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Criminal proceedings *in absentia*

Overview of the European standards regarding criminal proceedings held *in absentia*

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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*

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[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.

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]*.*

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

[8] No. 56581/00, 1 March 2006.

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.

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]

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[9] Emphasis added.

[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

21. However, the requirements do apply where the law precludes participation.[13]

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

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. 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

verify whether this has actually been received.[16]

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]

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[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, 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

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 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

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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).

[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.

necessary steps in order to ensure receipt of a notification of prosecution.[26]

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

[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 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))

accused ‘s address[28] and doubts should be resolved in favour of the accused[29].

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]

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[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 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)”.

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]

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

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[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 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.

interest.[38]

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]

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[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 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

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]

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]

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 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.

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 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-

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[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.

[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.

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]

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

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[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 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)".

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 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

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[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.

[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.

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]

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

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[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 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).

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 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

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[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.

[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

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 (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

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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.

[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"".

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 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

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[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.

[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.

- 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.

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.