth; ethnicity and citizenship; identification number of Bosnia and Herzegovina citizen; profession; family situation; is he literate; completed education; has he served in the army, and if so, when and where; whether he has a rank of a reserve officer; whether he is entered in the military records and if yes with which authority in charge of defence affairs; whether he has received a medal; financial situation; previous convictions and, if any, reasons for the conviction; if convicted whether he served the sentence and when; are there ongoing proceedings for some other criminal offense; and if he is a minor, who is his legal representative. The suspect shall be instructed to obey summonses and to inform the authorized officials immediately about every change of an address or intention to change his residence, and the suspect shall also be instructed about consequences if he does not act accordingly. (2) At the beginning of the questioning, the suspect shall be informed of the charge against him, the grounds for the charge and he shall be informed of the following rights: a) the right not to present evidence or answer questions; b) the right to retain a defence attorney of his choice who may be present at questioning and the right to a defence attorney at no cost in such cases as provided by this Code; c) the right to comment on the charges against him, and to present all facts and evidence in his favor and that, if he does so in the presence of the defence attorney, the statement made is allowed as evidence at the main trial and may, without his consent, be read and used at the main trial; d) that during the investigation, he is entitled to study files and view the collected items in his favor unless the files and items concerned are such that their disclosure would endanger the aim of investigation; e) the right to an interpreter service at no cost if the suspect does not understand the language used for questioning. (3) The suspect may voluntarily waive the rights stated in Paragraph 2 of this Article but his questioning may not commence unless his waiver has been recorded officially and signed by the suspect. To waive the right to a defence attorney shall not be possible for the suspect under any circumstances in case of a mandatory defence under this Code. (4) In the case when the suspect has waived the right to a defence attorney, but later expressed his desire to retain one, the questioning shall be immediately suspended and shall resume when the suspect has retained or has been appointed a defence attorney, or if the suspect has expressed a wish to answer the questions. (5) If the suspect has voluntarily waived the right not to answer the questions asked, he must be allowed to present views on all facts and evidence that speak in his favor. (6) If any actions have been taken contrary to the provisions of this Article, the Court's decision may not be based on the statement of the suspect*

Namely, an **investigation** can be conducted in the absence of a suspect. Ultimately, however, "the indictment shall not be issued if the suspect was not questioned" (Art 225 (6) CPC BiH).

Therefore, a case will remain in the investigation phase, an indictment will not be filed and brought before a court, in case a suspect is absent/ not available for questioning by the competent prosecutor, during which, among others, a suspect is informed about the charges against him/her. Once a suspect becomes available to the prosecution for questioning, the investigation can be continued and concluded, and an indictment can be filed.

When it comes to the **trial stage**, the CPC BIH does not allow, but moreover, prohibits explicitly to hold trials *in absentia*. The CPC BiH provides that "an accused may never be tried *in absentia*" (Art 247 CPC BiH).

When it comes to the trial stage, the CPC BIH prohibits explicitly to hold trials *in absentia*. The CPC BiH provides that "an accused may never be tried *in absentia*" (Art 247 CPC BiH).

2. An investigation can be conducted in the absence of a suspect. Ultimately, however, "the indictment shall not be issued if the suspect was not questioned" (Art 225 (6) CPC BiH). Therefore, a case will remain in the investigation phase, in case a suspect is absent/ not available for questioning by the competent prosecutor and an indictment cannot be filed before the competent court.

When it comes to the announcement of the verdict, Art 286(3) CPC BiH provides that "the verdict shall be announced even if the parties, the defence attorney, legal representative or power of attorney are not present. The Court may decide that the judge or the presiding judge shall orally announce the verdict to the accused absent during the announcement or that the verdict only be served on the accused".

Furthermore, as highlighted in relevant OSCE report on war crimes processing in Bosnia and Herzegovina, one of the most serious procedural challenges faced by the Court of BiH in the first years of its operation related to the refusal of a number of accused to attend the hearings scheduled in their cases. In January 2007, at least 29 defendants started a hunger strike while in detention. As part of their protest, they refused to respond to the Court's summonses to attend hearings, claiming that, due to the hunger strike, they were too exhausted to attend the proceedings. The judges assigned to these cases had to determine whether the trials could continue without their presence in the courtroom in light of the prohibition to hold trials *in absentia* in the CPC BiH Criminal Procedure Code. In the vast majority of these instances, trial panels took the view that proceedings should continue since the accused/ defendants had been duly informed about the ongoing proceedings and they had deliberately decided not to attend them. Accordingly, it was held that continuation of the trial in those cases was in accordance with fair trial standards, taking into consideration that the right to defence was ensured by the mandatory presence of their attorneys.

3. Even though Article II(2) of the Constitution of BiH provides that the rights and freedoms set forth in the Convention) and its Protocols shall apply directly in BiH and "shall have priority over all other law", there is no known instance to the author that precedent as referred to in the question was applied in relation to enabling *in absentia* criminal proceedings.

4. Bosnia and Herzegovina ratified the Convention on 12 July 2002. Since the ratification of the Convention, there were no amendment(s) to the criminal procedure legislation, specific to the purpose of regulating proceedings *in absentia*, but rather towards deregulating it.

With the adoption of the new criminal procedure legislation in March 2003, Bosnia and Herzegovina went from allowing for trials *in absentia* in accordance with the "old" CPC to prohibiting trials *in absentia* in the new CPC BiH (as well as in the FBiH and RS Entity CPCs and the Brcko District CPC). For more details on pre-March 2023 war crimes trails, please see under Q45.

5. N/A

Specific features of the proceedings

Classification based on substantive grounds

6. Criminal procedure legislation does not allow *in absentia* proceeding in the cases of specific offences. It does not provide for any exceptions to the absolute prohibition/ban of trials *in absentia*.

7. N/A

Classification based on procedural grounds

8. See below

9. Having in mind the principal concept and approach of the criminal procedure legislation towards proceedings *in absentia* (see 1. and 2.), there are certain decision/measures that can be taken *in absentia*. Here are some examples of such decisons/measures:

Pre-trial custody (detention) - If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him, if he hides or if other circumstances exist that suggest a possibility of flight. (Art. 132 (1) lit a) CPC BiH)

Custody after the Confirmation of the Indictment - After the confirmation of indictment, custody may be ordered, extended or terminated. The review of justification of the custody shall be carried out upon the expiration of each two (2) month period following the date of issuance of the most recent decision on custody. The appeal against this decision shall not stay its execution. After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than: a) one year in the case of a criminal offense for which a punishment of imprisonment for a term up to five years is prescribed; b) one year and six months in the case of a criminal offense for which a punishment of imprisonment for a term up to ten years is prescribed; c) two years in the case of a criminal offense for which a punishment of imprisonment for a term exceeding ten years may be imposed, but not the long-term imprisonment; d) three years in the case of a criminal offense for which a punishment of long-term imprisonment is prescribed. (Art. 137 CPC BiH)

Ordering Custody after the Verdict is pronounced - When the Court pronounces a sentence of imprisonment against an accused, the Court may order the accused into custody, or continued custody, while taking into account all the circumstances related to the commission of the criminal offence and the personality of the perpetrator. In such a case, a special decision shall be issued, and an appeal from such decision shall not stay its execution. (2) Custody shall be terminated and release of the accused ordered if he has been acquitted or if the charges against him have been rejected for the reasons other than lack of jurisdiction of the Court or he has been found guilty but released from penalty or he has only been fined or conditionally sentenced or, due to crediting the custody time, he has already served the sentence. (3) After pronouncing the first instance verdict, the custody may last no longer than additional nine months. Exceptionally, in complex cases and for the important reasons, the Appellate Panel may extend the custody additionally for a six months maximum. If during that period no second instance verdict to alter or sustain the first instance verdict is pronounced, the custody shall be terminated and the accused shall be released. If within the prescribed deadlines the second instance verdict is pronounced reversing the first instance verdict, the custody shall last for no longer than another year after pronouncement of the second instance verdict. (4) At the request of the accused, who is in custody after a sentence of imprisonment has been pronounced on him, a judge or the presiding judge may commit the accused by a decision to an institution for serving the sentence even before the verdict becomes legally binding. (5) Custody shall always be terminated upon the expiration of the pronounced sentence. (6) The accused placed in custody against whom a sentence of imprisonment has become legally binding, shall remain in custody until he/she is sent to prison but not after the expiration of the

prison term he has received. (Art. 138 CPC BiH)

Failure of the Accused to Appear at the Main Trial - If the accused was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge shall postpone the main trial and order that the accused be brought in at the next session. If the accused justifies his absence before apprehension, the judge or the presiding judge shall revoke the order of apprehension. (Art. 246 (1) CPC BiH)

If the accused was duly summoned but obviously avoids appearing at the main trial, and if apprehension was not successful, the judge or the presiding judge may order that the accused be placed in custody. (Art. 246 (2) CPC BiH). The appeal is allowed against the decision on custody but such appeal shall not stay the execution of the Court decision on custody. (Art. 246 (3) CPC BiH).

Announcement of the Verdict – After the pronouncement of the verdict, the Court shall announce the verdict immediately. If the Court is unable to pronounce the verdict the same day the main trial was completed, the judge may postpone the announcement of the verdict for a maximum of three (3) days and shall set the date and place when the verdict shall be announced. The Court shall read the pronouncement of the verdict in the presence of the parties, the defence attorney, legal representatives and the power of attorneys and briefly explain it. The verdict shall be announced even if the parties (including accused), the defence attorney, legal representative or power of attorney are not present. The Court may decide that the judge or the presiding judge shall orally announce the verdict to the accused absent during the announcement or that the verdict only be served on the accused. (Art. 286 CPC BiH)

Order for Apprehension - (1) The Court may order the accused to be apprehended if a detention warrant has been issued or if the accused duly

summoned has failed to appear without justification, or if the summons could not have been orderly serviced and the circumstances obviously indicate that the accused is evading service of summons.

(2) Exceptionally, in emergency cases, the order referred to in Paragraph 1 of this Article may be issued by the Prosecutor if the duly summoned suspect has without justification failed to appear.

(3) The order for apprehension shall be executed by the judicial police.

(4) The order shall be given in writing. The order shall contain: the name and last name of the accused who is to be apprehended, the criminal offense with which he is charged, the specific citation of the relevant criminal provisions, the grounds for ordering the person to be apprehended, the official stamp and the signature of the judge ordering the apprehension.

(5) The person authorized to execute the order shall hand the order to the accused and instruct the accused to follow him. If the accused refuses, he shall be apprehended by force. (Art. 125 CPC BIH)

House Arrest and Travel Ban - If there are circumstances indicating that the suspect or accused might flee, hide or go to an unknown place or abroad, the Court may, by a reasoned decision, place the suspect or accused under house arrest and/ or issue a travel ban.

Issuance of Warrants and Notifications - If the permanent or temporary residence of the suspect or the accused is not known, the Prosecutor or the Court shall, if necessary under the provisions of this Code, request that the police authorities search for the suspect or the accused and inform the Prosecutor or the Court of his address. (Art 442 CPC BiH)

Issuance of a warrant may be ordered by a Court if the suspect or the accused against whom criminal proceedings have been instigated due to a criminal offense for which it is possible to pronounce a prison sentence of three (3) years or more is on the run, and an order for his

apprehension or a decision specifying his detention has been issued. Warrants and notifications are issued by the responsible police body designated by the Court in each individual case, or the institution from which the person has escaped where he was serving a sentence or institutional measure. If it is likely that the person, after whom the warrant has been issued, is abroad, the competent Ministry of Bosnia and Herzegovina may issue an international warrant. (Art. 442 and 446 CPC BiH)

In synthesis and conclusion, decisions and measures can be taken *in absentia* when it comes to various remand (with the meaning of custody/detention) proceedings. However, the implications for the criminal proceedings as a whole are that

> if a suspect is absent and has not been questioned (incl. laying of charges), an investigation cannot be concluded, and an indictment cannot be filled;
>
> during the trial stage, if an accused is absent (not physically present in the court room during the trial), a court trial cannot be commenced, resumed and/ or concluded.

These circumstances lead to the consequences that

> investigations are ceased and indictments are not filed, i.e. investigations can be pursued until defined offence-specific statute of limitations approach (with the exception to war crimes that has no statute of limitations),
>
> trials have to be adjourned until defined offence-specific statute of limitations approach (with the exception to war crimes that has no statute of limitations) and/or recommenced.

In more detail, on the motion of the parties or the defence attorney, the main trial may be adjourned by the decision of the judge or the presiding judge if new evidence needs to be obtained or if the accused became incapable after commission of the criminal offense and or if there are other impediments that prevent the main trial from successful conduct (including absence of the accused as a key condition to hold a trial). The decision to adjourn the main trial shall be entered in the record and, when convenient, the day and hour of the resumption of the main trial shall be designated. The judge or the presiding judge shall also order the securing of evidence that could be lost or destroyed as a result of the adjournment of the main trial. (Art. 251 CPC BiH). If the main trial resumes after it has been adjourned before the same judge or the Panel, the judge or the presiding judge shall briefly summarize the previous course of the proceedings. The judge or the presiding judge may order that the main trial recommence from the beginning. (Art. 252 (1) CPC BiH)

The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days but with consent of the parties and the defence attorney, the Panel may decide that in such a case the witnesses and experts shall not be examined again and that the new crime scene investigation shall not be conducted but the minutes of the crime scene investigation and testimony of the witnesses and experts given at the prior main trial shall be used. If the main trial is held before another judge or presiding judge, the main trial must commence from the beginning and all evidence must be again presented. In exceptional cases, if the main trial is held before another presiding judge, with consent of the parties and the defence attorney, the Panel may decide that the earlier presented evidence shall not be presented again. The judge or the Panel, without consent of the parties and the defence attorney, but after hearing parties and the defence attorney, may decide to use the testimony of the witnesses and experts given at the prior main trial as evidence if witnesses or experts died, became mentally incapacitated or unavailable or their appearance before the Court is impossible or difficult due to other reasons. (Art. 252 (2)-(4) CPC BiH).

Situations

10. In all situations, such as refusal to appear after having been properly summoned, including but not limited to various situations of summoning an apprehension/ detention can be ordered (Art. 125(2) CPC BiH)

The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favor. (Art.6 CPC). During an investigation, the defence attorney has a right to inspect the files and obtained items that are in favor of the suspect. Therefore, it would be problematic for a prosecutor to file an indictment without having questioned the suspect on all fact and evidence incriminating him.

Apprehension/ detention can be ordered and/or warrant issued Investigation can be conducted and Indictment filed.

Apprehension/ detention can be ordered and/or warrant issued. (Art 125 CPC/ Art. 442 - 446 CPC BiH)

Trial can continue, if accused represented by a defence attorney. In case the accused is not represented by defence attorney, the trial has to be adjourned and a new hearing has to be scheduled.

One of the most serious procedural challenges faced by the Court of BiH in the first years of its operation related to the refusal of a number of accused to attend the hearings scheduled in their cases. In January 2007, at least 29 defendants started a hunger strike while in detention. As part of their protest, they refused to respond to the Court's summonses to attend hearings, claiming that, due to the hunger strike, they were too exhausted to attend the proceedings. The judges assigned to these cases had to determine whether the trials could continue without their presence in the courtroom in light of the prohibition to hold trials *in absentia* in the BiH CPC. In the vast majority of these instances, trial panels took the view that proceedings should continue since the defendants had been duly informed about the ongoing proceedings and they had deliberately decided not to attend them. Accordingly, it was held that continuation of the trial in those cases was in accordance with fair trial standards, taking into consideration that the right to defence was ensured by the mandatory presence of their defence attorneys.

Summons and notifications

11. Art.169 CPC BiH - Personal Delivery - A writ or notice that under this Code must be personally served shall be delivered directly to the person to whom it is addressed. If a person to whom a writ or notice must be personally delivered has not been found where the delivery was to take place, the writ server shall make inquiries as to when and where that person may be found and shall leave with one of the persons under Article 170 of this Code (see next paragraph) a written notice that he should be in his dwelling or at his workplace at a particular day and hour in order to receive the writ or notice. If even after this the writ server does not find the person to whom the writ or notice is to be delivered, he shall use the procedure under the provision of Article 170, Paragraph 1 of this Code, and it shall be assumed that the writ or notice has been served.

> *Article 170 (Indirect Delivery) - (1) Writs and notices for which this Code does not specify personal delivery shall also be delivered in person; but if the recipient is not found at home or at work, such documents may be given to any of adult members of his household, who must accept the document. Should any of the household members not be found at home, the document shall be left with a neighbor, if he consents to accept it. If a writ or notice is delivered to a person at his workplace, and the person concerned has not been found there, the document may be delivered to a person authorized to receive mail, who must accept the document, or to a person employed at the same workplace, if he consents to accept it. (2) Should it be established that the person to*

whom a writ or notice is to be delivered is absent and that persons under Paragraph 1 of this Article are therefore not in the position to present the document to him in a timely manner, the writ or notice shall be returned with an indication as to whereabouts of the absent person.

Article 172 (Receipt Confirming Delivery) - (1) The recipient and the person making the delivery shall sign the receipt confirming that delivery has been made. The recipient shall himself indicate the date of service on the receipt. (2) If the recipient is illiterate or unable to sign his name, the person making the delivery shall sign on his behalf, shall indicate the date of service, and shall make a note as to why he signed for the recipient. (3) Should the recipient refuse to sign the receipt, the person making the delivery shall make a note to that effect on the receipt and shall indicate the date of delivery, whereby service is completed.

Article 173 (Refusal to Receive a Writ) - If the recipient or an adult member of his family refuses to accept the writ, the person making the delivery shall note on the receipt the date, hour and reason for refusal, and shall leave the writ in the dwelling of the recipient or in his workplace, whereby service is completed.

Ultimately, the Court may order the accused to be apprehended if a detention warrant has been issued or if the accused duly summoned has failed to appear without justification, or if the summons could not have been orderly serviced and the circumstances obviously indicate that the accused is evading service of summons. Exceptionally, in emergency cases, the order may be issued by the Prosecutor if the duly summoned suspect has without justification failed to appear.

12. Case related documents shall as a rule be delivered by mail. Delivery may also be made through an official person of the authority that rendered the decision or directly with that authority. (Art. 168 CPC BiH)

The summons to the first examination in the investigation, the summons to the main trial, and the summons to the pronouncement of the criminal sanction hearing shall be personally served on the suspect or accused. (Art. 171 (1) CPC BiH).

The Court may also communicate a summons to a main trial or other summons orally to a person who is before the Court; such communication shall include an instruction as to the consequences of a failure to appear. Orally communicated summons shall be noted in the record, which the person summoned shall sign, unless such summons has been recorded in the main trial record. It shall be considered that valid delivery has thereby been made.

See also the means of summoning provide by Art. 170 CPC BiH, as explained under Question 12.

13. Neither legislation nor practice allow electronic summons. At the request of the accused, the verdict and other decisions shall be served on a person designated by him.

14. The Court may also communicate a summons to a main trial or other summons orally to a person who is before the Court; such communication shall include an instruction as to the consequences of a failure to appear. Orally communicated summons shall be noted in the record, which the person summoned shall sign, unless such summons has been recorded in the main trial record. It shall be considered that valid delivery has thereby been made. (Art.168 CPC BiH)

15.

Article 170 (Indirect Delivery) - (1) Writs and notices for which this Code does not specify personal delivery shall also be delivered in person; but if the recipient is not found at home or at work, such documents may be given to any of adult members of his household, who must accept the document. Should any of the household members not be found at home, the document shall be left with a neighbor, if he consents to accept it. If a writ or notice is delivered to a person at his workplace, and the person concerned has not been found there, the document may be delivered to a person authorized to receive mail, who must accept the document, or to a person employed at the same workplace, if he consents to accept it. (2) Should it be established that the person to

whom a writ or notice is to be delivered is absent and that persons under Paragraph 1 of this Article are therefore not in the position to present the document to him in a timely manner, the writ or notice shall be returned with an indication as to whereabouts of the absent person.

Criminal charges

16. In this case, after all attempts to summon the suspect/accused have failed, the Court may order the accused to be apprehended if a detention warrant has been issued or if the accused duly summoned has failed to appear without justification, or if the summons could not have been orderly serviced and the circumstances obviously indicate that the accused is evading service of summons. Exceptionally, in emergency cases, the order may be issued by the Prosecutor if the duly summoned suspect has without justification failed to appear. (Art. 125 CPC BiH)

If the permanent or temporary residence of the suspect or the accused is not known, the Prosecutor or the Court shall, if necessary under the provisions of this Code, request that the police authorities search for the suspect or the accused and inform the Prosecutor or the Court of his address. (Art 442 CPC BiH)

Issuance of a warrant may be ordered by a Court if the suspect or the accused against whom criminal proceedings have been instigated due to a criminal offense for which it is possible to pronounce a prison sentence of three (3) years or more is on the run, and an order for his apprehension or a decision specifying his detention has been issued. Warrants and notifications are issued by the responsible police body designated by the Court in each individual case, or the institution from which the person has escaped where he was serving a sentence or institutional measure. If it is likely that the person, after whom the warrant has been issued, is abroad, the competent Ministry of Bosnia and Herzegovina may issue an international warrant. (Art. 442 and 446 CPC BiH)

17. The indictment shall not be issued if the suspect was not questioned, and he was informed about the criminal charges against him during the investigation.

18. The verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed or amended at the main trial or supplemented.

19. The procedure of notification of charges requires exclusive physical presence.

20. The delivery rules of Articles 169-171 CPC BiH (see answers to Q12 and Q13).

Disclosure

21. The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favor. During an investigation, the defence attorney has a right to inspect the files and obtained items that are in favor of the suspect. This right can be denied to the defence attorney if the disclosure of the files and items in question would endanger the purpose of the investigation. After the indictment is filed, the suspect, that is, the accused and the defence attorney, have the right to inspect all files and evidence.

22. Disclosure is a prerequisite to committing a person to trial. See also previous answer.

International cooperation

Institutional aspects

23. The Central Authority responsible for international cooperation in criminal matters (mutual legal assistance) is the ministry of Justice of Bosnia and Herzegovina.

According to Article 4 of the Law on Mutual Legal Assistance in Criminal Matters of Bosnia and Herzegovina, letters rogatory and supporting documents (including summons and

notifications) shall be transmitted to the national judicial authority through the Ministry of Justice of Bosnia and Herzegovina, and vice versa. In urgent cases, and when provided by International Treaty, Ministry of Justice may transmit and receive letters rogatory trough the Interpol. Exceptionally, and when provided by International Treaty in force, domestic judicial authority may transmit letter rogatory directly to the foreign judicial authority. In both mentioned cases domestic judicial authority shall submit copy of the rogatory letter to the Ministry of Justice. The Ministry of Justice shall transmit and receive letters rogatory through diplomatic channels (via Ministry of Foreign Affairs) to/from foreign state when there is no International Treaty in force on subject matter, as well as in cases when an International Treaty envisages use of special diplomatic channels.

Furthermore, according to Articles 14 and 15 of the Law on Mutual Legal Assistance in Criminal Matters of Bosnia and Herzegovina, the summons to be served upon the suspect, the prosecuted person, the accused, the witness, the expert witness or any other party to the proceedings who is summonsed from the requested State shall not include a warning of compulsion in the event of nonappearance. If the summonsed person does not comply with the summons, he/she shall not be subjected to any coercive measures. Delivery of documents is proved with a delivery receipt made in compliance with the regulations of the requested State. The delivery receipt shall include the place and date of receipt and the signature of the recipient or another manner of delivery noted. If the delivery was not possible, the requesting State shall be informed thereof without delay, noting the reasons that prevented the delivery.

The person summonsed to appear before national judicial authorities to be criminally prosecuted for the offence charged against that person shall not, regardless of his/her citizenship, be prosecuted or ordered into custody, or be subjected to deprivation or restriction upon liberty due to offences or convictions not stated in the summons, which date back from the period anterior to the person’s leaving Bosnia and Herzegovina. Criminal prosecution, deprivation of liberty or any other restrictions upon personal liberty shall be allowed if the person summonsed stayed in the state territory of Bosnia and Herzegovina longer than 15 days after the Court declares that his/her presence is no longer required, even though the person had an opportunity to leave, or if the person, after leaving the state territory of Bosnia and Herzegovina, voluntarily returns to its territory. (Art. 17 leg cit)

When it comes to summons and transfer of the Person Deprived of Liberty, Art. 18 leg cit regulates that if a foreign judicial authority summonses, as a witness or for confrontation purposes, a person deprived of liberty in Bosnia and Herzegovina, the person may be temporarily transferred to the requesting State. The person shall be temporarily transferred to the requesting State if the State offers guarantees in view of the person’s protection provided for in Article 17 of this Law as well as the guarantees that the person shall be returned within the deadline set. The transferred person shall be placed in custody of the requesting State.

The transfer may be refused if: a) the person deprived of liberty does not give a consent; b) the transfer is liable to prolong his or her deprivation of liberty; c) there are other overriding grounds against temporary transfer.

The transfer may be postponed if the presence of the person deprived of liberty is required in the criminal proceedings ongoing before national judicial authorities. The Ministry of Justice of Bosnia and Herzegovina shall decide on the transfer of the person deprived of liberty with a prior consent acquired from the authority that ordered custody. If a third State needs to transfer the person deprived of liberty via the State territory of Bosnia and Herzegovina, the transfer shall be allowed if the person is not a national of Bosnia and Herzegovina, on which the Ministry of Justice of Bosnia and Herzegovina shall decide having obtained approval from the Ministry of Security of Bosnia and Herzegovina.

24. Law enforcement agencies (LEAs) can cooperate directly with other law enforcement

bodies via Europol, Interpol and similar as well as on a multilateral/bilateral and Treaty basis.

The Directorate for Coordination of Police Bodies of Bosnia and Herzegovina and its Sector for international operative police collaboration represents a single point of exchange of information on the strategic and operational level in international investigations. Achieves international police cooperation, with securing, implementing and developing the coordination of home police, judicial and other bodies in international cooperation with other countries in the world, with respect to the best practices. Cooperation is achieved with Interpol, Europol and SECI centre, as well with other bodies in accordance with signed agreements. The work of the Sector is organized through Section – NCB Interpol Sarajevo and Section for multilateral and bilateral cooperation and implementation of international agreements.

Cooperation among prosecutors takes place via Eurojust by coordinating the work of national authorities – from the EU Member States as well as third States – in investigating and prosecuting transnational crime. Bosnia and Herzegovina is not yet member of Eurojust. Beside mutual legal assistance, direct cooperation between prosecution offices of two or more countries takes place on the basis of signed protocols (e.g. Protocols between BiH and Serbia, Montenegro and Croatia aimed at war crimes processing), during parallel investigations and joint investigation teams (JITs – Art. 24 Law on Mutual Legal Assistance in Criminal Matters BiH).

In conclusion, direct cooperation with other foreign law enforcement bodies, prosecution offices, and the judiciary is very frequent. However, in order to exchange summons, notifications, evidence, etc., this needs to be done via regular mutual legal assistance. Article 26 Law on Mutual Legal Assistance in Criminal Matters BiH (Providing Information without Request) foresees the provision of information without a request. Namely, (1) without prejudice to their own investigations or proceedings and subject to reciprocity, national judicial authorities may, without a prior request, forward to the relevant foreign judicial authorities information obtained during their own investigations and related to criminal offences if they consider that the disclosure of such information might assist the receiving State in initiating investigations or criminal proceedings or might lead to a request for mutual assistance by that State. (2) The relevant national judicial authority shall request from the relevant foreign judicial authority to which it transmitted the information referred to in paragraph (1) of this Article communication on any actions undertaken upon such information and it may also impose other conditions for the use of such information in the receiving State.

Exchange of summons and notifications

25. No information about issuing summons and notifications of persons fled to countries with which it severed diplomatic ties. It needs to be checked with relevant actors (e.g. PO BiH, Court of BiH, MOJ BiH)

26. No information about receiving summons and notifications from countries with severed diplomatic ties. It needs to be checked with relevant actors (e.g. PO BiH, Court of BiH, MOJ BiH)

27. The Ministry of Justice BiH shall transmit and receive letters rogatory through diplomatic channels (via Ministry of Foreign Affairs BiH) to/from foreign state when there is no International Treaty in force on subject matter, as well as in cases when an International Treaty envisages use of special diplomatic channels.

Searching for wanted persons

28. If the permanent or temporary residence of the suspect or the accused is not known, the Prosecutor or the Court shall, if necessary under the provisions of the CPC BiH, request that the police authorities search for the suspect or the accused and inform the Prosecutor or the Court of his address.

In case the suspect or the accused is not found, the prosecutor or the Court may issue a warrant. The requirements for issuance of warrants are

Issuance of a warrant may be ordered if the suspect[1] or the accused against whom criminal proceedings have been instigated due to a criminal offense for which it is possible to pronounce a prison sentence of three (3) years or more is on the run, and an order for his apprehension or a decision specifying his detention has been issued.

Issuance of a warrant shall be ordered by the Court.

Issuance of a warrant shall also be ordered in case a convicted person escapes from the institution in which he is serving a sentence regardless of its length, or in case of his escape from an institution in which he is serving an institutional measure related to apprehension. In such a case, the warden of the institution shall issue the order.

Order of the Court or warden for issuance of a warrant shall be submitted to the police authorities for the purpose of its execution. (Art. 443 CPC BiH)

Warrants are issued by the responsible police body designated by the Court in each individual case, or the institution from which the person has escaped where he was serving a sentence or institutional measure. If it is likely that the person, after whom the warrant has been issued, is abroad, the competent Ministry of Bosnia and Herzegovina may issue an international warrant.

a) Therefore, an apprehension/ arrest warrant is required for an international search warrant.

b) A person could be announced as wanted for notification of criminal charges if his/her whereabouts are known to be in the country with severed diplomatic ties.

29. No information about red notices, search warrants, interacting with the international mechanisms of cooperation in criminal matters.

Guarantees

30. As a general rule, the suspect or accused shall be entitled to have a defence attorney throughout the course of the criminal proceedings.

Article 45 CPC BiH provides for mandatory defence as a procedural guarantee. Among others, it provides that a suspect shall have a defence attorney at the first questioning if he is mute or deaf or if he is suspected of a criminal offense for which a penalty of long-term imprisonment may be pronounced.

A suspect or accused must have a defence attorney while deciding the proposal for ordering pre-trial custody, throughout the pretrial custody.

After an indictment has been brought for a criminal offense for which a prison sentence of ten (10) years or more may be pronounced, the accused must have a defence attorney at the time of the delivery of the indictment.

However, these situations presuppose the presence of the suspect/accused.

Ensuring the right to defence in the case of in-absence proceedings, Article 171 CPC BiH provides that the indictment and also the verdict and other decisions for which the period of time for appeal commences on the date of their service, including the appeal by the opposing party submitted for an answer, shall be personally served on an accused who does not have a defence attorney. At the request of the accused, the verdict and other decisions shall be served on a person designated by him.

[1] The term “suspect” refers to a person with respect to whom there are grounds for suspicion that the person may have committed a criminal offense.

If an accused who does not have a defence attorney is to be delivered a verdict by which a sentence of imprisonment has been pronounced against him, and the verdict cannot be delivered at his previous address, the Court shall ex officio appoint an attorney for defence of the accused, who shall perform that duty until the new address of the accused is learned. The appointed defence attorney shall be given the necessary period of time to acquaint himself with the case file, whereupon the verdict shall be served on the appointed defence attorney and proceedings shall resume. If it concerns another decision whose date of delivery becomes the date of commencement of the period of time for an appeal or if it concerns an appeal of the opposing party that is being submitted for an answer, the decision or appeal shall be posted on the bulletin board of the Court, and at the end of eight (8) days from the date of posting it shall be assumed that valid delivery has been made.

If the accused has a defence attorney, the indictment and all decisions for which the period of time for filing an appeal commences on the date of delivery, and also the appeal of the opposing party submitted for an answer, shall be served on the defence attorney and the accused in accordance with the provisions of Article 170 of this Code. In such a case, the period for pursuing a legal remedy or answering the appeal shall commence on the date when the writ or notice is delivered to the accused or defence attorney. If the decision or appeal cannot be served on the accused because the accused has failed to report a change of address, the decision or appeal shall be posted on the bulletin board of the Court and at the end of eight (8) days from the date of posting it shall be assumed that valid delivery has been made.

If a writ or notice is to be delivered to the defence attorney of the accused, and he has more than one defence attorney, it shall be sufficient to make delivery to one of them

Waiving

31. An accused may never be tried *in absentia*.

32. N/A

33. N/A

34. N/A

35. N/A

Re-determination of criminal charges

36. N/A

37. N/A

38. N/A

39. N/A

40. N/A

41. N/A

42. N/A

Alternatives to physical presence of the accused

43. There are no alternatives to proceedings requiring the physical presence of the accused.

Emergency situation

44. During the 1992-1995 armed conflict in Bosnia and Herzegovina and until March 1, 20023 (when the new procedural codes came into power), the applicable criminal procedure code allowed for proceedings/trials *in absentia*. The domestic courts in BiH, civilian and military, did

indeed proceed to try war crimes cases during and immediately after the conflict in Bosnia and Herzegovina (1992-1995). However, that loss of skilled members of the legal profession and the judiciary, as well as the physical destruction and lack of proper equipment or facilities significantly hampered the ability of the courts to administer justice properly or efficiently. This situation was further exacerbated after the conflict by the complexities of the legal framework in a two-entity state, with separate legal systems, police forces and ministries of justice. Outdated and inadequate procedural laws contributed to the inefficiency of the system. The loss of many pre-war judges resulted in the judiciary and prosecutors' offices, in different parts of the country, being dominated by the majority ethnicity. New, inexperienced judges and prosecutors were appointed on ethnic and political grounds. The prosecution of war crimes, in particular, ineffectual investigations, excessive and systematic delays in the resolution of trials and dubious decisions, compounded by a lack of public faith in the judicial system, brought into serious question the applicability of the rule of law. In this volatile and politicised context, certain police officers and prosecutors began investigating and prosecuting cases of alleged war crimes. There were a number of well-founded allegations of arbitrary arrests and unfair trials. Between 1993 and 1995, for example, 47 war crimes suspects were tried and convicted *in absentia* by the military court in the Municipality of Orašje. In some of these cases, the death sentence was imposed, commuted to 20 years imprisonment after capital punishment was abolished in 1998. After referral to the ICTY in 2001, 42 of these cases were categorised as either "B" (evidence insufficient to justify arrest or indictment) or "C" (unable to determine sufficiency of evidence). In 1993, at the District Military Court in Sarajevo, Sretko Damjanović was found guilty of genocide and crimes against the civilian population and sentenced to death, subsequently commuted to 20 years imprisonment. In 1997, the Human Rights Chamber of BiH (HRC) ruled that the District Military Court in that case "lacked a sufficient appearance of independence" and could not therefore "be regarded as a 'court' for the purposes of Article 2(1) of the Convention". His conviction was quashed in July 2002. The trial of Ibrahim Đedović at the Sarajevo Cantonal Court was strongly condemned in 1997 and 1998 by OHR, OSCE and other international organizations on the basis that, in numerous respects, he did not receive a fair trial. His conviction was subsequently overturned on 27 March 2000 after a second trial. In the Golubović case at the Mostar Cantonal Court, the proceedings lasted for more than seven years with long periods of delay and numerous interruptions in the investigative and trial proceedings. Although the prosecutor officially requested the commencement of investigative proceedings in April 1994, the criminal trial did not commence or proceed in a meaningful way until February 2000.[2]

The possibility of arbitrary arrests and unfair trials was a key concern to the international community in the immediate post-conflict phase in BiH. Atrocities and the mass displacement of civilians resulted in the establishment of majority rule in areas in which these had occurred. In such an environment, it was difficult for individuals to travel through BiH without fear of arbitrary arrest or detention. Providing for freedom of movement, especially to refugees and displaced persons, was crucial to the success of holding free and fair municipal elections in September 1996, especially as candidates and voters were being encouraged to stand and vote in their pre-conflict constituencies. For these reasons, the 'Rules of the Road' (RoR) procedure, annexed to the Rome Agreement, was introduced to enable the ICTY to oversee prosecutions undertaken by the relevant authorities. The Rome Agreement was a tripartite political agreement, signed on 18 February 1996, between the presidents of BiH, Croatia and Federal Republic of Yugoslavia. Under this agreement, the relevant authority had to submit each case to the ICTY for approval to proceed to arrest and indictment. The 'Rules of the Road' Unit was established at the Office of the Prosecutor (OTP) of the ICTY in order to advise

[2] See OSCE, War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina; Progress and Obstacles (March 2005), at p. 4.

whether or not: “the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect, or the continued detention of a prisoner”. Category “A” is granted against a particular suspect for a specific charge in order to indicate that: “the evidence is sufficient by international standards to provide reasonable grounds for the belief that (accused’s name) may have committed the (specified) . . . serious violation of international humanitarian law”. There are seven other categories (“B” through “H”), out of which “B” and “C” are the most significant in number and nature. “B” category indicated that “the evidence is insufficient” while in “C” category cases, the ICTY was “unable to determine the sufficiency of the evidence” and therefore instructed the BiH authorities to gather certain specific evidence after which the case should be submitted for re-categorisation. Since 1996, the ICTY RoR Unit received criminal files against a total of 5,789 persons suspected of war crimes. By 29 September 2004, the Unit reviewed and provided categories against a total of 3,489 persons, referring them back to the domestic authorities. Of the cases referred back to the domestic authorities in accordance with the RoRs, 846 cases received “A” categorisation, 2,346 received “B” categorisation and 675 received “C” categorisation. As of 1 October 2004, the Office of the Prosecutor of the ICTY was no longer in a position to review war crimes cases. Finally, the review of war crimes cases has been taken over by the BiH Prosecutor’s Office.[3]

45. An accused may never be tried *in absentia*, including the situations presented in the question.

46. N/A

47. No examples.

[3] Ibid., p. 5-6.

