



# Webinar Report on **ONLINE COURT HEARINGS**



Joint Project on Strengthening the Criminal Justice System and the Capacity of Justice Professionals on Prevention of the European Convention on Human Rights Violations in Turkey

Prepared by  
Kanstantsin Dzehtsiarou



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Dmitry Gurin  
Feridun Yenisey  
John Wadham  
Lorena Bachmaier  
Maria Filatova  
Tugce Duygu Koksall

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All other correspondence concerning this document should be addressed to the secretariat of the project.

Council of Europe  
Ankara Programme Office  
Yıldızevler Mahallesi, R. Tagore Cad., Yunus Ensari  
İs Merkezi, No:10/7-8  
06550 Ankara, Turkey  
[cas.ankara@coe.int](mailto:cas.ankara@coe.int)

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## 1. Introduction

The Covid-19 pandemic brought an unprecedented challenge before the judicial authorities. As a result, they had to initiate various measures aiming to prevent spreading of disease but avoiding paralysing of the court system. Shutting all courts would not be an option because some cases are extremely time sensitive and the national authorities had to look for appropriate and human rights compliant solutions.<sup>1</sup> One of the most obvious solutions that would make court proceedings possible without exposing the stakeholders to the threat of virus are online or hybrid trials. Online hearings are those that take place exclusively online through various tools of video-conferencing. Hybrid hearings are those where only some parts of the hearings are taking place online, for example, interrogation of some witnesses or experts while other parts of the hearing are arranged face-to-face.

First of all, the report looks into the case law of the European Court of Human Rights which is relevant to online and hybrid trials. The Court's case law in this area is sparse and the Court will have to elaborate on its standards in this area. This report continues with a very brief overview of the law and practice in relation to online and hybrid trials in five states: Spain, Germany, Russia, United Kingdom and Turkey. This analysis is not comprehensive but only provides a general background of relevant regulations.

During the seminar two main blocks of questions were discussed. The first part concerned with various procedural issues related to online and hybrid trials. These issues included the appropriateness of online and hybrid trials and what sort of legal regulations are required for them. It also looked into facilitating of participation of witnesses and admission of written evidence. The issues of confidentiality of communication between lawyers and clients were also addressed. Finally, the seminar considered some technical issues related to online and hybrid trials and the need for sufficient training.

The second major issue raised at the seminar was about ensuring of the public character of civil, criminal and administrative trials held either online or in a hybrid format. It was pointed out that under the European Convention on Human Rights all criminal and civil trials should be conducted publicly unless there are weighty reasons to the contrary. It means that the total ban on public hearings would be a violation of Article 6 of the Convention.

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<sup>1</sup> A general overview of the measures adopted by various judicial authorities in Europe were compiled by the European Commission for the Efficiency of Justice (CEPEJ). See, <<https://www.coe.int/en/web/cepej/compilation-comments>>.

## 2. Speakers

Prof Lorena Bachmaier (Complutense University of Madrid, Spain)

Dr Maria Filatova (Higher School of Economics, Russia)

Mr Dmitry Gurin (European Court of Human Rights)

Mrs Tuğçe Duygu Köksal (Human Rights Center of Istanbul Bar Association)

Mr John Wadham (UK NPM)

Prof Feridun Yenisey (Bahçeşehir University, Turkey)

Dr Akif Yıldırım (Turkish Constitutional Court).

## 3. Brief overview of the case law of the European Court of Human Rights (ECtHR) concerning online trials

Although the ECtHR has considered some aspects of online and/or hybrid trials, the Court managed to set only general standards which require further clarification and consolidation. Undoubtedly, as a result of the COVID-19 crisis new applications will be submitted questioning the Contracting Parties' practices in the area of online and hybrid adjudication. This will be an opportunity for the ECtHR to develop a set of practical standards ensuring human rights compliance during online and hybrid hearings. One can make an educated guess that the number and spread of such hearings will continue to grow and therefore a more detailed set of standards is in order. This Section of the report will examine the general standards that the ECtHR has established by date.

