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Videoconferencing in criminal proceedings

1 Introduction

Information and communication technology (IT) is going through a spectacular development. In less than 10 years, it has become possible to effect all information processing and communication anywhere and at all times in a safe, reliable and affordable manner. Virtual communication is developing at breakneck speed. Internet, email, smart phones, netbooks and iPads enable us to consult information and to communicate at any time. Working, together or alone, has become independent of time and place. It is impossible to imagine life today without the mobile phone, and 'free' communication tools such as Skype and Windows Live Messenger are becoming more and more popular. Video meetings and conferencing are used increasingly often. The difference between physical and virtual meeting is become smaller. This rapid development of information and communication technology does not pass the judiciary by unnoticed. The procedure before the courts used to be dominated by paper files, written exchange of documents and hearing persons in court, but these matters are changing fast. IT applications are increasingly applied when bringing cases before the court, preparing court sessions, hearing cases in court and when drawing up and publishing court decisions. Within the European Union (EU), many Member States are busy improving digital access to the administration of justice. Striving for digital access is one of the key objectives for EU judicial policy for the coming years. Videoconferencing is the central focus of this contribution.

2 European E-Justice action plan 2009-2013

The Ministers of Justice of the Member States of the European Union have decided to assign a high priority to E-Justice. The European E-Justice action plan 2009-2013 is intended to improve European and national procedures by making use of the possibilities offered by modern technology.[1] It is important in this connection that a great deal of legislation and regulations date from before the digital era. The possibilities offered by IT were not taken into account when said legislation and regulations were drawn up. Where the law, for example, requires identification of persons, signatures and sending documents or a personal appearance, it is not always clear whether this can also include digital identification, signatures or despatch and whether persons are allowed to appear by means of a video link. All of the above is often experienced as an obstruction to the progress of digitisation. It has to be clear whether the law allows the use of modern technology, and, if it does, the conditions under which this should happen. The E-Justice action plan intends to make a contribution to the above. In doing so, the focus is on four areas:

[1] (2009/C 75/01) http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:EN:PDF

Van der Vlis, E.-J. (2011). Videoconferencing in criminal proceedings. In Braun, S. & J. L. Taylor (Eds.), *Videoconference and remote interpreting in criminal proceedings*. Guildford: University of Surrey, 11-25.

- setting up a European E-Justice portal;
- deploying IT for communication between judicial authorities (cross-border videoconferencing has been designated a priority in that connection);
- using IT for specific procedures, for example the European order for payment procedure.[2]
- cross-border access to national registers, such as trade and insolvency registers, the land registry, Central Register of Wills, criminal registers and linking registers of legal interpreters and translators.

3 E-Justice portal

The E-Justice portal was launched in 2010. It forms a one-stop system. It focuses on citizens, companies, lawyers and judges with cross-border legal questions and promotes knowledge of the various legal systems. The portal contains more than 12,000 pages in 22 languages.[3] The portal site contains, for example, information on legal assistance, personal injury, training legal staff and videoconferencing, and links to judicial databanks and online insolvency registers and land registries. For example, a Dutch tourist can read in Dutch what his rights are as a traffic victim in Italy, and a Pole can read in Polish how to obtain legal assistance in Belgium. The portal will be further expanded to include interactive user options. It is the intention that as a result cross-border procedures can be conducted in a secure manner and in one's own language and that persons can also consult foreign registers in their own language.

4 Videoconferencing

The simplification and encouragement of the use of videoconferencing when hearing experts and witnesses is another component of the action plan. Hearing persons by means of videoconferencing refers to the situation in which a direct live image and sound connection is created between, for example, the judge hearing the case and the party being heard (for example a witness) with direct communication options for both sides. They are not present in the same room, but they can see and hear each other. The hearing party can ask questions and receive a direct answer as if the witness or expert were present in the same room. Hearing witnesses and experts by means of videoconferencing should be distinguished from recording a hearing on video with the aim of playing it back at a later stage, for example during the hearing in court. Characteristic of videoconferencing is that the hearing takes place directly, albeit by means of closed circuit video. This does not detract from the fact that hearings can be recorded on tape or disk.[4]

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2 http://eur-lex.europa.eu/Result.do?arg0=payment+procedure&arg1=&arg2=&titre=titre&chlang=en&RechType=RECH_mot&Submit=Search&ihmlang=en