Croatia

Research by Ms Anna Adamska-Gallant and Gallant Consulting Ltd

General characteristics of the proceedings

1. Criminal procedure in the member state allows, in principle, proceedings in the absence of the accused.

> *(Article 402 paragraph 3 of Criminal Procedure Act (CPA)*
>
> *The accused may be tried in absentia only if there are particularly important reasons to try him, and a trial in a foreign country is not possible or extradition is not possible or the accused is on the run or cannot be reached by state authorities.*
>
> *(Article 402 paragraph 4 of Criminal Procedure Act)*
>
> *The decision on the trial in absentia is made by the court after obtaining the prosecutor's opinion. The appeal stays the execution of the decision, if the decision was made against the prosecutor's opinion.*

2. The legislation explicitly, in absolute terms, does not prohibit any proceedings *in absentia*.

3. There is no partial regulation for *in absentia* proceedings.

4. According to the Croatian criminal law, only the provisions of the law on criminal procedure are relevant and judicial practice is not binding, but is taken into account.

5. There had not been any amendment(s) to the criminal procedure legislation, specific to the purpose of regulating proceedings *in absentia*.

6. Some changes had been originated not in legislation but in judicial practice (case law). So Article 402, paragraph 3. Croatian Criminal proceedings law prescribes that the accused may be tried *in absentia* only if there are particularly important reasons to try him/her, and a trial in a foreign country is not possible or extradition is not possible, or the accused is on the run or cannot be reached by state authorities. Therefore, the basic condition is the existence of particularly important reasons for the defendant to be tried *in absentia*. In addition, at least one of the four conditions must be met, i.e. that a trial in a foreign country is not possible or that extradition is not possible or that the defendant is on the run or cannot be reached by state authorities.

In a situation where the defendant's whereabouts are not known at all, in addition to the basic condition for a trial *in absentia*, it is sufficient to justify that the defendant is on the run or that he is not reachable by state authorities. However, in a situation like the one in the case in question, i.e. when the addresses of all the defendants are known, i.e. where they are located, then the court should state the reasons why it considers that they are also fulfilled, i.e. , in the specific situation, the court should, in the reasoning of the decision by which it determines that the defendants will be tried *in absentia*, explain why their extradition is not possible, that is, that a trial in a foreign country is not possible (of course, if it determines that this is indeed not possible) (fragment from the decision of the Supreme Court of the Republic of Croatia, no. I Kž 497/15-5 of 24 July 2015.)

Specific features of the proceedings

Classification based on substantive grounds

7. There is no such classification, but only relevant criteria is "particularly important reasons for trial".

8. There is no distinction based on other criteria such as the seriousness of the offence, the gravity of punishment, or the type of crime or other criteria.

Classification based on procedural grounds

9. There is no such prohibitions regarding specific decisions or measures.

10. There is no specific period of time that must elapse in order to allow a trial *in absentia*, but in

addition to legally prescribed reasons, some procedural conditions must be met, such as pre-trial detention due to the risk of escape, and a arrest warrant and an international arrest warrant have been issued, as well as a European arrest warrant has been issued.

Situations

11. All situations come into consideration.

the general condition for trial *in absentia* of the accused is fulfilled, i.e. there are particularly important reasons for her to be tried because in this particular case it is about criminal offenses against the economy, where one criminal offense is punishable by a ten-year prison sentence, and the other criminal statute of limitations the prosecution will begin on March 31, 2025, and bearing in mind that his extradition is not possible, and more than 15 years have passed since the commission of the criminal acts that caused the unlawful property gain of over one million kuna (as it follows from the confirmed indictment), all connected with the fact that the state attorney did not propose the transfer of criminal prosecution to the Republic of Serbia, nor is extradition possible in accordance with the Agreement between the Republic of Croatia and the Republic of Serbia on extradition dated June 29, 2010, there are special reasons to try him *in absentia* (from the decision of the High Criminal Court of the Republic of Croatia, no. I Kž-40/2024 of 26 March 2024.

In addition to the above, the general condition for the trial *in absentia* of the accused is also met, that is, there are particularly important reasons to try him because in this particular case it is about criminal offenses against the economy that damaged the state budget by as much as HRK 7,210,846.29, and bearing in mind the ten-year period since the commission of these criminal acts, as well as their severity and the prevented sentence, all related to the fact that the state attorney did not propose the transfer of criminal prosecution to the Republic of Serbia, nor is extradition possible in accordance with the Treaty between the Republic of Croatia and the Republic of Serbia on extradition of 29 . June 2010, and in terms of Article 8 of that Agreement, because it is not about criminal offenses of organized crime and corruption in accordance with their internationally accepted definitions, which circumstance was correctly established by the first-instance court (from the decision of the High Criminal Court of the Republic of Croatia, no. I Kž-38/2023 of 21 February 2023.

When it is borne in mind that according to the contents of the report of Police Station K. dated April 5, 2016 (sheet 1154 of the case file), the defendant has not lived at the address of the registered residence for a long time and the address of his current residence is unknown, as well as that the arrest warrant issued against the defendant on March 4, 2016, due to serving a two-year prison sentence according to the verdict of the Municipal Criminal Court in Zagreb No. Kov-928/13, all the highlighted circumstances in their totality undoubtedly point to the conclusion that the defendant is unreachable by the state authorities of the Republic of Croatia and that, considering that the address of his place of residence and residence is unknown, no other legal means can be applied against him to complete this criminal procedure that has been going on for many years. (from the decision of the Supreme Court of the Republic of Croatia, no. I Kž 518/2018-4 of 8 November 2018.)

Summons and notifications

12. In accordance with Croatian Crminal procedure law, the defendant must confirm that he(she) recived summon by personaly signature on delivery report. After that, when the defendant refuses to appear in court, the authorities place the summons on the notice board of the court and then it is considered that the delivery has been properly made.

13.

Article 96 of the Croatian Criminal Act

The presence of the defendant when performing actions in criminal proceedings is ensured by summoning him. The summons is sent to the defendant according to Article 175 of this Law.

Article 175 paragraph 2

Summoning is done by direct, personal delivery of a sealed written summons containing: the name of the summoning body, the name and surname of the defendant, the name of the criminal offense charged, the place where the defendant must appear, the day and time when he must appear, an indication that he is being summoned in his capacity of the defendant and a warning that in case of non-appearance he will be forcibly brought, the official seal of the body and the signature of the person issuing the summons. In the summons, the defendant will be instructed that he is obliged to immediately inform the body conducting the procedure about the change of address and about the intention to change his place of residence and to warn him of the consequences prescribed by this Act if he does not do so.

Phone calls as the only way of summoning are not allowed.

14.

Article 172a of CPA

(1) Delivery through the information system (electronic summons) is done by sending the decision or letter to the recipient's secure electronic mailbox.

(2) Simultaneously with the sending of the decision or letter from paragraph 1 of this article, the information system sends to the recipient's email address an informative message informing him of the delivery. In the recipient's message, the recipient is warned of the legal consequences from paragraph 3 of this article.

(3) When the delivery is made through the information system, the decision or letter will be deemed to have been delivered at the end of the eighth day from the day they were received in the recipient's secure electronic mailbox.

(4) In the manner specified in this article, through the information system, decisions and letters that have originals in physical form can also be submitted if the electronic (scanned) transcript made on the basis of the original in physical form is certified by a qualified electronic seal of the court.

(5) Delivery made through the information system is considered immediate delivery.

Summons via defence counsel is possible only if the decision on trial *in absentia* has become final.

15. Legislation or practice does not require formal summoning for each court hearing if in the record of the previous hearing had been indicated the date of the next one.

16. In cases of unknown whereabouts, the procedure does not allow substitution of the accused for the purposes of notification. Such situation is not possible if the decision on trial *in absentia* hasn't become final yet. If it has, then all deliveries are made via defence lawyer.

Criminal charges

17. It is also possible to lay criminal charges or a report against an unknown perpetrator.

18. Prosecution cannot send casefile to trial without the formal procedure of laying criminal charges during the pre-trial stage. It is not possible in our jurisdiction.

19. It is not possible in our jurisdiction because the accusation is final and the state attorney can change the factual description and the legal designation of the act but he cannot accuse the other person in the same procedure.

20. It is not possible to ensure that charges have been notified and received by the accused remotely.

21. The prosecution ensure that charges have been notified and received by the accused through written delivery and returned delivery slips personally signed by the defendant.

Disclosure

22. In the trial phase, the court decides which evidence will be presented, it can be any personal or material evidence. All evidence must be specified in the indictment and the court will decide which evidence (or all of them) will be presented on hearing.

23. All the evidence proposed in the indictment, regardless of whether it is a trial *in absentia*, can be presented at the hearing if the court allows it

International cooperation

Institutional aspects

24. The trials *in absentia* are subjected to the regime of so called diplomatic delivery through the Ministry of Justice of the two countries.

25. Croatian criminal legislation makes difference regarding international cooperation in criminal matters inside European Union, and cooperation outside European union (so called: third countries)

European union: The county courts have special administrative divisions for international cooperation, including judges nominated as contact points, and they cooperate via EJN instruments. According to Croatian Judicial cooperation in criminal matters between member states of the European union act, Croatian judges and prosecutor are authorised contact with colleagues all over EU directly. In addition, they can ask assistance from Ministry of Justice and Croatian representative in EUROJUST.

Third countries: Cooperating with so called third countries goes via Ministry of Justice in accordance with Mutual Cooperation in Criminal Matters Act and signed and ratified international agreements.

Exchange of summons and notifications

26. No information about summons and notifications of persons fled to countries with which it severed diplomatic ties.

27. No information about receiving summons and notifications from such countries.

28. See p. 24.

Searching for wanted persons

29. When it is established by the court that the defendant is on the run, then the court orders the defendant to be remanded in custody due to the risk of absconding, and then a domestic and international arrest warrant and a European arrest warrant as well had been issued. So, an arrest warrant is required for all international search announcements and a person can be announced as wanted for notification of criminal charges if his/her whereabouts are known to be in the country with severed diplomatic ties.

30. To issue red notice or search warrants Croatian court in decision must justify reasonable doubt that certain person commited a crime.

Interaction and cooperation with international mechanisms of cooperation in criminal matters is very intensive due to the trends of migrations inside and outside European union and the fact that Croatia is very popular tourist destination. In that context Croatian courts can use many legal instruments inside international mechanisms of cooperation. including international police organisations.

Guarantees

31. The defendant has right to a defence counsel appointed by the court, or by chosen lawyer.

Waiving

32. General rule is that accused cannot waive his/her right to be present before court (*ratio legis*: he/she is subject and object – source of information - of criminal procedure).

33. See p. 32. But, accused can be passive – use his/her right to remain silent without any negative consequence.

Also, for less serious crimes (with proscribed punishment up to 12 years imprisonment), during the hearing, after it has begun, accused who was duly summoned did not appear or summons cannot be served on him because he has changed his address and has not informed the court about this, or is clearly avoiding the summons, the court can decide that the hearing be conducting in the absence of the accused if the accused was previously warned that could be tried *in absentia* and if he made a

statement about the indictment in the presence of a defence attorney. In such hearing accused must be presented by defence lawyer.

34. See 32. and 33.

35. Explained under 32. and 33.

36. According to the Croatian Constitution, consequently to Criminal procedure Act, the appeal is one of the basic constitutional rights and there is no connection between two situation, the accused can lodge an appeal in all circumstances.

Re-determination of criminal charges

37. A person who has been convicted *in absentia* can request a re-trial of his or her case udder the circumstances prescribed in Article 497 paragraph 3 CCA:

Criminal proceedings in which a person was convicted *in absentia* (and there was a possibility of retrial in his presence, will be renewed if the convicted person or his defence counsel, within one year from the day when the convicted person learned about the final verdict, submits a request for the renewal of the proceedings in which the address to which the written document can be delivered to the convicted person is specified, and the convicted person promises to respond to the court's call.

38. Re-trial implies full rehearing of the case, with re-examination of evidence and the facts.

39. a person can appeal the sentence rendered *in absentia*.

40. The time for appeal is being calculated by the day the defence counsel receives the contested judgment.

41. The appeal presupposes full re-hearing of the case.

42. There is no specific appeal which is different from other criminal cases.

43. The second-instance court examines the judgment in that part in which it is contested by appeal and from the grounds on which it is contested. Ex officio, the second-instance court must always examine:

1) whether there is a violation of the provisions of the criminal procedure from Article 468, paragraph 1, points 1, 5, 6, 9 to 11, from Article 468, paragraph 2, and whether the hearing, contrary to the provisions of this Act, was held in the absence of the accused and his defender,

2) whether the criminal law was violated to the detriment of the accused.

If the appeal filed in favor of the accused does not contain information from Article 466, paragraph 1, point 3 of this Act (contest of the appeal), the second-instance court will limit itself to examining the violation from paragraph 1, points 1 and 2 (previous two reasons) of this article and examining the decision on sentence.

Alternatives to physical presence of the accused

44. Article 404 paragraph 3 CCA

(3) If the proceedings are conducted for a criminal offense for which a prison sentence of up to twelve years is prescribed, the defendant who was duly summoned did not appear, or the summons cannot be served on him because he changed his address and did not inform the court about this or clearly avoided the summons. , the court may decide to conduct the hearing in the absence of the accused if the accused was previously warned that he may be tried *in absentia* and if he made a statement about the indictment in the presence of a defence attorney.

(4) At the hearing, the accused must have a defence attorney. The defence attorney can give statements and receive communications on behalf of the defendant on all issues related to the conduct of the proceedings and the decision on the main issues.

(5) If the proceedings are conducted for a criminal offense for which a fine or a prison sentence of up to five years is prescribed, the hearing may be held without the presence of the defendant who was duly summoned but did not appear or could not be served with the summons because he changed his address. and he did not inform the court about it or it is obvious that he wants to avoid the summons, with the condition that his presence is not necessary and that he was previously questioned or made a statement about the accusation.

Online hearings and the written procedures are not allowed.

Emergency situation

45. No information about emergency situations

46. No prohibition to hold *in absentia* proceedings for any crimes, including international core crimes.

47. The domestic courts retain the discretion to refuse to hold *in absentia* proceedings even if all conditions for such proceedings are fulfilled because trial *in absentia* is only possibility and not a legal obligation to the court.

48. The most recognized cases in Croatian law are definitely war crime cases. Famous judgment of European Court *Sanader* vs Croatia, Application no. 66408/12, 12 February 2015.

Georgia

Research by Mr Lilian Apostol

Sources

- Criminal procedure code of 09 October 2009, last amended on 21 February 2024

General characteristics of the proceedings

1. The Georgian legislation allows *in absentia* proceedings. The relevant provisions are as follows

> *Article 22 Composition of courts*
>
> *9. If a criminal case is triable by a jury and the accused evades appearing in the court, the court shall hear the case in his/her absence, without the participation of the jury. …*
>
> *Article 85 - Liability for non-performance of procedural duties and for disrupting order in a courtroom*
>
> *2. If a participant in proceedings or a person attending a court session disrupts order during a session, disobeys an order of the presiding judge or shows disrespect towards the court, the presiding judge shall give him/her an oral warning and ask him/her to stop the inappropriate behaviour. In the case of disobedience to the above request, the presiding judge shall, by deliberation in the courtroom, impose a fine and/or remove the person from the courtroom. If the person removed still continues disrupting order, the court bailiff shall, upon instructions of the judge, remove the person from the court (building); in addition, this person may receive a fine provided for by this article or detention. …*
>
> *4. If the accused has been removed from a courtroom, a final court decision shall be announced in his/her presence, and if the accused still continues disrupting order, the decision shall be announced in his/her absence. After that, the accused shall be handed over a copy of the decision, which shall be confirmed by his/her signature.*
>
> *Article 189 – Hearing in the absence of the accused*
>
> *1. A case hearing in the absence of the accused may be held if the accused avoids appearing before the court. In such a case, participation of a defence lawyer of the accused in the case hearing shall be mandatory.*
>
> *2. If a detained accused has not been presented before the court due to a failure to transport him/her, the court shall adjourn the hearing for a reasonable period but no longer than 10 days, and notify the General Director of the Special Penitentiary Service accordingly, who shall be obliged to ensure the attendance of the accused at the next session, and notify the court of the reason for failure to transport the accused.*

2. The legislation prohibits absentia trials in cases of the transference of criminal prosecutions to foreign countries if the extradition of the accused is not possible or has been refused.

3. The legislation refers only to judicial hearings at the trial stage that could be held *in absentia* and contains no special provisions regulating the pre-trial investigation or prosecution.

4. The legislation remains silent on the possibility of holding prosecution and pre-trial investigations *in absentia*. However, one could implicitly apply the provisions regulating trials *in absentia* to prosecution and pre-trial investigation. The criminal procedure legislation of Georgia can be interpreted extensively.

5. Georgia adopted its current criminal procedure legislation in 2009 keeping the provisions on holding trials *in absentia* almost the same as in previous legislation. Newly adopted provisions were criticized by the OSCE experts[1] for the lack of clarity concerning the procedure

[1] See Joint opinion on the criminal procedure code of Georgia (Opinion-Nr.: CRIM -GEO/257/2014 [RJU]) 22 August 2014, §§ 47-48

of summons based on which the decisions to hold a trial in the absence could be taken. Georgia has not reacted to this criticism. It did, however, change its legislation in 2010[2] introducing the right to appeal designated specifically for a person convicted *in absentia*.

6. Not applicable.

Specific features of the proceedings

Classification based on substantive grounds

7. Georgian legislation allows trials *in absentia* irrespective of the gravity of the offence.

8. Not applicable.

Classification based on procedural grounds

9. Legislation does not specify or, otherwise, prohibit specific decisions or measures to be taken *in absentia*.

10. Not applicable.

Situations

11. *In absentia* proceedings are allowed in the following situations:

- non-appearance before the court;
- contempt of the court sanctioned by forcible removal of the accused from the court room.

Summons and notifications

12. The Georgian criminal procedure code does not establish specific rules for summoning or notification procedures. Civil proceedings are more explicit in this sense, describing means and methods of serving summons and notifications, mostly using agents for serving summons, postal services, and publication in mass media.[3] One could reasonably assume that criminal proceedings employ the same methods. This also implies that formal rules do not apply to summons and notifications in Georgian criminal proceedings, enabling the prosecution to demonstrate the summons' service using any available evidence. In practice, however, the accused's written signature is the preferred means to prove the service of a summons. Furthermore, Georgian legislation permits serving the summons to the defence lawyer rather than the accused.

13. Given less formalistic procedures, any summoning method could be considered valid as long as it originates from an official authority with criminal prosecution or judicial powers. One can interpret legislation widely to allow any means of summoning and notification. Quotation is not possible because Georgian criminal procedure does not dedicate special provisions to regulating summoning and notification.

14. Legislation and practice allow electronic summons or summons via representatives or a defence lawyer.

15. Legislation does not require formal summoning for each court hearing, and it could be inferred that the accused was notified about court hearings once he or she attended at least one of the court sessions.

16. The Georgian legislation allows explicitly to notify and summon the accused via his defence lawyer.

[2] Law of Georgia no 3616 of 24/09/2010

[3] E.g. *Gakharia v. Georgia*, no. 30459/13, 17 January 2017

Criminal charges

17. Criminal charges in cases of refusal to appear or unknown whereabouts of the accused could be notified to his defence lawyer. The relevant provisions are as follow:

> *Article 169 – Indictment of a person*
>
> *6. If the accused avoids appearing before an investigative authority, he/she or his/her relative shall be given a reasonable period for hiring a defence lawyer. If he/she fails to hire a defence lawyer within that period, the accused shall be assigned a mandatory defence. In order to bring charges, the prosecutor, or upon his/her instructions, an investigator, shall summon the defence lawyer of the accused and familiarise him/her with the indictment, which shall be considered the same as bringing charges. The defence lawyer of the accused shall confirm in writing that he/she has become familiar with the charges.*

18. The prosecution cannot send a casefile to trial without formally indicting the person during the pre-trial stage.

19. Criminal charges can only be changed or withdrawn at the trial stage, but they should be laid down at the pre-trial stage.

20. The prosecution has significant discretion in determining how to summon and inform the accused about the charges. Once the accused chooses a lawyer or the state appoints one, it is reasonable to assume that they can receive notification of criminal charges, even remotely.

21. A signature on a copy of the indictment would be sufficient to prove notification. Georgian legislation also provides that the prosecution should record in the indictment both the refusal and the reasons of the accused or defence lawyer to confirm the receipt of the indictments.

Disclosure

22. Georgian legislation does not provide special rules and proceedings for disclosure of the case file material before the trial. While the case was sent to trial, the defence lawyer has unlimited access to the case-file materials.

23. The non-disclosure of the case file cannot affect the progression of criminal proceedings.

International cooperation

Institutional aspects

24. The Ministry of Justice is the central authority for all matters relating to international cooperation in criminal proceedings. The Georgian prosecution and judicial authorities seeking international cooperation in criminal matters, including service of summons, notifications, detention, and search warrants, should formulate and receive requests via the Ministry of Justice.

25. Courts, judicial police, and prosecution offices do not have their own special administrative divisions for international cooperation, and they cannot interact directly with other similar entities except through the Ministry of Justice.

Exchange of summons and notifications

26. Georgia cut diplomatic ties with Russia after the 2008 War and has frozen intergovernmental cooperation since 2010. In 2018, Georgia also cut relations with Syria due to the formal recognition of Abkhazia and South Ossetia.[4] There is no indication that Georgia may have continued international cooperation in criminal matters with these countries.

27. There is no public information available on the matter.

[4] https://mfa.gov.ge/en/bilateral-relations

28. Summons or notification of the accused persons should be sent only by rogatory letters via Ministry of Justice; otherwise, they could not be valid for the purposes of criminal proceedings.

Searching for wanted persons

29. The Georgian legislation empowers the prosecutor to issue orders for searching persons pending criminal investigation and trials. The legislation does not specify the circumstances or the grounds for making such a decision. Investigative bodies carry out the search for wanted persons.

Declaring a person in international search implies an arrest warrant *in absentia*, since the legislation provides that the status of a wanted person appears to be a valid ground for the court to order remand detention. Given the lack of clear grounds for searching for wanted persons in Georgian legislation, one could argue that it theoretically permits declaring a person in international search, even if their whereabouts are known to be in a country with severed diplomatic ties.

30. Georgian police handle Interpol red notices after the prosecutor issued search warrants and judges rendered convictions. Judges can issue search warrants, but only following convictions *in absentia*. Georgia signed a cooperation agreement with Europol.

Guarantees

31. According to rules regulating *in absentia* proceedings, mandatory participation of a lawyer, whether chosen or appointed by the state, appears to be the only guarantee.

Waiving

32. There are no provisions in the Georgian legislation prohibiting the accused from waiving his or her right to be present. However, the Georgian legislation does not seem to grant the accused such a right.

33. Not applicable.

34. Not applicable.

35. Not applicable.

36. Not applicable.

Re-determination of criminal charges

37. When convicted *in absentia*, an individual can only appeal the sentence, not seek a re-trial of the case. The only requirement is to comply with the statutory time limit of one month for an appeal after learning about the sentence.

38. Georgian legislation limits the scope and examination of appeal proceedings. However, it makes an exception for persons convicted *in absentia* and allows full re-examination of the case. If the appeal was lodged by prosecution or by victims and the convicted person is still absent, the appeal hearings are limited.

39. See § 37.

40. The time for appeal is being calculated from the formal receipt of notification of the sentence or from the day of arrest based on the conviction.

41. See § 38.

42. Georgian legislation does not provision a procedure for leave to appeal.

43. Compliance with the statutory time limit is the only admissibility criteria for an appeal.

Alternatives to physical presence of the accused

44. There seems to be no alternatives to proceedings requiring the physical presence of the accused.

Emergency situation

45. Georgia has experienced international armed conflict on its territory, and it currently classifies the presence of Russian armed forces in Abkhazia and South Ossetia as a belligerent occupation. Georgia, however, has not accommodated its criminal proceedings to this specific situation, except in parts related to the non-recognition of the acts emanating from that region or any cooperation with the local separatist authorities.

46. The Georgian law is quite liberal. It permits the application of *in absentia* proceedings to almost all crimes and situations.

47. Domestic courts and the prosecution have the discretion to either suspend proceedings or move forward with an *in absentia* conviction.

48. The following cases need to be researched to observe the issues related to *in absentia* proceedings in Georgia:

- Saakashvili v Georgia No. 6232/20, 22394/20 (23 May 2024)
- Agajaniani v Georgia (communicated) No. 57310/22 (26 March 2024)
- Lobzhanidze and Peradze v Georgia No. 21447/11, 35839/11 (27 February 2020)
- Gelenidze v Georgia No. 72916/10 (7 November 2019)
- Batiashvili v Georgia No. 8284/07 (10 October 2019)
- Bartaia v Georgia No. 10978/06 (26 July 2018)
- Peradze v Georgia (communicated) No. 35839/11 (13 December 2017)
- Lobzhanidze v Georgia (communicated) No. 21447/11 (13 December 2017)
- Merabishvili v Georgia [GC] No. 72508/13 (28 November 2017)
- Gakharia v Georgia No. 30459/13 (17 January 2017)
- Gelenidze v Georgia (communicated) No. 72916/10 (14 March 2016)
- Khutsidze v Georgia and 4 Other Applications (communicated) No. 5787/08 (24 February 2016)
- Assatiani v Georgia (communicated) No. 29845/07 (12 March 2013)
- Kakabadze and Others v Georgia No. 1484/07 (2 October 2012)
- Abashidze v Georgia (dec) No 47974/07 (4 September 2012)
- Ramishvili and Kokhreidze v Georgia (dec) No. 1704/06 (27 June 2007).

Germany

Research by Ms Lorena Bachmaier Winter

General characteristics of the proceedings

The German criminal procedure is in principle reluctant to allow proceedings in the absence of the accused, albeit some exceptions to this principle are foreseen. The caselaw of the German Constitutional Court (*Bundesverfassungsgericht*) has stated that the participation of the accused in criminal proceedings is rooted in the constitutional obligation of the state to respect human dignity and, following from that, in the right to a fair hearing and in the principle of culpability.[1] Individual blameworthiness of the accused is thus central to the criminal law. Consequently, in order to establish the true facts of the case, the personality of the accused individual is of paramount importance and therefore it is necessary to have the defendant present at trial. Thus, beside fair trial concerns, the accused's presence is meant to provide the court with direct knowledge of his or her personality and explanations, thereby reflecting the constitutional requirement, originating from the principle of human dignity and culpability that the purpose of the criminal trial is to uncover the truth.

The German criminal procedure code (*Strafprozessordnung,* StPO) assumes both a right and a duty of the defendant to attend the entire trial (*Hauptverhandlung*);[2] and if defendants do not appear at trial without sufficient justification, the court can order them to be brought before it or have them arrested for the duration of the trial; in the written summons to the hearing, however, they must already be informed about the possible consequences of their non-appearance. This is provided under:

> *Article 230 StPO*
>
> *"(1) No trial shall be held against a defendant who fails to appear.*
>
> *(2) If insufficient excuse has been provided for the defendant's failure to appear, an order is made to bring the defendant before the court or a warrant of arrest is to be issued insofar as this is necessary in order to conduct the main hearing."*

There is different situation where the trial can continue without the presence of the defendant.

Trial in absentia after the defendant has appeared at trial

Once the defendant has appeared, the court may take "appropriate measures to prevent the defendant from absenting himself". If the defendant, once having appeared at trial does not appear to the next sessions and does not present any justification. Requirements to continue trial without him/her are mentioned under Article 231.2 StPO: that he/she is has been examined about the charges; that the defendant consciously disregards the duty to attend without a legitimate excuse; the defence lawyer is present; the court considers his/her presence is not indispensable; and that he/she was warned about the possibility to continue the trial *in absentia* if he does not attend to the later sessions. This is provided under Article 231 StPO:

> *Article 231 Defendant's duty to be present*
>
> *(1) A defendant who has appeared may not leave the hearing. The presiding judge may take appropriate measures to prevent the defendant from leaving; the judge may also have the defendant kept in custody during any interruption of the hearing.*
>
> *(2) If the defendant nevertheless leaves or fails to appear when an interrupted main hearing is*

[1] Meyer-Goßner Kommentar zur Strafprozessordnung (2016), Article 230, para. 3 ff. For preparing this report we have used extensively the German Commentaries on the German Code of Criminal Proceedings, and the information found in Beck-Online,in addition to interviewing some practitioners. This report is based also to a large extent on the chapter written by B. Vogel, "Report on Germany" in S. Quattrocolo and S. Ruggeri (eds.) *Personal Participation in Criminal Proceedings. A comparative Study of Participatory Safeguards and in absenti Trials in Europe,* Springer, Cham, 2019, pp. 123-164.

[2] For the term "Hauptverhandlung" here it will be used indistinctively the English words of "trial" or "main hearing".

resumed, it may be concluded in his or her absence if the defendant has already been examined on the charges, the court does not consider the defendant's further presence to be necessary and the defendant was informed in the summons that the main hearing may, in such cases, be concluded in his or her absence.

(3) It is for the court to decide, after hearing a physician as an expert, whether to hold the hearing in the absence of a defendant pursuant to subsection (1). The decision may already be given prior to the beginning of the main hearing. An immediate complaint against the decision is admissible; it has suspensive effect. A main hearing which has already commenced is to be interrupted until a decision on the immediate complaint is made; the interruption may last no more than 30 days even if the conditions of section 229 (2) are not met.

(4) Defence counsel is to be appointed for a defendant who is not represented by defence counsel as soon as a hearing in the absence of the defendant is being considered in accordance with subsection (1).

The obligation for the defendant to attend includes instances in which the court takes evidence by examining objects outside the courtroom. Defendants are also regarded as having failed to appear where they are physically present but unfit to stand trial and therefore unable to reasonably represent their interests. If the defendant, who is present at trial, however, puts him/herself in a situation of not being able to stand to trial, as provided under Article 231a StPO. Examples in practice are, among others: consumption of alcohol or narcotics; self-harm; hunger strike, etc.

The requirements to continue the trial without the defendant are more stringent if the trial court was not even able to examine him/her on the charges during the trial. If this occurs before having been heard about the charges at the trial, the trial can continue *in absentia* only after the defendant has been given the opportunity to make a statemen on the charges before the trial court or before a single member of the trial court outside the main hearing (Article 231a. 1 StPO), even if the defendant does not comment on the charges because he/she is mentally not able to do it. In any event, in these cases will the *in absentia* proceedings be granted only exceptionally. This provision covers both, the situation of permanently or temporary unfitness, caused intentionally by the defendant. The reason for this provision is to prevent the defendant from undermining the criminal proceedings once they are under the reach of the authorities.

If the defendant is fit again before the trial has ended, he/she can come back to the trial and regain their procedural rights, as for example, applying for certain evidence to be taken or make the closing statements.

Article 231a StPO Bringing about of unfitness to **stand** *trial with intent*

(1) If the defendant has intentionally and culpably brought about a condition which precludes his or her fitness to stand trial and if, as a result, said defendant knowingly prevents the proper conduct or continuation of the main hearing in his or her presence, then if the defendant has not yet been examined on the charges, the main hearing is to be conducted or continued in his or her absence, unless the court considers his or her presence to be indispensable. The procedure described in sentence 1 only applies where the defendant has, after proceedings have been opened, had the opportunity to make a statement on the charges before the court or a commissioned judge.

(2) As soon as the defendant is again fit to stand trial, the presiding judge must inform him or her of the essential content of the proceedings during his or her absence, unless pronouncement of judgment has commenced. [3]

The defendant can also be allowed to exceptionally leave the trial hearing in cases of multiple defendants, when there are parts of the hearing that do not affect that particular defendant, neither directly nor indirectly. If, for example, the charges being discussed against other defendants do not concern a particular one. Upon application to the court, an individual defendant and his/her defence lawyer can be excused to attend parts of the main hearing.

[3] See Meyer-Goßner (2016), Article 230, para. 8.

Proceedings in absentia where the defendant is not present

Investigative phase

As a rule, *in absentia* proceedings are only partially prohibited, since the investigative phase (*Ermittlungsverfahren*) can take place without the suspect/defendant being present. The hearing on the remand in custody cannot be held without the attendance of the defendant. If the accused has been apprehended on the basis of an arrest warrant, he or she must be brought before the competent judge without delay. The judge must examine the accused in person. If the accused cannot be brought to the court due to ill health, a judge must visit him in hospital. At this hearing, the accused must be given the opportunity to refute the grounds for suspicion. The accused can also apply for the taking of exonerating evidence. If accused use their right to first consult a defence counsel, the hearing has to be postponed in order to enable counsel to attend.

Absence in appeal proceedings

In addition to the general rules pertaining to the defendant's absence at the trial, some special rules apply to the defendant's participation in *Berufung* proceedings (appellate proceedings). If at the beginning of the main *Berufung* hearing neither the defendant nor a defence counsel whom the defendant has authorised to be present has appeared, and if there is no sufficient excuse for the failure to appear, the court can dismiss the appeal by the defendant without hearing the merits of the case (Article 329.2 StPO).

