

FACTSHEET

Trials *in absentia*

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A number of legal systems allow for trials to take place without the presence of the accused. This is known as a trial *in absentia*. British nationals may find that they have been tried and sentenced overseas in their absence and are subsequently arrested in order to serve the sentence that has been handed down. The law of each country relating to ‘trials *in absentia*’ will vary but this factsheet examines the general human rights issues involved.

Contents

1	Relevant international human rights law	2
2	Have the authorities made an effort to contact the accused?.....	2
2.1	How much effort do the authorities have to make to contact the accused? ..	2
2.2	What if the accused is notified of proceedings but does not come to court? .	2
2.3	What if the accused is unable to attend court due to illness?.....	3
3	What if the accused is notified of proceedings but is excluded from proceedings for being disruptive?	3
4	Are there any other protections that should be provided for a trial in absentia to be acceptable?	3
4.1	Is there possibility of a fresh determination of the merits in the presence of the accused?	3
5	Is there a right of appeal?.....	4
6	Death penalty	4
7	Extradition	4
8	Right to be present at appeal	4
9	Recent developments – moving away from trials <i>in absentia</i>	5
10	What to do if you have been convicted <i>in absentia</i>	5
11	Some of the countries that allow trials <i>in absentia</i>	5

1 Relevant international human rights law

The right to a fair trial explicitly includes the right to be tried in your presence¹. This is a key part of the right to defend yourself. There is also a right to defend yourself in person or through legal assistance of your choosing² which can only be exercised alongside the right to be present at your trial.

Despite these provisions, trials *in absentia* are not entirely prohibited by international human rights law. The UN Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights has said that, in some circumstances, trials *in absentia* are permissible in the interests of the proper administration of justice³. Nonetheless, trials *in absentia* are still only acceptable in exceptional circumstances and there are certain conditions that have to be met for a trial *in absentia* to be human rights-compatible.

2 Have the authorities made an effort to contact the accused?

In order for a trial *in absentia* to be compatible with international human rights law, the relevant authorities must have made an effort to contact the accused and their defence counsel to tell them of the trial. The accused must be told the date and location of the trial in sufficient time to allow them to prepare their defence and attend the trial. The Council of Europe Committee of Ministers recommends that 'no-one may be tried without first having been effectively served with a summons in time to enable him to appear and to prepare his defence'⁴.

2.1 How much effort do the authorities have to make to contact the accused?

The authorities have to use a degree of diligence in their efforts to contact the accused⁵. This includes where the accused is living abroad, especially if their whereabouts are known⁶. According to the Council of Europe recommendations, the accused must have actually been told of the proceedings against them before the case can go ahead in their absence. Therefore, within Council of Europe member states, trial proceedings should not go ahead if the person cannot be found and notified⁷.

2.2 What if the accused is notified of proceedings but does not come to court?

If the accused is notified of proceedings and fails to attend court, if the law of the country concerned allows it, the accused may lose their right to be present at their trial as they may be seen as deliberately trying to evade justice.

¹ Article 14(3) International Covenant on Civil and Political Rights (ICCPR)

² Article 14(3) ICCPR, Article 6(3)(c) European Convention on Human Rights, Article 8(2)(e) American Convention on Human Rights

³ See *Mbenge v Democratic Republic of Congo* CCPR/C/18/D/16/1977, decided 25 march 1983.

⁴ Council of Europe Committee of Ministers Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused.

⁵ In *Colozza v Italy*, (1987) 7 EHRR 516, this diligence was not found to have been used because other Government departments had been able to locate Mr Colozza for the purpose of other criminal proceedings (para 28),

⁶ *Mbenge v Democratic Republic of Congo*, *infra*

⁷ Although note that the Council of Europe Recommendation is not legally binding.

It is also possible for the accused to choose to waive their right to appear at trial. A waiver of this right cannot be presumed from a failure to respond to a Court summons⁸ and must be done explicitly and unequivocally, preferably in writing⁹.

If the accused has deliberately sought to evade justice by failing to attend court after they have been adequately summoned or has explicitly waived their right to appear at trial, they may not be entitled to a re-trial in their presence (see below).

2.3 What if the accused is unable to attend court due to illness?

It is unclear whether a Court can proceed with a prosecution where the accused is unable to attend due to illness or other factors outside their control. It is likely that in this situation, the case should not proceed.

3 What if the accused is notified of proceedings but is excluded from proceedings for being disruptive?

The right of an accused to be present at trial may be temporarily restricted if the accused disrupts the court proceedings to such an extent that the court deems it impractical to continue in his/her presence.

4 Are there any other protections that should be provided for a trial in absentia to be acceptable?

The Human Rights Committee has said that, in the exceptional circumstances where a trial *in absentia* is permissible, strict observance of the rights of the defence is all the more necessary¹⁰. A person charged with a criminal offence does not lose the benefit of the right to be effectively defended by a lawyer merely on account of not being present at the trial¹¹, whatever the reason why the accused is not present. The right to be represented by a lawyer of your choosing is not lost by the fact that you yourself are not present at court. The lawyer should have adequate time and facilities to prepare a defence and examine witnesses on behalf of the accused (in practical terms, these rights will be harder to achieve without the presence of the accused, which is why a retrial should be possible – see below). These rights apply even when the accused has forfeited their right to attend their trial by not turning up, explicitly waiving their right, or disrupting the court.