3 https://e-justice.europa.eu/home.do

4 https://e-justice.europa.eu/content/Presentation.do?idTaxonomy=69&plang=en&init=true%vmac=iUbSi_fISE9lBi_tE6pwdPNeSKJOPos8A-VH6IkSGm9Ll3SV0i28d7NU51mU2BsibN5W5RnohdpLCCcBsz9XAAAEngAAAAH

4.1 Examples

The need for videoconferencing in criminal cases arose in first instance in countries with a large territory. The development of modern means of communication techniques in combination with the need to save time and money has led to the introduction of the possibility of hearing suspects, witnesses and experts by means of videoconferencing. Other reasons for introduction include:

- the wish to protect minor and other vulnerable witness from confrontation with the suspect;
- the reduced risk of escapes and problems that could arise from an escape, such as personal injury and mass police deployment;
- increasing the quality of the process: witnesses who otherwise would not be able, or in a less direct form, to contribute to establishing the truth, are now available to the parties and the judge;
- reducing delays because the suspect cannot be present in court on time as a result of traffic jams or for other reasons.

In Australia, a statutory regulation has for some time provided conditions for the use of videoconferencing when hearing the suspect. There is a separate regulation for hearing witnesses who reside abroad in cases concerning sex tourism involving children.[5] Canada has legislation in place for hearing witnesses by means of videoconferencing and recording statements that can serve as evidence.[6] Hearing witnesses by means of videoconferencing is applied on a large scale in the United States,[7] especially during the initial appearance, i.e. the first time the suspect is brought before the court (generally within 24 hours after arrest), and with respect to hearing a suspect who fails to pay a fine or compensation.[8] The suspect is usually located in a detention centre or a police station from which communication with the judge, who has to decide on the decision to detain the person involved, can take place by means of a closed circuit television system. The suspect's lawyer is also present at the place of detention. The Public Prosecutor is the same area as the judge.[9]

In Italy, the security of trials against mafia suspects provided a reason to introduce videoconferencing in criminal proceedings in 1992. This regulation was expanded significantly in 1998. The regulation is linked to the special detention status of the person to be heard. In addition to remote videoconferencing, hearing persons in another courtroom via videoconferencing has also been regulated. The same applies to splitting up the video image to observe several suspects remotely at the same time. Large numbers of suspects are mainly found in trials against members of the mafia.[10]

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5 Federal Magistrates Act 1999, s.69 and Crimes Act s 50EA.

6 Federal Court Rules 1998. http://www.canlii.org/ca/laws/regu/si-98-78/si-98-78.html.

7 It was decided in the case Edwards vs. Logan, 38 F. Supp. 2d 463, 465-68, that a prisoner who has initiated compensation proceedings against a guard guilty of using excessive force does not have the right to appear in person. The costs of transferring Edwards from New Mexico to Virginia would amount to $ 8652. http://www.wsba.org/info/bog/sept09tab16.pdf.

8 Mols, G.P.M.F. Het telehoren van verdachten en getuigen, Metro, 1995. Federal Rules of Criminal Procedure, Rule 5(f).

9 Law decree 356/1992.

10 Le procès à distance au moyen de la vidéoconférence: l'experience Italienne (A/Conf. 187/Italy/2).

Germany applies a regulation for hearing witnesses using videoconferencing whose wellbeing could be jeopardised. A similar regulation exists for hearing children and vulnerable witnesses. A regulation that provides for hearing witnesses, experts and suspects during the preliminary investigation using videoconferencing has been in place in Belgium since 2002.[11]

At the International Criminal Tribunal for the former Yugoslavia (ICTY), the judge can take measures to protect victims and witnesses pursuant to the Rules of Procedures and Evidence.[12] The International Criminal Court applies a similar regulation.[13]

This general overview makes it clear that videoconferencing is applied for various reasons.[14] Bridging large distances, which involves significant cost, and the efficiency gains to be made in that connection, particularly play a role in countries with an extensive territory and in international cooperation. The verification of provisional deprivation of liberty (initial appearance) concerns both shorter distances and the need imposed by law to perform the hearing within a relatively short period of time. Videoconferencing mostly prevents a large number of short-distance movements and in doing so can contribute to efficiency and cost savings. An entirely different reason is the application of videoconferencing with a view to the physical or psychological protection of witnesses (minors, victims of sexual abuse or protected witnesses). Hearing by videoconferencing can contribute to the protection of these witnesses against reprisal by the suspect and his/her accomplices. Improving the quality of the administration is also important. Witnesses who otherwise could not contribute, or not contribute as directly, to establishing the truth, can be heard using videoconferencing.