To the extent that the defendant's presence is not necessary in view of the court's duty to uncover all relevant facts, the main hearing is conducted without the defendant if he/she is represented by a defence counsel whom the defendant has authorised to this effect. Exceptionally the appellate hearing can also conducted without the defendant—even in the absence of a defence counsel—if the defendant's absence has not been sufficiently excused and the appeal was filed by the prosecution (Article 328.2 StPO). In this case, if any of them appear while the hearing has not ended, the court shall inform the defendant or defence counsel of the main acts that took place during their absence. If, following an appeal by the prosecution, the main hearing cannot be concluded in the absence of the defendant, the court shall, to the extent necessary to uncover relevant facts, order the defendant to be brought before it or to be arrested (Article 329.3 StPO)· If, following an appeal by the defendant and despite a defence counsel being present, the presence of the defendant is necessary, the court shall summon the defendant to appear before it; if the defendant then does not appear without sufficient excuse and his or her presence continues to be necessary, the court shall dismiss the appeal. In the summons, defendants must be informed that the appeal may be dismissed in their absence (Article 329.4 StPO)

After service of the appeals judgement issued in their absence, defendants may lodge an objection within one week to the effect that they were prevented from attending the appeals hearing through no fault of their own. Defendants are granted restoration of the *status quo ante* upon application, in particular, if they had not been properly summoned to this hearing before the appellate court (Article 329.7 StPO).

Thus, German law does provide for *in absentia* proceedings before the appellate court if the defendant is represented by a defence counsel or the appeal has been filed by the prosecution. As already mentioned, however, such *in absentia* hearings are allowed only to the extent that the defendant's presence is not deemed necessary for the court to uncover all relevant facts. In practice, the presence of the defendant at the appellate proceedings hearing will usually be considered necessary, if it is to be expected that the defendant's participation can contribute to the discovery of the truth, better assess his/her personality, or his/her presence seems appropriate in light of the gravity of the expected sentence. The presence of the defendant might be required for parts of the main hearing, but not for other parts.

In *Revision* proceedings (an appeal on points of law only, similar to appeal in cassation in other jurisdictions), the defendant may "appear at the main hearing or may be represented by defence counsel." However, if the defendant is remanded in custody, he or she is not entitled to be present (Article 350.2 StPO).

Trial which can be held in absentia: minor offences

Two types of situations can allow a trial *in absentia*: the first, despite the obligation of the defendant to attend, and the second, where the system does not impose such obligation but allows the defendant to decide whether to attend or not. In both cases the defendant should have been summoned and informed about the consequences of not attending the trial.

In the first case, a complete trial against absent defendants is allowed in the interest of protecting the functioning of the criminal justice system if they were properly summoned—which requires that defendants' whereabouts are known to the court—and thereby explicitly warned that the hearing may take place in their absence. This is only allowed, however, if, limited cases where the offence can entail only "a fine up to 180 daily units, a warning with sentence reserved, a driving ban, forfeiture, confiscation, destroying or making an item unusable, or a combination thereof" (Article 232.1 StPO) and the defendant has consciously stayed absent (article 235 StPO). Meeting these conditions authorises the court to conduct the trial *in absentia*, but it does not mean that the defendant does not have the duty to appear. In any event, the court will only allow the trial *in absentia* if it considers that the defendant's presence is not necessary for discovering the truth.

If a record of a prior judicial examination of the defendant is available, it must be read out at trial, except when the absent defendant is represented by defence counsel, as the latter can make a statement on the charges in the name of the defendant. Should the court, at the main hearing, find that the defendant is guilty of an offence different from the one mentioned in the indictment, it can proceed with the hearing only if the absent defendant is represented by a defence counsel (Articles 265.2 and 234a StPO).

The judgement rendered *in absentia* must be served on the defendant personally or on the defence counsel (Article 232.4 StPO). Defendants can apply for the restoration of the *status quo ante* within 1 week of service of judgement if they were prevented from attending the hearing through no fault of their own and at any time if they were not informed of the summons for attending the trial (Article 235 StPO).

The second case, is regulated under Article 233 StPO:

> *Article 233 StPO, Defendant's release from obligation to appear*
>
> *(1) The defendant may, upon application, be released from the obligation to appear at the main hearing if only imprisonment for a term not exceeding six months, a fine not exceeding 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is expected to be imposed. An increased penalty or a measure of reform and prevention may not be imposed in the defendant's absence. Disqualification from driving is admissible.*
>
> *(2) Defendants who are released from the obligation to appear at the main hearing are to be examined on the charges by a commissioned or requested judge. In this connection, they are to be advised of the legal consequences which are admissible at the hearing in their absence and asked whether they uphold their application to be released from the obligation to appear at the main hearing. In lieu of a request or a commission referred to in sentence 1, the court may also conduct the examination on the charges outside the main hearing in such a way that the defendant is located somewhere other than the court and the examination is simultaneously transmitted audio-visually to the place where the defendant is located and to the courtroom.*
>
> *(3) The public prosecution office and defence counsel are to be informed of the date set down for the examination; their presence at the examination is not required. The record of the*

examination is read out at the main hearing.

Penal orders (Strafbefehl)

In case of misdemeanours, a court can impose the legal consequences of an offence by means of a written penal order without a main hearing. The public prosecution office can file an application to this end if, in view of the results of its investigation, it does not consider a main hearing to be necessary. A penal order cannot, however, lead to the imposition of a custodial sentence if the indicted person has no defence counsel. If the accused has a defence counsel, a penal order can also impose impris- onment for up to 1 year, provided that its execution is suspended on probation (Article 407.1 StPO). The court may issue a penal order if, on the basis of the file submitted by the prosecutor, there appear to be sufficient grounds to suspect that the indicted accused has committed a criminal offence. Thus, for a penal order to be issued, it is not necessary that the judge previously hears the suspect nor to be fully convinced of the accused's guilt.

However, the judge must open a "main hearing, if he has reservations about deciding the case without a main hearing, if he wishes to deviate from the legal assessment in the application to issue the penal order, or if he wishes to impose a legal consequence other than those applied for, and the public prosecution office insists on its application." (Article 408.3 stop).

In addition, in proceedings before a single criminal court judge (*Strafrichter*) and in proceedings before a court with lay judges (*Schöffengericht*)— i.e., in cases of minor or medium gravity offences—if the main proceedings have already been opened, the prosecutor can apply for a penal order if the defendant fails to appear or if a main hearing is impeded for other important reasons (such as the absence of an important witness), provided that the aforementioned conditions for issuing a penal order are fulfilled.

The judge shall grant the application if he/she has no reservations (Article 408a StPO). If the accused does not yet have a defence counsel and if the judge is considering the issuing of a penal order with a suspended prison sentence of up to 1 year, he must first appoint a defence counsel for the defendant. The penal order must be served to the defendant, e.g., personally or by placing it in the letterbox of the effective domicile or at the business premises where the defendant is employed (Article 37.1 StPO), or to defence counsel if appointed.

"Within two weeks following service of the penal order the defendant may lodge an objection against the penal order at the court which issued it." (Article 410.1 StPO). In this case, the court will proceed to set the date for the full main hearing. At this hearing, the defendant can be represented by a defence counsel; the defendant is not required at attend in person (Article 411.1 and 2 StPO). If the defendant does not appear at the main hearing, is not sufficiently excused, and is not even represented by a defence counsel, the court shall dismiss the objection without hearing its merits (Articles 412 and 329.1 StPO). When this happens, or an objection is not lodged in time, the order becomes equivalent to a judgement that has entered into force. However, if the defendant was prevented from observing the two week time limit for lodging an objection "through no fault of his own, he shall be granted restoration of the *status quo ante* upon application." (Article 44.1 StPO). This holds especially true if defendants can prove that they were temporarily absent from home and had no reason to anticipate that they would be served with a penal order during their absence.[4]

There have recently not been any relevant amendment(s) to the criminal procedure legislation, specific to the purpose of regulating proceedings *in absentia*.

[4] Constitutional Court decision (*Bundesverfassungsgericht*), of 9 July 1969, NJW 1969/1531 (*Strafbefehl während der Urlaubsabwesenheit*).

Specific features of the proceedings

Classification based on substantive grounds

The prohibition of holding the trial *in absentia* is general, however there are some exceptions provided by the StPO based on the seriousness or the type of the criminal offence, as has been explained above.

Proceedings before Juvenile Courts

Further, special requirements apply for exceptions to the defendant's personal participation at the main hearing before the juvenile courts, i.e., criminal courts that deal with crimes committed by youths (aged 14–17) and, under certain circumstances, young adults (aged 18–20). Due to the primarily educational purpose of juvenile courts, the law is particularly reluctant to allow for proceedings against absent defendants. The main hearing may take place in the absence of the defendant only if this would be permissible in the general proceedings, if there are special reasons to do so and with the assent of the public prosecutor.

Special reasons are only given in cases of less serious crimes, provided that the court already has sufficiently detailed information about the defendant's personality and provided that the defendant's appearance would not have a detrimental impact, e.g., on his or her employment situation. Under such circumstances, it may often be appropriate to dispense with prosecution or discontinue proceedings. [5] Still, the accused in the juvenile court can temporarily be excluded from the main hearing to the extent that discussions could be disadvantageous to the accused's education and development; in this case, the court must inform the accused of the content of deliberations held in his or her absence as far as this is necessary for the defence.[6]

Classification based on procedural grounds

As seen above, the main prohibition the German legislation concerns the trial, which as a rule cannot be held *in absentia*. If the defendant is on flight and cannot be found, as a rule the setting the case for trial will be suspended indefinitely.

Situations

In absentia proceedings are allowed in the following situations if applicable:

- Refusal to appear after having been properly summoned, including but not limited to various situations of summoning, but only a very limited cases/type of proceedings, as explained above.

- For official notification about criminal charges in exceptional cases as reflected above.

- In the cases not related to official notification of criminal charges (e.g., disclosure of evidence, additional statements, attendance to specific investigative measures such as experiments, cross-examination.

- Evidence gathering/securing evidence: Special proceedings exist for the purpose of preserving evidence when the accused's whereabouts are unknown or the accused is otherwise out of reach for the German authorities.[7] In such proceedings, the accused may be represented by a defence counsel and even by relatives. If charges have already been filed against an absent accused, the entirety of the accused's property, to the extent that it is located within Germany, may be seized by the court in order to force his or her appearance should the grounds for suspicion justify the issuing of an arrest warrant.

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[5] Article 50.1 Youth Courts Act (*Jugendgerichtsgesetz*), available at: https://www.gesetze-im-internet.de/jgg/BJNR007510953.html

[6] Article 51.1 Youth Courts Act

[7] Articles 276 and 285 StPO.

- In limited cases of absconding after having been notified about criminal charges as explained above.

> *Article 276 StPO Meaning of 'absent'*
>
> *"Accused persons are deemed to be absent if their whereabouts are unknown or if they are abroad and it does not appear feasible or reasonable that they can be brought before the competent court."*

- In the cases if contempt of the court sanctioned by forcible removal of the accused from the court room. The court has the power to remove the defendant from the courtroom for the purpose of keeping order if the defendant seriously disrupts the hearing.

- In case of refusal to grant extradition request, the court so decides, it can take place without the sought person being present.

In this case, Article 231b StPO provides that "the hearing may be conducted in his absence if the court does not consider his further presence to be indispensable" for assessing the evidence "and as long as it is to be feared that the defendant's presence would be seriously detrimental to the progress of the main hearing." (para.1) In any case, the trial court must give the defendant the opportunity to comment on the charges. As soon as the defendant is allowed back into the courtroom, the court is required to "inform him of the essential contents of the proceedings during his absence." (para.2).

The law also allows for removal of the defendant from the courtroom during parts of the hearing in the interest of discovering the truth or to protect witnesses or defendants themselves. The defendant can be ordered to leave the courtroom during an examination if, on the basis of specific facts, it is to be feared that a witness or co-defendant will not tell the truth or refuse to give evidence in the presence of the defendant. (Article 247.1 StPO). Such removal is also possible "if on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health."

In the interest of the defendant, removal can also be ordered "for the duration of discussions concerning the defendant's condition and his treatment prospects, if substantial detriment to his health is to be feared." (Article 247.3 StPO)

In order to safeguard defence rights, the presiding judge is obliged to inform the defendant "of the essential contents of the proceedings, including the testimony, during his absence" immediately after the defendant returns to the courtroom or ensure that the defendant can, during his absence, follow the hearing by means of an audio-video link (Article 247 StPO)

Once they have been informed about the essential content of the proceedings during their absence, or during/after following the hearing via an audio-video link, defendants must be given the opportunity to directly question the witness or submit questions to him or her.

Regarding the surrender proceedings, the relevant applicable rules are found in the Law on International Cooperation in Criminal Matters (*Gesetz über Internationale Rechtshilfe in Strafsachen*, Law on ICCM*).* The execution of an extradition request in Germany takes place in two stages. After reception of the extradition request, the single criminal court judge (*Strafrichter*) shall advise the person sought of his rights and "ask him whether and if so on what grounds he wishes to object to the extradition." (Article 28.2 Law on ICCM).The single judge does not, however, decide on the admissibility of extradition, but only records the sought person's statements.In fact, if the person sought does not consent to the extradition or the public prosecution service applies for a judicial decision, the admissibility of extradition shall be decided by the Higher Regional Court (*Oberlandesgericht*). The Higher Regional Court may also hold an oral hearing, but this rarely occurs in practice. The presence of the sought

person in this hearing is regulated under Article 31 Law ICCM:

> *Article 31 Law ICCM Conduct of the oral hearing*
>
> *(1) The public prosecutor's office at the Higher Regional Court, the person being prosecuted and his legal counsel (§ 40) must be informed of the place and time of the oral hearing. A representative of the public prosecutor's office at the Higher Regional Court must be present at the oral hearing.*
>
> *(2) If the person being prosecuted is in custody, he must be brought before the court unless he has waived his right to be present at the hearing or unless the long distance, illness or other insurmountable obstacles prevent his being brought before the court. If the person being prosecuted is not brought before the oral hearing, legal counsel (§ 40) must protect his rights at the hearing. In this case, a lawyer must be appointed as legal counsel for the oral hearing if he does not already have legal counsel.*
>
> *(3) If the person being prosecuted is at liberty, the Higher Regional Court can order him to appear in person. If the defendant, who has been duly summoned, does not appear and his absence is not sufficiently excused, the Higher Regional Court may order the defendant to appear.*
>
> *(4) The parties present at the oral hearing must be heard. Minutes of the hearing must be taken.*

Summons and notifications

For the summons in the criminal proceedings, Article 37 StPO refers generally to the Code of Civil Proceedings (*Zivilprozessordnung,* ZPO). Service of process is regulated under Articles 166 to 195 ZPO. The general rule is that the first notification to the defendant, who is not arrested, shall be done personally. However, if not found at his/her place of residence or working place, the summons can be done at his home.

If delivery to the recipient fails, the most important special form of delivery is the substitute service of process (Article 178 ff. ZPO). This means that a decision is effectively received even if the person concerned does not have personal knowledge of it. Substitute service of process requires that the recipient of the notification was not found in his/her home, business premises or a community facility. This is the same if he/she refuses to accept the document to be delivered. The prerequisite for substitute service at home is that the recipient actually lives at such address.

Once the defendant has a defence counsel (of own choice or duty appointed, the notifications can be done to the lawyer:

> *Section 145a StPO Service on defence counsel*
>
> *(1) Defence counsel of choice whose power of attorney has been documented and court-appointed defence counsel are considered authorised to receive notifications and other communications on behalf of the accused. To document the power of attorney it is sufficient for defence counsel to transmit a copy of the power of attorney. A request may be made for subsequent submission of the original of the power of attorney; a time limit may be imposed in that regard.*
>
> *(2) A summons for the accused may be served on defence counsel only if he or she is expressly authorised to receive summonses by documented power of attorney. Section 116a (3) remains unaffected.*
>
> *(3) If a decision is served on defence counsel pursuant to subsection (1), the accused is to be informed thereof; defence counsel is to be provided with a copy of the decision at the same time. If a decision is served on the accused, defence counsel is to be simultaneously informed thereof even if the files contain no power of attorney; he or she is also to be provided with a copy of the decision.*

In cases of refusal to appear the authorities shall check whether the accused has been properly summoned and has received the notification. However, since under certain circumstances the law allows for service by publication, it cannot be ruled out that in the few cases where the German criminal procedure code allows for a trial *in absentia* to be held,

there might be a possibility that the defendant does not know about the proceedings nor about the main hearing against him/her:

> *Section 40 Service by publication*
>
> *(1) If service on an accused upon whom a summons to the main hearing has not yet been served cannot be effected in Germany in the prescribed manner and if compliance with the provisions for service abroad appears impracticable or will presumably be unsuccessful, then service by publication is admissible. Service is considered effected once two weeks have elapsed since the notice was displayed.*
>
> *(2) If the summons to the main hearing has already been served on the defendant, then service on the defendant by publication is admissible if it cannot be effected in Germany in the prescribed manner.*
>
> *(3) In proceedings concerning an appeal on points of fact and law or an appeal on points of law filed by the defendant, service by publication is already admissible if it is not possible to effect service at an address at which service was last effected or which the defendant last provided.*

This form of notification is not valid in cases of penal orders (*Strafbefehle*).

The general rules apply for the summons and notifications to soldiers, for them the troop accommodation to be regarded as their residence. Delivery to the company sergeant or his representative can be regarded as an effective form of substitute delivery under Article 178 ZPO.

The legislation does not require formal summoning for each court hearing.

Criminal charges

In cases of unknown whereabouts there is no possibility of pressing charges and proceedings to trial, and since in almost all cases (except misdemeanours and penal orders) the defendant has the duty to appear in court, there is no possibility for the defendant refusing to appear, and thus the question on how he/she shall be informed about the charges or the sending of the case file does not apply to the German context.

Charges can be notified remotely (e.g., via post, by paper, online, etc.) in the cases described above: when the substitute service of process is allowed under the rules of the ZPO and in cases where the International Conventions allow so. In such cases, however, the receipt of the postal communication is to be included in the court file.

Disclosure

The general procedure for disclosure of evidence and criminal casefile materials is regulated under:

> *Article 147 StPO Right to inspect files, right of inspection; accused's right to information*
>
> *(1) Defence counsel is authorised to inspect those files which are available to the court or which would have to be submitted to the court if charges were preferred and to view items of evidence in official custody.*
>
> *(2) If the fact that the investigations have been concluded has not yet been recorded in the file, defence counsel may be refused inspection of the files or of individual parts of the files and the viewing of items of evidence in official custody insofar as this may jeopardise the purpose of the investigation. If the conditions of sentence 1 are met and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty is to be made available to defence counsel in suitable form; to this extent inspection of the files is, as a rule, to be granted.*
>
> *(3) At no stage of the proceedings may defence counsel be refused inspection of records drawn up of the examination of the accused or of such judicial investigatory acts to which defence counsel was or ought to have been admitted, nor may he or she be refused inspection of expert opinions.*

(4) An accused who has no defence counsel is authorised, applying subsections (1) to (3) accordingly, to inspect the files and to view, under supervision, items of evidence in official custody insofar as the purpose of the investigation even in other criminal proceedings cannot be endangered thereby and the overriding interests of third parties meriting protection do not constitute an obstacle thereto. If the files are not kept in electronic form, instead of granting inspection of the files, copies of the files may be made available to the accused.

(5) The public prosecution office decides whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in all other cases, the presiding judge of the court seized of the case is competent to decide. If the public prosecution office refuses inspection of the files after noting the termination of the investigations in the file, if it refuses inspection pursuant to subsection (3) or if the accused is not at liberty, a decision by the court competent pursuant to section 162 may be applied for. Sections 297 to 300, 302, 306 to 309, 311a and 473a apply accordingly. These decisions are given without reasons if their disclosure could jeopardise the purpose of the investigation.

(6) If the reason for refusing inspection of the files has not already ceased to exist, the public prosecution office revokes the order no later than upon conclusion of the investigations. Defence counsel or an accused who has no defence counsel is to be notified as soon as he or she once again has the unrestricted right to inspect the files.

Thus, the law does not contemplate as a ground for denial to access to the file to the defence lawyer, if his/her client is absent. Differently is when there whereabouts of the defendant are unknown and there is no lawyer who has been appointed for the pre-trial stage. In any event, since the trial, as a rule, will not be held if the defendant, despite having been notified about the criminal charges, is absent, the question whether the non-disclosure can affect the advancement of the proceedings to trial, is not relevant in the German context.

International cooperation

Institutional aspects

The relevant legal framework on the institutional setting for the international cooperation in criminal matters is set out under Article 74 of the Law on ICCM:

Article 74 Powers of the Federation

(1) The Federal Ministry of Justice and Consumer Protection decides on foreign requests for legal assistance and on the submission of requests for legal assistance to foreign states in agreement with the Foreign Office and with other federal ministries whose area of responsibility is affected by the legal assistance. If an authority belonging to the area of responsibility of another federal ministry is responsible for providing legal assistance, this ministry takes the place of the Federal Ministry of Justice and Consumer Protection. The federal ministries responsible under sentences 1 and 2 can delegate the exercise of their powers to subordinate federal authorities. The Federal Office of Justice decides on requests under subsections 2 and 3 of section 2 of part nine of this law.

(2) The Federal Government can delegate the exercise of the power to decide on foreign requests for legal assistance and to submit requests for legal assistance to foreign states to the state governments by means of an agreement. The state governments have the right to further delegate.

(3) The powers of the Federal Criminal Police Office to transmit data, issue alerts and establish identity in response to foreign requests are governed by Article 27.1.2 and Article 33. 1 to 4 of the Federal Criminal Police Office Act.

Courts, judicial police, and prosecution offices include their own special administrative divisions for international cooperation and can cooperate directly with other foreign law enforcement bodies, prosecution offices, and the judiciary.

Exchange of summons and notifications

According to Section 183.1.1 ZPO, notifications abroad are possible by way of postal mail with return receipt, provided that documents can be sent directly by post under international

agreements, which is essentially already guaranteed for criminal proceedings under Article 52.1 of the Schengen Implementation Agreement. The return receipt, which must be sent to the sending office, must state to whom the delivery was handed over. For the notification to be effective, the return receipt must be included in the court files; substitute notification by depositing the document is not sufficient in this respect.

If there are no applicable international agreements, notification is made under Article 183.1.2 ZPO by requesting the trial court (presiding judge) to deliver the document via the appropriate authorities of that state (Governmental central authority) or via the diplomatic or consular representation of the Federal Republic of Germany in the country of destiny. If the addressees of the service enjoy immunity, this service is carried out by the Foreign Office in accordance with Section 183.1.3 ZPO. If all of this fails, the Federal Police can be requested to serve the document in the event of re-entry.

Germany has diplomatic relations with all countries, and therefore it is difficult to refer to experience in international cooperation where such diplomatic relations with a relevant country did not exist. This expert has not been able to find any information or experience regarding the issuing or incoming requests, summons and/or notifications of persons fled to countries with which it severed diplomatic ties in the past. And currently this question does not apply.

Searching for wanted persons

The electronic police information system at the Federal Police Agency (*Bundeskriminalamt* BKA) known as INPOL is indispensable for searches and investigative work. After entry into the system, data about persons wanted by the German police or judicial authorities are available within seconds to all agencies connected to the system. In addition to the BKA, state police offices, the Federal Police and the customs authorities have access to the system. The databases on persons and property play a central role. The wanted notices are automatically checked to ensure that data are deleted at the required time in compliance with the provisions of data protection law. [8]

The procedure to declare a person wanted and announce him/her in an international search, does not always require an arrest warrant. Regarding the question whether a a person could be announced as wanted for notification of criminal charges if his/her whereabouts are known to be in the country with severed diplomatic ties, see above: Germany has currently diplomatic relations with all countries.

Waiving

In principle the defendant cannot waive his/her right to attend the trial, although as seen above, under certain circumstances in order to prevent the proceedings to be halted or delayed, the StPO allows in limited cases to hold *in absentia* proceedings. There is the obligation to attend to the trial and the law only exceptionally provides for the possibility to waive the right and avoid the obligation to attend to trial.

This is first in the so-called “private prosecution” cases.

For a limited number of comparatively less serious offences (such as trespassing, defamation, non-aggravated bodily injury, and stalking), German criminal procedure provides for private prosecutions, thereby allowing an aggrieved person to bring a prosecution without taking recourse to the public prosecution office. In this case, the defendant can be assisted at the main hearing by an attorney or be represented by an attorney and is thus not required to be present in person. The court can, however, order the personal appearance of the defendant, in particular when this seems necessary for fact-finding purposes.

Secondly, as mentioned above, Article 233 StPO provides for a formal waiver of the duty to

[8] Information accessible at: https://www.bka.de/EN/OurTasks/SupportOfInvestigationAndPrevention/ElectronicSearchAndInformationSystems/electronicsearchandinformationsystems_node.html

attend in order to take legitimate interests of the defendant into account. The defendant can lodge an application to the court to be released from the obligation to appear at the main hearing if, in view of the facts of the case, "only imprisonment up to six months, a fine up to 180 daily units, a warning with sentence reserved, a driving ban, forfeiture, confiscation, destroying or making an item unusable, or a combination thereof, is expected to be imposed." A higher penalty or a measure of reform and prevention may not be imposed in his absence.

Such an application can be especially useful if the defendant would prefer to refrain from appearing personally, but the court may withdraw its authorisation at any point, if his/her presence is deemed necessary.

Furthermore, the law provides safeguards to protect accused from making an insufficiently informed application and to provide them with the opportunity to present their perspective before a judge: the defendant must be examined on the charges by a judge of the trial court or by a commissioned judge of another court. On this occasion, the defendant must also "be advised of the legal consequences admissible at the hearing in his absence and be asked whether he maintains his application to be released from the obligation to appear at the main hearing." To facilitate the aforementioned application, and lieu of an examination of the accused by a requested or a commissioned judge, the court may also conduct the examination on the charges outside the main hearing by means of video link, thus allowing the defendant to be in another location than the court. (233.2 stop). The record of the defendant's examination must be read out at the main hearing.

Re-determination of criminal charges

When a main hearing in the (permanent or temporary) absence of the defendant is allowed, subsequent judicial remedies against the judgement are the same as those applicable to judgements following an ordinary main hearing: *Revision* (i.e., an appeal on points of law only) and in some cases appellate review. Particularly in those cases in which the law allows for *in absentia* proceedings in view of the minor severity of the expected sentence, the defendant normally has the opportunity to appeal the first instance judgment on points of fact and law. To the extent that the first judgment is appealed, this leads to a full retrial before a higher instance court (Articles 312 and 327 StPO).

As already stated, the law provides additional remedies in two cases (trials on minor charges where no custodial sentence is expected and *Berufung* proceedings) in which defendants were unable to attend the main hearing through no fault of their own, including the situation of not having been previously warned that a judgement could also be rendered in their absence. These remedies lead to a complete retrial in the same instance (232, 235, and 329.7 StPO).

According to Article 338.5 StPO the judgment is always to be considered to be based on a violation of the law if the court conducted the entire trial or parts of the trial in the absence of the defendant, but the conditions for such an *in absentia* trial were not given and the conviction must be set aside irrespective of whether this absence has had a material effect on the judgment or not. The quashing of the judgment can lead to a partial or complete retrial in a lower-instance court, depending on whether the defendant has limited the appeal to only parts of the judgment or is contesting it in its entirety (Article 353.1 StPO). The jurisprudence of the Federal High Court has adopted a rather strict approach when determining whether the relevant part of a hearing was significant and therefore justifies a quashing of the judgement. Any exclusion of the defendant from the hearing must be limited to what is strictly necessary to safeguard other important interests.[9]

Emergency situation

Germany has not experienced an emergency situation requiring to accommodate law to criminal proceedings *in absentia*. COVID-related emergency could be referred to as an

[9] See, for example, BGHSt 55, 87 = BGH NJW 2010, 2450, 2451 f.; BGH NStZ 2006, 713.

example, but German law has not been amended to this emergency.

The Federal Constitutional Court has stressed that judicial in camera proceedings (i.e., court proceedings in which the decision is taken on the basis of evidence that is not disclosed to the accused and defence counsel) are not permitted in criminal procedure. Even in judicial complaint proceedings against coercive and clandestine investigative measures, the evidence underlying the investigative measure must be accessible to the applicant in the same way as it is for the court of review.

There is no specific rule expressly prohibiting or implying that *in absentia* proceedings cannot be held or the accused cannot be convicted *in absentia* in Germany in situations related to secret or closed hearings (e.g., confidential informants, state secrets, etc.); or core international crimes, according to the Rome statute (e.g., war crimes, crimes against humanity, genocide, and aggression) or other offences that domestic legislation classifies as international or transborder crimes (e.g., terrorism, torture, piracy, human trafficking, etc.); or any other specific crimes. This express rule is not necessary since the German system is based upon the general prohibition of holding trials *in absentia*, save the misdemeanour proceedings and the penal order proceedings.

The domestic courts retain the discretion to refuse to hold *in absentia* proceedings even if all conditions for such proceedings are fulfilled, due to the reasons explained above: the aim of the proceedings is very much linked to establishing the truth and the principle of guilt. The German doctrine as well as the courts have to fulfil these aims the presence of the defendant and the analysis of his/her personality is crucial, and thus, the presence of the defendant is not only a right, but a duty.

Romania

Research by Mr Lilian Apostol

Sources

- Criminal procedure code, of 01 July 2010, last amended on 16 May 2024;
- Law no 302 of 26 June 2004 on international cooperation in criminal matters
- Law no 704 of 03 December 2001 on international judicial assistance in criminal matters

General characteristics of the proceedings

1. The law allows proceedings in the absence of the accused:

> *Article 309. Initiation of criminal action*
>
> *(1) The criminal action shall be initiated by the public prosecutor, by means of an order, during criminal proceedings, when he finds evidence that a person has committed a criminal offence and there is none of the cases of impediment provided for in Article 16 (1). (1).*
>
> *(2) The criminal action shall be notified to the accused by the prosecuting authority, which shall summon him/her to be heard.*
>
> *...*
>
> *(5) The prosecuting authority shall continue the prosecution even without hearing the accused when he/she is unjustifiably absent, absconding or missing.*
>
> *Article 364 Participation of the defendant in the trial and he/she rights*
>
> *(1) The trial of the case shall take place in the presence of the defendant. It shall be compulsory for a detained person to be brought to trial. An accused person deprived of liberty shall be deemed to be present if, with he/she consent and in the presence of he/she chosen or appointed defence counsel and, where necessary, an interpreter, he/she participates in the trial by video conference at the place of detention.*
>
> *(2) The trial may take place in the absence of the accused if he/she is missing, absconds from the trial or has changed his/her address without informing the judicial authorities and, following the checks carried out, his/her new address is not known.*
>
> *(3) The trial may also take place in the absence of the defendant if, although lawfully summoned, he/she fails to appear in court without justification.*
>
> *(4) Throughout the trial, the defendant, including when deprived of his liberty, may request in writing to be tried in absentia and be represented by his legal counsel of his own motion or by a lawyer of his own motion. If the detained defendant has requested to be tried in absentia, the court may, on request or of its own motion, order that he/she may make submissions in the course of the proceedings and be heard by video conference in the presence of he/she chosen counsel or defence counsel.*

2. The legislation does not prohibit proceedings *in absentia*.

3. There are no limits for the proceedings *in absentia*.

4. The written legislation is the only source of law in Romania.

5. Criminal procedure legislation of 1936, regulated proceedings *in absentia* but some of its provisions did not entirely guarantee the right to defence. In 2008, Romania was criticised by the Court for the errors in summoning and the lack of clear procedure to review and reopen *in absentia* proceedings[1]. In 2001, Romania introduced new criminal procedure legislation including an extensive regulation on reopening of the *in absentia* proceedings, which has no

[1] *Gaga c Roumanie* , no. 1562/02 (25 March 2008).

longer posed questions[2]. Issues remain on the procedure for notification and holding *in absentia* proceedings following formal summons.

6. The changes in legislation have not originated from practice.

Specific features of the proceedings

Classification based on substantive grounds

7. The law allows *in absentia* proceedings in all cases regardless of the offences of which the person has been accused.

8. No other distinction is relevant.

Classification based on procedural grounds

9. The law generally allows both pre-trial investigations and trials *in absentia*, as well as proceedings on issuing detention warrants if the accused has not appeared.

10. In the Romanian legal system, only the prosecutor can bring criminal charges, known as the decision to "initiate a criminal action". Following this decision, the prosecutor commits the suspect to trial, unless he/she decides to terminate the criminal action on specific legal grounds. The prosecutor's decision to initiate a criminal action is unilateral and cannot be influenced by the presence or absence of the defendant. The charges must be brought to the knowledge of the defendant, and he/she must be heard. In his/her absence, the prosecution continues the investigation without such a notification and commits the person to trial. Only in the limited situations described below can the trial judge examine and sentence a person *in absentia*.

Situations

11. *In absentia* proceedings are allowed if the suspect or the defendant:

- refused to appear without any justification after having been properly summoned, including but not limited to various situations of summoning:
    - for official notification about criminal charges;
    - for the court hearings;
- absconded;
- disappeared;
- changed the residence without informing the court and his/her new location has not been established;
- waived the right to be present at court hearings.

Summons and notifications

12. The Romanian legislation sets up complex rules and many ways to serve summons and notifications. The main proof of receipt is the signature of the summoned person or the persons to whom the summons were served. However, in certain situations, the specific summoning method, such as public display of the summons or mass media publications, assumes the receipt of summons. But this method of serving summons is applicable only if the ordinary ways of summoning fail or the person refuses to sign the proof of receipt. When serving a summons via post, the authorities accept proof of registered mail as valid evidence of receipt, even if the summons were sent abroad. If the summoned person accepts the electronic

[2] *Nicolae Popa c Roumanie (dec)* no. 55242/12 (6 March 2018), *Antonescu v Romania (dec)* No. 5450/02 (8 February 2011), *Kattan v Romania (dec)* no. 26850/11 (21 January 2014), *Giurgiu v Romania (dec)* no. 26239/09 (3 October 2017), *Rusu c Roumanie (dec)* No. 6246/04 (31 August 2010), *Casandra v Romania (dec)* no. 36066/12 (13 November 2018).

communication, it also becomes valid.

13. The legislation prefers written summons but largely accepts other means of communication. Thus, summons can be served:

- in written followed by signature of receipt.
- orally followed by signature in the minutes of the judicial hearings or criminal investigation files;
- via special agents of investigation bodies, courts or local police officers, who must return the proof of receipt or to draw a report if the service of summons has failed;
- using registered mail service, including for serving summons abroad;
- via diplomatic and consular offices abroad, only for the diplomatic staff and the members of he/she family;
- at the known place of work or human resources division at the workplace;
- via relatives or neighbours;
- using any electronic means of communication, only if the summoned person accepts it this way of being summoned;
- at the defence lawyer's office, but only if the defendant named the lawyer and did not appear after the first summons;
- at detention facility;
- at military unity;
- at port where the ship is registered;
- via rogatory letters, but only if the summons by registered mail has failed;
- by hanging the summons at the doors of the last known accused's residence, in cases of refusal to sing or receive the summons or
- by displaying the summons at the court buildings only in cases of unknown residence or workplace.

14. The law allows electronic summons, if the defendant accepts this means of communication. Summons via the defence lawyer are also accepted if the lawyer has been chosen by the defendant and the first summons were ignored.

15. The law requires formal summoning for each court session, which could be done orally by mentioning it in the minutes of the court.

16. The procedure of notification of the accused follows the same rules as summoning. It is however unclear whether a representative or a defence lawyer could replace the defendant in receiving the decision to file criminal charges. Although the law is unclear, its narrow interpretation could allow for such method of notification.

Criminal charges

17. The law provides that the prosecution should inform and hear the defendant about the charges. No specific procedure is provisioned in this respect.

18. The law also provides that the prosecution may continue to pursue the case against the defendant who refused to appear, absconded, or disappeared, and his/her notification was not possible. Therefore, one could infer that the prosecutor holds the discretion to decide whether to proceed with the case *in absentia* under these circumstances. Once the court receives the case with indictments *in absentia*, the trial judge decides on preliminary matters (e.g. jurisdiction, disclosure, complaints, preliminary measures, etc.). Thus, the judge at this preliminary stage can check the grounds for holding the proceedings *in absentia* before leaving the case to trial.