In the leading Grand Chamber judgment on the issue *Saknovsky v. Russia*, the ECtHR stated:

[online] proceedings [are] not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that [the parties are] able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for.<sup>2</sup>

In effect all guarantees, that are provided by the European Convention on Human Rights should be ensured equally online and offline. Of course, conducting trials in the online or hybrid form should pursue a legitimate aim.<sup>3</sup> In the circumstances of pandemic moving trials into online or hybrid forms will pursue a legitimate aim of protecting public health but this should not undermine the fairness of the proceedings. The Contracting Parties should have a clear legal framework that would be able to guide the presiding judge as to what factors should be taken into consideration in deciding of whether to allow online or hybrid hearings or not. The presiding judge is in the best position to decide on the practical

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<sup>2</sup> *Saknovskiy v. Russia* [GC], no. 21272/03, 2 November 2010, para 98.

<sup>3</sup> See, *Marcello Viola v. Italy*, no. 45106/04, ECHR 2006-XI, para 68.

arrangements of the proceedings with the aim of ensuring the overall fairness. The decision shall be reasoned and provide for a fair balance of the rights of parties in the proceedings.

The online or hybrid hearings might interfere with human rights provided by Articles 3,<sup>4</sup> 5<sup>5</sup> and 6<sup>6</sup> of the European Convention on Human Rights. Under certain circumstances they can also interfere with other rights such as right to privacy (Article 8) or freedom of religion (Article 9) but this report will only focus on the former three rights.

### 3.1 Prohibition of torture, inhuman and degrading treatment (Article 3)

It seems that it is safe to suggest that everything that is considered as a prohibited conduct offline should be equally considered prohibited if it is done online. For example, holding a man in a cage during an online hearing amounts to degrading treatment.<sup>7</sup> It was previously established in a number of cases that similar conduct offline is a violation of Article 3 of the Convention.<sup>8</sup>

The national judge should have an opportunity to see and hear the victim of alleged ill-treatment well to be able to assess the extent of injuries. While this is not normally an issue during the face-to-face hearing, it might be more challenging during the online or hybrid trials.

### 3.2 Right to a fair trial (Article 6)

The ECtHR considered online and hybrid trials in the context of the right to a fair trial under Article 6 of the European Convention on Human Rights. The guarantees of this right are applicable to both civil and criminal trials. During online trials some requirements of fair trial become particularly important due to the nature of the online hearings. For instance, the Court stated that ‘the exercise of the right to legal assistance takes on particular significance where the applicant communicates with the courtroom by video link’.<sup>9</sup> The applicant and her defence lawyer should have enough time to prepare defence<sup>10</sup> and be able to communicate confidentially.<sup>11</sup>

### 3.3 Right to liberty and security (Article 5)

Online and hybrid hearings can be used in remand hearings (Article 5(3) and 5(4)). These hearings are often considered urgent and therefore online or hybrid formats can be justified in these cases. Article 5 establishes less strict procedural requirements than Article 6. For instance, here the hearing should not necessarily be public, Article 5 does not provide for a

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<sup>4</sup> Prohibition of torture.

<sup>5</sup> Right to liberty and security.

<sup>6</sup> Fair trial.

<sup>7</sup> *Karachentsev v. Russia*, no. 23229/11, 17 April 2018.

<sup>8</sup> *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, ECHR 2014.

<sup>9</sup> *Misyukevich v. Russia*, no. 63053/09, 30 April 2015, para 31.

<sup>10</sup> *Sakhnovskiy v. Russia* (n 2).