4.2 EU convention on mutual assistance

The use of videoconferencing is increasing all the time within the EU as a result of the EU convention on mutual legal assistance (Mutual Assistance in Criminal Matters between Member States). It has been laid down in this convention that Member States can make use of videoconferencing when performing cross-border witness hearings.[15, 16]

Article 10

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the

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11 Criminal Code § VII, article 112/317.

12 Rule 71bis – Rules of Procedures and Evidence (Testimony by Videoconference link). http://www.icty.org/.

13 http://www.icc-cpi.int/Menus/ICC/Legal+Texts+Tools/Official+Journal/Rules+of+Procedures+and+Evidence.htm

14 The E-Justice website contains information per Member State on the use of videoconferencing. https://e-justice.europa.eu/contentPresentation.do?idTaxonomy=151&plang=en&vmac=6PfEnQngpnf80JIWvBoLEl_T5MPbj5jBudB5G8N03mrxYOaqDzX9MOFZZ0fpZ3OsNoV4e-RttOsACOHMBYRObgAAG4sAAAAV

15 2000/c97/01. http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33108_en.htm

16 A treaty with a similar provision was signed between the EU and Japan. http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,nl&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=508413:cs&page=

hearing take place by videoconference, as provided for in paragraphs 2 to 8.

2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.

The above provision enables one Member State to request another Member State to hear a witness or expert using videoconferencing. In this case, the hearing is performed under the supervision of the requesting foreign authority, for example in Belgium, while the witness or expert is located in France. The laws of both Member States apply to the video hearing and the same rules apply that would apply to a hearing in which the witness is physically present. The consent of the person to be heard is required. In addition to hearing witnesses and experts, hearings using videoconferencing are also possible with respect to suspects, provided that the Member States involved consider this to be necessary, their judicial authorities agree thereto and the suspect consents as well (article 10, paragraph 9).[17]

5 Judicial cooperation

The argument for including the possibility of using videoconferencing in the EU convention is that the technology and quality of videoconferencing links have developed to such an extent that it is responsible to make use of it within the context of judicial cooperation. Judicial cooperation is high on the EU agenda. It has become simpler for persons to move from one Member State to another as a result of the disappearance of internal borders.[18] Millions of people now travel abroad, partly as a result of the emergence of low budget airlines. An ever larger group of persons move to a different Member State of the EU to settle there temporarily, to work or with the intention of settling there permanently. Increasing mobility is not limited to holidays and (labour) migration, but those involved in drug trafficking, human trafficking and financial fraud also benefit from the open borders. Criminal organisations easily move from one country to the next. Judicial cooperation and exchange of information is essential if the aim is to prevent offenders from moving from one Member State to another without being punished. This is why it was agreed during a session of the European Council in Tampere (1999) that mutual recognition of court decisions and judgments have to become the cornerstone of judicial cooperation within the EU.[19]

5.1 Mutual recognition

The starting point is that Member States recognise and implement each other's court decisions without a great deal of red tape. Said starting point is based on the notion that

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17 As regards civil law, the provision has been included in the EU Evidence Regulation that a court can request another Member State that use is made of videoconferencing. http://eur-lex.europa.eu/LexUriServ/LexUirServ.do?uri=OJ:C:2000:314:0001:0020:EN:PDF

18 http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration_/l33020_en.htm

19 The Presidency conclusions at the Tampere European Council, October 15-16, 1999 § 33-37.

there is mutual confidence among the Member States as regards the constitutionality, legitimacy and honesty of each Member State's legal system. The underlying thought in this connection is that all Member States are bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR). There are two sides to confidence. One the one hand, the implementing state whose cooperation is requested has to be confident that the procedure in the requesting Member State on which the request is based occurs in accordance with the law and the guarantees of the ECHR. The requesting state, on the other hand, has to be confident that the procedure in the implementing state also occurs in accordance with the law. Mutual recognition renders harmonisation of criminal justice systems – something that is considered a bridge too far in Europe[20] - unnecessary. Mutual recognition should thus facilitate judicial cooperation and prevent a thorough review of each other's criminal justice system.[21]

The first instrument that was based on mutual recognition is the European Arrest Warrant (EAW) that has replaced the various extradition procedures within the EU. This regulation makes it much simpler, for example, to extradite a British citizen who is alleged to have committed an offence during a holiday in Portugal to said country.[22] The number of requests for extradition between Member States has increased significantly as a result of this regulation.[23] There are furthermore (draft) framework decisions on the taking of evidence in criminal proceedings and the harmonisation of the criminalisation of, for example, human trafficking, money laundering, drug trafficking, terrorism and victim care, mutual recognition of default judgments and the implementation of criminal justice sanctions.