19. The prosecution can change, amend, or retract the charges during the trial. It could not investigate and then lay charges directly in court.

20. Given that the legislation provides a number of ways for notification, similar to the

summoning procedures described in § 13, it could be assumed that the act of laying charges can be notified remotely. Yet, the Romanian legislation prohibits the notification of criminal charges by rogatory letters to the accused who stays abroad. Still, he/she can be summoned by rogatory letters to appear for the act of laying charges.

21. Summons and notifications are bound by the same rules described in §§ 12-13. Therefore, the prosecution ensures the notification of charges by the same means as summoning.

Disclosure

22. The Romanian legislation allows unrestricted disclosure of the case file at the trial stage. During the pre-trial stage, an investigation measure or an act of prosecution may be disclosed to the persons and parties to whom it concerns or whose interests it may affect. In cases where the defendant refused to appear, absconded, or his or her whereabouts remain unknown, the defence lawyer has unlimited access to the case file, but only pending trial.

23. The non-disclosure at the pre-trial stage cannot affect the progression of criminal proceedings. The disclosure is not a prerequisite to committing a person to trial since the case files should remain open to the defence at the courthouse.

International cooperation

Institutional aspects

24. The specific jurisdiction of each institution involved in criminal proceedings and the character of the requested international assistance determine the rules of international cooperation in Romania. Central authorities, such as the Ministry of Justice, the General Prosecutor's Office, the Ministry of Interiors, or the Ministry of Exteriors, ensure the transmission or receipt of rogatory letters and requests for assistance in criminal matters. In some cases, if international agreements allow, the Romanian judiciary can send or receive requests directly to or from the judicial authorities in the country concerned. The Romanian legislation outlines in detail the acts or measures under the jurisdiction of various institutions, with the issuing authority and the jurisdiction in criminal proceedings that define the competence to request international cooperation:

- the Ministry of Justice handles almost all requests and rogatory letters formulated by judges pending trials;
- the General Prosecutor's Office retains exclusive authority to handle international cooperation during pre-trial prosecution and criminal investigation;
- the Ministry of Interior resolves the matters related to law enforcement and police cooperation;
- the Ministry of Exteriors is involved in transmission and receival of materials, in any other cases when no direct cooperation or international assistance is possible.

25. Courts, judicial police, and prosecutors' offices include either focal points or entire administrative divisions designated to resolve international cooperation matters. They can cooperate directly with other foreign law enforcement bodies, prosecution offices, and the judiciary.

Exchange of summons and notifications

26. There is no public information available to answer this question. Further research is needed.

27. There is no public information available to answer this question. Further research is needed.

28. The law allows for the summons or notifications to be served to the accused persons via foreign missions or diplomatic cable, only if they are part of the Romanian diplomatic staff or

members of their family residing abroad.

Searching for wanted persons

29. The Romanian police retain exclusive jurisdiction to decide whether to initiate investigations for the search of wanted persons, including to announce them in international search and apply red notices. This decision shall be made only under the following conditions:

- if there is a valid arrest warrant or a sentence with deprivation of liberty;
- if the accused has not been found;
- in the case of announcing an international search, there should be a reasonable presumption that the accused has left the territory of Romania;
- in the case of enforcing an international search warrant, there should be a reasonable presumption that the accused has entered the territory of Romania.

Thus, according to the first condition, a person could be declared wanted only for arrest, which in Romanian procedure implies a notification of criminal charges.

Given that the second condition implies that whereabouts of the accused are unknown, it is unlikely that an international search warrant would be issued when the accused person hides in a country with which Romania has severed diplomatic ties. The law still requires the fulfilment of the second condition for an international search warrant, even if the third condition deems that a reasonable presumption of leaving the country would be sufficient.

30. The law regulates in detail the process of issuing red notices and international search warrants. It mainly requires the conditions mentioned in the previous paragraph and replicates the conditions of international agreements to which Romania is a party. It is worth mentioning that the Romanian legislation recognises Interpol red notices as a valid request for extradition in order to arrest the accused person in its territory. It is also important to mention that Romania, as a member of the EU, is part of Eurojust and, in particular, of the European Warrant System, which makes cooperation and mutual recognition of acts in criminal matters less burdensome.

Guarantees

31. The legislation does not distinguish the specific rights of the defence for *in absentia* proceedings. All guarantees that ensure proper defence in ordinary proceedings are equally applicable to *in absentia* cases. The defence lawyer, whether chosen or appointed by the authorities, must be present or notified whenever the accused's interests are involved. The defence can either appeal or seek reopening of the proceedings terminated by sentence *in absentia*.

Waiving

32. The accused can waive he/she right to be present at trial.

33. The legislation does not set up specific formal requirements for the waiver, except that the defence lawyer must always be present at trial if the accused waives his right to be present.

34. It could be assumed that the waiver could be both partial and full.

35. The legislation is silent on whether the waiver could be recalled but it could be assumed that it is possible and should be made in the same way as it was declared.

36. The waiver of being present at trial does not imply the waiver of the right to appeal.

Re-determination of criminal charges

37. A person convicted *in absentia* can seek a re-trial the case by requesting reopening under the following conditions:

- the request should be lodged in one month after having been notified about the sentence, including after being brought back in the country following extradition;
- the convicted person should have proven justifiable reasons for the reopening such as
    - he/she had not been notified about the sentence or
    - had no knowledge about the criminal proceedings.

In one of the following situations, the person convicted of absentia loses the right to seek reopening:

- if the convicted person was represented by a chosen lawyer or a representative, who were present at trial;
- if the convicted person, after being notified about the sentence did not appeal, refused to appeal or withdrew the appeal;
- if the convicted person waived his/her right to be present at trial.

If the statutory time limit and the justifiable reasons are met and the convicted person does not fall into one of the exclusionary situations, the trial judge may grant leave to reopen the proceedings and suspend the execution of the sentence pending re-trial.

38. If the case is reopened, it implies full rehearing of the case, with re-examination of evidence and the facts, including submission of new evidence and facts.

39. The person convicted *in absentia* can appeal the sentence through a defence lawyer within the statutory time. He or she can also demonstrate a legitimate obstacle impeding the lodging appeal in time, a factor that the appeal court shall solely assess when determining whether to extend the appeal period.

40. In the case of reopening, the time limit of a month is always calculated from the day of official notification of a copy of the sentence rendered *in absentia*. An ordinary appeal within the statutory time limit of 10 days begins with the formal notification of the written operative part of the sentence. In cases of appeal after the statutory time limit, the 10 days for appeal begin on the day when the justifiable cause for the delay has ended.

41. The appeal presupposes full re-hearing of the case.

42. The law does not establish a procedure for leave to appeal. The reopening, on the other hand, requires a preliminary decision by the trial judge on compliance with the conditions for reopening and the lack of exclusionary criteria.

43. The appeal should comply with the statutory time limit, which is the only admissibility criterion. The request for reopening must comply with both time limits and substantive requirements concerning the justifiable grounds for being absent.

Alternatives to physical presence of the accused

44. The only alternative to the requirement of physical presence is hearings by videoconference with the defendant only applicable to detention pending trials.

Emergency situation

45. Except the COVID-19 pandemic, Romania has not experienced any other emergency situation warranting a wider use of the *in absentia* proceedings.

46. Proceedings *in absentia* in Romania have no restriction based on the type of crimes or special procedures. The law allows trials and convictions *in absentia* for any crimes.

47. The domestic courts retain the discretion to refuse to hold *in absentia* proceedings.

48. Many cases in which the Court found a violation of the Convention on account of *in absentia* proceedings revealed the problem of limited means for the convicted persons to seek reopening of proceedings. In other cases, the Court declared the complaints inadmissible due

to the justified reasons to hold *in absentia* proceedings or the failure of the applicants to exhaust remedies:

- Antonescu v. Romania (dec.), No. 5450/02 (February 8, 2011).
- Boroanca c. Roumanie, No. 38511/03 (June 22, 2010).
- Casandra v. Romania (dec.), No. 36066/12 (November 13, 2018).
- Coniac v. Romania, No. 4941/07 (October 6, 2015).
- Gaga c. Roumanie, No. 1562/02 (March 25, 2008).
- Giurgiu v. Romania (dec.), No. 26239/09 (October 3, 2017).
- Kattan v. Romania (dec.), No. 26850/11 (January 21, 2014).
- Lazăr v. Romania, No. 20183/21 (April 9, 2024).
- Nicolae Popa c. Roumanie (dec.), No. 55242/12 (March 6, 2018).
- Rusu c. Roumanie (dec.), No. 6246/04 (August 31, 2010).
- Sâncrăian c. Roumanie, No. 71723/10 (January 14, 2014).
- Șercaru v. Romania, No. 13088/09 (April 2, 2013).

The case of Albert Wass is notable for the purposes of the present study. He was accused of having committed war crimes during World War II and sentenced to death *in absentia* by a Romanian people's tribunal in 1946 as an extension of the Nürnberg International Tribunal. In the 1980s, Romanian authorities requested his extradition from the United States, but to no avail. The sentence was upheld in 2008 by a Romanian court rejecting the appeal lodged by his son.

Spain

Research by Ms Lorena Bachmaier Winter

General characteristics of the proceedings

Spanish criminal procedure allows in principle proceedings *in absentia*, except in cases of very serious offences. These are those proceedings for offences sanctioned with a custodial penalty higher than 9 years imprisonment. In all other proceedings, under certain conditions, the proceedings, including the trial can take place in the absence of the defendant, requiring as a rule that the defence lawyer is present.

For understanding the context and the safeguards for the defendant in the Spanish criminal procedure and thus also the scope of trials/decisions *in absentia*, several factors are important to be taken into account:

1) The legal assistance is mandatory in all criminal proceedings, except in proceedings for misdemeanours (*delitos leves*). Since the moment of the person being considered a suspect –detained or not– (Article 118 and 520 CPC), he/she has the right to legal assistance, a right that cannot be waived. If the suspect/defendant does not appoint a lawyer of own choice, he/she will get one duty lawyer.

2) Another factor which is relevant is the mandatory representation of every defendant/party to the proceedings to be represented by a judicial or court representative (*procurador de tribunales*) (Article 118 CPC). This figure is the link between the court and the party/defence lawyer, so that the notifications, once the suspect has been identified are carried out through this legal professional. The first notification has to be done personally to the defendant, but once a lawyer is appointed (of won choice or duty appointed), the judicial representative will also be appointed. He/she will receive all the following notifications related to the proceedings and will transmit them to the defence lawyer who assists the defendant. The only cases where legal assistance and the judicial representative are not mandatory is in criminal cases for misdemeanours.

3) Since the amendments introduced in the justice system by Law (Real Decreto-Ley) 6/2023, of 19 December 2023, all court hearing should be held preferably by way of electronic means (Article 258 bis CPC), except in cases where the defendant lives in the same district. Otherwise, the law provides for a shift towards the “digital presence” of the defendant in court, except for trials where the penalty is higher than 2 years imprisonment. However, the preference for the digital hearings is applicable as long as the defendant or the defence lawyer or the court do not request the physical presence. Being very ambitious in implementing the digitalisation of the court system, in practice this is happening only at a slow pace when it comes to holding trials (not for communications): the law provides that the digital trials will only take place once the courts have the technical infrastructure to hold the trials electronically. And the investment for doing this is only taking place very slowly.

The Spanish Criminal Procedure Code (CPC) provides for three types of proceedings, depending on the gravity of the penalty: 1) petty offences proceedings (*delitos leves*, never entailing imprisonment: withdrawal of driving licence up to one year; withdrawal of weapons permit up to one year; professional disqualification up to one year; and fines up to 3 months, etc…; 2) ordinary criminal proceedings, called also “abbreviated” proceedings (up to 9 years imprisonment); and 3) proceedings for serious crimes (higher than 9 years imprisonment).

The most important legal provisions related to *in absentia* proceedings are:

Article 786 CPC:

> *"1. The holding of the oral trial requires the attendance of the accused and the defence attorney. However, if there are several accused and one of them fails to appear without legitimate reason, as determined by the Judge or Court, the latter may agree, after hearing the parties, to continue the trial for the rest.*
>
> *The unjustified absence of the accused who has been summoned personally, or at the home or person referred to in article 775, will not be cause for suspension of the oral trial if the Judge or Court, at the request of the Public Prosecutor's Office or the party The accuser, and after hearing the defence, considers that there are sufficient elements for prosecution, when the requested penalty does not exceed two years of deprivation of liberty or, if it is of a different nature, when its duration does not exceed six years.*
>
> *The unjustified absence of the civilly responsible third party duly summoned will not in itself be cause for suspension of the trial."*
>
> *Article 834 CPC:*
>
> *"The defendant who does not appear within the period established in the summons, or who does not appear before the Judge or Court hearing the case, will be declared a "absent".*

In the case the defendant is not found or absconds, the court or judge will issue an arrest warrant and an order for his/her localization (Article 835 CPC).

> *Article 840 CPC:*
>
> *"If the case is at the pre-trial investigation stage, it will continue until it is declared finished by the competent Judge or Court, suspending its course and preserving the records and evidence that could be preserved and were not from a third party."*

The Spanish Criminal Procedure Code of 14 September 1882 did not allow holding the criminal trial *in absentia*, while the whole pre-trial stage could be carried out without the defendant being present. The presence of the defendant was considered indispensable, and in case the defendant was absent, the criminal procedure would be suspended until he/she was found.

In 1967 a simplified procedure for minor offences (up to 3 years imprisonment) and any flagrant crime, was introduced, allowing already for the trial *in absentia* under the conditions that the defendant had been personally summoned and the judge considered that the trial could take place without him/her being present. Later in 1980 a new procedure for urgent cases was also introduced, and this allowed also the trial *in absentia*. These two special proceedings were declared unconstitutional by judgment 145/1988 of the Constitutional Court, for the same judge that carried out the pre-trial investigation was later also involved in the adjudicating stage. This triggered the major amendment of the CPC by Organic Law 7/1988, of 28 December, introducing a new "ordinary" procedure for less serious crimes (up to 9 years imprisonment), which also allowed the trials *in absentia*, as reflected above, but limited to the cases of offences where the maximum penalty is not higher than two years imprisonment.

These have been the reforms related to trials *in absentia* introduced in the Spanish CPC of 1882 since the Nuremberg trials and after the ratification of the Convention.

The changes were triggered by the need to deal in a more effective way with absconding and not found defendants, mainly due to the increase of criminality. The Convention and the European Court case law has not had any direct impact on limiting the possibilities of holding trials *in absentia* in criminal proceedings in Spain so far. Nevertheless, the Spanish provisions on trials *in absentia* have followed the caselaw of the European Court taking into account that the safeguards required by the European Court consisting of: the summons to the hearing of

the accused has been made in person;[1] the accused could have reasonably foreseen the consequences of his criminal conduct, which implies that he pays special attention to the content of the notified indictment, emphasizing that it must contain complete information of the charges against him, including, therefore, facts and legal qualification; the burden of proof that he did not intend to evade the action of justice or that his absence was due to a just cause should not be attributed to the defendant;[2] and the need that the defendant's lawyer is present at the moment of waiving the right to be present, to ensure that the defendant knows what he is waiving and is aware of all the legal implications that may arise from his absence.[3]

In drafting the rules for the holding of trials *in absentia* in limited cases in 1988, the Spanish legislator followed Resolution (75) 11 of the Committee of Ministers of 21 May 1975.

Specific features of the proceedings

Classification based on substantive grounds

As indicated above the legislation does not allow trials *in absentia* in cases where the criminal offence can entail a penalty of more than 9 years imprisonment. No other criteria apply.

The situation regarding criminal proceedings against minors/juveniles (in Spain from 14 years up to 18 years old defendants), is somewhat complicated. In order to avoid doctrinal discussions that took place in the Spanish scholarship, suffice to say that the Organic Law 5/2000 of 12 January, regulating the special proceedings against minors, allows for the possibility to hold trials *in absentia*. Article 35 OL 5/2000 reads:

> *"The trial will be held with the attendance of the Public Prosecutor, the parties, the minor's lawyer, a representative of the technical team that issued the report provided for in article 27 of this Law (psychologist) and the minor himself, who will be present accompanied by his legal representatives,* ***unless the Judge, after hearing the opinion of the Public Prosecutor, the minor's lawyer and the representative of the technical team, agrees otherwise.*** *The representative of the public entity for the protection of minors that has intervened in the investigation stage may also attend, when precautionary or definitive measures imposed on the minor previously have been executed. Likewise, the person or persons from whom civil liability is required must appear; although the unjustified absence of the latter will not in itself cause the suspension of the hearing."*

Upon this unclear regulation, the literature has considered that, even if the absence of the minor does not prevent necessarily the trial to take place, this situation should be seen in these types of proceedings as exceptional, and also limited to offences punished with deprivation of freedom of no more than 2 years. In other words, since the criteria for allowing the judge in cases against minors to hold the trial *in absentia* are not clear, the general stance is that it should be exceptional and should comply also the conditions foreseen under the CPC for adults under Article 786 CPC (regular notification, presence of lawyer, and a limit of 2 years custodial prison).

Classification based on procedural grounds

In fact, the rules on attendance or absence of the suspect/defendant during the criminal

[1] Despite recognizing that art. 6 of the Convention does not impose a specific type of communication act, the European Court has emphasized that the summons must allow the accused, first, to know the date, time and place of the hearing and, second, to be able to prepare his defence sufficiently in advance. See, among many others, *Somogyi v. Italy* (2004), *M.T.B. v. Türkiye* (2018), *Dridi v. Germany* (2018) and *Vyacheslav Korchagin v. Russia* (2018)

[2] See Medenica v. Switzerland (2001)

[3] Effective legal assistance to the accused, prior to express waiver of being
present at the trial, cannot be substituted by the information by the court could about the consequences of the waiver, see *Pfeifer and Plankl v. Austria* (1992).

proceedings is quite scarce. Beyond the general rule copied above –general provision on the pretrial investigation without presence of the defendant and possibility to hold trial under the limited conditions of Article 786 CPC), the Spanish CPC is silent about the presence of the accused in every single hearing. Thus, as mentioned above, the pretrial stage can take place without the presence of the accused. During this stage, however, there are certain hearings where the presence of the defendant is mandatory, since the law does not provide for the possibility to waive the right to be presence. First, the act where a person is informed about the criminal investigation directed against him/her. The information about the condition of being a "person under investigation" is done in person by the Investigating Judge, and the law does not foresee the possibility to be absent or appear through a representative, except in cases of indicted legal persons.

The hearing to decide on custodial prison (Article 505 CPC), requires also the attendance of the investigated person, regardless of whether he/she is detained or not.

- Thus, the situations in which the absence of the defendant is allowed after having been properly summoned:
    - after the receival of such notifications;
    - in the cases not related to official notification of criminal charges (e.g., disclosure of evidence, additional statements, attendance to specific investigative measures such as experiments, cross-examination, etc.);
    - absconding after having been notified about criminal charges;
    - contempt of the court sanctioned by forcible removal of the accused from the court room, but in this case the defendant shall be allowed to follow the hearing from another room via videoconference
    - refusal to grant extradition request;

As to the attendance of the defendant at trial, the rules vary depending on the type of procedure.

Misdemeanour proceedings (delitos leves)

Upon the report of the police or the victim, all parties will be immediately summoned, directly by the police or by the investigating judge, to appear to the trial. Defendant shall be granted access to lawyer, but mandatory legal assistance is only required when the fine foreseen for the offence is between three and six months (Article 967.1 CPC). Judicial representative (*procurador*) as a rule is not mandatory.

The CPC does not require the defendant to appear at the misdemeanour trial if he/she lives in another district. If this is the case, he/she may either send the written defence to the adjudicating judge (which can be the Investigating Judge or the Gender Violence Court) or may be represented by his attorney or the court representative (Article 970 CPC). The unjustified absence of the presumed offender (*denunciado*) does not cause the trial to be suspended, except in those cases where the judge deems his presence indispensable to assess the facts and render sentence (Article 971 CPC).

Fast track misdemeanour proceedings

By Law 38/2002, several amendments were introduced in the petty offences' proceedings in order to simplify the summons of the parties and thus con- duct the trial within a very short time frame. Specifically, for petty offences of minor injuries, threats, or defamation, and flagrant thefts, it is provided that the police officer who writes the report on the facts will at the same time cite the parties and witnesses to appear before the responsible court for trial (Article 962 CPC). A lot of time and steps are saved by this simple legal measure of the police issuing the sum- mons to the parties at the crime scene or shortly afterwards and setting the date for

trial. Within these proceedings, it is the police who have the task of informing the victim of his rights and to inform the offender of the crime reported and his procedural rights. The police will also advice the parties of the consequences of not attending the trial. The non-attendance of the parties and the witnesses can be sanctioned with a fine of EUR 200 up to EUR 2,000 (Article 967.2 CPC). When summoned for trial, the parties shall be told that on the date of the trial they shall bring all evidentiary elements they want to be produced in the trial.

After recording the facts in writing, informing all parties on their rights and duties, serving the summons to the interested parties and witnesses, and informing them of the court they must appear, the police shall send the whole file to the responsible investigating judge, indicating also the date set for trial. This does not mean that the police control the judicial calendar or the handling of the dockets, but only that they have direct connection to them so that they can introduce the date directly in the electronic calendar and proceed immediately to summon the parties present at the crime scene. In any event, everyone shall be requested to indicate an e-mail address to receive further communications as well as a telephone number to be easily reached. On the day the case has been set for trial by the police, the trial judge shall decide if the trial shall be held, or the proceedings shall be discontinued. If the parties have appeared for trial before the responsible trial judge on the day set and if the evidence the parties proposed can be produced at that moment, the trial will take place. Obviously, if the trial judge considers that the facts do not constitute an offence after viewing the report, no trial will be held. The absence of the defendant will not halt the trial, unless the court considers that it is indispensable to hear the defendant.

Ordinary proceedings for serious (proceso por delitos graves) and less serious crimes (proceso abreviado)

Once the date for trial has been set, the court will summon the parties, the witnesses, and the experts to appear at trial. The defendant will be summoned through the court representative, if he/she has appeared during the pre-trial stage.

If the defendant is not found and the summons can- not be served upon him, or if he has failed to comply with the bail conditions, the court will issue an order to arrest the defendant (*orden de busca y captura*). If the police do not find the defendant's whereabouts, he will be declared absconded or in default (*rebeldía*).

The general rule is that the attendance of the defendant and his/her attorney is mandatory, which means that if they do not appear, the trial cannot be held. No trial for serious offences will be held if the defendant is not present (Article 841 CPC). The presence of the defendant is required as an additional safeguard of the constitutional right to be heard. This rule does not apply for defendants who are legal persons. If there is more than one defendant charged in the same case, the unjustified absence of some of them will not necessarily halt the continuation of the trial with the co-defendants who are present. The trial can continue with those who are present and will not necessarily be suspended.

As an exception to the general rule, the CPC, as explained above, provides for the possibility of holding the trial *in absentia* within the scope of this procedure. If the defendant is voluntarily absent, the trial may proceed to completion if the counsel for the defence is present and the offence is punishable by fine or by custodial penalty up to two years, and the court does consider that the trial can be conducted without the presence of the defendant (Article 786.1 CPC).

The non-attendance of the public prosecutor or the counsel for the defence will cause the trial to be suspended, and they could be subject to disciplinary sanction in case of unjustified absence.

The general rule is that in domestic cases, the refusal of the defendant to appear obliges to close the case until the defendant is found, except the cases where the CPC allows for the trial to continue *in absentia* (Article 786 CPC and misdemeanours). The foreign defendant can also waive the right to be present at trial, under the same circumstances as any national.

The Spanish law has followed the requirements set out in the European Court case law. These safeguards are: there has to be a personal notification to the defendant Kolozza and Rubinat 12 February 1985), and this shall include information about the consequences if he/she refuses to appear (that the trial can take place without the defendant). Notification by way of postal service or other forms which are not personal, prevent to apply the rules for holding the trial *in absentia*; the defendant must have indicated an address for notifications; the presence of the defence lawyer is mandatory; the control of the judge whether the case can be sentenced without the defendant or shall be suspended until the defendant appears; the suspension of the proceedings when the court considers that there is a ground that has impeded the defendant to appear; and finally the possibility to challenge the decision by way of an annulment remedy, whose time limits do not start to run but after the defendant has acquired knowledge of the judgment. This is the way for ensuring that the defendant's rights to defence are not infringed, and to ensure that only if there is knowledge that his/her absence are voluntary because the defendant knows about the criminal proceedings against him/her, the trial will be held.

As to the appeal by cassation, the law provides that si el acusado se hubiera fugado después de serle notificada la sentencia y estando pendiente el recurso de casación, éste se sustanciará hasta que se dicté la sentencia defintiiva (Article 845 CPC).

The general rules on summons are following: first notification needs to be done personally to the suspect/defendant. To that end, traditionally this was carried out by personal notification by the court officers in the domicile of the suspect/defendant, or while executing an arrest warrant. In case the notification is not accompanied by the arrest warrant, it is also foreseen to summon the person to appear in court to be notified, and once at the court premises, to provide the notification and ask for indicating an address to be notified, while he/she appoints a lawyer and court representative. If this personal notification does not take place or is ineffective because the suspect/defendant is not found, the trial *in absentia* cannot take place.

The very first procedural act that needs to take place is to inform the defendant about the criminal proceedings, the reasons why he/she is considered suspect (*investigado*), and to inform him/her about all the rights (Article 118 CPC). The list of rights of the suspect/defendant under 118 CPC reflect the content of the different European Directives on rights of suspects and defendants in criminal proceedings. During this hearing with the Investigating Judge to be informed about the criminal investigation and the condition of suspect/defendant, he/she will be required to indicate the address to receive notifications and will be warned that the notifications done in that address will be considered as received and valid.

Article 775 CPC provides:

> *"1. At the first appearance, the Judge will inform the defendant, in the most understandable way, of the facts of which he is investigated. Previously, the Judicial Secretary will inform about the rights, in particular those listed in section 1 of article 118, and will require to designate an address in Spain where the notifications will be made, or a person who will receive them at the domicile, with the warning that the summons made to said address or to the designated person will allow the trial to be held in his or her absence in the cases provided for in article 786."*

Once the first notification has been done to the defendant/suspect personally, the following notifications and summons will be done to the court representative by way of the electronic system. The court representative will communicate the defence lawyer. In the few cases where the court representative is not mandatory, and the summons and notifications and the

defendant has not appointed one, the notifications will be sent to the defence lawyer. Every procedural act will be notified to the court representative, as well as every summons to attend a hearing or any notification to be present at an investigative act. The trial will also be notified in this way. Once the trial has started, if it extends beyond one day, each of the hearings is notified in the court room to all parties and can also be sent digitally to the court representative. So, in general for each of the court sessions, once the trial has started, there is no need to issue a formal summons to the parties.

Only in misdemeanor proceedings and less serious road traffic offences can the defendant waive the right to legal assistance, and in such cases, the notifications will be done directly to him/her. To this end, during the first notification, as explained above, the suspect/defendant will be required to indicate the address or e-mail where he/she wants to receive the notifications (Article 775 CPCP). The preferred way for notifications is the electronic notification, as is done with most notifications of public offices to the citizens (tax authority, road traffic authorities, etc.).

In sum, all notifications are done digitally, except the first one, which will be done at the crime scene by the police or at the domicile of the suspect/defendant, when he has one and is found in it. In all other cases, the “requisitoria” (order for search) will be issued, to locate the person and arrest him/her to bring him/her before the judge. The court will also issue a European Arrest Warrant or an extradition order, against the absconding defendant in order to make him/her appear in court.

In the search order the judge requests the police to find the suspect/defendant and to bring him/her before the judge within a certain date. After the time to appear has elapsed, the court will declare the defendant absent *(rebeldía*) and will proceed to issue an arrest warrant. No search orders are issued with regard to the criminal proceedings which can be held *in absentia* (misdemeanour proceedings and less than 2 years imprisonment proceedings). The order with warning to appear, will be issued in case the suspected or investigated subject is not found at his address or does not have a known address, the judge will issue a summons (Articles 762, 784) for the search and arrest of the absent person.

The search order could also be published in the media (Article 784.4 CPC), although this is rarely done. If the suspect/defendant does not comply with the order to appear voluntarily or is not found, the judge can issue an arrest warrant, which will be digitally transmitted to the police and judiciary computer system. Sometimes problems have arisen due to the computer systems not being interconnected. However, the usual way is to report the arrest warrant o Interpol and the Sirene system of Europol, and once the suspect/defendant is located initiate the proceedings for the execution of the European Arrest Warrant or the extradition proceedings.

In case of legal persons, this request for searching the defendant, will be issued if the legal person does not have a corporate seat (Article 839 bis 1 CPC).

Criminal charges

The procedure for laying criminal charges in cases of refusal to appear or unknown whereabouts of the accused, is different, depending on the type of procedure and whether the defendant has initially appeared and been notified of the proceedings, or was never found.

As to the formal pressing of charges, the Spanish system differentiates the initial informing of the charges (*imputación*) or reasons why a person is being investigated; and the formal one which takes place once the pre-trial stage is closed. In the case the defendant was initially attending the proceedings, the pressing of charges *(imputación*) will be notified as all other judicial decisions and procedural acts: to the defence lawyer, via court representative through

the electronic platform, if the defendant is not present at that moment; or directly at the address provided by the defendant at the first meeting, if the case does not require mandatory lawyer and court representative. In the second case –the defendant is identified, but has never appeared or been found, there will be no formal notification of any of the procedural acts carried out during the pre-trial stage.

As to the formal pressing of charges or indictment –which will determine the scope of the object of the criminal trial, this usually takes place once the pre-trial stage is formally closed by the judge (because all the investigative acts regarding the criminal facts and the identification of the offender and responsible persons have been carried out). This would be the moment where the accusatory pleadings are handed over to the defendant, so that he/she can prepare the trial and file the written defence, propose evidence, etc. No other charges can be added beyond this stage: the scope of the case is defined at this stage.

If the defendant is not present at this stage, the proceedings will be provisionally suspended, until the defendant is found (Articles 840 and 841 CPC). In the meantime, the orders for search (*requisitorias,* or European Arrest Warrant or extradition procedure) continue to be active so that when police know the whereabouts of the defendant, he/she can be detained and brought before the court to be tried.

The prosecution casefile will remain either with the Investigating Judge or with the trial court (depending on the type of proceedings), and the case cannot be set for trial until the defendant is found, except in the cases where the trial *in absentia* can take place (see Article 786 CPC above).

Disclosure

The defendant has the right to access to the file from the very beginning of the investigation. If the defendant is detained, the defence will be granted access to all acts, materials and information the police or the court has, in order to be able to challenge the lawfulness of the detention and oppose to the preventive detention (Article 505.3 CPC).

As set out in Article 776 CPC at the very beginning of the proceedings each of the parties (defendant, accusing parties, victims), will be informed of his/her rights, including the right to have access to the file and request evidence to be collected. This right can be restricted, in those limited cases when the pre-trial stage or certain investigative acts are declared secret (Article 302 CPC). The decision to keep the investigation secret must be justified by the judge and has a limited time of one month, albeit the possibility of being extended. The reasons to prevent access to the file during this limited time and under the special circumstances are set out in Article 302 CPC: need to keep secret the investigation because if disclosed this could endanger in a severe way the investigation or put at risk other persons.

In any event, 10 days before the closing of pre-trial stage the secrecy of the investigation or certain investigative acts needs to be ended, and the parties will have full access to the complete case file.

The access to the file will be granted to the defence lawyer, if the defendant appointed one, despite not being present; if the defendant was never found, all the materials and evidence will be stored and kept for the moment the defendant is found and the proceedings can be resumed and advance to the trial stage.

The trial in absentia

The way the trial *in absentia* will take place does not differ essentially from the trial where the defendant is present. However, the consequences of not being present are, that the defendant

will waive his/her right to intervene in the diverse procedural acts foreseen for the defendant, which are:

2. 1)The defendant will not be questioned or cross-examined.
3. 2) There is no possibility to enter a plea agreement with the absent defendant (Article 787 CPC).
4. 3) The defendant will not be able to make use of the last word or closing statement (Article 739 CPC).
5. 4) The sentence handed down in the absence of the accused may be challenged only by way of appeal for annulment by the convicted person within the same period and with the same requirements and effects as those established for the ordinary appeal, once he/she is aware of the conviction sentence.

International cooperation

Institutional aspects

Spain is party to the European Convention on Mutual Legal Assistance (MLA) in Criminal Matters of 20 April 1959, which was ratified by Spain on 18th August 1982 and the Convention on MLA in Criminal Matters between the member States of the EU of 29 May 2000, which entered into force the 23d August 2005. However, Spain had previously agreed on the provisional implementation of the 2000 Convention, and it was therefore already applicable in Spain even before it had officially entered in force (BOE 15 October 2003). Regarding incoming requests the main authorities that are involved in international judicial cooperation in Spain are three: 1) the judiciary; 2) the Ministry of Justice; and 3) the Public Prosecution Service.

Investigating judges will receive the legal assistance requests directly in all cases where the international conventions or the European instruments so provide. Once the request has been received — either directly or through the central authority designated in the Conventions or through the National Court or Prosecutor's Office—, Spanish authorities are obliged to execute it. We must recall that the EU Convention of 1959 also allows the direct transmission of the requests in urgent cases (Article 15.2 of the Convention MLA criminal matters 1959). In these urgent cases, the requests might be sent through Europol.

The General Council of the Judiciary *(Consejo General del Poder Judicial)* gives support in mutual legal assistance proceedings. Any Spanish judge that requires it, will be assisted by the General Council in the correct transmission, and effective execution of international legal assistance requests4. Furthermore, the Council has published an online guide which contains the complete regulation —listing all the bilateral and multilateral conventions, as well as the EU instruments and their transposition to Spanish domestic law—, practical explanations on how to manage legal assistance requests, standard forms and information on how to communicate with the contact points of the European and the Spanish Judicial Networks.

Exchange of summons and notifications

The general rule is that the notification of a criminal proceeding against a person who is abroad will be done by way of the relevant mechanism of international cooperation. Thus, it will take place according to the applicable bilateral or multilateral convention. According to the practitioners specialised in international judicial cooperation interviewed, they explain they have no experience in issuing summons of persons fled to countries with which it severed diplomatic ties, neither in receiving summons from such countries. This might be explained because Spain has diplomatic relations with all countries, as far as we are not mistaken. In the hypothesis this would have occurred, the practitioners explain that it would be almost

[4] Art. 71 ff. Of the. Reglamento 5/1995, 7 June, de los aspectos accesorios de las actuaciones judiciales.

impossible to get the summons and/or notifications enforced. In any event, the national provisions establish that in absence of applicable Convention, the international rule on reciprocity would apply.

In the practice of international cooperation, there is no domestic legislation on the sending of summons or notification of the accused persons via foreign missions or diplomatic cable. In practice the trend is to communicate directly with the central authority indicated in the Convention.

Searching for wanted persons

The procedure to declare a person wanted and announce him/her in an international search, usually takes place by posting a red notice with Europol or Interpol. The search usually is coupled with an order to arrest, but this is not necessarily the case: the Spanish issuing authority can issue a search warrant only for notifying or summoning a person, without an arrest order.

As to outgoing requests, the Investigating Judge carrying out the investigation of the offence is competent to issue the international cooperation request. The notifications regarding criminal proceedings when the suspect is abroad and there is no arrest warrant against him/her, will be done following the rules in Article 7 of the Council of Europe MLA Convention of 1959 and Article 5 of the EU MLA Convention of 2000.

When the notification to a suspect/defendant who is abroad is coupled with the arrest warrant, this will be done via European Arrest Warrant or with third countries not members of the EU via extradition proceedings.