<sup>11</sup> *Ichetovkina and others v. Russia*, no. 12584/05, 4 July 2017.

right to free legal assistance and there is no obligation to adjourn hearings because of the absence of the accused's lawyer.<sup>12</sup>

Such hearings can be held online but the core requirements must be ensured such as adversarial character of the process, equality of arms, reasonable time to prepare and access to prosecution materials.<sup>13</sup>

#### 4. Brief overview of the states presented during the seminar

##### 4.1 Spain

There were legal provisions authorising hybrid hearings in Spain since 2003:

These procedural acts may be carried out through videoconference or another similar system that allows two-way and simultaneous communication of image and sound and visual, auditory and verbal interaction between two geographically distant people or groups of people, ensuring in any case the possibility of cross-examination and confrontation of the parties and the safeguarding of the right of defence, when so agreed by the judge or court.<sup>14</sup>

Since 2015 the use of electronic means of case processing increased. According to the Royal Decree on electronic communication in the Administration of Justice all communications with courts are done via LEXNET (electronically), no complaints or documents are allowed by other means. In Spain, hybrid trials were used regularly to interview witnesses, victims, experts especially when they reside far from the court. Special law was adopted in April 2020 to deal with procedural and organisational measures in the judiciary.

##### 4.2 Germany

German law was much less accepting online and hybrid hearings due to the principle enshrined in Article 230(1) StPO that the defendant needs to be physically present at the hearings. The same principle is applicable to witnesses (Article 250 StPO). For these reasons, there is no legal framework that would allow or regulate video online or hybrid trials. The protective measures were introduced in courts but not online or hybrid trials.

##### 4.3 Russia

In Russia, some participants in remote locations could be interviewed by videoconference. However, these technologies were used in 0.5% of cases only and depended on a type of courts (general courts or commercial courts). There were no cases of fully online proceedings before the COVID-19 crisis. The extent to which online and hybrid hearings were used after the beginning of pandemic depended on the type of the court. In December

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<sup>12</sup> See, *Lebedev v. Russia*, no. 4493/04, 5 October 2007.

<sup>13</sup> See, *Trepashkin v. Russia* (No. 2), no. 14248/05, 16 December 2010.

<sup>14</sup> Organic Law 13/2003, of 24 October 2020, which added section 3 of article 229.

2020, 98 out of 113 commercial courts got connected to the online hearing system. In criminal cases some elements of hybrid adjudication became more widespread post-COVID.

#### 4.4 United Kingdom

Many trials were conducted online in the United Kingdom. Some hearings of the UK Supreme Court were done online.<sup>15</sup> In relation to civil cases the Protocol Regarding Remote Hearings was adopted. It has set the key standards of online and hybrid hearings. For instance, 'The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions'.<sup>16</sup>

#### 4.5 Turkey

The Turkish legislation contains relevant articles that enable the court to carry out online or hybrid hearings. It is stipulated in the Judicial Reform Strategy Document which has been adopted after the pandemic broke out by the Ministry of Justice's Guidelines on New Working Principles in the Scope of Coronavirus Measures in Justice Services. As a result, it is possible to send a hearing request on the Lawyers' Portal, where lawyers can login via identity verification using e-signature, or "Inquire Hearing" menu on a mobile application (CELSE). After the judge accepts the request via UYAP (see section 5.5 of this report), the identity verification of the lawyers is made by electronic signature method. After the presiding judge confirms the information and photographs of the lawyers through the UYAP system, the e-hearing begins with the activation of the system. The e-hearing application has been implemented in the pilot courts since 12 September 2020. As of 31 December 2020, the number of courts where e-hearings are applied has increased to 405 in 30 cities. The system is currently being implemented in consumer courts, civil courts of enforcement, civil courts of first instance courts, cadastral courts and commercial courts of first instance.

Having said that, there are some difficulties related to the technological problems and also arising from the automatically use of the e-hearings (SEGBİS) in criminal cases regardless the respect to right to defence and procedural guarantees, in particular in respect of the audition of the accused and witnesses. The challenges related to the hearing of the vulnerable groups and the issues related to respect of private life should be taken into consideration and the legislation should be revised in this regard.

### 5. Procedural issues related to online or hybrid trials

#### 5.1 Online and hybrid trials should be compatible with the standards of human rights and the rule of law

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<sup>15</sup> See, <https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html>

<sup>16</sup> Civil Justice in England And Wales Protocol Regarding Remote Hearings 26 March 2020. < [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_.GenerallyApplicableVersion.f-amend-26\\_03\\_20-1-1-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1-1.pdf)>.