5.2 Roadmap Stockholm Programme

A problematic aspect of mutual recognition is that it mainly focuses on the repressive side of criminal law. It often fails to consider that in each Member State evidence is formed in a context of legal guarantees. That context makes the evidence legal and reliable, or illegal and unreliable. The relevant rules differ from country to country and the guarantees are shaped in different phases. For example, in Belgium the caution need not be given prior to a hearing, in Poland it is permitted to monitor communication between a lawyer and a detainee during the first fourteen days and in Finland nearly half of all criminal cases are settled without the presence of the accused or in writing.[24]

The context factors are removed if evidence is transferred to a different country without that country being allowed to consider its formation. If in France a lawyer is not

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20 National criminal law of all Member States was developed over centuries, it symbolizes a national identity and culture. Each Member State treasures its own characteristics.

21 Mutual confidence is also the essence of the ruling in the Güzütuk and Brügge Case 187/C and Case-385/01. According to the Court, it is necessary 'that Member States have mutual confidence in their respective criminal justice systems and that each Member State accepts the application of the criminal justice system in place in the other Member States, also if its own criminal justice system would lead to a different outcome.'

22 Several examples can be found on the Fair Trials International website. See: http://www.fairtrials.net/cases/spotlight/garry_mann/

23 http://ec.europa.eu/justice/policies/criminal/extradition/docs/com_2011_175_en.pdf

24 Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, Effective Criminal Defence in Europe, Intersentia 2010.

allowed to be present during every phase of the hearing of the witness, this is compensated in a later phase of the criminal proceedings. Mutual recognition compels the Member State to refrain from examining a specific aspect (the foreign evidence) concerning its compatibility with the right to a fair trial as laid down in Article 6 of the ECHR. As a result, mutual recognition can be on strained terms with Article 6 of the ECHR.

Practical application of the EAW raises questions regarding whether the same standards are applied throughout Europe, despite the fact that the law and criminal procedures in all Member States are subject to the standards of the ECHR. A person can apply to the European Court of Human Rights (ECtHR) to enforce his rights, but this is only possible if there is an alleged violation and all national remedies have been exhausted. It has become clear that this is not an effective means of guaranteeing that Member States comply with the standards of the ECHR.

This situation has prompted the European Commission to draft a roadmap to strengthen the procedural rights of suspects and accused persons in criminal procedures. This Roadmap comprises a phased plan that was included in the Stockholm Programme, which was adopted by the European Council in December 2009.[25] The first step is formed by the right established in October 2010 to interpretation and translation.[26] The next steps include a directive relating to the information on the rights of suspects, the so-called 'Letter of Rights'[27] and a directive on the right to legal assistance. Directives concerning vulnerable suspects and the right to communication of detained persons with family, their employer and the appropriate consulate are also anticipated.

6 Videoconferencing is not without problems

Hearing suspects, witnesses and experts by means of videoconferencing is not without problems. In the United States research has been carried out among users for some time.[28] Judges were generally enthusiastic about hearing using videoconferencing. They indicated that the handling of cases progressed more smoothly than in the case of traditional arraignments. Handling progressed more quickly (fewer delays caused by bringing in the suspect), while, in their opinion, the use of videoconferencing did not have a negative influence on control of the trial, the behaviour of the suspect or communication with him/her. Terry and Surette (1985) note in their video-based study that:

> They [judges] all felt the video either increases or has little effect upon the speed of the arraignments, the effectiveness of the defendant's legal representation, or the

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25 http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0036_en.htm and http://ec.europa.eu/.../planned.../22_jls_stockholm_programme_en.pdf

26 See the contribution of Caroline Morgan – The New European directive on the rights to interpretation and translation in criminal proceedings.

27 http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DisId=199549

28 Ray Surrete – W.C. Terry – Media Technology and the courts: the case of closed circuit video arraignments in Miami, Florida, 1990.