In those cases where an arrest warrant has been issued to bring the suspect before the court to be tried, and the suspect is located abroad in a Member State of the EU, the Investigating Judge or the court will issue a European Arrest Warrant (EAW), under the rules set out in the FD 2002/584/JHA of 13 June as amended by FD 2009/299/JHA, of 28 February 2009. The rules on the EAW and other mutual recognition principles are included in the domestic legislation in the Spanish law by Law 23/2014, of 20 November 2014.

If the person to be brought before the judge is located outside the EU, the relevant treaties – multilateral or bilateral– on extradition will apply. The domestic rules on active extradition are set out in the CPC (Articles 824, 825, 828, and 829 CPC and Article 23 Law on the Judiciary), which establish that the Investigating Judge or the court might send a request to the Ministry of Justice, by way of the chair of the relevant court asking to propose the extradition of the suspect/defendant located abroad. This decision shall be grounded, and it shall be accompanied by the motives for the extradition and the investigative measures already carried out. In handling the extradition, the relevant divisions on International Cooperation within the Ministry of Justice as well as the special unit for International Cooperation of the Judiciary and eventually the International Cooperation Unit of the Public Prosecution Office might be involved. The Police has also a special unit for International Cooperation.

All these units can cooperate directly with the analogue divisions in the foreign country, but the precise proceedings will depend on the applicable extradition treaty with the relevant country.

Re-determination of criminal charges

Conviction judgments rendered *in absentia* can be reviewed by way of an exceptional remedy, called “anulación”. This remedy to challenge the judgment rendered *in absentia* can be filed only by the sentenced person within 10 days after the defendant became aware of the judgment (Article 790 CPC). This remedy is handled under the rules of the ordinary appeals

(Article 793 CPC), however its object is limited to decide on the re-opening of the proceedings (*iudicium rescindens).* The decision about the annulment of the judgment *in absentia* is limited to decide whether there are grounds to set aside the default judgment or not (Judgment of the Supreme Court 1372/2002 of 19 July 2002); in other words, whether the requirements to render the judgment *in absentia* were not respected.

If the court decides on the annulment of the judgment rendered *in absentia*, there will be a new trial (iudicium rescissorium). This re-trial implies full rehearing of the case, with re-examination of the evidence and those facts where the outcome might be different. The caselaw has tried to find a balance between the efficiency and the right to defence, not requiring as a rule that all acts are to be reiterated and every piece of evidence is to be re-examined, but only those where the intervention of the defendant can lead to a different result or assessment of evidence: some witnesses might be called to be questioned again, but not necessarily all of them. The same is applicable to the expert reports and to other material evidence. The re-examining court has certain margin of discretion to decide which acts and evidence is to be produced again. There is however not much caselaw on this, because there are only very few cases where an annulment of the sentence rendered *in absentia* has been granted, since the requirements are very stringent, and they are widely respected.

As explained above, the time for filing the appeal for annulment is counted from the moment the defendant is formally notified of the conviction judgment.

Alternatives to physical presence of the accused

See above.

Emergency situation

Since the civil war in 1936 there hasn't been an armed conflict in Spanish territory and Spain has not been involved in any international armed conflict as party. Thus there is no experience under the current laws on criminal proceedings in emergency situations due to armed conflict, however, there is some experience during the COVID-related emergency, when courts were closed or only accessible for very urgent cases. However, during this emergency situation there were no special provisions on trials *in absentia* and the requirements to hold trials *in absentia* were not affected by the sanitary emergency situation.

During the emergency situation the possibility to hold almost all hearings –except the trial–, by way of videoconference was introduced. This shift towards extending the online hearings has been adopted in the new legislation adopted on 19 December 2023, as described above, something which really represents a decisive step towards digitalisation and online hearings.

Regarding the possibility of holding trials *in absentia* related to secret or closed hearings (e.g., confidential informants, state secrets, etc.), or core international crimes, the Spanish CPC does not include any specific provision in this regard.

The rules on trials *in absentia* in criminal proceedings in Spain are extremely respectful with the defendant's rights and with ensuring the procedural safeguards. Due to the requirements for holding a trial *in absentia* and the limited scope of it, in practice this rarely represents any problematic issues. In any event, the trial *in absentia* cannot be imposed to the parties, it can only be held if the accusing parties or the defence request it. Thus, the court cannot decide on this ex officio. Once any of the parties has requested the trial to be held *in absentia*, the court has in any event the final say, being able to refuse it, when the court considers that the presence of the defendant is necessary to adjudicate the case.

The Netherlands

Research by Ms Anna Adamska-Gallant and Gallant Consulting Ltd

General characteristics of the proceedings

1. Criminal procedure in the member state allow, in principle, proceedings in the absence of the accused. While most of the suspects are in custody when prosecution starts, criminal procedure in the Netherlands in principle allows proceedings in the absence of the accused. Persons can be convicted *in absentia* under certain conditions laid down in Articles 279 and 280 of the Dutch Criminal Code of Proceedings (Wetboek van Strafvordering, hereinafter DCCP). Dutch courts can try the accused even if he or she is no longer present on the territory and has not explicitly authorised a lawyer to act on his or her behalf. Such trials *in absentia* are allowed if the court does not see a reason to (i) declare the summons to appear in Court null and void, or (ii) issue an order to forcibly bring the defendant to the Court (Article 278-2 DCCP).

2. Proceedings *in absentia* are in principle possible under certain circumstances (see answer 1). Jurisprudence indicates that in extradition cases, Article 280 DCCP (trial *in absentia*) does not apply due to the importance attached to establishing that the requested person is actually present (Hoge Raad 10 June 2003, NJ 2003/610).

3. Proceedings *in absentia* are not limited to specific phases in the proceedings.

4. Proceedings *in absentia* are explicitly regulated in the Dutch Criminal Code of Proceedings. However, the Dutch Parliament stated that, although it is possible under Dutch criminal law to try a person *in absentia* in universal jurisdiction cases, it is deemed undesirable (Dutch Parliament, Explanatory Memorandum, 28 337, no. 3, page 18).

5. There have not been any recent amendments to the criminal procedure legislation specific to the purpose of regulating proceeding *in absentia*. The last substantive change dates to 1998 after two European Court cases against the Netherlands.

On 22 September 1994, in two European Court cases against the Netherlands, Lala and Pelladoah, the European Court of Human Rights found the so-called compelling reasons jurisprudence of the Supreme Court to be in conflict with the European Convention on Human Rights. Based on the Lala and Pelladoah cases, the defence counsel had to be allowed to speak in all cases where he wished to act on behalf of the absent defendant at trial. On 18 April 1996, the bill for the revision of the trial investigation was submitted. This bill contained, among other subjects, a revised regulation of trials *in absentia*, particularly a new regulation of the defence *in absentia*. The amended regulation has been in force since 1 February 1998. The core of the new regulation is formed by Article 279 of the DCCP. This provision introduced the figure of the defence counsel expressly authorized to defend.

6. Not applicable.

Specific features of the proceedings

Classification based on substantive grounds

7. Legislation does not prohibit or, otherwise, allow *in absentia* proceedings in the cases of specific offences. However, the judge can deem the presence of a defendant necessary for the proceedings. In the Explanatory Memorandum it was stated that substantial prison sentences or measures involving deprivation of liberty will almost never be imposed without the court forming an opinion about the accused. On the other hand the legislator did not rule out that in special situations, conducting a procedure in the absence of the accused is preferable to losing the right to prosecute due to the exceeding of the reasonable period within which the trial must take place.

8. N/A

Classification based on procedural grounds

9. N/A

10. The conditions under which a judgment *in absentia* can be given against an individual are the following:

- the writ of summons for the hearing has been served upon the individual in person, or it is evident from other facts or circumstances that the individual was aware of the date, time and place of the hearing. The individual fails to appear at the hearing and a judgment *in absentia* is issued by the District Court. The individual has a statutory 14-day period to file an appeal against this judgment. If the individual does not make use of this legal remedy, the judgment becomes final and conclusive.

- the writ of summons for the hearing has not been served upon the individual in person, and it is not evident that the individual otherwise was aware of the hearing. The individual fails to appear at the hearing, and a judgment *in absentia* is issued against the individual. The judgment of the District Court must be issued in person to the sentenced person, in the form of a notice of judgment (*mededeling uitspraak*). From the moment of issue of the notice of judgment in person to the sentenced person, the statutory 14-day period for filing an appeal against the judgment commences. If no appeal is filed, the judgment becomes final and conclusive. Where a judgment has become final and conclusive, there is only the exceptional remedy of review before the Supreme Court (*Hoge Raad der Nederlanden*) under Dutch law. However, this is an exceptional remedy, which only is in order if there are two conflicting judgments, if a new factual circumstance comes to light that was not known to the court delivering the judgment, or if a complaint filed with the European Court is successful. Filing a request for review does not suspend enforcement of the judgment unless the Supreme Court rules otherwise in a separate judgment.

Situations

11. In the Dutch system three types of proceedings can be distinguished. Firstly, there is the procedure where the defendant is personally present, and the procedure is therefore conducted with all relevant parties present. Secondly, there is the trial *in absentia* where no role is assigned to the defence lawyer (following the summoning procedure described under question 12). Finally, the procedure where the defence of the absent defendant is conducted by a lawyer expressly authorized for this purpose. According to Article 279, paragraph 2 of the Criminal Code of Proceedings, this procedure is also considered to be conducted with all relevant parties present (this is not a trial *in absentia*).

Extradition

Under certain conditions, the Netherlands can extradite individuals sentenced by judgment *in absentia*. The Dutch authorities will refuse to extradite individuals for the enforcement of judgments *in absentia* for which no legal remedy is available, unless the person concerned has been given the opportunity to defend him/herself. The Netherlands Government has made a reservation in respect of article 1 of the European Convention on Extradition. This reservation reads as follows: ‘The Netherlands Government reserves the right not to grant extradition requested for the purpose of executing a judgement pronounced by default against which no remedy remains open, if such extradition might have the effect of subjecting the person claimed to a penalty without his having been enabled to exercise the rights of defence prescribed in article 6(3)c of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.’ The Dutch Extradition Act (uitleveringswet) has worded the ground for refusal as follows (Section 5): Indien, (…) de veroordeling tot vrijheidsstraf bij verstek heeft plaatsgevonden, kan de uitlevering slechts

worden toegestaan, indien de opgeëiste persoon in voldoende mate in de gelegenheid is geweest of alsnog zal worden gesteld om zijn verdediging te voeren. [If, (…) a person has been sentenced to a period of imprisonment delivered in a judgment *in absentia*, extradition is not possible, unless the person whose extradition is sought has had or will be given the opportunity to defend him/herself.] In fact, this means that the person can either ask for a new trial (there being a fresh determination) and attend the hearing and defend him/herself or have counsel handle the defence for him/her, or that the person was served a writ of summons earlier or otherwise was informed personally of the date and place of the hearing and actually had been given the opportunity to defend him/herself or have counsel (of his/her choice) handle his/her defence. The Dutch rules follow the case law of the European Court; however, Dutch law emphasizes the right of defence of the person sentenced by delivering judgment *in absentia*, not his/her right to attend the hearing. If these conditions are not fulfilled, the extradition will not be granted. So it is a mandatory ground for refusal.

Summons and notifications

12. By way of a writ of summons, a defendant must be informed of the date, time and place of the hearing and of the charges.

Dutch law prescribes that writs of summons in principle must be served. Service is effected by issuing such writ of summons.

Issue takes place:

- to the individual in person who has lawfully been deprived of his/her liberty in the Netherlands, in connection with the criminal case to which the writ of summons to be issued relates (the writ of summons is in fact handed over to the person concerned);

- to any other individual: in person or if service in person is not prescribed by law and the notice is in Dutch:

A to the address where the addressee is listed as a resident in the municipal personal records database, or,

B - if the addressee is not listed as a resident in the municipal personal records database, to the home address or abode of the addressee,

C - if the addressee is not listed as a resident in the municipal personal records database, and his/her home address or abode is unknown, to the registry of the District Court in the District in which the case will be heard or has most recently been heard.

In the situation referred to in A or B:

- if the addressee is not found at the address, the document will be issued to another person present at the address and willing to hand over the document forthwith to the addressee;

- if nobody is found at the address, the document is issued to the addressee or to any authorized representative at the place specified in a note left at the aforementioned address. Issue to any representative authorized in writing by the addressee is equivalent to service in person;

- if it has been impossible to effect service, the notice is returned to the sending authority. If it turns out that the addressee was listed as a resident in the municipal personal records database on the day it was presented at the address specified in the note and at least five days thereafter, the notice is subsequently issued to the registry of the District Court of the District in which the case will be heard or has most recently been heard. In that case, the Public Prosecution Service will forthwith send a copy of the notice to that address, that fact

being endorsed on the deed of issue.

A deed is drawn up of every issue.

Issue to the addressee whose foreign home address or abode is known, is effected by the Public Prosecution Service sending the notice, either directly or through the competent foreign authority or institution and, where a convention/treaty is applicable, with due observance of the provisions of that convention/treaty. Writs of summons are translated in the language or one of the languages of the country in which the addressee is staying or, where it is plausible that he/she only has command of another language, in that other language.

13. The summoning procedure is described above.

14. Since an amendment in 2020 Dutch legislation does allow for the use of electronic means for summons. As per Article 36f DCCP, electronic service of summons is permissible under certain conditions.

The core of the regulation is that service by means of electronic transfer is equivalent to service by means of personal delivery (Art. 36b paragraph 2 DCCP) and counts as personal service if the addressee, after being notified that a judicial notice has been sent to them, identifies themselves in the prescribed manner in the designated electronic facility (Art. 36f paragraph 2).

As proof that electronic service has occurred, identification and other details concerning the transfer are logged and recorded (Art. 36i paragraph 1) in such a way that these details can be consulted by a judge if necessary.

15. By way of a writ of summons, a defendant must be informed of the date, time and place of the hearing and of the charges. According to case law, it should not be readily assumed that the defendant has implicitly waived his or her right to be present. However, if the defendant is informed of the new court date at the adjournment of the hearing and subsequently fails to appear, it may generally be assumed that the defendant has waived his/her right to be present (Hoge Raad 8 December 1998, NJ 1999/225)

16. For the cases of unknown whereabouts, the procedure allows substitution of the accused for the purposes of notification. See the answer to question 12.

Criminal charges

17. The writ of summons in which a defendant is informed about the hearing also includes the charges.

18. When a criminal case has not been settled out of court, the prosecutor will summon the suspect to appear in court. The summons comprises the charge (*tenlastelegging*) and a list of witnesses to be sub-poenaed.

The public prosecutor is truly *dominus litis*. The trial judge has no control over the content of the charge. The prosecutor may decide to charge the suspect with a less serious offence (e.g. by disregarding aggravating circumstances) despite the existence of sufficient evidence to charge the suspect with a more serious crime, or may limit the charge to certain of the offences committed by the suspect. The court is informed in an informal way about the other offences committed (*voeging ad informandum*). At the imposition of sentence, the court may consider these non-charged offences, provided that the suspect does not deny them and the offence can be proved.

The trial stage begins as soon as the prosecutor has issued a summons.

19. Defendants in criminal proceedings receive a summons from the Public Prosecution Service, which explains the offences they are charged with and when the case will be heard.

The pre-trial phase ends and the trial-phase begins with the decision to prosecute the case and to summon the offender. As described above the charge is included in the summons (*dagvaarding*) to enable the offender to prepare his defence.

A court hearing commences with the identification of the accused by the presiding judge of the court and the reading of the charge (*tenlastelegging*) by the public prosecutor. The accused is reminded by the court of his right to remain silent.

The charge is the subject of the court session. It consists of a description of the alleged criminal offence, and closely follows the statutory definition of the offence. The court does not have the power to modify the charge even if it deems this necessary. This is due to the fact that the prosecutor is truly master of the trial; this is known as 'the tyranny of the charge', i.e. that the court may only convict on the basis of the charge.

The public prosecutor can request a change of charge while the case is pending in court. Orally, he can add any aggravating circumstances to the charge as these circumstances come to his knowledge during the trial. Where the public prosecutor is otherwise of the opinion that the charge must be changed or supplemented, he make requests to the court in writing. The increased or supplemented charge cannot alter the act for which the suspect has to stand trial (sect. 313 DCCP).

The charge can be changed or supplemented even after the final speech of the public prosecutor or even at the appeal stage. The court, before accepting the change, shall hear the suspect and the defence lawyer on the proposed change.

20. A defendant must be informed about the hearing and of the charges by way of a writ of summons as explained above.

21. Dutch law prescribes that writs of summons in principle must be served. Service is effected by issuing such writ of summons. See the answer to question 12. The use of electronic means for summon is also available. See the answer to question14.

Disclosure

22. The accused has the right to be present at the court trial, but he is not obliged to appear in court unless the court orders so, which is rarely the case. A case may be tried in the absence of the accused, unless he was improperly summoned. An offender can be convicted only when the Court, during the Court trial, is convinced by the evidence that the offender has committed the offence defined by statute as charged (sect. 338 DCCP).

23. N/A

International cooperation

Institutional aspects

24. AIRS, which falls under the Ministry of Justice and Security, is the Central Authority for mutual legal assistance in criminal matters and extradition. As Central Authority, AIRS assesses incoming and outgoing requests before transmitting the requests to the competent International Legal Assistance Centre (IRC) in the Netherlands or foreign Central Authority. The International Legal Assistance Centres are responsible for the execution of the request.

25. Treaties provide information on whether a request should be sent through diplomatic channels, or directly to AIRS as Central Authority. Some treaties allow a request for mutual legal assistance to be sent directly to a competent judicial authority. Requests for extradition should always be sent to AIRS. A request that is based on the principle of reciprocity, should be sent through diplomatic channels to AIRS.

Exchange of summons and notifications

26. This question has to be answered by a Government representative.

27. This question has to be answered by a Government representative.

28. See the answer to question 25.

Searching for wanted persons

29. The specifics of this procedure are known by experts at AIRS/Ministry of Justice and Security

30. The specifics of this procedure are known by experts at AIRS/Ministry of Justice and Security

Guarantees

31. The defendant has the right to legal representation. If a defendant has no counsel, he/she may request the Juridisch Loket (Legal Aid Office) that counsel be allocated. If the defendant is in detention, counsel will be allocated.

If the person concerned opts for not appearing at the hearing, he/she may explicitly authorize counsel to handle his/her defence in court. This authorization does not have to be given in writing, as counsel does not have to submit documentation in that respect to the court. If counsel argues that he is explicitly authorized and is at the hearing to handle his client's defence, it is regarded as a defended action under Dutch law.

Waiving

32. The right to appear at the hearing may be waived. If the person concerned opts for not appearing at the hearing, he/she may authorize counsel to handle his/her defence in court. See also the answer to question 31.

33. A trial *in absentia* is granted after the case is called (Article 270 DCCP), generally at the request of the Public Prosecutor. The decision to conduct a trial *in absentia* does not need to be substantiated (Hoge Raad, 2 March 1982, DD 82.24). The judge is not required to conduct further investigation into the absence of the defendant (Hoge Raad, 20 December 1977, NJ 1978/226) unless very exceptional circumstances arise (Hoge Raad, 21 February 1984, NJ 1984/730). After a trial *in absentia* has commenced, the defendant may still appear during the trial or be defended by counsel (Article 279 paragraph 1 DCCP). In such a case, the court must annul the trial *in absentia*. If the court annuls the trial, it must restart the proceedings.

34. The waiver cannot be partial.

35. After a trial *in absentia* has commenced, the defendant may still appear during the trial or be defended by counsel (Article 279 paragraph 1 DCCP). See above.

36. Where a judgment *in absentia* has not become final and conclusive yet, the normal steps need to be taken. In that case, it is possible to file an appeal or appeal in cassation.

Re-determination of criminal charges

37. Where a judgment *in absentia* has become final and conclusive, there is no possibility of a new trial. Where a judgment *in absentia* has not become final and conclusive yet, the normal steps need to be taken. In that case, it is possible to file an appeal or appeal in cassation. However, it should be noted that cassation proceedings are not about the merits of the criminal case. In order to be able to sentence someone by delivering a judgment *in absentia*, the writ of summons or the judgment must have been served in person upon the defendant. The statutory 14-day period to seek legal remedy does not start until the moment of issue of the judgment to the sentenced person.

38. If an appeal is lodged against a judgment delivered by the District Court, the merits of the criminal case are heard again. In that case, the defendant can (again) exercise his/her right to attend the hearing. Appeal in cassation lodged against a judgment delivered by the Court of Appeal, however, does not involve a hearing on the merits of the case. Cassation proceedings merely cover a limited review of the case, which moreover is solely by exchanging documents. Counsel has to submit a document with grounds for appeal in cassation. Counsel may also submit comments, but attending the hearing is not possible.

39. A person appeal the sentence rendered *in absentia*. See the answer to question 37.

40. Where the individual fails to appear at the hearing, and a judgment *in absentia* is issued against the individual the judgment of the District Court must be issued in person to the sentenced person, in the form of a notice of judgment (*mededeling uitspraak*). From the moment of issue of the notice of judgment in person to the sentenced person, the statutory 14-day period for filing an appeal against the judgment commences. If no appeal is filed, the judgment becomes final and conclusive. Where a judgment has become final and conclusive, there is only the exceptional remedy of review before the Supreme Court (Hoge Raad der Nederlanden) under Dutch law. However, this is an exceptional remedy, which only is in order if there are two conflicting judgments, if a new factual circumstance comes to light that was not known to the court delivering the judgment, or if a complaint filed with the European Court is successful. Filing a request for review does not suspend enforcement of the judgment unless the Supreme Court rules otherwise in a separate judgment.

41. The appeal presupposes full re-hearing of the case. See the answer to question 38.

42. There is no a procedure for leave to appeal in these cases.

43. The regular procedure and admissibility criteria apply. The individual has a statutory 14-day period to file an appeal against a judgment. If the individual does not make use of this legal remedy, the judgment becomes final and conclusive.

44. No information concerning alternatives to hearings in person and *in absentia*.

Emergency situation

45. N/A

46. N/A

47. The court can deem the presence of a defendant necessary for the proceedings.

48. No information about leading criminal cases held *in absentia* in the context of emergency situations.

The Republic of Moldova

Research by Mr Lilian Apostol

Sources

- Criminal Procedure Code of 2003, last amended in May 2024
- Criminal code of 2002, last amended in November 2023

General description

The Moldovan legislation defines five legal statuses for a person falling into the category of the defence party:

- the suspect is a person:
  - arrested under a reasonable suspicion of having committed a crime;
  - subjected to any preventive measure but without deprivation of liberty;
  - recognised as a suspect by decision of the prosecution.
- the accused is a person against whom prosecution issued a decision to charge him or her with criminal offence, even without formal notification;
- the defendant is the accused person who has been committed to trial with the indictments;
- the convicted is the defendant who has been found guilty and sentenced by a final court decision;
- the acquitted is the defendant who has been cleared of all criminal charges by a final court decision.

The person is notified of each of these statuses in a different way, which determines different rules for *in absentia* procedures.

1. Moldovan legislation explicitly permits both prosecution and trial *in absentia*. The main provisions are as follows:

> ***Article 291[1]. Completion of prosecution in the absence of the accused***
>
> *(1) If the accused evades prosecution or his whereabouts are not established as a result of search investigations or it has not been possible to bring charges in accordance with the provisions of Art.282[1], the public prosecutor shall, by reasoned order, ex officio or at the request of the prosecuting authority, order the prosecution to be completed in the absence of the accused, with the information of the chosen defence counsel or the lawyer providing state-guaranteed legal assistance, and shall submit an application to the investigating judge requesting consent to complete the prosecution.*
>
> *(2) Completion of criminal proceedings in the absence of the accused shall take place if the following conditions are cumulatively met:*
>
> > *a) an indictment has been issued against the person for committing one or more serious, particularly serious or exceptionally serious offences under the Criminal Code;*
> >
> > *b) the accused absconds from prosecution or his whereabouts are unknown and it was not possible to ensure his presence before the prosecution;*
> >
> > *c) search investigations have been ordered against the accused;*
> >
> > *d) the person charged is not a minor.*
>
> *(3) Completion of criminal proceedings in the absence of the accused shall not be permitted in relation to offences other than those specified in paragraph (2) lit. a), except in cases where the offences are committed by the same person who is evading prosecution or whose whereabouts have not been established and in respect of whom search investigations have been ordered, and the disjoining of criminal proceedings will adversely affect the full and objective conduct of the criminal prosecution and judicial investigation.*
>
> *(4) Where in the same criminal case there is more than one accused, one of whom is wanted*

and who has committed one of the offences specified in paragraph 2 lit. a), the prosecutor may order the completion of the criminal proceedings in the absence of the accused who is the wanted person. The prosecution of the other defendants shall continue in accordance with the general procedure.

…

Article 321. Participation of the accused in the trial and effects of his/her non-appearance

(1) The trial of the case at first instance and on appeal shall take place with the participation of the accused, except in the cases provided for in this Article.

(2) The trial of the case in the absence of the accused may take place if:

1) when the defendant is hiding from the court;

2) when the defendant in detention refuses to be brought to court for trial and his refusal is also confirmed by his defence counsel or by the administration of the place of his detention;

3) where the accused requests that the case be tried in his absence, if the court finds the existence of exceptional circumstances and objective reasons justifying the absence of the accused from the hearing, to that effect, the accused solemnly declaring at a previous hearing or submitting a document countersigned by his counsel expressing his wish based on an informed choice to expressly waive the exercise of his right to appear in court, and the waiver is not contrary to an overriding public interest;

4) the completion of the criminal prosecution in the absence of the accused under Article 291[1].

(2[1]) In the case referred to in paragraph (2) p.2), the accused may be subject to compulsory attendance in court to confirm his refusal to participate in the trial.

(3) In the case of trial in the absence of the accused or by videoconference, the participation of the defence counsel and, where appropriate, his legal representative shall be mandatory.

(4) If the accused fails to appear in court, the trial shall be adjourned, except in the cases provided for in paragraphs (2) and (2[1]).

(5) The court, in the event of the unjustified non-appearance of the accused at the trial, shall have the right to order that the accused be brought before the court, with the consignment of the accused at the border, and to apply a preventive measure or to replace it with another measure which will ensure his appearance in court, and, at the request of the public prosecutor, to order that the accused be put in search. The order to put the accused person on the wanted list shall be executed by the internal affairs authorities.

(6) The court shall decide to try the case in the absence of the accused for the reasons set out in paragraph (2) p. 1) only if the prosecutor has presented credible evidence that the person charged and in respect of whom the case has been transferred is hiding from the trial and, following search measures, it has been impossible to obtain the defendant's willingness to appear in court.

2. The law does not explicitly prohibit proceedings *in absentia*, but rather treats them as an exception to the rule of mandatory presence of the accused.

3. The law allows for *in absentia* proceedings at all stages, including sentencing.

4. The written legislation is the only source of law regulating criminal proceedings; the case-law is a secondary source with no binding effect; the Convention and the Court's case-law are directly applicable and may override the effects of the national legislation.

5. The old criminal procedure legislation of 1964 and new legislation of 2003 both allowed for *in absentia* proceedings, but only at the trial stage. In July 2022, the legislation was amended to allow such proceedings at the pre-trial stage with special procedural safeguards. These changes were prompted by a series of high-profile anti-corruption prosecutions of former high-ranking officials and well-known oligarchs who had fled the country.

6. The changes were made through legislative amendments driven by the practical needs of prosecution and law enforcement.

Specific features of the proceedings

Classification based on substantive grounds

7. The law allows a person to be prosecuted and tried *in absentia* only if he/she is accused of at least one serious, particularly serious or exceptionally serious offense, classified according to the severity of the penalty provided for in the Criminal Code (see below). In other cases, a person may be prosecuted *in absentia* only if he/she is accused of committing a lesser or minor offense in a joint criminal enterprise and if the disjoining of he/she criminal file would compromise the integrity of the criminal proceedings against other accused persons. The legislation does not distinguish between the seriousness of the offences or the forms of participation in order to allow for trial and sentencing *in absentia*. It expressly prohibits the trial of minors *in absentia*.

8. Criteria to be taken into account are as follows:

- The pre-trial investigation and indictments can be carried out *in absentia* only if the person is
    - no less than 18 years old, at the time of indictments, and
    - and is accused of
        - an offense for which the criminal legislation provides for a punishment of more than 5 years imprisonment or life imprisonment; or
        - participation in a joint criminal enterprise for the offences punishable by less than 5 years imprisonment or a fine;
- Trial and conviction do not impose any special substantive conditions, which means that almost any person, except minors, could be tried and convicted *in absentia*, regardless of the seriousness of the charges.

Classification based on procedural grounds

9. The law distinguishes between the powers of a public prosecutor, an investigating judge and a trial judge to issue decisions *in absentia*.

- The prosecutor can
    - initiate criminal investigation
    - lay criminal charges, including through rogatory letters;
    - commit an accused absentee to trial;
    - order search for the wanted person pending criminal investigation and trial;
    - suspend or reopen a suspended criminal investigation in the case of wanted person or refuse of extradition;
    - disjoin criminal investigation into a separate set of the proceedings related to the absent accused, or join the criminal case with other proceedings.

The decisions to close a criminal investigation or to drop charges do not require the presence of the accused, but giving him/her notice is mandatory.

- The investigating judge exercises judicial review of all prosecutorial decisions taken in the absence of the accused, and may in particular
    - order pre-trial detention upon the request of prosecutor;
    - authorise certain investigative and injunctive measures, such as home search, seizure of goods, secret surveillance or taping conversations;
    - authorise the prosecutorial decision to commit an absentee for trial.

However, the powers of judicial review are limited. The investigating judge can overturn almost any decision of the prosecutor, except the decision to open a criminal investigation and to charge a person with an accusation. Also, the judge cannot make decisions instead of the

prosecutor, but he/she can order the prosecutor to remedy a violation. The investigating judge cannot order a search for the wanted person or force the prosecutor to charge the absent person with a criminal offense or to suspend, close the criminal case.

- The trial judge is limited to decisions related to the determination of criminal charges, sentencing, and administration of justice, and he/she can
    - order and extend detention pending trial;
    - authorise investigative and injunctive measures;
    - reopen the trial held *in absentia*;
    - order the search of the convicted persons escaping execution of criminal sentences after the trial.

10. Each of these decisions has specific legal consequences because they should be made in a particular order, leaving the prosecution or investigating judges no choice but to follow a specific procedure. For example, the decision to charge a person with criminal offence shall always precede the indictment and should be notified to the accused before sending the case file to trial with indictments. The prosecutor cannot commit the defendant for trial *in absentia* without the authorisation of the investigating judge. Also, the investigating judge and the trial judge would not normally order remand in custody without a specific decision of the prosecutor to charge a person with an offence and declare the person as wanted.

Only in the event of a failed extradition, the prosecutor may choose either to suspend the criminal investigation indefinitely or to seek judicial authorisation to commit him/her for trial *in absentia*.

Situations

11. The proceedings *in absentia* could be carried out in the cases where:

- the person has been notified about criminal charges but
    - resides abroad and refuses to appear

      or
    - absconds from prosecution and his/her whereabouts are unknown;
- the prosecution could not formally notify charges because
    - the person's whereabouts are unknown

      or
    - he/she is residing abroad in a known location but the requested foreign state has
        - refused to enforce letters rogatory to notify criminal charges and any international assistance related thereto;
        - returned the letters rogatory without notifying the charges;
        - not responded to repeated requests and reminders of the prosecution seeking execution of such letters rogatory;
- the detained defendant refused to be escorted to judicial hearings;
- the defendant waived of the right to be present in court.

Summons and notifications

12. In order for the summons to be valid, the law requires:

- a proof of receipt signed by a person to whom the summons was served,

6. or

- a report of the summoning agent if the person to whom the summons was supposed

to be served
   - refused to sing the proof of receival

7. or
   - no longer resides in the last known location and his/her newest location could not be established by the summoning agent.

Minors under the age of 16 may be summoned under special rules and require special proof of receipt.

The law sets out a number of formal requirements that a proof of receipt or a report from the summoning agent should contain.

13. The law stipulates that written summons is the preferred method of notification, but it largely accepts all other modern means of communication, such as telephone, telegraph and electronic communications, provided that the prosecution can prove that the summoned person has actually received the summons. The judge may summon a person orally during the trial. The relevant rules are as follows:

> *Article 236. Summons procedure*
>
> *(1) A person shall be summoned to appear before the prosecuting authority or court by written summons. The summons may also be made by telephone or telegraphic note, fax, or electronic means.*
>
> *(1[1]) The summons may also be served by electronic mail or any other electronic messaging system if the investigating officer, the prosecutor, the court has the necessary technical means to prove that the summons has been received.*
>
> *…*
>
> *(3) The summons shall be served by the agent authorized to serve the summons (hereinafter referred to as agent) or by the postal service.*
>
> *(4) The court may also serve the summons orally on the person present at the hearing, informing him of the consequences of non-appearance. In the course of criminal proceedings, the summons issued in this way shall be recorded in minutes and signed by the person so summoned.*

The law provides that the summons may be served to relatives, legal representatives, neighbours, and defence lawyers if the summoned person refuses to provide proof of receipt or no longer resides at the last known place of residence.

14. The law allows electronic summons and the summons via lawyers.

15. The law does not require a formal summons for each court session, but in practice the courts issue the summons orally and require it to be signed in the court record. This procedure ensures that the defendant has been properly notified.

16. The legislation allows the summoning and notification of the accused to be made through his representatives, relatives or defence lawyer. However, the legislation also provides that certain procedural acts may have their own special rules of notification. For example, the indictment may not be notified to the defence lawyer alone.

Criminal charges

17. Charging a person with a crime at the pre-trial stage is a two-step process. First, the prosecutor issues a formal decision to charge a person with a crime, after which that person acquires the status of the accused under the law. Second, the prosecutor formally notifies the person of the decision and records the person's statement or refusal to make a statement on the charges. The law separates these steps, which should be repeated if the prosecutor decides to change the charges. In other words, the prosecutor can issue a decision to charge a person *in absentia*, but notification of the charges depends on whether the prosecutor is

able to reach that person or ensure that he/she is present. There are two situations when the rules of notification differ:

- when the accused has been properly summoned for notification of charges but refused to appear, in which situation the prosecutor has the following options taken either separately or in conjunction:
    - to bring the accused forcibly for the purpose of notifying him or her about the charges;
    - to apply restriction to leave a locality or country or to seek remand detention or house arrest on the ground of risk of absconding;
    - to request international assistance in notifying the accusations by rogatory letters when the location of the accused is known to be abroad;
- when the accused whereabouts are unknown at the time when the formal charges have been issued, which could lead the prosecutor
    - either to submit a copy of the decision laying charges to defence lawyer and then to request authorisation of the investigation judge to commit the accused to trial *in absentia*

8. or
    - to suspend criminal proceedings.

In the latter situation, it is common practice for the prosecutor to declare the accused wanted and request an arrest warrant *in absentia*.

If the accused fled after being notified of the charges and was subsequently brought to trial, the issue of notification of the charges would only arise if the prosecutor decided to amend the charges during the trial. If the judge decides to continue the trial *in absentia* and the prosecutor amends the charges, the new indictment should be read out during the hearings and a copy given to the defence lawyer, which implies that the defendant has been duly notified *in absentia*.

18. The prosecutor cannot commit the accused or send the case to trial without the formal procedure of indictment during the pre-trial investigation. If the accused refuses to appear for the notification of charges, or if his whereabouts are unknown, the prosecutor should formally charge him using the special procedure described above and then send the case file to trial *in absentia* with the investigation judge's authorisation.

19. Criminal charges cannot be directly notified at the trial stage; they can only be modified and then notified using a similar procedure of notification.