Online and hybrid trials should be conducted in accordance with the national laws and in compliance with the standards of the rule of law and human rights. The increased number of online and hybrid trials might require special guidelines and protocols developed by the rule-makers in collaboration with IT specialists and circulated among judges. Online and hybrid trials can be a way of facilitating the safe and effective environment of organising judicial activities both in short and long terms. However, the application of these solutions should be based on legal regulations reflecting predictable, consistent and clear principles.

As it was mentioned above, different states have different legal regulations of online and hybrid trials. In some countries, the legal regulations for some elements of trials through video-conferencing have been in existence for many years (Spain), in other countries these regulations are much more limited or totally absent (Germany). It seems safe to suggest that clearer regulations will be required in this area to facilitate safe adjudication in the circumstances of pandemic and at the same time ensure the fundamental rights of the stakeholders.

In Russia and the UK, the judicial authorities issued guidance related to online and hybrid trials.<sup>17</sup> In Russia the Draft Law on Online Proceedings was recently introduced by the Government. This law does not only cover technical issues but also ensures that procedural guarantees are maintained during online and hybrid trials.

The online system called 'SEGBİS' is used in Turkey. Even before the pandemic the Turkish Law allowed interrogation of certain witnesses through videoconferencing (anonymous witnesses (Article 139 CMK), witnesses whose life is under threat (Article 58 CMK)). Article 196 of the Criminal Procedure Code is useful here:

#### ARTICLE 196

(2) Except for the crimes that require imprisonment as upper level for five years and up, the accused may be interrogated through rogatory. The day that is set for the interrogation shall be informed to public prosecutor, to the accused and to his defence counsel. There is no obligation for the public prosecutor and the defence counsel to be present during the interrogation. Before his interrogation, the accused shall be asked if he wishes to be interrogated in the competent court or not.

(3) The record of the interrogation shall be read during the main hearing.

(4) In cases where the judge or the court deems it necessary, the interrogation of the accused who is present in homeland, may be conducted by video conference broadcasting simultaneously vision and voice transmitting, or his presence at the main hearing may be ordered.

(5) If as a result of some obligatory situations, such as illness or disciplinary measure or other necessary grounds, the arrested individual has been transferred to a

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<sup>17</sup> Supreme Court's Ruling issued soon after the lockdown was introduced (29 March 2020).

hospital or to a jail, which is not in the same jurisdiction with the trial court, the court may decide, that the accused shall not be transferred to the main hearing for a hearing that the court deems the presence of the accused is not necessary, if the accused had been interrogated previously.

(6) If it is difficult to be present at the trial for the accused who is in a foreign country during the determined trial day, the trial may be conducted on an earlier date, or he can be interrogated by letter of rogatory.<sup>18</sup>

The law in Turkey regarding civil cases was amended on 22 July 2020. Currently the relevant Article reads as following:

ARTICLE 149 - (Amended article and title: 7251 - 22.07.2020/a.17) (1) Upon the request of one of the parties, the court may decide that the requesting party or their counsel attend the hearing virtually.

(2) The Court may ex officio or upon request of one of the parties, decide on hearing the witness, expert or expert witness virtually through simultaneous transmission of their audio and video.

(3) The court may decide ex officio, in cases and affairs on which the parties shall not freely dispose, to hear the persons concerned virtually through transmission of audio and video at the same time.

(4) Due to actual obstacles or security reasons, the court may decide to hold the hearing elsewhere within the provincial boundaries, by obtaining the approval of the judicial commission of the regional court of appeal whose judicial locality it is placed in.

(5) The procedures and principles regarding the implementation of this article are determined in the regulation.<sup>19</sup>

These new regulations might be in conflict in previously established rights of the stakeholders in criminal and civil cases. For instance, the right of the accused to attend the hearing in person, the right to question witnesses and others. All these issues need to be carefully considered and every limitation of procedural rights should be compensated by additional safeguards.