> humanization of the arraignment. Finally they felt that the use of video did not increase the likelihood of defendant's pleading guilty.[29]

Public Prosecutors were also enthusiastic, but less so than the judges. They considered that videoconferencing led to reduced quality of communication between the defendant and the other trial participants. The defence lawyers proved much more critical. According to the lawyers, the judge is less able to control the proceedings, communication is complicated and as a result the quality and effectiveness of legal assistance to the defendant is negatively influenced. Opinions differed among the defendants that were interviewed. The opinions of the defendants that were interviewed are set out in the table below.[30]

Survey item	**(N)**	**Yes %**	**No %**	**Unsure %**
I think that using video limited my ability to argue my case	345	31.6	64.3	4.1
There were questions I wanted to ask but didn't because I was on TV	338	20.1	78.4	1.5
I acted or spoke differently because I was on TV	339	18.9	78.4	2.1
The use of TV made me nervous	342	29.2	70.2	0.6
I feel that the use of TV violated my legal rights	342	15.2	79.5	5.3
If I wasn't on TV I would have pled differently	338	10.7	85.5	3.8
I think that using TV for court appearance is a good idea	348	72.1	20.4	7.5
I was happy with my televised court appearance	344	78.5	19.5	2.0
I feel that the use of video made my case go faster	340	84.4	12.1	3.5

American literature also highlights the risk that the wish to save costs will become dominant and that – despite criticism from defendants and lawyers – the application of videoconferencing will be expanded ever further. This may jeopardise the right to confrontation,[31] the right to due process, a public trial and the right to effective legal assistance. It is pointed out in this connection that pronouncing a judgment forms such a central element of criminal proceedings that it would undesirable in principle to sentence persons via a television screen. This in fact also applies to adopting a position with regard to the question of whether the defendant is guilty of the matters s/he is charged with.

Hoogstraten points out the risk that the parties involved will *stare* at the image instead of having actual eye contact (monitor capture or TV watching). If a defendant addresses the court and the judge is (unconsciously) staring at the TV screen (displaying the defendant) this can be very confrontational for the defendant.[32]

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29 Terry, W.C. and Surette, R. (1985), 'Video in the Misdemeanor Court: The South Florida Experience'. IN *Judicature* 69 (10), 18.

30 Terry and Surette (1985: 19).

31 The United States recognises the defendant's constitutional right to directly confront those who accuse him of a criminal act. This right has been laid down in the Sixth Amendment.

32 Hoogstraten, J. – Verdachten en verhoren, Amsterdam 1995.

Orie, a judge on the International Criminal Tribunal for the Former Yugoslavia, emphasises the importance of the procedural context in which videoconferencing is applied.[33] He emphasises the fact that the technical quality of videoconferencing is mainly a matter of money. A good connection is no longer a problem using current technology. However, the reason for using videoconferencing is often decisive for the procedural context. At a short distance, a lawyer will have a choice of being in court or with the defendant. That choice will often not exist if large distances have to be bridged. Who monitors the hearing and the room in which it takes place? Conversely, if the lawyer is not physically present with the defendant, this will not benefit the communication. A separate telephone line will not always prevent the defendant from feeling abandoned and alone. If the lawyer is present in the detention centre, he will miss direct contact with the judge and the impression that more is required to convince him will easily arise. Who bears responsibility for the hearing and according to what law (the right to refuse to give evidence, taking the oath and witness protection)? The answer to these questions is relevant to the decision to make use of videoconferencing.

7 Videoconferencing in relation to the ECHR

This paragraph deals with the question of how hearing via videoconference link corresponds to the demands it makes of the law of criminal procedure. Articles 5 and 6 of the ECHR are relevant in this context. Article 5 ECHR protects the personal freedom of citizens. If someone is deprived of his/her liberty such must occur in accordance with a procedure described in law. This provision grants a suspect who has been arrested the right to be brought before the competent court. Article 6 contains the principles for the proper administration of justice. For example, in the determination of his/her civil rights and obligations or when determining the lawfulness of a prosecution brought against him/her, everyone has the right to a fair and public handling of his/her case, within a reasonable term by an independent and impartial court. This concerns the principle of a fair trial.

Art. 5. Right to liberty and security

1. Everyone has the right to liberty and security of person.
   No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry

[33] Orie, A.M.M. – De verdachte in beeld?, Deventer 2004.

into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Art. 6. Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part in the trial of the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. 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;
   (b) to have adequate time and facilities for the preparation of his defence;
   (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.

Article 5, third paragraph, provides, briefly, that anyone who has been arrested or detained must be brought promptly before a judge. This provision serves to limit the actual possibility of arbitrariness and to prevent abuse of detainees. As far as is known, the ECHR never made any provision on the manner in which the arraignment before a judicial agency should be structured.