4.1 Is there possibility of a fresh determination of the merits in the presence of the accused?

When a trial *in absentia* has taken place, once the accused has found out about the proceedings, there must be an opportunity for a fresh determination of the merits of the case in the presence of the accused¹². Such a procedure can ‘cure’ the trial *in absentia*. Ideally, this should be accomplished by a retrial. It is not enough for there simply to be an appeal to decide whether the procedural conditions necessary for a trial *in absentia* to take place were met. It is open to question whether the requirement of a fresh determination applies when the accused has waived his right to be present¹³ or deliberately sought to evade justice by failing to attend court after they have been adequately summoned.

⁸ *Colozza v Italy*, *infra* para 28.

⁹ *Poitrimol v France*, judgment of 23 November 1993, Series A no. 277

¹⁰ Human Rights Committee General Comment No.14 13, para 11.

¹¹ *Poitrimol v France*, *infra* para 34.

¹² *Colozza v Italy*, *infra* para 29

¹³ *Poitrimol v France*, *infra* para 31

5 Is there a right of appeal?

As in all criminal convictions, there must be right of appeal in cases where the trial was conducted without the presence of the accused. This right is over and above the possibility of a retrial mentioned above and applies even if the accused has waived their right to be present or deliberately sought to evade justice.

6 Death penalty

In some countries, a person may be sentenced to death as a result of a trial at which they were not present. In these circumstances, the same right to a retrial applies. If the death penalty is at stake, it is arguable that there should be a retrial even if the accused has waived his right to be present or deliberately sought to evade justice.

7 Extradition

Cases may arise where a British national is arrested overseas (or in the UK) as a result of an extradition request from a third country where he/she has already been convicted of an offence in their absence. The procedure by which that extradition request will be considered by the requested country will depend on the extradition arrangements between the two countries involved and that law of the requested country. There may be human rights implications in such an extradition.

In many countries, an extradition may be refused if there is concern that the person to be extradited will be executed or is at real risk of torture in the requesting country. If a person has been sentenced to death in their absence, if the country from which their extradition has been requested has abolished the death penalty, they may seek assurances from the requesting country that the death penalty will not be carried out before agreeing to extradition. The UK will seek such assurances before agreeing to extradition.

Countries may also refuse extradition if they are concerned that the individual will not receive a fair trial in the requesting country. In cases where the individual has been tried *in absentia* they might refuse extradition without assurances that there will be a complete retrial.

8 Right to be present at appeal

The right to be present at appeal depends on the nature of the appeal, mainly whether it will consider issues of law or fact. If the Court will be considering issues of fact, the accused should generally be present¹⁴, although, this requirement may be satisfied if the accused's lawyer of choice is present.

If only issues of law are to be considered, it is sufficient if the lawyer of choice is present¹⁵. Further, if the lawyer fails to turn up to court or notify the appellant of the appeal, it may not be a human rights violation for the accused not to be present or represented in court at all¹⁶.

¹⁴ *Botten v Norway* (50/1994/497/579), 19 February 1996

¹⁵ *Henry v Jamaica* CCPR/C/43/D/230/1987, decided 19 November 1991

¹⁶ *Tripodi v Italy* (4/1993/399/477), 22 February 1994

9 Recent developments – moving away from trials *in absentia*

The international community seems to be moving away from the use of trials *in absentia*. The International Criminal Tribunals for Rwanda and the former Yugoslavia and the International Criminal Court rejected the use of trials *in absentia* for those that have committed the most serious offences (such as genocide and crimes against humanity).

International human rights organisations such as Amnesty International and Human Rights Watch have said that they do not agree with trials *in absentia* except for in very limited circumstances where ‘the accused has deliberately absented themselves from proceedings after they have begun or has been so disruptive that they have had to be removed temporarily.’ Both organisations believe that if someone is arrested after having been convicted *in absentia*, the verdict should be quashed and a completely new trial should be held before a different trial court.

10 What to do if you have been convicted *in absentia*

If you have been convicted *in absentia* the first thing to do is to contact a lawyer in the country where you have been convicted. A list of local lawyers can be obtained from the nearest British consulate. The first step your lawyer should take should be to request a retrial in your presence. If the relevant authority has not tried to contact you to tell you of your trial or your interests were not represented by a lawyer, there may be additional human rights issues that your lawyer should raise. In some circumstances, it may be possible for a UK-based lawyer from the FCO *pro bono* lawyers’ panel to be asked to assist with your case.

11 Some of the countries that allow trials *in absentia*

Below is a list of some countries which allow trials *in absentia*. This list is by no means complete, but does demonstrate that these trials are permitted in countries throughout the world. Generally, its use is restricted to countries with a civil law legal system such as continental Europe.

- Algeria
- Belgium
- Egypt
- France
- Italy
- Jordan
- US Federal law allows for trials in absentia in limited circumstances such as disruptive behaviour of the accused or when the accused flees in the middle of a trial. Individual states vary.
- Uzbekistan

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