## 5.2 Appropriateness of online or hybrid trials and the consent of the stakeholders

Online and hybrid trials are not appropriate in all cases and some flexibility should be allowed. The rule-makers should allow some discretion in deciding if a trial by videoconference is possible and desirable. The presiding judge needs to consider the impact of the possible delay on the rights of the parties, nature of the hearing, access and

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<sup>18</sup> Article 196 of the Criminal Procedure Code.

<sup>19</sup> Article 149.

availability of necessary equipment, the need to physically examine the evidence. Moreover, the consent of the parties might be required.

In Turkey the issue of consent has been under scrutiny of the Constitutional Court. In order to be justified, the application of 'SEGBIS' should have been freely accepted by the accused. The Constitutional Court of Turkey has emphasized this requirement in the *Şehrihan Çoban* case: If an accused person demands that she is physically present before a court then she cannot be forced to communicate with the court via video and audio transmission.

It is more challenging to ensure that the participants are not under pressure during the online and hybrid trials than during the face-to-face trials. For instance, the victims of domestic violence should not give evidence from home in the presence of the defendant. Those complaining about ill-treatment might not give their statements in a police station. If possible and necessary, the participants of online and hybrid trials should be able to observe all other participants.

### 5.3 Participation of witnesses and victims

During the online and hybrid trials the presiding judge should ensure that the witnesses and victims can take a proper part in the hearings. The Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings state that 'irrespective of whether evidence is transmitted via a private or a public connection, the quality of the videoconference should be ensured and the video signal encrypted to protect against interception'.<sup>20</sup> If the quality is unsatisfactory the trial needs to be adjourned.

In the UK special guidance notes were developed to assist witnesses in their participation in online hearings. The behaviour in video proceedings shall be the same as in courtrooms. However, some NGOs raise a question on inability of effective participation of witnesses with disabilities (especially communicative disabilities). For some category of witnesses, in contrast, remote participation in proceedings could be beneficial (for example, minors or victims of sex crimes).

The question on the available methods to secure the authenticity of the witness testimony during cross examination seems to have no solution at the moment and probably could be answered to by means of special technical solutions and regulation. In Russia, if the witness is giving her testimonies from another court, her identity is verified by the court clerk but if this is a fully online trial from a 'unofficial'<sup>21</sup> location then the issue of verification of identity remains a complex one. Having said that, the Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings clearly state that: 'The procedure and technologies applied to the taking of evidence from a remote

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<sup>20</sup> Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680902e0c](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680902e0c) para 5.

<sup>21</sup> Any place other than courts, police, prosecutor's office, detention centres etc.

location should not compromise the admissibility of such evidence and the ability of the court to establish the identity of the persons concerned'.<sup>22</sup> At the same time, the methods of identification should not undermine the guarantees under Article 8 of the Convention. The measures of identification should not be excessively intrusive, they should have clear legal framework. The received data should be stored securely and subsequent use of this data should be properly addressed.<sup>23</sup>

Overall, the effectiveness of participation of witnesses and general effectiveness of justice and fairness of the proceedings remain the paramount aspects when a judge is taking a decision about online or hybrid trials.

#### 5.4 Confidential communication between the parties and their lawyers should be ensured

The authorities should ensure that confidential communication is facilitated between the parties (defendants in criminal cases or parties in civil cases etc) before and during the online and hybrid trials. This recommendation is especially relevant if the defendant is in pre-trial detention. Client – lawyer communication in private during criminal proceedings is one of the guarantees under Article 6. The respective arrangements (including technical ones) during online hearings shall be given special consideration in order to avoid any instances of pressure or influence on the accused person (especially detained) which are not visible in the remote hearing.

In Spain, this problem was solved on an ad hoc basis by using mobile phones during the trials. It was also pointed out that in some other countries (Russia) it is not possible to use mobile phones in places of detention and therefore this solution is not particularly appropriate. In Russia, in December 2020, the system of online client-lawyer communication system was tested.

It is crucial to ensure that the communication between the client and her lawyer is confidential. It would be a violation of the European Convention if such communication is recorded or takes place in close proximity from the guards, bailiffs or any persons.