It is clear that when the ECHR as drafted in 1950, the physical arraignment of the defendant before the judge was assumed. The same applies to the hearing of witnesses and experts. On the other hand, the ECHR is a dynamic instrument that does not remain untouched by modern technologies. It is established ECtHR case law that the ECHR is "a living instrument which must be interpreted in light of present-day conditions".[34] The objective of the arraignment is important when answering the question whether,

[34] ECtHR 25 April 1978, Tyrer v. United Kingdom, Series A no. 26, at § 31.

according to current standards, a different manner of arraigning defendants or hearing witnesses can withstand review against the ECHR. The ECtHR rendered an opinion in this context in the Schiesser case.[35] According to the ECtHR, that objective lies in offering persons who have been deprived of their liberty a court procedure, by way of special guarantee, in order to prevent arbitrary deprivation of liberty and to ensure that the deprivation of liberty will be as short as possible. Article 5, third paragraph, ECHR contains, according to the ECtHR, a procedural and substantive requirement: the relevant authority will, on the one hand, have to hear the opinion of the defendant brought before it and, on the other hand, assess whether there are reasons for continuing the detention. In its assessment, it will also want to take into consideration whether the person is physically able to undergo detention and has not been subjected to disproportionate violence during arrest. In this light, physical arraignment is the starting point, but a different manner of arraignment using modern techniques need not be excluded in advance, provided the video and audio connection satisfies the relevant quality requirements.

7.1 The right to be present

According to the ECtHR, Article 6 of the ECHR provides for the right to be present at the hearing. Not until the defendant, or his lawyer, is present at the hearing, will he be able to exercise his rights such as examining witnesses. The term hearing will have a different meaning if videoconferencing is applied. The hearing will take place in the courtroom, but the judge and the others present in the courtroom will receive part of the proceedings via a video connection, which is different to the classic manner. The defendant is also present in court during the videoconference session, albeit not physically. The quality requirements set by law in respect of the audio and video connection can moreover ensure that the right to follow the court hearing is sufficiently implemented.[36]

The defendant has the right to participate actively in the court hearing. The defendant is in principle able to follow the proceedings, can ask questions and consult his lawyer via videoconference link.

It is furthermore important whether hearing by videoconference constitutes a sufficiently public handling of the case. The public nature of the hearings where this applies need not be impaired by a hearing using videoconferencing, provided the setup of the TV screens or other screens is such that persons other than the judge can also see the images. The requirement of a public handling of the case has been satisfied if any member of the public can have a seat in the courtroom in the customary manner and has a good view of the screens.

7.2 Hearing witnesses

Hearing an incriminating witness is partly intended to check his or her testimony for reliability and credibility. A direct confrontation can simplify this check because the judge of the defence is better able to respond to the body language of the witness. It is furthermore plausible that a witness is less inclined to lie during a direct confrontation.

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35 ECtHR 4 December 1979, Series A 34, at § 30-31.

36 ECtHR 23 February 1994, Series A, vol. 282-A.

The ECtHR has decided, however, that it is not necessary that incriminating witnesses are heard in all cases, provided the defendant has had an adequate and proper opportunity to examine the witnesses or have them examined.[37] All of the above does not detract from the fact that, according to case law of the ECtHR the right to examine witnesses can also be satisfied if the lawyer of the defendant has had the opportunity to ask questions. It will therefore depend on the specific case whether the absence of the defendant was so serious the right to examine witnesses was violated.[38]

In the case of Marcello Viola versus Italy[39] - a criminal case against a person suspected of several homicides and membership of the mafia – Viola, who was detained, had the opportunity during the appeal proceedings of attending his trial via videoconference link. He was also able to communicate confidentially with his lawyers. Before the ECtHR, Viola invoked violation of Article 6, paragraphs 1 and 3, of the ECHR. The ECtHR commenced with an explanation of the right of a defendant to personally appear at the criminal proceedings. The interests of victims and witnesses should not be disregarded in this connection, even if their interests are not included in Article 6 ECHR. Article 6 guarantees the defendant's right to actually participate in his trial. But the personal appearance of the defendant during appeal proceedings is not of the same importance as during the first instance, not even if the court of appeal is fully competent, both factually and with respect to the questions of law. The court of appeal in the Viola case was fully competent, both with respect to establishing the facts and the law. It had to assess the guilt or innocence of the defendant, which is why the defendant's participation in the trial was necessary. However, this can also occur via videoconference link. Italian law provides for this option. The ECtHR also pointed out several international law instruments that provide for participation in the trial using videoconferencing. Such a manner of participation is, in itself, not contrary to Article 6 ECHR. In the Viola case, the security risks inherent in transport had to be taken into account. Viola was accused of very serious, mafia-related crimes and the risk of collusion or escape was taken seriously. On the other hand, other considerations, such as the right to adjudication within a reasonable term, may be taken into account within the context of the decision whether the public debate after the first instance provided for a need. Using videoconferencing in this case served to protect public order, to prevent crime, to guarantee the rights of witnesses and victims, and to facilitate the handling of the case within a reasonable term. In order to answer the question of whether the manner in which the defendant was enabled to participate in his trial satisfied the requirements of Article 6 ECHR, the Court considered it important that the defendant could hear and see from detention the persons who played a role in the courtroom and that he could be heard and seen by the judges and witnesses. The defence lawyers were able to communicate with him in a confidential manner, both from the courtroom and in the place of detention. This manner of participation in the trial did not essentially prejudice the position of the defence when compared with the position of the other parties to the trial. The defendant had the opportunity to exercise the rights guaranteed by the requirements of due process and Article 6 ECHR was therefore not violated.