20. The procedure of notification of charges requires exclusive physical presence and cannot be done remotely.

21. The accused person's and defence lawyer's signatures are the only proof of notification of accusations.

Disclosure

22. The prosecution must disclose the casefile before it may proceed to trial. It entails inviting the accused and the defence lawyer to become acquainted with the evidence and case file materials. In situations of refusal to appear, absconding, or unknown whereabouts of the accused, the prosecutor decides to conclude the criminal investigation, disclose all documents to the defence lawyer, and then seeks permission from the investigative judge to send the case file to trial *in absentia*. In every situation, the casefile cannot be submitted until the defence lawyer is acquainted with the evidence and casefiles.

23. If the accused is notified of criminal accusations but refuses to take knowledge of evidence, his/her case can be considered without disclosure, but only if the casefile materials have been presented to the defence lawyer. If the accused demands disclosure at trial, it is for the trial

judge to ensure the disclosure.

International cooperation

Institutional aspects

24. The Special Division for International Cooperation within the General Prosecutor's Office handles all rogatory letters issued by the prosecution service and investigating authorities during the pre-trial stage. The Ministry of Justice has its own section that sends rogatory letters issued by judges during trials and following convictions. However, in pending trials, this distinction is not always evident because trial judges prefer to direct the prosecution to issue rogatory letters and transmit them via the General Prosecutor.

25. Only the General Prosecutor's Office and the Ministry of Justice are authorised by criminal procedure legislation to deliver rogatory letters during criminal investigations and trials. Courts, police, and law enforcement agencies established their own divisions for international cooperation in areas other than criminal matters, such as judicial dialogue or law enforcement cooperation. However, these latter divisions are not relevant for criminal proceedings.

Exchange of summons and notifications

26. The Republic of Moldova has not experienced requesting international assistance with countries with which it severed diplomatic relations.

27. The Republic of Moldova has not executed letters rogatory from a country with which it severed diplomatic ties.

28. The law does not provision sending summons or notification of the accused persons via foreign missions or diplomatic cable.

Searching for wanted persons

29. Only the prosecution has the authority to declare a person wanted and initiate an international search. This decision can only be made against an accused person, regardless of whether he/she has been notified of criminal charges. Even when the criminal investigation has been suspended, the prosecution indicates the police as an investigative body to continue the search. It normally requests an arrest warrant for the international search, but the law does not impose it as a condition for the wanted persons.

In a hypothetical case, any person could be declared wanted for notice of criminal charges, even if his or her location are known to be in a country with cut diplomatic ties.

30. The National Central Bureau of Interpol was established as an agency of the General Police Inspectorate under the Ministry of Interior, solely responsible for cooperating with Interpol's Central Bureau and National Bureaus in other states to locate international fugitives. The Prosecutor General Office and/or investigating bodies send search and arrest warrants to the National Bureau, which is responsible for reviewing and issuing red notices under Interpol's constitution and guidelines.

The Ministry of Interior also acts as an intermediary institution for cooperation with the Europol based on Agreement on Operational and Strategic Cooperation.

Guarantees

31. The law provides a number of procedural safeguards to ensure the fairness of the proceedings held *in absentia*, which could be classified in two categories:

- guarantees for the defence:
    - a defence lawyer must be chosen by representatives of the accused or appointed by the state regardless of the gravity of accusations;
    - the defence lawyer must be present and duly notified about all proceedings

held *in absentia*;
    - all evidence and materials should be fully disclosed to the defence lawyer;
    - the defence lawyer cannot reveal information that could be used in the accused's detriment; however, the law is not clear whether the defence lawyer can be compelled to reveal information leading to identification of the whereabouts of the accused;
    - the defence lawyer can appeal any decision of the prosecution, including search and arrest warrants and the sentences rendered *in absentia*;
- limits for the prosecution
    - the prosecution requires judicial authorisation to send a case to trial *in absentia*;
    - only crimes of certain gravity and any other crimes committed in a joint criminal enterprise can be prosecuted *in absentia*; (see § 7. above);
    - minors under 18 years old cannot be prosecuted *in absentia*;

Waiving

32. The accused can waive he/she right to be present but only at trial.

33. Waiver can be accepted only if it was expressed unequivocally and:

- in front of the trial judge during judicial hearing

9. or

- in written signed by both the accused and his lawyer

and only if

- the trial judge found exceptional circumstances and objective reasons for the accused absence, and
- the waver does not run contrary to a compelling public interest.

34. The legislation does not provide any possibilities for the accused to refuse attendance at the pre-trial stage. At the trial stage, the legislation does not specify whether the accused may relinquish his or her right to be present only partially or temporarily. However, such a waiver declaration could be limited in time and to particular judicial hearings throughout the trial stage. On the contrary, the right to waive is restricted to the trial for which it was stated. It is also possible that the accused should reconfirm his or her waiver for judicial hearings in appeals, cassation, reopening, or special reviews.

35. It appears that the legislation is not totally clear on whether and how the waiver declaration can be revoked. However, it may be argued that retracting the declaration must be done in the same manner in which it was made.

36. The waiving declaration applies only to the right to be present at court hearings; it does not imply the waiving of the right to appeal or any other rights unrelated to the right to be present.

Re-determination of criminal charges

37. It could be argued that Moldovan legislation establishes three options for the defendant convicted *in absentia* to seek re-determination of the criminal charges. Firstly, the defendant has the right to appeal the sentence through his or her chosen lawyer within the statutory time limit. Secondly, the convicted individual may request that the statutory period for an appeal be restored if he/she can demonstrate good cause for the delay. Thirdly, the convicted person may request a full re-trial of the case under the specific provisions for reopening *in absentia* proceedings. All these scenarios overlap and impose limits on the ability to appeal or request re-trial, as follows:

- the law does not provide particular requirements for a person convicted *in absentia* to appeal within the statutory time limit; also the defence lawyer can file an appeal on

behalf of the defendant;
- to be allowed to appeal after the statutory limit, the convicted person must have demonstrated that he or she had solid justification for the delay, which allows the appeal judges a broad discretion to examine whether to grant an extension or not, and whether the reasons are truly justified;
- in order to be eligible for a reopening, the convicted person must not have been:
    - aware of the criminal proceedings in addition to being absent for non-justifiable reasons;
    - represented at trial by a defence lawyer of he/she own choice;
    - notified about the sentence at the relevant time and refused to appeal that sentence or recalled that appeal;
    - waived the right to be present at court.

38. In either way, appeal or reopening, the case should be fully reheard. It entails re-examination and reassessment of evidence and facts. The parties are allowed to bring new evidence and make new arguments.

39. If the convicted person does not qualify for requesting a reopening, he/she can appeal the sentence after the statutory limit, providing that he/she proves good reasons for the delay.

40. In the case of an ordinary appeal, the statutory 15-day timeframe begins on the day the sentence is publicly delivered in the presence of the defence lawyer. If the defence party was not present at the public announcement, the day is set by the procedures for serving a copy of the sentence, including to the defence lawyer. If an appeal is filed after the statutory time limit, the appellate court determines the starting point in the preliminary hearings.

In the cases of a reopening, the convicted person can lodge the request in 30 days after

- being served a copy of the sentence,

10. or

- being received by the authorities in case of extradition.

This statutory time limit can be extended by the trial judge for justifiable reasons but no longer than 3 months after the convicted person was officially served a copy of the sentence.

41. The appeal presupposes full re-hearing of the case.

42. The appeal does not involve the decision to granting a leave to appeal. However, the request for reopening implies an assessment whether the convicted person has complied with statutory time limit and whether he/she does not fall into one of the four situations excluding the right to request re-trial (see § 37). This examination can be seen as a procedure for the leave to reopening.

43. The rules for ordinary appeal set only the temporal admissibility criterion, namely the statutory time limit. The reopening requires compliance with both temporal and procedural criteria, namely the statutory time and the four exclusionary situations described in § 37 above.

Alternatives to physical presence of the accused

44. The law allows questioning a suspect, accused or defendant by videoconference but only if he/she is in detention. There are no other alternatives to physical presence.

Emergency situation

45. Moldova has had two emergency situations, although none has required the accommodation of criminal proceedings *in absentia*:

- the armed conflict of 1992 in the breakaway region in Transnistria;
- COVID-related emergency.

Moldova has amended its criminal procedure to accommodate the prosecution at the pre-trial stage for the purposes of prosecuting fugitives *in absentia* (e.g. former senior officials, party leaders, oligarchs, etc.) accused in complicity to embezzlements and frauds in high-profile cases, known as the “2014 Moldovan bank fraud scandal” or “the Moldovan laundromat”.

46. Except when the accused is a minor, *in absentia* proceedings are not prohibited by law for any crimes or persons.

47. The domestic courts retain the discretion to refuse to hold *in absentia* proceedings.

48. Some leading criminal cases, held *in absentia* are as follows:

- Giuliani (dec), friendly settlement, 23/10/2007;
- Gavrilita (dec), 17/01/2012
- Năstase (dec), 04/12/2018
- Burlacu (dec), 11/01/2022
- Iurcovschi and others, 10/07/2018

The United Kingdom

Research by Mr Ian Welch

Introduction

The United Kingdom has three different criminal justice jurisdictions: England & Wales, Northern Ireland and Scotland. The first two are very similar, but Scotland is distinctly different. All three are based upon Common Law

Laws and procedural rules, together with case law decided by the courts. form the bases of the law in each jurisdiction.

In England & Wales and in Northern Ireland it is the Police and other law enforcement agencies that conduct investigations into crime. They arrest and interview the suspect and send the evidence to the prosecutor, who will decide whether or not proceedings should be taken and what the charges will be. The defendant will either be bailed to attend the court at a future date, or, where a remand into custody is sought, appear in court after being charged.

There are three types of criminal court in England & Wales and in Northern Ireland. All criminal cases involving adult accused begin in the Magistrates' Court, which deals with the more minor offences. The Youth Court deals with young offenders (10 – 17-year-olds) and the Crown Court deals with the more serious offences.

In Scotland, reports of crime are sent to the Crown Office & Procurator Fiscal Service of Scotland by the police. The Service has an investigative role, and it can direct and instruct the police in an investigation, but the modern practical reality is that the majority of crimes are detected and investigated by the police without any involvement of the Service. The Procurator Fiscal will decide whether or not proceedings should be taken against an accused, and, if so, what the charge should be, and in which court the case should proceed.

Scottish cases are dealt with before the Sheriff Court or the High Court. Proceedings in the Sheriff Court can either be before a Sheriff and a jury or be a summary hearing before the Sheriff. The most serious crimes are heard in the High Court. Minor cases are dealt with by a Justice of the Peace Court.

In all three jurisdictions, until a suspect has been charged or summonsed to court there can be no trial.

Overview

England & Wales and Northern Ireland

A defendant has the right to be present at the trial in order to meaningfully participate in the proceedings and to be legally represented. This usually means physical presence at court, but, where it is in the interests of justice, a judge can direct that a defendant can attend via audio or video link.

There is a difference in procedure between the Magistrates' Court and the Crown Court as regards criminal proceedings *in absentia*.

When a defendant deliberately fails to attend for trial at a Magistrates' Court, the court must be satisfied that the defendant is aware of the proceedings and has been notified of the date of the hearing. A Magistrates' Court will then proceed to trial, provided that the court has satisfied itself that an adjournment is not required, as no acceptable reason for the defendant's non-attendance has been provided, and that it is in the interests of justice to proceed.

Where proceedings have been commenced by way of summons or by post, a defendant found guilty *in absentia* cannot be sentenced to imprisonment, so the court must issue a warrant for

the defendant's arrest to bring them before the court for sentencing. Where the proceedings commenced by charge, a court can impose a sentence of imprisonment and will then issue a warrant for the arrest of the defendant.

The procedure is governed by the Criminal Procedure Rules 2020 (rule 24 in particular) and Practice Directions.

A defendant in the Magistrates' Court has an absolute right of appeal to the Crown Court.

The Magistrates also have the power to re-open a case where it appears in the interests of justice to do so.

Where a defendant fails to attend or absconds during a trial at the Crown Court, the judge has a discretion as to whether to commence or continue the trial. It is a discretion that must be exercised with 'the utmost care and caution', having regard to the interests of justice and the overall fairness of the proceedings.

The criminal procedure rule 25.2 (b) states: "the court must not proceed if the defendant is absent, unless the court is satisfied that – (i) the defendant has waived the right to attend, and (ii) the trial will be fair despite the defendant's absence".

Defendants are reminded at the plea and trial preparation hearing that they must maintain contact with their legal representatives and that, if they fail to attend the trial, their case may be tried in their absence and their legal representatives may have to withdraw.

The right to attend can be waived by defendants by their deliberately and voluntarily absenting themselves from the proceedings, by withdrawing their instructions to their legal representatives or by disrupting the trial by their behaviour.

The House of Lords (now the Supreme Court, the highest court in the United Kingdom,) laid down guidance for the Crown Court when a defendant fails to appear for trial: the case of *R v Jones (2002)*.

This case sets out the following matters to be taken into consideration in deciding whether to try the case in the absence of the defendant. The list is not exhaustive.

- The nature and circumstances of the defendant's behaviour in absenting him/herself from the trial or disrupting it, and, in particular, whether the defendant's behaviour was deliberate, voluntary and as such clearly waived the right to appear;
- Whether an adjournment might resolve the problem;
- The likely length of such an adjournment;
- Whether the defendant, though absent, is or wishes to be legally represented at the trial, or has, by their conduct, waived their right to representation;
- Whether an absent defendant's legal representative already has, or is able to receive, instructions from the defendant during the trial, and the extent to which they are able to present the defence;
- The extent of the disadvantage to the defendant in not being able to give their account of events, having regard to the nature of the evidence against the defendant:
- The risk of the jury reaching an improper conclusion about the absence of the defendant;
- The general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time;
- The effect of a further delay upon the memories of the witnesses;
- Where there is more than one defendant, and not all are absent, the undesirability of separate trials, and whether defendants who are present can have a fair trial.

The judge must make a proper enquiry so as to ascertain whether the defendant has waived the right to be present at the trial or whether any good reason exists for the absence.

Each case is fact specific, but where the absence is involuntary e.g. a medical emergency or illness, then the trial should be adjourned, unless the defendant is represented and consents to the trial taking place *in absentia*. This would be an exceptional step, and only undertaken if unavoidable.

Where the absence is voluntary, a trial may take place in the absence of the defendant, even if the legal representatives have to withdraw.

The judge will be expected to warn the jury that the absence of the defendant is not an admission of guilt, adds nothing to the prosecution case and that they must not draw any adverse inference from the fact that the defendant has not given evidence.

Scotland

In Scotland the procedure for dealing with trials where the defendant fails to attend is covered by section 150A Criminal Procedure (Scotland) Act 1995 as amended.

This allows in exceptional cases for a trial to proceed in the absence of a defendant. Where the defendant was present at the start of the trial, but then fails to attend court, the trial can proceed in absence, provided that a legal representative is present.

General characteristics of the proceedings

1. The Criminal Procedure Rules 2020 allow Magistrates' and Crown Courts in principle to proceed to trial *in absentia*.

2. The Magistrates' Courts cannot proceed *in absentia* where it finds that the defendant's reason for non-attendance is reasonable, where it would be contrary to the interests of justice to proceed or where the defendant is under 18. The Crown Court must not proceed if the accused is absent, unless it is satisfied that the defendant has waived the right to attend and that the trial will be fair despite their absence.

3. An investigation will carry on in an accused's absence, but there will be no trial until the suspect is charged. Where an accused is prosecuted, a trial *in absentia* may take place dependent upon the circumstances of each case. Where a defendant is convicted *in absentia* before the Crown Court, a sentence can be imposed.

4. Secondary legislation in the form of the Criminal Procedure Rules 2020 set out the procedure to be applied for trials *in absentia*. Case law as decided in the case of *R v Jones (2002)* for the Crown Court and *R(Killick) v West London Magistrates' Court (2012)* for the Magistrates' Court set out the principles to be applied when deciding whether to proceed in the absence of a defendant.

5. In Northern Ireland from 1973, during what is termed 'The Troubles', trial before a jury was abolished for certain serious and terrorism related cases. Judges sat alone and decided both law and fact. Although their automatic use has now been ended, a single judge can still hear cases involving those type of offences upon the certification of the Director of Public Prosecutions for Northern Ireland.

6. See the answer above.

Specific features of the proceedings

Classification based on substantive grounds

7. For minor non-imprisonable offences commenced by summons, especially road traffic offences, there is a procedure allowing a defendant to enter a guilty plea and be dealt with *in absentia*, or for the matter to be proved in absence, before a Magistrates' Court.

8. The Magistrates' Court deals with minor offences and it is in this forum that trials *in absentia* occur most often.

Classification based on procedural grounds

9. Where a defendant has entered a guilty plea by post to a minor offence only triable by the Magistrates' Court, the court can proceed in the defendant's absence (rule 24.8 Criminal procedure Rules 2020). Section 11 Magistrates' Courts Act 1980 allows for a trial to take place in the absence of the defendant in the Magistrates' Court. Rule 25.2 of the Criminal Procedure Rule 2020 prohibits a Crown Court from conducting a trial in absence, unless the judge is satisfied that the defendant has waived the right to attend and the trial will be fair despite the defendant's absence.

10. The Magistrates' Court is able to hear a case in the defendant's absence. Where a Crown Court exercises its discretion not to proceed to trial the judge would issue a warrant for the arrest of the defendant and the trial will be postponed until such time as the defendant is apprehended.

Situations

11. Where a defendant is aware of the hearing date and fails to appear, a court can proceed in absence in these situations. Where a suspect fails to attend a police station to be charged with an offence, and his whereabouts are unknown, the police will circulate the suspect as wanted and seek to arrest him. Where the United Kingdom refuses to grant an extradition request from a foreign state, it can only try a fugitive where the offences can be fairly and effectively tried in the U.K.; where a foreign state refuses to grant the extradition of a fugitive back to the U.K. and the defendant had already been charged and before the courts, a judge may then be persuaded to exercise discretion to have the case tried *in absentia*. (See one of my examples involving a Russian-Georgian dual national).

Summons and notifications

12. A Magistrates Court must be satisfied that a summons has been served upon a defendant or that the defendant has appeared at an earlier hearing in the proceedings. Defendants appearing before the Crown Court are warned that the trial may take place in their absence if they fail to attend.

13. Rule 4 Criminal Procedure Rules 2020 provides for a summons to be served by delivering it to the person, by leaving it for him/her with someone at the last known address or usual place of abode, or by sending it through the post to the last known address or place of abode.

14. Rule 4 Criminal procedure Rules 2020 allows for the service of documents by e-mail in certain limited circumstances.

15. Legislation does not require formal summoning for each court hearing and it could be implied that the accused has been notified about the court's schedule once attended one of the court sessions.

16. Where a defendant is legally represented, notifications can be sent to the lawyer.

Criminal charges

17. A summons can be issued by the Magistrates' Court. Where the suspect has fled abroad, extradition proceedings can be commenced using the available evidence.

18. Prosecution cannot send casefile to trial without the formal procedure of laying criminal charges during the pre-trial stage.

19. A court can allow a prosecutor to add charges, but the defence would then be entitled to an adjournment. At the Crown Court, the Indictment is put to the defendant at the arraignment; this may contain additional charges provided the evidence supports their inclusion in the Indictment.

20. Defendants are charged at the police station, or a summons can be issued and served personally or through the post.

21. When a summons is served, the person who served or posted it will sign a certificate explaining how and when it was served.

Disclosure

22. For minor road traffic offences, the evidence is served with the summons to allow the defendant to plead guilty or to allow the prosecution to read out the evidence in the defendant's absence. Advance disclosure is usually served upon the defendant at the first hearing at court. Evidence for a case sent to the Crown Court is served in accordance with a timetable set down by a judge at a preliminary hearing. Where a defendant has failed to appear before the service of documents, a warrant for arrest would be issued; where the defendant is represented in the proceedings, service will be made upon the legal representatives. Where an extradition is sought from a country where the defendant is residing, some evidence will be sent with the extradition papers for service upon the fugitive.

23. Until the prosecution has served its evidence the case cannot progress.

International cooperation

Institutional aspects

24. In England, Wales and Northern Ireland the U.K. Central Authority of the Home Office is the designated institution to deal with incoming mutual legal assistance requests. In Scotland, the Crown Agent is the central authority for mutual legal assistance, and the International Co-operation Unit of the Crown Office Procurator Fiscal Service acts as the single point of contact for judicial, law enforcement and prosecution authorities. Requesting authorities can send procedural documents by post directly to someone living in the U.K.

25. Incoming requests would be dealt with usually through the Home Office or Crown Office as the designated authorities for mutual legal assistance. In England & Wales, the City of Westminster Magistrates' Court is the designated court to deal with outgoing extraditions. The Sheriff's Court in Edinburgh is the designated court for extradition cases in Scotland. Law enforcement liaise with each other and make use of Europol and INTERPOL. The Metropolitan Police in London has an Extradition & International Assistance Unit. The National Crime Agency has the U.K. International Crime Bureau and a network of over 130 International Liaison Officers; it also has the U.K. National Central Bureau for INTERPOL and the U.K. Europol National Unit. The Specialist Crime Division of Police Scotland will deal with cases with an international aspect. The Crown Prosecution Service's Serious Economic Organised Crime & International Directorate deals with international co-operation issues; there are also liaison prosecutors based in a number of countries. In Scotland, the International Co-operation Unit of the Crown Office Procurator Fiscal Service deals with all international co-operation matters, and in Northern Ireland the High Court & International section of the Public Prosecution Service of Northern Ireland deals with these matters.

Exchange of summons and notifications

26. No. As such countries are not recognised no action can be taken e.g. Turkish Republic of Northern Cyprus.

27. Some applications have been received, but these cannot be actioned.

28. Extradition requests are usually sent through diplomatic channels via the U.K. Embassy/Consulate to the relevant Ministry of Justice or equivalent abroad. U.K. prosecutors can issue Letters of Request to the appropriate judicial authority in countries that have implemented Article 15 to the European Convention on Mutual Assistance in Criminal Matters

(1959) known as direct transmission, otherwise the prosecutors have to send their Letters of Request via the U.K. Central Authority. Incoming requests would go to the designated Central Authority.

Searching for wanted persons

29. An arrest warrant is not required for each international search announcements. A person could be announced as wanted for notification of criminal charges if his/her whereabouts are known to be in the country with severed diplomatic ties.

30. The U.K.'s National Central Bureau will transmit a request for a Red Notice to Interpol. A member of law enforcement applies to a Magistrate for a search warrant. The applicant needs to demonstrate that there are reasonable grounds to believe a crime has been committed and evidence of the crime will be found on the premises to be searched. Police and other law enforcement agencies will contact U.K.'s National Central Bureau, the U.K. Desk at Europol, or may try to directly liaise with their counterparts abroad. Prosecutors will contact the U.K.'s liaison person at Eurojust or the Home Office (for England & Wales), International Co-operation Unit at the Crown Office (Scotland), Department of Justice (Northern Ireland) and may consult with a national contact point for the European Judicial Network. They may also contact foreign prosecutors/judges directly.

Guarantees

31. In the case of *R v Jones* (See Examples) the defendants' legal representatives withdrew from the trial. The judge highlighted evidence advantageous to the defendants and gave careful directions to the jury to ensure the trial was fair. In Scotland, there has to be a legal representative present.

Waiving

32. A defendant will be expected to attend the court hearing if on bail and may be arrested upon failure to attend court. A defendant in custody will be produced from prison to the court. Permission can be obtained from the court for the defendant not to appear where the presence of the accused is not required. A defendant could indicate that he will not be attending court, but runs the risk that the court will issue a warrant for arrest.

33. It is a matter for the court as to whether it accepts the defendant's wish to waive the right to attend a particular hearing.

34. It is possible for a defendant to attend some, but not all, hearings.

35. The defendant can attend court at any time.

36. The waiver of being present does not imply the waiver of the right to appeal.

Re-determination of criminal charges

37. A defendant convicted *in absentia* before a Magistrates' Court has an absolute right to appeal to the Crown Court. The Magistrates' Court also has the power to re-open the case under Section 142 Magistrates' Court Act 1980 where it appears to the court that it would be in the interests of justice to rehear the case. Where a defendant has been convicted *in absentia* before a judge and jury at the Crown Court, there is right of appeal to the Court of Appeal Criminal Division, but an application for permission to appeal has to be made.

38. An appeal from the Magistrates' Court to the Crown Court involves a full rehearing of the case. An appeal before the Court of Appeal Criminal Division is based upon legal submissions e.g. why the judge was wrong in law to proceed to trial in the absence of the defendant.

39. A person can appeal the sentence rendered *in absentia*.

40. An appeal from the Magistrates' Court to the Crown Court must be made within 15 days

of the date upon which the defendant was sentenced; if the appeal is lodged after 15 days, it may be considered provided there is good evidence as to why the time limit could not be met. An application to seek leave to appeal from a Crown Court decision to the Court of Appeal Criminal Division must be made within 28 days of the date upon which the defendant was convicted (if it is an appeal against conviction), or 28 days from the date of sentence (where the appeal is an appeal against sentence).

41. An appeal from the Magistrates' Court to the Crown Court is a full re-hearing of the case. Where permission is granted to appeal to the Court of Appeal Criminal Division, the hearing involves the consideration of legal submissions. Witnesses can be called to give evidence at the appeal hearing.

42. An application to appeal from the Magistrates' Court to the Crown Court is made in writing and submitted to the Crown Court. An application to the Court of Appeal Criminal Division is made in writing and is initially considered by a single judge; the single judge can grant or refuse leave to appeal, or refer it to the full court for consideration.

43. There is an absolute right of appeal to the Crown Court from the Magistrates' Court. An appeal before the Court of Appeal Criminal Division is not a re-trial; the court will examine whether the trial judge conducted the trial in accordance with the law and procedure, whether the judge summed up the facts fairly and correctly instructed the jury on the law, and whether the conviction is unsafe.

Alternatives to physical presence of the accused

44. Remands to custody can be carried out by video link. Simple procedural hearings involving only the judges and advocates can be carried out remotely. For minor road traffic offences, there is a procedure whereby these matters can be dealt with on the papers. Similarly, for minor offences a legal representative can represent the client without the attendance of the defendant being required. This year, 2024, a new video hearing service is to be introduced following a successful test at the Crown Court at Chester.

Emergency situation

45. No. During 'The Troubles' in Northern Ireland, the only change to procedure that was made was for a judge to sit without a jury. Defendants were still required to attend. In response to the COVID-19 epidemic a cloud video platform (CVP) procedure was introduced (See paragraph 44).

46. In cases involving security issues, a Special Advocate may be appointed to represent a defendant's interests where material is kept secret from the defendant and legal representatives. This will only be part of the trial, and a defendant who does not attend can still be convicted *in absentia*. Almost all international tribunals prohibit trials to be held *in absentia*. The U.K.'s War Crimes Act 1991 does not allow for trials *in absentia*. In relation to cross-border crimes, the decision in *R v. Jones* will apply, so, where a defendant does not attend at trial, the judge can decide to hold a trial in absence.

47. The domestic courts retain the discretion to refuse to hold *in absentia* proceedings even if all conditions for such proceedings are fulfilled.

48. Examples

- R v. Jones (2002).
- Summary of a case where the trial took place in the defendant's absence.
- Edited submissions to a Crown Court for a trial to take place in the absence of the defendant.

Conclusion

In the Magistrates' Court, trials in absence will take place where the defendant is at least 18 years' old and there is no acceptable reason for the defendant's absence, and it is not contrary to the interests of justice to proceed in their absence. There is an absolute right of appeal to the Crown Court and a power for the court to re-open proceedings.

At the Crown Court, a judge exercising discretion with the utmost care and caution, having due regard to the interests of justice and ensuring that a trial can be as fair as the circumstances permit and that it will lead to a just outcome, can decide to hold a trial in the absence of the defendant (and his legal representatives if they withdraw) in accordance with the principles laid down in the case of *R v. Jones.* There is the possibility of applying for permission to appeal such a conviction to the Court of Appeal Criminal Division.

ANNEX 3. OVERVIEW OF THE EUROPEAN STANDARDS REGARDING CRIMINAL PROCEEDINGS HELD IN ABSENTIA

Research by Mr Jeremy McBride

A. Introduction

1. This Note provides an overview of the standards of the Council of Europe regarding criminal proceedings held *in absentia.*

2. These standards are essentially those arising from the obligations arising under the European Convention on Human Rights ("the European Convention"), as elaborated in the case law of the European Court of Human Rights ("the European Court"), the essentials of which – but not all the detail – are contained in the recommendations in the Committee of Ministers' Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused[1].

3. It should also be noted that these standards are also reflected in the rights to be present at the trial and to a new trial in Articles 8 and 9 of 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.[2]

4. Furthermore, the standards discussed below are applicable not only to cases where persons do not attend their trial and/or subsequent proceedings in respect of them but also to situations where the accused has been removed from the court room for the purpose of maintaining order there.[3]

5. It should also be kept in mind that, although the requirements elaborated in the case law of the European Court initially focused on criminal proceedings, they have since been held to be equally applicable to civil proceedings.[4] This could be significant in the context of civil proceedings have a connection with the criminal process, such as ones concerned with non-conviction-based seizure and confiscation of property of illicit origin.

6. The Note considers first the provisions under the European Convention that are relevant for

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[1] Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies.

[2] Article 8 provides that: "1. Member States shall ensure that suspects and accused persons have the right to be present at their trial. 2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. 3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned. 4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. 5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with. 6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial". Article 9 provides that: "Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, 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, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence".

[3] See, e.g., *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012.

[4] See, e.g., *Dilipak and Karakaya v. Turkey*, no. 7942/05, 4 March 2014, *Ažđajić v. Slovenia*, no. 71872/12, 8 October 2015, *Bartaia v. Georgia*, no. 10978/06, 26 July 2018 and *Berestov v. Russia*, no. 17342/13, 18 May 2021.

holding criminal proceedings *in absentia* before examining in turn the general approach of the European Court to the use of criminal proceedings *in absentia*, the proceedings to which it does not consider the requirements elaborated by it are applicable, the scope of the requirement for notification, establishing whether persons are evading a trial or waiving their right to participate in it, the need for legal representation in proceedings held in absentia, the requirements for a fresh determination and certain consequential matters, followed by a conclusion summarising the essential points.[5]

7. This Note has been prepared by Jeremy McBride[6] under the auspices of the Council of Europe project "Fostering Human Rights in the Criminal Justice System in Ukraine".

B. Relevance of the European Convention

8. The use of *in absentia* proceedings is a widespread means of handling criminal proceedings that is found in many jurisdictions of Council of Europe member States, with the aim at increasing the efficiency of criminal justice and combating crime in general.

9. This is something that the European Court fully appreciates. In particular, it has long been well aware of the problems that can be caused by an accused's absence, observing in 1985 that:

> *As was pointed out by the Government, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice.*[7]

10. There is, however, no provision in the European Convention that deals specifically with a prosecution being conducted in the absence of the accused.

11. Nonetheless, there are four provisions in the European Convention that are potentially of particular relevance to such a prosecution, namely, sub-paragraphs (a), (c), (d) and (e) of Article 6(3), which provide that:

> Everyone charged with a criminal offence has the following minimum rights:
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; ...*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

12. As the Grand Chamber of the European Court made clear in *Sejdovic v. Italy*:

> *81. ... the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see Colozza, cited above, § 27; T. v. Italy, cited above, § 26; F.C.B. v. Italy, cited above, § 33; and Belziuk v. Poland, 25 March 1998, § 37, Reports 1998-II)*[8].

[5] Cross-referencing and citation of cases are generally omitted in extracts from judgments in the footnotes.

[6] Barrister, Monckton Chambers, London.

[7] *Colozza v. Italy*, no. 9024/80, 12 February 1985, para. 29.

[8] No. 56581/00, 1 March 2006.

13. Moreover, it observed that:

> *89. Under the terms of paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This provision points to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (see Kamasinski v. Austria, 19 December 1989, § 79, Series A no. 168).*
>
> *90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see Pélissier and Sassi v. France [GC], no. 25444/94, § 52, ECHR 1999-II).*

C. General approach

14. The conducting of a trial *in absentia* will not necessarily entail a violation of Article 6.

15. In the European Court's view, as expressed in its *Sejdovic* judgment, there will only be a denial of justice – and thus a violation of Article 6 - if the person convicted in such a trial:

> *is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself (see Colozza, cited above, § 29; Einhorn v. France (dec.), no. 71555/01, § 33, ECHR 2001-XI; Krombach v. France, no. 29731/96, § 85, ECHR 2001-II; and Somogyi v. Italy, no. 67972/01, § 66, ECHR 2004-IV) or that he intended to escape trial (see Medenica, cited above, § 55).*
>
> *83. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. 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 sought to escape trial (see Somogyi, cited above, § 67).*
>
> *84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see Stoichkov v. Bulgaria, no. 9808/02, § 56, 24 March 2005). 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" (ibid., §§ 54-58).*
>
> *85. The Court 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 the court of appeal and to request the admission of new evidence, entailed 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 (see Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003).*[9]

16. Thus, there is no right to have a fresh determination where the accused has waived the right to appear and to defend themselves or evaded the trial. However, as will be seen, establishing that there has been such waiver or evasion is not something that can be lightly assumed. Moreover, where a fresh determination is required after criminal proceedings have been held *in absentia*, that determination must follow proceedings that are in full compliance with the right to a fair trial under Article 6 of the European Convention.

[9] Emphasis added.

D. Proceedings Excluded

17. The requirements for *in absentia* proceedings are not applicable to certain proceedings despite their connection to the criminal process.

18. In the first place, they are not applicable to those proceedings which are not actually concerned with determination of a charge.[10]

19. Secondly, they will not apply to an absence from a single hearing at which no activity requiring the presence of the accused in person - such as the production of evidence - took place during the hearing in question.[11]

20. Thirdly, they do not apply to those proceedings which, under the case law of the European Court, the presence of the accused is not required, although for these other requirements of fairness, such as the ability to put one's case in writing must be observed.[12]

21. However, the requirements do apply where the law precludes participation.[13]

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[10] As in *Crociani, Palmiotti, Tanassi and LeFebvre d'Ovidio v. Italy* (dec.), no. 8603/79, 18 December 1980 (which concerned proceedings relating to decisions on the indictment and committal to trial) and *Brozicek v. Federal of Germany* (dec.), no. 11338/85, 12 July 1985 (which concerned a complaint about the refusal of the authorities of the Federal Republic of Germany to delete from the criminal records the judgment *in absentia* of an Italian court sentencing the applicant to five months' imprisonment with probation in that he had been given no opportunity to defend himself in the procedure).

[11] As in *Previti v. Italy* (dec.), no. 45291/06, 8 December 2009. Moreover, the European Court observed: "196. As for the judgment phase, the Court notes that the debates took place during numerous hearings: according to the information provided by the applicant himself, 108 hearings were held before the Milan court, 33 before the Court of Appeal and 8 before the Court of Cassation (paragraphs 150, 152 and 153 above). However, the person concerned only complains about his absence from one of them, and precisely that of November 21, 2001. The Court considers that when, as in the present case, a considerable number of hearings take place in a trial, it is only in very exceptional circumstances that the defendant's non-participation in one of them can compromise the fairness of the procedure as a whole".