#### 5.5 Written evidence and case processing

The authorities need to introduce electronic case management systems linking all the stakeholders to facilitate social distancing before, during and after trials. In order to facilitate online and hybrid trials, the rule-makers might need to ensure that the new simplified rules related to the circulation of documents are introduced. According to the Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings 'Courts should not refuse electronic evidence and should not deny its legal effect only because it is collected and/or submitted in an electronic form'.<sup>24</sup> These rules however need not to compromise the authenticity of these documents.

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<sup>22</sup> Guidelines of the Committee of Ministers (n 20) para 4.

<sup>23</sup> See, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008.

<sup>24</sup> Guidelines of the Committee of Ministers (n 20) para 6.

Acceptance of scanned copies of documents and e-signatures might be appropriate in some cases.

In the UK electronic access and exchange of documentation is the normal practice for many years occurring at an early stage of the proceedings, especially in criminal cases. There is also an extensive use of email communication between the parties and the courts. Russia's experience during the crisis resulted in an increase of the online communication with the courts due to need for interaction and cooperation between the parties and the judges. Evidence presentation in Russia in online proceedings is normally facilitated by uploading all the documents before the trial. However, as the disclosure rule is not strict sometimes parties do not follow this requirement and present new documents through screen sharing during videoconference. This could jeopardise an efficient reaction by the other party to a new evidence provided in the hearing. In such cases the party which shall react to a newly presented document either does it online or asks for a break in hearing. Such issues do not occur in the UK as the parties are obliged to reveal their line of defence in pre-trial proceedings, failure to do it would lead to impossibility to rely on that defence during the trial.

The Turkish authorities have been developing UYAP (the National Judicial Network Project in Turkey) Automation System and its infrastructure for over twenty years. As a result of the gradual developments in this system, it is now possible to use e-signature to access the case file, the investigation documents if the prosecutor permits, send documents, bring a lawsuit or send a motion of objection, and appeal requests. Similarly, judicial fees and expenses can be deposited through this system. However, due to technological shortcomings, certain problems may be experienced while logging into the UYAP system, especially when during the periods of high demand. Lawyers and courts may not be able to log into the system, and the proceedings may be suspended because even though the hearings would take place in person, the case file is opened through UYAP in the courtroom. The same issue can also be experienced while establishing connection through the Audio and Video Information System (SEGBİS) due to technical errors. The fact that SEGBİS screens are too small and possible issues with the Internet Connection can undermine the effectiveness of this system and its compliance with human rights standards.

## 5.6 Technical support and training

The rule-makers should conduct a thorough human rights compatibility and technical assessment before introducing new courtroom technologies. The new rules should explain how the hearings are organised, what soft- and hardware is required, how the unsupervised communication of the parties with their lawyers can be arranged, what the presiding judge should do with disruptive witnesses or other participants, what to do when in case of bad connectivity, a participant cannot be heard and other comparable questions.

The judges, parties, court staff and all other participants should be able to access IT support in order to avoid delays and technical difficulties during online and hybrid trials.

Generic videoconferencing tools are appropriate as a temporary solution during the health emergency but more tailor-made tools are required in the long run. The authorities also need to ensure that the courts, pre-trial detention centres and other appropriate bodies have necessary equipment and software to facilitate online and hybrid trials.

As it was mentioned, the special platform 'SEGBİS' is available in Turkey. However, some participants expressed the view that it is difficult to see clearly the images while using this system and that it has its limitations. It was pointed out that it is important that the accused is seen and observed by the court in order to individualise the punishment. That is not easy to accomplish on SEGBİS screens.

In Russia, a special videoconference system is used in criminal proceedings but it is available only in authorised points, e.g. courts, remand centres and prisons; it facilitates examination of accused/ detainees / witnesses in another region but it is impossible to connect from home or other unauthorised place. In commercial courts the use of a special online platform is possible; parties and lawyers may connect from everywhere, there is a special identification procedure, but it is not used in ordinary (general) courts. During the lockdown there were some isolated cases of private web-platforms use, such as Skype and WhatsApp. In Spain, during the pandemic, Facetime, Skype, Zoom, and other platforms have been allowed for pre-trial detention hearings. From the ECHR standards standpoint, the choice of platform does not matter, as long as it provides sufficient quality of video/audio enabling parties to follow the proceedings and to participate in them and allows confidential communication between the defendant and her lawyer.