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37 ECtHR Saïdi v. France Publication: A 261 C.

38 ECtHR King/UK, 26 January 2010, no. 9742/07

39 ECtHR 5 October 2006, no. 45106/04 (Viola).

No violation of Article 6 §§ 1 and 3
Marcello Viola v. Italy (no. 45106/04)

The applicant complained that his participation in the hearing by videoconference had amounted to a violation of Article 6 (right to a fair trial). Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), he further complained that he had been tried twice for the same offence.

In the Court's opinion, it was undeniable that the transfer of a prisoner such as the applicant entailed particularly stringent security measures and a risk of absconding or attacks. It could also provide an occasion to renew contact with the criminal associations to which the applicant was suspected of belonging.

In the present case, the applicant was accused of serious crimes related to the mafia's activities. The fight against that scourge could, in certain cases, require the adoption of measures intended to protect, in particular, public safety and order and to prevent other criminal offences. With its rigid hierarchical structure and very strict rules and its substantial power of intimidation based on the rule of silence and the difficulty in identifying its followers, the Mafia represented a sort of criminal opposition force capable of influencing public life directly or indirectly and of infiltrating the institutions. It was not therefore unreasonable to consider that its members could, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, especially the victims and witnesses who had turned state evidence.

In those circumstances, the Court considered that the applicant's participation at the appeal hearings by videoconference pursued legitimate aims, namely the protection of public order, the prevention of crime, protection of the right to life, freedom and security of witnesses and victims of offences, and compliance with the "reasonable time" requirement in judicial proceedings. In addition, the Court found that the arrangements for the conduct of the proceedings had respected the rights of the defence. It therefore concluded, unanimously, that there had been no violation of Article 6 §§ 1 and 3.

The case of Zagaria versus Italy is also interesting.[40] In this case, the European Court did consider that Article 6, paragraph 3, at c, had been violated. In this case, a violation of Article 6, paragraph 3, at c, ECHR in combination with Article 6, paragraph 1, ECHR was assumed, because no confidential communication with the lawyer had been possible during the court hearing, because the telephone connection used for communication between the lawyer and the defendant had been tapped. This case also concerned crimes related to the mafia. Zagaria was located in prison and was connected to the courtroom by means of videoconference link. He communicated confidentially with his lawyer using the telephone. In the file, however, his lawyer found a written report drawn up by a police officer of a conversation with his client concerning a fax and a man called RG. It is essential to a fair trial that a defendant can give his lawyer instructions in a confidential manner when his case is discussed and the evidence is produced. A violation of Article 6(3) occurred, despite the fact that the lawyer did not find out that the conversation had been listened in on until after the trial. At that time, the proceedings against RG were still pending and several other procedures were pending as well. In view of the weak response of the government with respect to the police officer who had violated the confidentiality - said person was neither prosecuted nor subjected to disciplinary measures - there is no guarantee that the incident will not occur again. Zagaria had a justified fear that conversations were listened in on, which could be reason for him to hesitate to put forward issues that could be relevant to the case brought against him.