[12] Thus, in *Kammerer v. Austria*, no. 32435/06, 12 May 2010, the European Court observed, referring to the case of *Jussila v. Finland* [GC], no. 73053/01, 23 November 2006, that: "26. …the Court qualified tax surcharge proceedings against the applicant as falling under the criminal law limb of Article 6 § 1 of the Convention (cited above § 38). However, as regards compliance with Article 6 § 1, the Court found no breach of that provision on account of a lack of an oral hearing. It emphasised that the obligation to hold a hearing was not absolute and, in particular, acknowledged that the national authorities may have regard to the demands of efficiency and economy in deciding whether or not to hold an oral hearing (cited above § 42). Even though requirements of a fair hearing under Article 6 § 1 for the sphere of criminal law were stricter than civil law, the Court did not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it was self-evident that there were criminal cases which did not carry any significant degree of stigma. There were clearly "criminal charges" of differing weight and, consequently, the criminal-head guarantees did not necessarily apply with their full stringency (cited above § 43). The Court concluded that the requirements of fairness were complied with and did not necessitate an oral hearing, since no issue of credibility arose in the proceedings which required oral presentation of evidence or cross-examination of witnesses. Further, a minor sum of money was at stake and the applicant was given ample opportunity to put forward his case in writing, (cited above §§ 46-49). 27. The approach adopted in the *Jussila v. Finland* case, namely to apply the criminal head guarantees of Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma certain criminal cases carried, is, in the Court's view, not limited to the issue of the lack of an oral hearing but may be extended to other procedural issues covered by Article 6, such as, in the present case, the presence of a accused at a hearing. 28. The Court observes at the outset that a fine order under the Motor Vehicles Act for non-compliance with the obligations of registered owners to have their cars duly inspected, does not belong to the traditional categories of the criminal law and, under domestic law, does not fall within the jurisdiction of ordinary criminal courts but of the Independent Administrative Panel which has jurisdiction in administrative criminal cases (see *Hubner v. Austria* (dec.), no. 34311/96, 31 August 1999). The Court therefore finds that such an accusation did not carry any significant degree of stigma. 29. The applicant, who had also been aware of the hearing of 22 February 2005, was represented by counsel throughout the proceedings and counsel attended the hearing in which he had been able to argue the applicant's case. Moreover, in the course of the hearing no witnesses were examined. Lastly the Court observes that the proceedings before the IAP concerned a minor sum of money, namely a fine of EUR 72".

[13] As in *Vasenin v. Russia*, no. 48023/06, 21 June 2016, in which the authorities had not ensured the applicant's appearance before the trial, alleging that Russian law did not call for his presence in view of his mental condition. However, the European Court stated that "although not having an absolute character, the right of being heard in court enjoys such a prominent place in a democratic society and has such a fundamental value for the protection of an individual against arbitrariness on the part of public authorities, that the mere fact that an individual suffers from a mental illness or has been declared legally incapacitated cannot automatically lead to the exclusion of the exercise of that right altogether. It is the very weakness of a mentally ill defendant which should enhance the need for supporting his or her rights. In this context, the authorities must show requisite diligence in ensuring the accused's right to be present in an effective manner and must act particularly carefully when infringing upon that right, so as not to place the mentally ill at a disadvantage when compared with other defendants who do enjoy such a right" (para.

E. Notification

22. In all cases, an accused should be notified about the charges and date of the trial.

23. A notification of charge must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the rights of the accused, and in particular those under Article 6(3)(a) and (b) their rights to be informed in detail of the nature and cause of the accusation against them and to have adequate time and facilities for the preparation of their defence.[14]

24. There must, however, have been diligent efforts to give the accused notice of the hearing at which they were to be tried,[15] unless they had made themselves unavailable to be informed.

25. Where reliance is placed on a summons for this purpose, there is a need for the court to verify whether this has actually been received.[16]

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139). It found that the courts concerned had not made a proper assessment of the applicant's ability to participate usefully in the criminal proceedings against him and concluded that there was no evidence convincingly demonstrating that his behaviour or his mental condition precluded his stating his case in open court.

[14] See, e.g., *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1990, *Abramyan v. Russia*, no. 10709/02, 9 October 2008 and *Nevzlin v. Russia*, no. 26679/08, 18 January 2022.

[15] *Colozza v. Italy*, no. 9024/80, 12 February 1985; "In fact, the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption (…), inferred from the status of "latitante" which they attributed to Mr. Colozza that there had been such a waiver. In the Court's view, this presumption did not provide a sufficient basis. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General's records (via Fonteiana), yet it was known that he was no longer living there (…). The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor's office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr. Colozza's new address (see paragraph 15 above); it was thus possible to locate him even though - as the Government mentioned by way of justification - no data-bank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner (see, mutatis mutandis, the Artico judgment of 13 May 1980, Series A no. 37, p. 18, para. 37). In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question" (para. 28)(cross-referencing omitted). See also ***Bacaksız v. Turkey***, no. 24245/09, 10 December 2019; "58. In respect of the first question, the Court must therefore examine whether the national authorities showed sufficient diligence in their efforts to locate the applicant and inform him of the civil proceedings. In that connection, when the trial court sought assistance from the relevant Security Directorate to determine the applicant's current address after the first failed attempt to deliver the summons to the applicant, the Court observes that the Security Directorate replied to the trial court with two possible addresses where the applicant could be found: the address that was given to the Civil Court by the plaintiff where delivery had already been attempted but failed; and another address declared as his work address by the applicant when he had registered the car, where no delivery had so far been attempted by the trial court. While in those circumstances it would have been more appropriate and reasonable to try the work address of the applicant, the Civil Court chose to send the summons again to the applicant's old home address even though it was obviously futile to do so. The trial court's final step, which was to post the summons at the entrance of the building of the applicant's old address and deem it to be served, could hardly qualify as making reasonable efforts to appraise a defendant of the proceedings against him. In the light of the foregoing, the Court holds that the trial court's efforts to locate the applicant were not Convention-compliant. In that connection the submission that the national courts served the decision in accordance with the domestic legal provisions is not sufficient in itself to relieve the State of its obligations under Article 6 of the Convention". For the absence of sufficient diligence, see also *M.T.B. v. Turkey*, no. 47081/06, 12 June 2018

[16] See, e.g., *Kolegovy v. Russia*, no. 15226/05, 1 March 2012; "41. Turning to the circumstances of the present case, the Court observes that the Government did not submit any evidence showing that the summons for the appeal hearing had reached the applicants or their representative in good time. Moreover, they did not submit any documents to demonstrate that the summons had, in fact, been sent to the applicants or their lawyer, such as copies of the summons, acknowledgments of receipt, envelopes bearing postmarks, a checklist of the case-file or any other record confirming the fact of actual dispatching of the notifications to the applicants or their representative (see, by contrast, *Belan v. Russia* (dec.), no. 56786/00, 2 September 2004, and *Bogonos v. Russia*, cited above). In these circumstances, the Court is unable to accept the Government's submission that the respondent party had been notified of the hearing as sufficient evidence of the applicants' notification of the examination of the case. Similarly, the fact that the decision of 6 October 2004 contained a new date of the hearing, taken alone, cannot be regarded as an appropriate notification. It is important to note in this respect that the applicants had not been present at the court on 6 October 2004 and that the case-file does not contain any information as to the date on which they had received a copy of the decision to adjourn the case taken on that date. Moreover, the Court observes that there is nothing in the text of the appeal judgment to suggest that the appeal court examined the question whether the applicants had been duly summoned, and, if they had not been,

26. Efforts can still be regarded as having diligent even though these might have proved unsuccessful.[17]

27. Awareness of the proceedings from the accused's participation in earlier stage of them may be sufficient to consider that there was sufficient notification.[18]

28. However, learning about the proceedings through a journalist or from the local press will not suffice.[19]

29. Nor will vague and informal knowledge about the proceedings, such as through a letter

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whether the examination of the appeal should have been adjourned. In fact, the court's reasoning in this respect was confined to a finding that the applicants had been apprised of the date of the examination of their case, without further details. 42. It follows that the domestic authorities failed to demonstrate that they had taken a reasonable effort to duly summon the applicants to the hearing (see by contrast *Babunidze v. Russia* (dec.), no. 3040/03, 15 May 2007). In these circumstances the Court accepts the applicants' allegation that the domestic courts had failed in their duty to inform them of the appeal hearing. See also Berestov v. Russia, no. 15226/05, 1 March 2012; "41. There is nothing in the text of the judgment of 24 June 2011 to suggest that the District Court examined the question whether the applicant had been duly summoned, and, if not, whether the examination of the case should have been adjourned. To the contrary, despite the fact that the District Court became aware on 24 June 2011 that the applicant did not live at his registered address, it proceeded with the judgment on the same day. The court's reasoning in this respect was confined to a finding that the applicant had been duly summoned to the hearing". In addition, see *Somogyi v. Italy*, no. 67972/01, 18 May 2004*, Religious Community of Jehovah's Witnesses and Hansen v. Azerbaijan*, no. 52682/07, 30 January 2020 and *Jafarzade v. Azerbaijan*, no. 2515/11, 20 February 2020.

[17] See, e.g., *Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017, in which it was found that the authorities had taken all reasonable and necessary steps in order to ensure that the applicant would appear before the district court for her trial, but that she could not be traced at the addresses that she had provided.

[18] See, e.g., *B. v. France* (dec.), no. 10291/83, 12 May 1986, where the applicant had participated in all the investigatory proceedings against him. See also *Mihelj v. Slovenia*, no. 14204/07, 15 January 2015, in which the European Court noted that "prior to receiving the summonses to the hearing, the applicant had been served with the indictment charging him with attempted aggravated fraud, to which he had objected. He then received the decision of the pre-trial panel of the Ljubljana District Court dismissing his objection. In this decision the offence he was charged with was reclassified to attempted fraud and the case was referred to the Ljubljana Local Court (see paragraph 9 above). Thus, the Court considers that the applicant could reasonably have expected to be summoned to appear before the latter court, regardless of the fact that the proceedings were commenced before the Ljubljana District Court. Moreover, the applicant himself acknowledged that the summonses to the hearing had included reference to the allegedly violated provisions of the Criminal Code, which had already been included in the decision of the pre-trial panel. In view of this, the Court is unable to accept the applicant's argument that he had lacked knowledge of what proceedings the summonses were referring to, especially since he did not allege that any other set of criminal proceedings concerning the same charge was pending against him at the time. In any event, the Court notes that the applicant received the summonses almost two months before the date of the hearing (…), and could therefore have brought any matter of controversy to the local court's attention sooner than one day before the hearing was to take place" (para. 40). In addition, see *Vybornova v. Russia* (dec.), no. 34839/11, 26 March 2019 ("30. The Court notes that in the present case the police had questioned the applicant as a suspect before she left for the Czech Republic in the summer of 2005. In September 2005, the applicant was charged with embezzlement and money laundering and the domestic court remanded her in custody. In August 2006, the applicant applied for asylum in the Czech Republic, stating that she was being prosecuted in Russia on charges related to the YUKOS scandal and that she feared an unfair trial, imprisonment and the removal of her minor child if she returned to Russia. Her request was allowed and she was granted subsidiary protection. The Russian authorities' requests to extradite the applicant were rejected. Therefore, it is evident to the Court that the applicant decided to stay away from Russia and to refrain from direct involvement in the criminal proceedings against her long before the trial. In such circumstances she may be regarded as having been sufficiently aware of the prosecution and the charges against her and as having deliberately chosen not to attend the hearings at the first-instance and appeal courts") and *Bykhovets v. Russia* (dec.), no. 59743/10, 17 September 2019 ("25.Turning to the circumstances of the present case, the Court notes that on 16 April 2010 the Moscow City Court acquitted the applicant of the relevant charges and ordered that he be released from detention. The hearing was held in the presence of the applicant and his lawyer. However, on 17 June 2010 the Supreme Court of Russia quashed the acquittal and remitted the case for a fresh examination in the applicant's absence but in presence of his lawyer. Therefore, the question arises as to whether the applicant knew that the acquittal had been quashed and that the proceedings had been resumed but, fearing prosecution, chose to escape. 26. The Court reiterates that certain established facts might provide an unequivocal indication that an accused does not intend to take part in a trial or wishes to escape prosecution. This may be the case, for example, where materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him (see *Sejdovic*, cited above, § 99). In the instant case, according to the transcript of the hearing held on 14 July 2010, the judge asked the applicant's lawyer, K., whether he had stayed in touch with the applicant. K. answered that the applicant called him from time to time and confirmed that he had told the applicant about the quashing of his acquittal. 27. Therefore, it is evident to the Court that the applicant learned about the quashing before the second trial on 5 October 2011 and deliberately chose not to attend. The Court considers that the applicant, as a former bailiff with legal knowledge, could have been expected to appreciate that his failure to attend the hearing would result in his being tried and convicted in his absence").

[19] See *Somogyi v. Italy*, no. 67972/01, 18 May 2004, at para. 75; "Lastly, as regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 § 3 (a) of the Convention; vague and informal knowledge cannot suffice (see *T. v. Italy*, cited above, p. 42, § 28).

shown to the accused's wife[20] or the fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted.[21]

30. Furthermore, mere absence from home is seen as insufficient to consider that a person charged with a crime was aware of the proceedings and escaped.[22]

31. Moreover, the fact that the accused were defended by a counsel appointed by their family members does not indicate that they had sufficient knowledge of pending legal proceedings or that the family members had acted, explicitly or implicitly, under their instructions.[23]

32. Publication on a court's notice board is unlikely to be sufficient, especially where the accused is abroad.[24]

33. Moreover, it seems unlikely that the availability of information about a hearing in criminal proceedings only on the court's website will be considered sufficient for the purpose of notification.[25]

34. However, the authorities cannot be held responsible when an accused person fails to take necessary steps in order to ensure receipt of a notification of prosecution.[26]

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[20] *T. v. Italy*, no. 14104/88, 9 April 1988; "27. Mr T. denied having received the "judicial notification" of 15 February 1983. At the time he had already left Saudi Arabia to take up residence in Khartoum (…). The Court is not therefore concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, in an unequivocal manner waived his right to appear and defend himself. Accordingly, it does not, in this instance, have to determine whether and under what conditions an accused can waive exercise of this right (…). The Government did not dispute the applicant's assertion. Yet they considered that it had not been prejudicial to his right to defend himself. They contended that the applicant had known perfectly well that he had been charged with rape, as was shown by his letter of 30 September 1983 to his wife; in their view, the truth of the matter was that he had deliberately evaded trial. 28.Like the Commission, the Court finds that the applicant had learned indirectly that criminal proceedings had been instituted against him. To inform someone of a prosecution brought against him is, however, 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, as is moreover clear from Article 6 para. 3 (a) (art. 6-3-a) of the Convention. Vague and informal knowledge cannot suffice".

[21] *Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012, at para. 31.

[22] As was the situation in both *Zunic v. Italy*, no. 14405/05, 21 December 2006 and *Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012.

[23] As in, e.g., *Shkalla v. Albania*, no. 26866/05,10 May 2011 and *Muca v. Albania*, no. 57456/11, 22 May 2018. However, this does not preclude proof to the contrary being established.

[24] See *Dimchevska v. North Macedonia*, no. 13919/18, 4 April 2023; "The order was not served on the applicant, as the two attempts by the trial court to do so were unsuccessful. Both receipt slips indicated that she was in Germany. The publication of the order on the court's notice board, as required by law, could not have led to her acquiring knowledge of the order in these circumstances and by that time, the domestic authorities had already been aware of the applicant's absence from the country. As the court-appointed lawyer did not challenge the penal order, the applicant's conviction became final without her knowledge of the proceedings against her".

[25] Such a conclusion was reached by the European Court in *Lazaris v. Albania*, no., 48806/06, 20 June 2023 regarding the possibility of learning about hearings before the Supreme Court in civil proceedings, which were only published in its premises and on its website. In its view, the applicants could not be reasonably expected to do that for each and every notice of hearings published by the Supreme Court during about half a year elapsed after they had learnt of the appeal. It also stated that: "As to the Government's argument that the public notice of the hearing had enabled the opposing party to appear before the Supreme Court and plead their case, it may well be that the public notice of hearings may achieve the result of appearance of the parties before a court. In the other eventuality, however, the same requirement of diligence calls on the court to take steps to ensure that the party's right to be present is respected, and it may adjourn the hearing pending due notification" (para. 25). An even more strict approach might be expected in criminal proceedings given the potential consequences for the accused.

[26] See, e.g., *Nicol v. Netherlands* (dec.), no. 12865/87, 6 December 1991 "the Commission notes that the summons to appear before the District Court on 14 February 1984 was unsuccessfully presented at the applicant's verified home address on 13 and 27 January 1984, that the summons to appear before the Regional Court on 20 March 1985 was unsuccessfully presented at the applicant's verified home address on 5 February 1985 and that on each of these occasions a formal notification [kennisgeving] was left behind at the applicant's home address, stating where he could collect the judicial document that had arrived for him, which three notifications the applicant claims never to have received. The Commission considers that in these circumstances the applicant must have been aware of the criminal proceedings against him and that he could expect a hearing of his case. In view of the authorities' attempts to inform the applicant of the hearings of his case and the applicant's apparent lack of diligence in his case, the Commission is of the opinion that the authorities cannot be held responsible for the applicant's absence at the hearings of his case", *Hennings v. Germany*, no. 12129/86, 16 December 1992 ("26. The Court, like the Commission and the Government, considers that the applicant could reasonably have been expected to obtain a key to his letter-box in order to have ready access to any mail addressed to him, particularly since he must have foreseen that proceedings would be brought against him as a result

35. This will also be the case where the accused, through their actions had brought about a situation that made them unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against them.[27]

36. On the other hand, there should be efforts to resolve contradictory information about an accused's address[28] and doubts should be resolved in favour of the accused[29].

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of his failure to reply to the letter of 9 August 1984 from the public prosecutor's office (…). The authorities cannot be held responsible for barring his access to a court because he failed to take the necessary steps to ensure receipt of his mail and was thereby unable to comply with the requisite time-limits laid down under German law") and *Kattan v. Romania* (dec.), no. 26850/11, 21 January 2014 ("32. Like the domestic courts, the Court notes that during the course of the criminal proceedings brought against him the applicant was repeatedly summoned at the correspondence address indicated by him and that he was assisted by the same chosen legal representative. Although he attended hearings before the first-instance court, the applicant did not appear before the second-instance court and made his submissions before it exclusively through his chosen lawyer. In addition, the final-instance court lawfully summoned him on three occasions and expressly indicated prior to the hearing of 14 September 2010 (when it heard the parties' submissions with regard to the merits of the case) that the applicant had to appear before it in order to be heard. Even if, contrary to his allegations, it appears that the applicant was aware of how his case was progressing and that he had continuous contact with his chosen legal representative, he did not attend any hearing before the final-instance court. Moreover, neither he nor his legal representative informed the domestic courts, particularly the final-instance court, about a change of correspondence address or provided a reason preventing him from appearing before them. In these circumstances, notwithstanding the applicant's arguments, the Court considers that the final-instance court had fulfilled its positive obligation to take steps in order to ensure the applicant's attendance before it. 33. Consequently, the Court considers that the applicant had largely contributed to the creation of a situation preventing him from appearing before the final-instance court (see, *mutatis mutandis*, *Medenica*, cited above, § 58) and that he could have reasonably foreseen the consequences of his conduct (see, *mutatis mutandis*, *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003). See also, as regards civil proceedings, *Sydorenko v. Ukraine* (dec.), no. 73193/12, 18 February 2021; "31. The letter of Ukrposhta of 26 March 2013 further suggests that notifications of the court's letter of 29 May 2012 had been duly left at the applicant's address by a post officer but she never appeared at the post office to pick the correspondence up. To the extent that the applicant may be understood as challenging Ukrposhta's submissions, the Court notes that whilst the general concept of a fair trial and the fundamental principle that proceedings should be adversarial require that court documents should be duly served on a litigant, Article 6 of the Convention does not go as far as obliging the domestic authorities to provide a perfectly functioning postal system (see, for example, *Lazarenko and Others*, cited above, § 37, and, in the context of Article 8 of the Convention, *Foley v. the United Kingdom* (dec.), no. 39197/98, 11 September 2001). 32. In other words, the authorities may only be held responsible for failure to send the relevant documents to the applicant. The fact that the applicant did not receive the correspondence sent to her by the Higher Specialized Court on its own is not sufficient to lay an arguable basis for the claim that the applicant's rights under Article 6 § 1 of the Convention have been breached. 33. In this respect the Court finds it striking that, being aware of the difficulties with the delivery of correspondence in the past, or at least of the authorities' allegations in this respect, the applicant remained rather passive and did not seem to have taken any measure aimed at ensuring that correspondence sent to her would reach her. Nor had she made any enquiry with the courts about the state of the proceedings while it was highly probable that the University would appeal against the judgment delivered in the applicant's favour. 34. The Court recalls in this respect that it is incumbent on the interested party to display special diligence in the defence of her interests and to take the necessary steps to apprise herself of the developments in the proceedings (see, among other authorities, *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001) 35. In view of the above, the Court concludes that it has not been shown in the present case that it has been the respondent's State responsibility that the applicant failed to provide her comment on the appeal on points of law lodged by the University. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention". See also *H.N. v. Italy* (dec.), no. 18902/91, 27 October 1998, *Kattan v. Romania* (dec.), no. 26850/11, 21 January 2014 and *Sydorenko v. Ukraine* (dec.), no. 73193/12, 18 February 2021.

[27] As in *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008 (in which the applicant had been subject to a restriction on his movements in respect of other proceedings which entailed that he should not leave a particular village without an authorisation from the public prosecutor's office. However, in violation of this restriction and without informing the prosecuting authorities of his new address, he had changed his place of residence and there was no indication or claim that he had good cause in violating the restriction order or that he had moved for reasons beyond his control) and *Vyacheslav Korchagin v. Russia*, no. 12307/16, 28 August 2018 ("the Court considers that the applicant should have realised that, following the compiling of the offence record, he was about to be cited before a commercial court and that a related notification would be sent to his registered residence address, at which he was, probably, not actually residing but remained formally registered" (para. 77))

[28] *Berestov v. Russia*, no. 17342/13, 18 May 2021; "38. In the present case, as regards address no. 1, the domestic court received confirmation that the applicant did not live at that address, made appropriate arrangements to ascertain the applicant's place of residence, recorded the relevant information in its decision of 4 May 2011 and referred the case to another court (…). Subsequently, that court sent the summons to three of the applicant's different addresses of which it was aware and additionally asked the Administration to serve the summons on the applicant (…). 39. By 24 June 2011, the date of the hearing on merits at the District Court, the court had received confirmation from the Administration that the applicant was not available at address no. 3 and that his mother had stated that he was living at address no. 1 (…). 40. It seems that on 24 June 2011 the applicant was registered at address no. 3 but lived at address no. 2 (...). Despite the fact that the domestic authorities made efforts to deliver the summons, the conclusion cannot be made that they complied with their duty to duly notify the applicant of the hearing. The domestic court did not verify whether the summons was delivered to address no. 2 or returned to the sender, nor did it attempt to resolve the confusion arising from the contradictory information about the applicant's place of residence."

[29] *F.C.B. v. Italy*, no. 12151/86, 28 August 1991; "34.In the Government's opinion the applicant was responsible for the position, in that he failed to take the necessary steps, either before or during the hearing on 9 April 1984, to prove that he was indeed unable to attend and in that he omitted to inform the appropriate authorities of his change of address. They suggested that this

37. Particular attention will be paid to what is stated in a judgment concerning efforts to contact an accused.[30]

38. It is possible that the gravity of an alleged crime and the public interest in effectively prosecuting it – such as a war crime in the situation of escalating war - and the fact that the accused live in a territory outside of the authorities' control could justify the conclusion that holding a hearing in their absence would not in itself be contrary to Article 6, even though the authorities had been unable to notify them of the proceedings or to secure their presence.[31] However, that would not mean that a fresh determination would not then be required.[32]

F. Evasion

39. Although trial *in absentia* is acceptable where the accused are aware of the proceedings against them but has chosen to evade them, it is for the authorities to prove that they did intend to evade justice.[33]

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was an attempt by him to delay a verdict which was bound to be adverse. 35.The Court considers these two criticisms to be unfounded. As to the first point, it has not been shown that Mr F.C.B. was aware of the date of the trial. As to the second point, the applicant's conduct may give rise to certain doubts but the consequences which the Italian judicial authorities attributed to it are - in the light of the information available to the Milan Assize Court of Appeal on 9 April 1984 - manifestly disproportionate, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the above-mentioned Colozza judgment, Series A no. 89, p. 16, para. 32)"

[30] See, e.g., *Kolegovy v. Russia*, no. 15226/05, 1 March 2012 ("the Court observes that there is nothing in the text of the appeal judgment to suggest that the appeal court examined the question whether the applicants had been duly summoned, and, if they had not been, whether the examination of the appeal should have been adjourned. In fact, the court's reasoning in this respect was confined to a finding that the applicants had been apprised of the date of the examination of their case, without further details" (para. 41)) and *Gankin and Others v. Russia*, no. 2430/06, 31 May 2016 ("the appeal judgments do not mention any proof of receipt of summonses by the applicants or any analysis as to whether or not it might be necessary to adjourn hearings pending their proper notification. Nor did they say anything about the nature of their legal claims which might have rendered their presence unnecessary. It follows that the arguments raised by the Government were not tested in the domestic proceedings and appeared for the first time in the proceedings before the Court. The Court reiterates in this regard that that a lack or deficiency of reasons in the domestic decisions cannot be made up *ex post facto* in the Court proceedings, for it cannot take the place of the national courts which had the evidence before them. For that reason, the Court is unable to entertain the claims which the respondent Government raised for the first time in the proceedings before it" (para. 41).

[31] *Sanader v. Croatia*, no. 66408/12, 12 February 2015; "76. 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 the reason for his absence from Sisak at the time was to avoid 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 (…). In the case at issue these reasons were associated with the necessity to effectively prosecute the serious war crimes committed against the prisoners of war (…). 77. The Court has already accepted that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice (see *Colozza*, cited above, § 29). Thus, in the particular circumstances of the present case, given that 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 in itself contrary to Article 6. However, the Court is also mindful of the applicant's position, namely, the fact that it has not been shown that he had any knowledge of his prosecution and of the charges against him or that he sought to evade trial or unequivocally waived his right to appear in court".

[32] A point specifically underlined in the Sanader case by the European Court: "78. The Court thus considers that when domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in the applicant's position, 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 (see *Colozza*, cited above, § 29 *in fine*). It therefore remains to be determined whether the domestic legislation afforded the applicant with sufficient certainty the opportunity of appearing at a new trial (see *Sejdovic*, cited above, § 101). In other words, the Court must establish whether the procedural means for retrial offered by the domestic authorities complied with the requirement of effectiveness (see *Medenica*, cited above, § 55)".

[33] See, e.g., *Colozza v. Italy*, no. 9024/80, 12 February 1985 ("Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General's records (via Fonteiana), yet it was known that he was no longer living there (…). The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor's office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr. Colozza's new address (…); it was thus possible to locate him even though - as the Government mentioned by way of justification - no data-bank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise

40. The fact that an accused is absent, abroad or untraceable is not sufficient for him/her to be declared as "a fugitive".[34]

41. Some circumstances can provide a sufficient basis to assume accused knew about proceedings,[35] while others may not[36].

42. Exercising the option recognised by law to oppose extradition cannot be interpreted as an attempt to evade trial.[37]

G. Waiver

43. Waiver of the exercise of a right guaranteed by the European Convention must always be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance, as well as not running counter to any important public interest.[38]

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in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner (see, mutatis mutandis, the Artico judgment of 13 May 1980, Series A no. 37, p. 18, para. 37). In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice" (para. 28)).

[34] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006; "99. (…) The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution (…). 00. In the Court's view, no such circumstances have been established in the instant case. The Government's argument is not based on any objective factors other than the applicant's absence from his usual place of residence, viewed in the light of the evidence against him; it assumes that the applicant was involved in, or indeed responsible for, the killing of Mr S. The Court is therefore unable to accept this argument, which also runs counter to the presumption of innocence. The establishment of the applicant's guilt according to law was the purpose of criminal proceedings which, at the time when the applicant was deemed to be a fugitive, were at the preliminary investigation stage" . See also *Abdelali v. France*, no. 43353/07. 11 October 2012, at para. 54 and *Yeğer v. Turkey*, no. 4099/12, 7 June 2022, at para. 34.

[35] See, e.g., *Nicolae Popa v. Romania* (dec.), no. 55242/12, 6 March 2018 (in which the conclusion that an accused was aware of the relevant proceedings was based on a the content of a statement showing that he must have known of the context and the framework of the accusations made against him and that he had not severed all ties with his family who had been informed of the proceedings) and *Rroku v. Albania* (dec.), no. 51830/16, 19 September 2023 (in which reliance was placed on a public interview of the accused from his prison cell in the United States for a TV show in Albania, where he claimed that he did not remember having committed the crime, allegedly suffering from amnesia, but admitted to having left the crime scene, having obtained a false identity and having illegally immigrated there).

[36] See *Pozder v. Croatia*, no. 56510/15, 13 January 2022; "37. In this connection, the Court observes that the applicant had personally participated in the initial stages of the investigation against him, before he was released from detention for the purposes of a prisoner exchange (…). Accordingly, he must have had some knowledge of the proceedings against him. However, after his departure from Croatia, there is no evidence that the applicant was ever notified of the ongoing proceedings against him, nor was he ever served with the indictment or summonses for trial hearings, or informed in any way by the Croatian authorities that the proceedings against him had continued or that he should inform them of a new address where the court summons could be served on him. 38. What is more, the Court notes that the applicant left Croatia as part of a negotiated prisoner exchange (…). However, there is no evidence that the domestic authorities ever tried to 'establish his whereabouts for instance through the official channels facilitating that exchange, to the extent they may be relevant, such as the Government Commission on Detainees and Missing Persons or the International Red Cross'. 39. In any event, given the conditions of the escalating war in Croatia at the material 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 indictment or to secure his presence at the trial. It was also highly improbable that he could have had knowledge of the continuation of the criminal proceedings against him (compare *Sanader*, cited above, § 76).

[37] *Baratta v. Italy*, no. 28263/09, 13 October 2015, at para. 116.

[38] See, e.g., *Kemal Kahraman and Ali Kahraman v. Turkey*, no. 42104/02, 26 April 2007 ("31. The Court finds that, contrary to the Government's contention, the fact that the applicants raised no objections when the Bandirma Criminal Court took their statements does not signify that they implicitly waived their right to defend themselves or to appear before the Niğde Criminal Court"), *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012 ("178. The Court discerns nothing in the material in its possession to suggest that the judge had either issued a warning or considered a short adjournment in order to make the applicant aware of the potential consequences of his ongoing behaviour in order to allow him to compose himself. In such circumstances, the Court is unable to conclude that, notwithstanding his disruptive behaviour, the applicant had unequivocally waived his right to be present at his trial") and *Petrina v. Croatia*, no. 31379/10, 13 February 2014 ("54. Moreover, as the applicant pointed out in his appeal (see paragraph 27 above), he was never informed that the physician had been summoned to the trial, and thus his relying on the medical expert report indicating that his appearance in court could only be possible in the presence of a medical team in no way signified that he has waived his right to defend himself and to appear before the trial court"). See also *Bacaksız v. Turkey*, no. 24245/09, 10 December 2019; "60. As regards the Government's argument that the applicant could not have been unaware of the civil proceedings lodged against him since in the criminal proceedings that court had requested certain documents and evidence from the Civil Court, the Court notes that there are several references to the civil proceedings in the minutes of the hearings of the Criminal Court as well as in its decision. That being so, there are no references in those documents to the names of the parties in the civil proceedings, a consideration which is important since there were more than two drivers implicated in the

44. Certainly, it cannot be concluded that the accused have waived their right to defend themselves in the proceedings where: they are not aware of the relevant proceedings;[39] they are untraceable;[40] or there is no procedure enabling detained persons to attend the hearing[41].

45. There should also be care in drawing any conclusions as to the reasons for the absence of persons from the trial.[42]

46. Moreover, before the accused can be said to have implicitly, through their conduct, waived an important right under Article 6 of the Convention it must be shown that they could reasonably have foreseen what the consequences of his conduct would be.[43]

47. It is possible that the circumstances may substantiate a waiver even though the accused has not received any official notification of the proceedings.[44]

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traffic accident, several injured passengers and two insurance companies. While the Court agrees with the Government that the applicant could have suspected that the civil proceedings in question concerned him, his lack of diligence is not sufficient for the Court to hold that it amounted to an explicit and unequivocal waiver of the right to participate in the civil proceedings. The same holds true as regards the Government's argument that the applicant's lack of diligence in updating his address with the traffic Registry should be taken as a waiver. The Court reiterates in that respect that the main precondition for waiving a right is that the person concerned is aware of the existence of the right in question, and therefore also aware of the related proceedings (see *Dilipak and Karakaya*, § 87; *Ažd*a*jić*, § 58; and *Gyuleva*, § 42, all cited above). It therefore rejects the Government's arguments on these points". See also *Ananyev v. Russia*, no. 20292/04, 30 July 2009. *Cf. Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017, in which it was established that the applicant had been duly informed of the existence of criminal proceedings against her, and of the offences with which she was charged. Indeed, she had acknowledged the offences and expressed her willingness to negotiate the sentencing conditions, and could therefore reasonably have expected to be summoned to appear before the courts. Nonetheless she had left the address which she had previously indicated to the authorities, without informing them of her change of address. The European Court thus considered that the applicant had knowingly and validly waived, by implication, her right to appear in person before the courts for the purpose of the criminal proceedings being conducted against her. See also the acceptance of a tacit waiver in both *Hermi v. Italy* [GC], no. 18114/02, 18 October 2006 (when the applicant, who was detained in prison, did not protest about not being taken to the hearing room) and *Di Silvio v. Italy* (dec.), no. 56635/13, 20 October 2015 (in which the applicant was aware of the proceedings and had produced a medical certificate to secure the postponement of the initial date set for the hearing).

[39] See, e.g., *Dilipak and Karakaya v. Turkey*, no. 7942/05, 4 March 2014; "It has not been demonstrated, or even alleged, that the applicant had been apprised of the proceedings from another source. The main precondition for waiving a right is that the person concerned must know of the existence of the right in question and, therefore, of the related proceedings".

[40] See, e.g., *Stoyanov-Kobuladze v. Bulgaria,* no. 25714/05, 25 March 2014 ("the Court (…) points out that the mere absence of the applicant from his usual place of residence and the fact that he was untraceable does not necessarily mean that he had knowledge of the trial against him" (para. 41).

[41] See, e.g., *Chernega and Others v. Ukraine*, no. 74768/10, 18 June 2019; "183. However, even if they had been notified, the applicants could not simply make their own arrangements to attend the hearings because they were detained. There had, therefore, to be a procedure in place, clearly established in law or in practice, for them to ask the authorities to bring them to the hearing. Moreover, that procedure had to be explained to the applicants by the authorities or easily consultable on the applicants' own initiative. Unless it is shown that those safeguards were in place, the Court cannot establish a valid waiver of the right to attend the hearings. 184. The Government have not shown that any such clear procedure was established at the time. In fact, domestic law does not appear to provide any such procedure in administrative offence cases (…)). 185. In such circumstances, it cannot be established in an unequivocal manner that the applicants waived their right to be present. In any event, it cannot be said that requisite safeguards were in place to ensure any waiver was effective".

[42] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006; "87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive" (latitante), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself".

[43] See, e.g., *Jones v. United Kingdom* (dec.), no. 30900/02, 9 September 2003; "In the present case, the Court notes that the applicant was aware of the date set for the start of his trial, and deliberately chose not to attend. However, as Lord Rodger of Earlsferry observed in the House of Lords, at the time of the applicant's trial it was not clearly established under English law that it was possible to try an accused in his absence throughout. The Court considers that the applicant, as a layman, cannot have been expected to appreciate that his failure to attend on the date set for the commencement would result in his being tried and convicted in his absence and in the absence of legal representation. It cannot be said, therefore, that he unequivocally and intentionally waived his rights under Article 6"). Cf. *Makarenko v. Russia*, no. 5962/03, 22 December 2009 ("The Court also considers that the applicant, being initially represented by three lawyers of his own choosing, could have been advised by his lawyers of the consequences of his refusal to attend the trial hearings and to terminate representation contracts and could have been expected to appreciate that his failure to attend and to retain counsel would result in his being tried and convicted in his absence and in the absence of legal representation" (para. 136) and *Bykhovets v. Russia* (dec.), no. 59743/10 17 September 2019 ("it is evident to the Court that the applicant learned about the quashing before the second trial on 5 October 2011 and deliberately chose not to attend. The Court considers that the applicant, as a former bailiff with legal knowledge, could have been expected to appreciate that his failure to attend the hearing would result in his being tried and convicted in his absence" (para. 27)). See also *Chong Coronado v. Andorra*, no. 37368/15, 23 July 2020.