40 ECtHR 27 November 2007, no. 58295/00.

7.3 Position of the interpreter

There is no case law yet concerning the position of the interpreter during video-conferencing in criminal cases. In this connection, the general rule applies that the responsibility of the government is not limited to appointing an interpreter, but that it should also ensure that the interpreter and his/her interpretation are of sufficient quality. This is to guarantee that the right to the assistance of an interpreter free of charge is 'practical' and 'effective'. Sufficient quality is a logical consequence, as the right to the assistance of an interpreter would otherwise hardly be a safeguard. In the case of Cuscani versus England, the ECtHR further tightened this line.[41] Cuscani, the manager of an Italian restaurant, whose command of English was poor, was prosecuted for tax evasion. The judge had been informed, shortly before the hearing, of Cuscani's poor command of English and his inability to follow the trial without the assistance of an interpreter. The judge then decided that an interpreter had to be present during the court hearing. No interpreter was present during court hearing, however, and the judge was persuaded by Cuscani's lawyer to let communication progress via his brother. It was later established that the brother did not translate everything during the court hearing.

The ECtHR established that the judge was under the obligation to ascertain – following consultation with Cuscani himself – that Cuscani was able to fully participate in a trial that could potentially have serious consequences for him. The Court concludes that the judge failed to comply with this obligation: the judge did not consult with Cuscani himself and relied on Cuscani's brother without testing his language skills. According to the Court, it is correct that the actions of the defence are primarily a matter for the defendant and his lawyer. However, the ultimate guardian of the fairness of the trial is the presiding judge who was aware of the difficulties that could have arisen for the defendant in view of the absence of an interpreter. The ECtHR establishes in this connection that the national courts have argued themselves that the judges have to look after the interests of the defendant with scrupulous care:

> However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused's interest with 'scrupulous care'.[42]

If the services of an interpreter are used during videoconferencing, the judge, under whose responsibility the hearing takes place, will have to assess explicitly whether the assistance rendered by the interpreter can be considered to be of sufficient quality. In this respect, the judge cannot hide behind an excessively careless attitude on the part of the lawyer.[43] However, practice does contain many examples of situations in which the judge is not sufficiently critical where the quality of interpreters is concerned. Judges are, however, faced with a difficult task. They are expected, on the one hand, to monitor the reliability of the interpretation, while, on the other hand, they are usually unable to assess

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41 ECtHR 24 September 2002, application no. 00032771/96 (Cuscani versus United Kingdom)

42 ECtHR, Cuscani vs. United Kingdom, (2003) 36 EHRR 1, §39.

43 Also in the case of Hermi versus Italy, the ECtHR concludes that the judge is obliged to guarantee the effectiveness of the defence for the defendant, even if the defendant has not informed the competent authorities or contacted his counsel himself. ECtHR 18 October 2006, application: 18114/02.

the quality of the interpretation. The interpreter is responsible for her/his work, the judge for the entire case, including the interpretation that is at the basis of his/her ultimate decision. After all, it is the duty of the judge to establish the truth. Effective communication creates an important condition for complying with this responsibility and to guarantee the quality of the examination in court. This is only possible if communication with the assistance of an interpreter progresses without problem. The findings of tests conducted within the context of AVIDICUS make it clear that interpreting in criminal cases in which videoconferencing is used requires additional skills. It is generally accepted that that these skills can only be obtained in sound interaction with the legal practice. Deploying judges, police detectives, Public Prosecutors and lawyers as teachers in the training of interpreters is therefore essential. It is also important that judges, police detectives, Public Prosecutors and lawyers are aware of the (im)possibilities when working with an interpreter during videoconferencing. They should develop the skill to approach the activities of interpreters with a sufficiently critical attitude.

8 Some conclusions

The introduction of videoconferencing in criminal proceedings clearly has advantages. As regards witnesses, think for example of the protection of vulnerable witnesses or witnesses who, due to the large distance or otherwise, cannot be heard or only with great difficulty. There are also advantages in terms of costs savings and efficiency benefits with respect to the administration of justice, mainly as a result of decreasing movement of defendants and hearing defendants residing abroad. The technical possibilities seem limitless, but caution is required. Attending a trial remotely using videoconferencing is in itself not contrary to the ECHR, provided its application serves a legitimate purpose and the manner of implementation is compatible with the rights of the defence. Alienation or mechanisation of the administration of criminal justice can easily occur if videoconferencing is applied en masse. If society gets the impression that handling court cases using videoconferencing impairs the quality of the administration of justice, the danger arises that videoconferencing ultimately impairs the legitimacy of the administration of justice. This is all the more pertinent for defendants who doubt the quality of the proceedings and consequently the correctness of the outcome of their criminal proceedings. In view of the increasing use of videoconferencing, it is very important that, when training judges, Public Prosecutors and lawyers, there is also attention to the use of videoconferencing in legal practice. This also applies to being able to assess critically the quality of the assistance offered by an interpreter.