[44] See *Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012, in which the European Court stated that it had: not ruled out the

48. Furthermore, there must be efforts to verify the situation.[45]

49. In addition, there can be no waiver even where the accused are aware of the proceedings concerned when it is actually impossible for them to attend them, such as where they are detained in another country.[46]

50. Such an impossibility might also be regarded as existing where there are other constraints on leaving a particular territory or on disregarding obligations that arise from military service.

51. Exercising the option recognised by law to oppose extradition cannot be interpreted as tacit waiver of participation in the trial.[47]

52. However, persons deliberately withdrawing from the proceedings[48] or choosing to leave the country[49] can be regarded as having waived their right to participate in them.

H. Legal representation in *in absentia* proceedings

53. The right of a person charged with a criminal offence to be effectively defended by a lawyer – guaranteed by of Article 6(3)(c) of the European Convention is a fundamental feature of a fair trial.[50]

54. The presence of the accused at the trial is immaterial for the realization of this right. In

possibility that, in the absence of official notification, certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and that he does not intend to take part in the trial or wishes to avoid prosecution. 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 (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 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 (see *Sejdovic*, cited above, § 99). Such circumstances are to be distinguished from the outright fact of fleeing from the crime scene in fear of prosecution or a general expectation that criminal proceedings might be instituted, which are not sufficient to justify the assumption that the accused was aware of the proceedings for the determination of the charges against him and has waived his right to appear in court. An assumption of that kind would risk undermining the very concept of the right to a public hearing within the meaning of Article 6 § 1 of the Convention as well as the notion of an effective defence guaranteed under Article 6 § 3 of the Convention, which includes the right of the accused to be informed promptly of the nature and cause of the charges against him, to have adequate time and facilities for the preparation of the defence and to examine or have examined witnesses against him" (para. 31).

[45] See, e.g., *Kaya v. Austria*, no. 54698/00, 8 June 2006; "30. As to the question whether the applicant had waived his right to be heard in person, the Court notes that the applicant, represented by his counsel, requested that an oral hearing be held by the Independent Administrative Panel in which he should be heard. The applicant was subsequently expelled to Turkey. The Independent Administrative Panel then scheduled a hearing to which the applicant was duly summoned *via* his counsel who had been required to inform the applicant. The Court reiterates that summons via counsel is not in itself in violation of Article 6 of the Convention. However, in circumstances where an accused has not been notified in person of a hearing, particular diligence is required in assessing whether he has waived his right to be present (see *Yavuz v. Austria*, cited above, § 49). 31. In the present case, counsel in disregard of his professional duties did not inform the applicant of the hearing. Counsel, however, told the Independent Administrative Panel that the applicant was not aware of the date of the hearing and reiterated the request that he be heard in person. In these circumstances, the Independent Administrative Panel could not consider that the applicant had unequivocally waived his right to be heard in person. Thus, the conduct of the proceedings *in absentia* was in violation of Article 6 §§ 1 and 3 (c) of the Convention".

[46] See, e.g., *Hokkeling v. Netherlands*, no. 30749/12, 14 February 2017: "62. The Court agrees with the Government that the applicant's arrest in Norway was a direct consequence of his own behaviour (compare, *mutatis mutandis*, *F.C.B. v. Italy*, cited above, § 35). It also recognises as legitimate the interests of the victim's surviving kin and of society as a whole in seeing the criminal proceedings against the applicant brought to a timely conclusion. Even so, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention, the Court cannot find that either the applicant's presence at hearings during the first-instance proceedings and the initial stages of the appeal proceedings or the active conduct of the defence by counsel can compensate for the absence of the accused in person (…)). 63. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention". *Cf. Năstase v. Republic of Moldova* (dec.), no. 74444/11, 4 December 2018, in which the applicant was considered to having largely contributed to bringing about a situation that prevented him from appearing before the courts given that he had fled abroad and had not informed them about his subsequent arrest in Russia.

[47] *Baratta v. Italy*, no. 28263/09, 13 October 2015, at para. 116.

[48] As in *Donnelly v. United Kingdom* (dec.), no. 43694/98, 27 January 2000 and *Makarenko v. Russia*, no. 5962/03, 22 December 2009.

[49] As in *Sulejmani v. Albania* (dec.), no. 16114/10, 19 June 2012.

[50] See, e.g., *Ibrahim and Others v. the United Kingdom* [GC], no. 50541/08, 13 September 2016, at para. 255 and *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, at para. 123.

particular, a denial of the possibility of being represented by a lawyer cannot be used as a sanction to secure the accused's presence at a hearing.[51]

55. Moreover, the failure of a person convicted *in absentia* to comply with an arrest warrant does not justify her/him being deprived of the right to legal assistance.[52]

56. Thus, the courts should ensure that lawyers who attend trials for the apparent purpose of defending the accused in their absence are given the opportunity of doing so.[53]

57. Ensuring representation may require a hearing to be adjourned[54] or the appointment of a lawyer[55].

58. In the latter case, the right of defence by a lawyer of one's own choosing should be respected.[56]

59. Relevant and sufficient reasons are needed to justify the denial of access to a lawyer of one's own choice. If these do not exist, the European Court will proceed with the evaluation of the overall fairness of the proceedings.[57]

60. However, subject to these considerations, representation can be provided by a court-appointed lawyer.[58]

61. Representation by a lawyer for a person being tried *in absentia* may be undermined by the absence of adequate time to examine the case files.[59]

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[51] See, e.g., *Pelladoah v. Netherlands*, no. 16737/90, 22 September 1994, at para. 40, *Krombach v. France*, no. 29731/96, 13 February 2001, at para. 84 and *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008, at paras. 51-52.

[52] See *Karatas and Sari v. France*, no. 38396/97, 16 May 2002, paras. 52-62.

[53] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, at para. 93.

[54] As in *Goddi v. Italy*, no. 8966/80, 9 April 1984, in which an officially-appointed lawyer replacing the applicant's lawyer, who had not been notified of the date of the hearing, did not "have the time and facilities he would have needed to study the case-file, prepare his pleadings and, if appropriate, consult his client (cf. Article 6 para. 3 (b) of the Convention) (art. 6-3-b). Short of notifying Mr. Bezicheri of the date of the hearing, the Court of Appeal should - whilst respecting the basic principle of the independence of the Bar - at least have taken measures, of a positive nature, calculated to permit the officially-appointed lawyer to fulfil his obligations in the best possible conditions (…). It could have adjourned the hearing, as the public prosecutor's office requested (…), or it could have directed on its own initiative that the sitting be suspended for a sufficient period of time. No inference can be drawn from the fact that Mr. Straziani himself made no such request. The exceptional circumstances of the case - the absence of Mr. Goddi and the failure to notify Mr. Bezicheri - required the Court of Appeal not to remain passive" (para. 31).

[55] As in *Petrina v. Croatia*, no. 31379/10, 13 February 2014; "56. In any event, the Court notes that even if the trial court considered that the applicant had abused his rights by failing to appear at the hearing, and given that the applicant's lawyer had informed that court that she could no longer represent the applicant (…), it was incumbent on the trial court, under the relevant domestic law (…), to appoint a legal aid lawyer to represent the applicant at trial. The law is clear that a person charged with a criminal offence does not lose the benefit of the right to be represented merely on account of not being present at the trial (see *Sejdovic*, cited above, § 91). However, the trial court failed to ensure that the applicant had legal representation, which meant that the applicant's absence from the hearing prevented him from exercising both his right to be present at the trial and to be effectively legally represented thereby upsetting the equality of arms".

[56] As in *Lobzhanidze and Peradze v. Georgia*, no. 21447/11, 27 February 2020, in which the appointment of a legal-aid, with whom the applicant had had no contact and notwithstanding the existence of the extensive power of attorney issued by him which authorised the initiation and pursuit of all appeals, had precluded an appeal being lodged on his behalf.

[57] *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015, at para. 81.

[58] As was seen to have occurred in *Casandra v. Romania* (dec.), no. 36066/12, 13 November 2018 and *Vybornova v. Russia*, no. 34839/11, 26 March 2019. In the latter case, the European Court observed that "the applicant's interests during the proceedings were defended by a privately financed lawyer, Ms A., and a State-appointed lawyer, Ms Z. The State-appointed lawyer was notified of the various steps in the proceedings, including the applicant's conviction. It seems that in the beginning Ms A. had some difficulties in getting access to the case because she had failed to comply with certain formalities. However, she was allowed to engage in the case after the formalities had been respected. Moreover, it seems that she was in contact with the State-appointed lawyer and submitted an appeal against the conviction. In these circumstances, the Court cannot but conclude that the applicant's rights during the criminal proceedings were secured" (para. 32).

[59] As in *Nevzlin v. Russia*, no. 26679/08, 18 January 2022; "144. The Court observes that the applicant was charged with six episodes of murder and attempted murder. The final indictment was adopted and sent to the trial court on 14 February 2008, together with the criminal case file which consisted of eighty-four volumes with about 19,000 pages in total (…). 145. At the preliminary hearing, on 6 March 2008, the applicant's chosen lawyer, Mr Kharitonov, received a copy of the indictment for the first time. From that day onwards he had fourteen days to examine the case file before the beginning of the trial on 19 March

62. Complaints about the ineffectiveness of the defence provided by a court-appointed lawyer should be raised in any appeal.[60]

I. Requirements for a fresh determination

63. Although proceedings that take place in the accused's absence are not in themselves incompatible with Article 6 of the Convention, a denial of justice will nevertheless undoubtedly be regarded by the European Court as having occurred where persons convicted *in absentia* are subsequently unable to obtain from the courts a fresh determination of the merits of the charge(s), in respect of both law and fact, where it has not been unequivocally established that they either had (a) waived their right to appear and to defend themselves or (b) intended to escape trial.[61]

64. Furthermore, persons charged with a criminal offence must not be left with the burden of proving that they were not seeking to evade justice or that they had waived their right to take part in it.[62] There must, therefore, be cogent evidence that this was the case where it is sought to preclude them retrial after any conviction *in absentia*.

65. However, where the accused were aware of the proceedings against them, the fact that there was an opportunity for them to present their defence before the domestic courts through a legal representative may be a reinforcing factor in determining that they need not be afforded the possibility of having a fresh determination of the merits of the charge.[63]

66. The right of a person charged with an offence under Article 6(3)(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him is still applicable even if he or she is absent from the trial.

67. It will, therefore, be material to the issue of whether a trial was fair at which persons did

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2008, but he managed to review only ten out of the eighty-four volumes (…). 146. Contrary to the Government's submission that the defence, namely the appointed lawyer, A.L., had properly examined the case file before the trial (…), the Court notes that at the very first hearing, the judge released A.L. from the applicant's representation in view of the fact that Mr Kharitonov was representing the applicant (…). A.L. did not represent the applicant during the trial, nor did he work in collaboration with the applicant's chosen lawyer. It is therefore irrelevant that A.L. had examined the case file since he stopped representing the applicant from the start of the trial (…). 147. The Court will further examine whether, in the circumstances of the case, the two weeks granted to Mr Kharitonov to examine the case file were sufficient. In so far as the Government argued that the applicant's chosen lawyer had been given an opportunity to examine the criminal case file, the Court observes that the investigator did indeed invite the applicant's lawyer to consult the case file twice in December 2007 (…). In response, on 20 and 24 December 2007, Mr Kharitonov dispatched letters to the investigator, asking for an appointment on other dates (…). 148. Assuming that the investigator received the lawyer's letters with a delay, on 10 January 2008, owing to factors beyond the control of either of them, the Court observes that the investigator's replies were dated 12 and 15 January 2008, and in those replies he again invited Mr Kharitonov to examine the case file (…). However, for an unexplained reason, the investigator's replies were dispatched with a delay of about three weeks, on 4 and 5 February 2008 (…), and the applicant's lawyer received them only on when the indictment and the case file had already been sent for trial (…). Accordingly, the Court rejects the Government's argument that the applicant's lawyer had an opportunity to examine the criminal case file before the trial. 149. Lastly, the Court notes that at the preliminary hearing the trial court acknowledged this issue and tried to redress it by granting the lawyer two weeks to examine the case file. However, the Court considers that the time granted by the court was insufficient to examine a 19,000-page case file involving accusations concerning several episodes of murder and attempted murder (see *Öcalan v. Turkey* [GC], no. 46221/99, § 147, ECHR 2005-IV, where the Court found that two weeks given to the defence to examine 17,000 pages of the criminal case file were insufficient). The Court agrees with the applicant that out of the fourteen days granted, his lawyer had even less time, only seven and a half days, because of weekends and holidays at that time, which was insufficient to enable the lawyer to adequately assess the charges and evidence against the applicant in order to develop a viable legal strategy for his defence" (…). 150. In view of the above, the Court concludes that the applicant's lawyer was not afforded adequate time and facilities to prepare the applicant's defence before the trial".

[60] As was found not to have occurred in *Casandra v. Romania* (dec.), no. 36066/12, 13 November 2018.

[61] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006; "84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005). 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" (ibid., §§ 54-58)".

[62] *Colozza v. Italy*, no. 9024/80, 12 February 1985, at para. 30.

[63] As was the situation in, e.g., *Vybornova v. Russia* (dec.), no. 34839/11, 26 March 2019 and *Bykhovets v. Russia* (dec.), no. 59743/10 17 September 2019.

not appear that they had been provided with full, detailed information concerning the charges against them, and consequently the legal characterisation that the court might adopt in the matter.

68. Moreover, no obligation exists to grant a retrial where, to a considerable extent, the persons convicted had helped to create a situation that prevented them from appearing in the courts.[64] or possibly where they chose not to appear at the fresh determination[65].

69. It is essential that any decision taken to refuse the reopening of proceedings leading to a conviction *in absentia* be sufficiently reasoned and should not involve an excessively formalistic application the procedural rules applicable.[66]

70. The destruction of the case file is not a good reason for not having a retrial.[67]

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[64] As in *Medenica v. Switzerland*, no. 20491/92, 14 June 2001; "57. It is true that Article 331 of the Geneva Code of Procedure in principle allows persons convicted *in absentia* to have the proceedings set aside and to secure a rehearing of both the factual and the legal issues in the case. However, in the instant case, the Canton of Geneva Court of Justice dismissed the applicant's application to have the conviction quashed on the grounds that he had failed to show good cause for his absence, as required by that provision, and that there was nothing in the case file to warrant finding that he had been absent for reasons beyond his control (…). That judgment was upheld by the Geneva Court of Cassation and the Federal Court. In the Court's view, there is nothing to suggest that the Swiss courts acted arbitrarily or relied on manifestly erroneous premisses (see also *Van Pelt v. France*, no. 31070/96, § 64, 23 May 2000, unreported). 58. In the light of the circumstances taken as a whole, the Court likewise considers that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the Geneva Assize Court. It refers, in particular, to the opinion expressed by the Federal Court in its judgment of 23 December 1991 that the applicant had misled the American court by making equivocal and even knowingly inaccurate statements – notably about Swiss procedure – with the aim of securing a decision that would make it impossible for him to attend his trial. 59. In the light of the foregoing, and since the instant case did not concern a defendant who had not received the summons to appear (…), the Court considers that, regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant's conviction *in absentia* and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty. 53. Consequently, there has been no violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c)". See also *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008 and *Ejnid v. Romania* (dec.), no. 43469/15, 14 December 2021.

[65] *Eliazer v. Netherlands*, no. 38055/97, 16 October 2001, which concerned a system of legal remedies in the Netherlands Antilles, according to which only an objection can be lodged against a judgment passed *in absentia*, after which an appeal in cassation can be filed; "33. In the present case, unlike the situation in *Poitrimol*, *Omar* and *Khalfaoui*, cited above, the applicant was under no obligation to surrender to custody as a precondition to the objection proceedings before the Joint Court of Justice taking place. It was the applicant's choice not to appear at these proceedings because of the risk that he could have been arrested. Furthermore, unlike the situation in these cases, the path to the court of cassation opened itself to the applicant once he chose to be present at the objection proceedings (…). 34. Against this background the Court finds that, in the present case, the State's interest in ensuring that as many cases as possible are tried in the presence of the accused before allowing access to cassation proceedings outweighs the accused's concern to avoid the risk of being arrested by attending his trial (…). 35. In reaching this conclusion, the Court has taken into account the entirety of the proceedings, in particular the facts that the applicant's lawyer had been heard in the appeal proceedings before the Joint Court of Justice even though the applicant had not appeared at these proceedings – unlike the situation in *Lala* and *Pelladoah* on which the applicant relies – and that it was open to the applicant to secure access to the Supreme Court by initiating proceedings which would lead to a retrial of the charges against him subject to the condition that he attend the proceedings. In the Court's view, it cannot be said that such a system, which seeks to balance the particular interests involved, is an unfair one. 36. The decision declaring the applicant's appeal in cassation inadmissible cannot, therefore, be considered as a disproportionate limitation on the applicant's right of access to a court or one that deprived him of a fair trial. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention". See also *Chong Coronado v. Andorra*, no. 37368/15, 23 July 2020, in which the obligation for the applicant to appear in person in connection with a recurs d'audiència was not a disproportionate burden that could upset the fair balance between the legitimate concern of ensuring the enforcement of judicial decisions and the right of access to a court together with the exercise of defence rights. In the European Court's view, as the applicant had intended to raise a defence on appeal which concerned only the factual circumstances and the assessment of the evidence by the first-instance court, and not points of law, such a challenge, strongly linked to the principle of immediacy, was likely to prove futile without his physical presence.

[66] See *Lobzhanidze and Peradze v. Georgia*, no. 21447/11, 27 February 2020; "90. More importantly, when rejecting, in a final decision, the application for leave to appeal against the applicant's conviction by the first-instance court, the appellate court's only finding was that the documents available before it had not evidenced the applicant's will to have the appeal heard in his absence, as required by the legal provision concerning the appeals procedure in respect of in absentia convictions (…). However, the Court observes that the law in question did not specify how such a will should have been expressed. Therefore, such a refusal, without addressing the existence of the extensive power of attorney issued by the applicant after he had apparently become aware of the judgment against him, and authorising his lawyer to initiate and pursue all appeals before the domestic courts in his stead (…), had constituted an insufficiently reasoned and excessively formalistic application by the appellate court of a procedural rule". See also, *Y.B. v. Russia*, no. 71155/17, 20 July 2021, in which a request for the reinstatement of the time-limit for appeal was refused without a hearing, in a non-procedural letter stating that conviction *in absentia* was not amenable to appeal, which was incorrect.

[67] "when the applicant requested reopening on the basis of the new Article 362a of the CCP in February 2001 – approximately one year after his arrest –, the Supreme Court of Cassation refused, essentially on the ground that the case-file of the original

71. In addition, a requirement in order to be able to request a retrial for persons tried *in absentia*, who has not had knowledge of his prosecution and of the charges against them or sought to evade trial or unequivocally waived their right to appear in court, to appear before the domestic authorities and provide an address of residence in the country concerned during the criminal proceedings is likely to be regarded as disproportionate where they do not live in that country and this would entail them surrendering to custody there in order to secure the right to be retried even before the decision on reopening is taken.[68]

72. It does not matter whether the reopening of the proceedings takes the form of a fresh trial or an appeal against the original conviction,[69] which may have implications for the re-opening of the applicable time limits.[70]

73. It will be important that there should not be any objective obstacles to seeking the

proceedings had been destroyed in 1997, which, in its view, rendered a rehearing impossible in practice (…). In this connection, it is noteworthy that the applicant subsequently requested the restoration of the case-file by the Pernik District Court, but has apparently received no reply to his request (…). The applicant was thus deprived of the possibility to obtain from a court, which has heard him, a fresh determination of the merits of the charges on which he was convicted"; *Stoichkov v. Bulgaria*, no. 9808/02, 24 March 2005, at para. 57.

[68] See *Sanader v. Croatia*, no. 66408/12, 12 February 2015; "85. Firstly, this requirement essentially provided that individuals sentenced *in absentia* to imprisonment who did not live on the territory of Croatia, as was the case in the present application (see paragraph 25 above), could not apply for the, in principle, automatic reopening of the proceedings unless they presented themselves to the Croatian judicial authorities which would in the ordinary course of action mean that they would be deprived of their liberty based on their conviction (…). Only then, once the reopening was granted, which according to the materials available before the Court could even take more than a month (…), and once such a decision became final, would the enforcement of the sentence be stayed and, if there were no other grounds warranting pre-trial detention, the person concerned released pending trial (…). 86. As to the Government's suggestion that the enforcement of the sentence could be postponed even before a decision on the request for reopening was taken, the Court firstly notes that such a possibility primarily relates to the requests for retrial based on new facts and evidence and not for the requests for an automatic retrial of those tried *in absentia* (…). In any case, such a possibility is discretionary as the relevant domestic law provides no possibility for the convicted person to request its application and, in case of an unfavourable outcome, to have an opportunity to appeal (…). Moreover, the materials available to the Court do not show that any such consideration was given in the applicant's case (…). Therefore, given that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (…) the Court cannot accept that such a possibility was sufficiently probable in practice. 87. In this connection, in view of the obligation of persons who did not live on the territory of Croatia to appear before the Croatian judicial authorities as a requirement for seeking a retrial, which would in the ordinary course of action lead to their custody based on the conviction *in absentia*, the Court reiterates, as already explained above, 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 (…). 88. This does not, of course, call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law (…). However, if applicable, 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 his detention (…). 89. Secondly, 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 from a procedural point of view (…). 90. In this connection the Court notes that, under the relevant domestic law, the mere reopening of proceedings does not have any effect on the substantive validity of the judgment delivered in the previous proceedings. Such judgment remains in force until the end of the retrial and only then can it be set aside partially or in whole, or fully remain in force (…). Thus, had the domestic courts accepted the applicant's request and ordered a retrial, it would have postponed the execution of the judgment (…) but his conviction would not as such be affected. At the same time, the domestic authorities would have allowed the applicant an opportunity to seek a retrial without bringing him to a situation where he would trade that opportunity with his liberty. It would then have been the applicant's responsibility to participate effectively and diligently in the proceedings. His failure to do that would legitimately have led to the discontinuation of the proceedings and his previous conviction being upheld (…)" (case references and cross-referencing omitted).

[69] *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006; "127. In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (…), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (…)".

[70] See *Y.B. v. Russia*, no. 71155/17, 20 July 2021, in which the applicant was deprived of the possibility to have a hearing – even in his absence – on his request to have the time-limit for appeal reinstated so that this also deprived him of a possibility to exercise the right of appeal effectively. See also *Baratta v. Italy*, no. 28263/09, 13 October 2015, in which the belated reinstatement of the time limit and the subsequent finding that the applicant had wrongly been declared as "eluding arrest" could not provide *a posteriori* justification for a deprivation of liberty which extended over approximately nine years and nine months.

reopening of the proceedings[71] or insufficient certainty as to the availability of such a possibility[72].

74. Moreover, the court determining the relevant application should not reject it through an insufficiently reasoned and excessively formalistic application of a procedural rule[73] or in a manner that could otherwise be regarded as unfair[74]. However, time-limits that are not rigidly enforced can be applied.[75]

75. Whatever the procedure used to reopen the proceedings, the need is for all the issues raised by the case to remain open during the re-opened proceedings, meaning that: (a) all the evidence should be examined in adversarial proceedings in the presence of an accused; and

[71] See, e.g., *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006 ("103. In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time, the Court would simply reiterate the observations it set out in connection with the preliminary objection (…). It notes again that the remedy provided for in Article 175 §§ 2 and 3 of the CCP, as in force at the time of the applicant's arrest and detention pending extradition, was bound to fail and there were objective obstacles to his using it. In particular, the applicant would have encountered serious difficulties in satisfying one of the legal preconditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition (…). Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected. The applicant might have been unable to provide convincing explanations, when requested to do so by the court or challenged by the prosecution, as to why, shortly after the killing of Mr S., he had left his home without leaving a contact address and travelled to Germany. Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 § 2 of the CCP (….). 104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence. It has not been argued before the Court that the applicant had any other means of obtaining the reopening of the time allowed for appealing, or a new trial") and *Pozder v. Croatia*, no. 56510/15, 13 January 2022 ("44. As to the remedy under Article 501 § 1 (3) of the Code of Criminal Procedure, the Court has already established in *Sanader* (…) that it did not guarantee effectively and with sufficient certainty that the applicant would have the opportunity of a retrial. Using this remedy, the applicant was essentially required, simply in order to obtain a retrial, to challenge the factual findings of the final judgment by which he was convicted – and this by submitting new facts and evidence of such strength and significance that they could at the outset convince the court that he should be acquitted. Such a demand appears disproportionate to the essential requirement of Article 6 that a defendant should be given an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him, an opportunity which the applicant never had (…). 45. In the light of the foregoing, the Court considers that the applicant 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 accordance with his defence rights".

[72] See, e.g., *Dimchevska v. North Macedonia*, no. 13919/18, 4 April 2023; "14. As to whether the domestic legislation afforded the applicant with sufficient certainty the opportunity of appearing at a new trial (see *Sejdovic,* cited above, § 101), given that the order was never served on her the applicant was precluded from challenging it and, it appears, was also precluded from seeking *restitutio in integrum* under the relevant section of the Criminal Procedure Act. Furthermore, the applicant's request for reopening of the proceedings was to no avail (…). It cannot be held against her that the court-appointed lawyer failed to challenge the penal order. The Government did not substantiate with any examples of domestic case-law their argument that a separate action brought by the applicant against the lawyer, on which she could have hypothetically relied in a subsequent request for a retrial, would have been effective (…).15. In conclusion, the applicant, who was tried *in absentia* and did not seek to escape trial or unequivocally waive her right to appear in court, was not afforded with sufficient certainty the opportunity to obtain a fresh determination by a court of the merits of the charges against her with her defence rights fully respected (…)".

[73] As in *Osu v. Italy*, no. 36534/97, 11 July 2002 (in which a provision that automatically suspends the running of procedural terms from 1 August to 15 September each year and automatically postpones the starting-date for a term that starts running during this period until the end of such period was not applied, without any explanation in the applicant's case), *Lalmahomed* v. *Netherlands*, no. 26036/08, 22 February 2011(in which leave to appeal on the ground that the applicant's statement that his identity details had been systematically misused by someone else and that he had been acquitted by the courts several times already because of that had been discounted without further examination), *Sik v. Greece,* no. 28157/09, 29 January 2015 (in which appeals had been declared inadmissible on the ground that a specific document required (supplementary to the main notice of appeal) had not been signed by the Registry official who had received it), Topi v. Albania, no. 14816/08, 22 May 2018 (in which a holding that the time period for filing a constitutional complaint started to run already from a moment when the applicant was not aware of the existence of the judgment of the Supreme Court, with the result that this period had expired when he became aware of that judgment at the earliest so that it became impossible for him to effectively exercise his right to file such a complaint) and *Lobzhanidze and Peradze v. Georgia*, no. 21447/11, 27 February 2020 (in which there had been a refusal on excessively formalistic grounds (and without addressing the applicant's principal arguments) to allow an application for leave to appeal out-of-time).

[74] As in *Huzuneanu v. Italy*, no. 36043/08, 1 September 2016, in which the possibility of appealing had been refused on the ground that the lawyer assigned to him had already filed an appeal without his knowledge and the court had ruled on it.

[75] As in *Ioannis Papageorgiou v. Greece*, no. 45847/09, 24 October 2013.

(b) the accused should be able to examine, or have examined, the witnesses testifying against her/him in the proceedings concerned.[76]

76. Likewise, the accused may question, for example, whether the evidence obtained in the first trial might be used in the new proceedings against them (such as where a witness who was interrogated in the trial conducted *in absentia* dies before the re-opening of the proceedings).[77] In general, the authorities are expected to do everything reasonable to secure the presence of a witness.

77. An oral hearing may not be required in the case of minor offences.[78]

78. All of these requirements will not be satisfied where the only procedure available does not actually allow for a hearing to be held.[79]

79. However, where they are satisfied there will not then be a violation of Article 6.[80] A failure to make use of such a procedure that satisfies these requirements will, therefore, result in a finding that domestic remedies have not been exhausted for the purpose of an application to the European Court[81]

80. There is no general requirement for there to be a fresh composition for the court before which there is to be a rehearing[82] but this is subject to observance of the general requirements concerning impartiality[83].

81. When a person convicted *in absentia* is unable to obtain a retrial and this constitutes a breach of Article 6, the European Court tends to include retrial requirements in its judgments.[84]

J. Some consequential matters

82. A conviction *in absentia* coupled with the impossibility to obtain a fresh determination

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[76] As was found not to be possible in, e.g., *Fedorov v. Russia*, no. 63997/00, 26 February 2009, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, *Petrina v. Croatia*, no. 31379/10, 13 February 2014, *Coniac v. Romania*, no. 4941/07, 6 October 2015 and *Malo v. Albania*, no. 72359/11, 22 May 2018. However, the procedural shortcoming involved in a trial held *in absentia* has been regarded as having been remedied where only the accused's legal representative took part in proceedings before an appeal court that had full jurisdiction to examine the case; *Dumbrava v. Ukraine* (dec.), no. 57785/19, 20 June 2024.

[77] In accordance with the rulings in *Al-Khawaja and Tahery v. United Kingdom [*GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

[78] As in *Van Velzen v. Netherlands* (dec.), no. 21496/10, 17 May 2016.

[79] As in *M.T.B. v. Turkey*, no. 47081/06, 12 June 2018, in which the Government had submitted that the applicant had failed to ask the Court of Cassation to hold a hearing, and consequently should be considered to have waived that right. However, there was no legal possibility to hold a hearing before the Court of Cassation in the applicant's case, since the offence with which he was charged did not fall within the scope of the legislative provision concerned. As the applicant had no right to a hearing before the Court of Cassation, the European Court concluded that he could not be said to have waived that right.

[80] As in, e.g., *Jones v. United Kingdom* (dec.), no. 30900/02, 9 September 2003 and *Abazi v. Albania* (dec.), no. 48393/12, 28 February 2023.

[81] As occurred in *Casandra v. Romania* (dec.), no. 36066/12, 13 November 2018.

[82] See, e.g., *Thomann v. Switzerland*, no. 17602/91, 10 June 1996; "35 (…) As the Federal Court explained (see paragraph 13 above), judges who retry in the defendant's presence a case that they have first had to try in absentia on the basis of the evidence that they had available to them at the time are in no way bound by their first decision. They undertake a fresh consideration of the whole case; all the issues raised by the case remain open and this time are examined in adversarial proceedings with the benefit of the more comprehensive information that may be obtained from the appearance of the defendant in person. That is in fact what happened in the present case. Such a situation is not sufficient to cast doubt on the impartiality of the judges in question. 36. Furthermore, if a court had to alter its composition each time that it accepted an application for a retrial from a person who had been convicted in his absence, such persons would be placed at an advantage in relation to defendants who appeared at the opening of their trial, because this would enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction. In addition, it would contribute to slowing down the work of the courts as it would force a larger number of judges to examine the same file, and that would scarcely be compatible with conducting proceedings within a "reasonable time"".

[83] See, e.g., *Muca v. Albania*, no. 57456/11, 22 May 2018, in which the European Court did not, however, find that such fears as the applicant may have had as to the impartiality of the courts concerned to have been objectively justified.

[84] See, e.g., *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, paras. 125-126, *Zunic v. Italy*, no. 14405/05, 21 December 2006, paras. 73-75 and *Kollcaku v. Italy*, no. 25701/03, 8 February 2007, paras. 80-82.

of the charges against him from a court which had heard him will have implications for the compatibility of detention with Article 5. This is because a deprivation of liberty that flowed from proceedings that were manifestly contrary to the principles embodied in Article 6 - and thus amounting to a denial of justice - will, even if initially justified under Article 5(1)(a) for the purpose of enforcing a lawful sentence, will cease to be so once there is a refusal to reopen the proceedings concerned.[85]

83. In determining the length of proceedings, the time corresponding to delays caused by the accused's non-availability for justice - including where they have absconded and had to be convicted *in absentia* cannot be attributed to the State. However, delays in conducting a retrial, in particular ones resulting from periods of inactivity, could give rise to a violation of Article 6(1).[86]

84. The extradition or return otherwise of persons to a country where there were substantial grounds for believing that they would be unable to obtain a retrial there and would be imprisoned there in order to serve the sentence passed on them *in absentia* would raise an issue of compliance with the obligations of the High Contracting Party concerned under Article 6 of the Convention. However, no violation of Article 6 would result from extradition or return to that country where it obtained an acceptable undertaking that those persons would not have to serve the sentence that had been imposed on them *in absentia* .[87]

85. Persons who have been granted bail but avoid prosecution by staying out of the country, leading to their trial being held *in absentia,* are likely to have their security for bail forfeited where this was a breach of the conditions imposed.[88]

K. Conclusion

86. Thus, resort to trial *in absentia* can be compatible with the European Convention so long as there is appropriate observance of the above requirements relating to:

- waiver;
- information about the accusation;
- legal representation; and
- reopening of proceedings following a conviction.

87. The failure to comply with the applicable aspects of these requirements set out above was found to have occurred in *Sejdovic* itself, with the European Court considering that:

> *105. ... 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, did not have the opportunity of obtaining a fresh determination of the merits of the charges against him by a court which had heard him in accordance with his defence rights.*

and it has consistently applied those requirements in many subsequent cases.

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[85] *Stoichkov v. Bulgaria*, no. 9808/02, 24 March 2005, at para. 58, followed in *Garkavyy v. Ukraine*, no. 25978/07, 18 February 2010, *Sâncrăian v. Romania*, no. 71723/10, 14 January 2014, *Baratta v. Italy*, no. 28263/09, 13 October 2015, *Gumeniuc v. Republic of Moldova*, no. 48829/06, 16 May 2017 and *Yeğer v. Turkey*, no. 4099/12, 7 June 2022. No such violation was found in *Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012, where the applicant was also detained pursuit to a sentence passed to a conviction that could not similarly be impugned.

[86] In *Czimbalek v. Hungary*, no. 23123/07, 24 September 2013, even discounting the period of the applicant's non-availability, the length of proceedings leading to his initial conviction were considered excessive. However, that deficiency did not affect his retrial.

[87] As was the situation in *Einhorn v. France* (dec.), no. 71555/01, 16 October 2001. No such risk was found to exist in *Tomic v. United Kingdom* (dec.), no. 17837/03, 14 October 2003 *Cenaj v. Greece and Albania* (dec.), no. 12049/06, 4 October 2007. Moreover, in *Pirozzi v. Belgium*, no. 21055/11, 17 April 2018, the claim that the applicant had been convicted in absentia was held to be unfounded as he had been officially informed of the date and place of the hearing and he had been assisted and defended by a lawyer whom he had himself appointed. Moreover, that defence had been effective, in that it had obtained a reduction in his sentence.

[88] As in *Lavrechov v. Czech Republic*, no. 57404/08, 20 June 2013.

88. This means that there can be resort to trial *in absentia* where (a) the accused are aware of the proceedings against them but either chooses to evade them or unequivocally waives their right to take part in them and (b) where they are not aware of the proceedings. However, in the latter case, compatibility with the European Convention can only be secured by providing an opportunity to have the proceedings re-opened once they become aware of them.