It has been identified that plenty of technical issues can happen during online and hybrid trials. It was stated that the judicial authorities should develop check-lists for judges and technical staff to ensure that the online or hybrid hearings take place without delays. Ideally, if time allows it is useful to have mock sessions before hearing. It is recommended by the International Chamber of Commerce for online arbitration.<sup>25</sup>

Judges, court staff and other professional participants of the online and hybrid trials should be provided with sufficient training in IT solutions as well as the standards of human rights protection during online and hybrid trials. The parties, defendants, witnesses and other ad hoc participants should be given instructions as to how to operate the soft- and hardware.

## 6. Ensuring public hearings

### 6.1 The hearings should be held public as much as possible

Online and hybrid trials should be made public as much as possible. According to Article 6 of the European Convention on Human Rights all hearings should be made public.

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<sup>25</sup> Checklist for a protocol on virtual hearings and suggested clauses for cyber-protocols and procedural orders dealing with the organisation of virtual hearings. < <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-checklist-cyber-protocol-and-clauses-orders-virtual-hearings-english.pdf>>.

'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in 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.'<sup>26</sup>

The publicity of trials can be ensured by allowing the public to join the online or hybrid hearing in real time or uploading the recordings to the court's website. Broadcasting of hearings could make the courts open and more accessible regardless of distances. But this could happen only in case when the information on the online hearings is publicly available.

As been stated, there are two key ways of public access to online or hybrid trials: in real time or in record. In the former case privacy of the participants to the hearing and respective risks for their privacy shall be taken into consideration. In the UK all the hearings of the Supreme Court are publicly available. However, real time public access to online hearings could produce such issues as Zoom bombarding, disruption by public, improper recording and privacy breaches. In Turkey, unauthorised recording of judicial hearings is a criminal offence. It almost impossible to prevent unauthorised recording if the hearing is broadcasted online. This issue needs to be addressed by the rule-makers. Some options in this respect were contemplated during the seminar: in the digital world the rule for not recording the hearing should disappear; or to prevent issues related to image/privacy rights, faces of defendants or other participants can be edited. The latter suggestion is however only possible in relation to the recorded hearings not the live ones. In Spain, up to now, there was no possibility to connect to online or hybrid hearings, and the physical presence was the rule.

Giving access to the recorded proceedings has its benefits as it allows to follow the process by a wide range of viewers but might be problematic as it leaves the digital footprint and can be accessed even years after the trial and even if it was deleted by the court. Immediate privacy concerns can be rectified in this case by editing the video. The European Court of Human Rights does not normally broadcast its hearings live but makes them available a couple of hours after the end of the hearings. That said, editing the recording will require investment of some resources. In Russia, many courts' official websites now have a folder 'Video-recordings' but in most cases it is inactive. One of the main reasons for that is the lack of technical resources.

National courts need to consider the privacy of the participants, the need to avoid disruptions of the hearings, the fact of whether the case is of public interest and other relevant considerations while deciding of whether to allow public to access the online hearing or upload the recordings. It is perhaps sensible to differentiate cases into the high-profile ones where more publicity is possible and into the regular ones in which online broadcasting might be less appropriate.

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<sup>26</sup> Article 6 ECHR.

## 6.2 Illegality of the total ban on public hearings

The blanket rule prohibiting the public from attending online, hybrid or regular trials is likely to be disproportionate and the authorities should find ways to allow some access to trials. In general, a 'balancing exercise' to be performed by a domestic court; here this exercise seems to be basically the same, as when it decides to hold hearings in camera. One of the most recent authorities on the issue is that case of *Yam v. the United Kingdom*.<sup>27</sup>

Some temporary prohibition might be acceptable at the initial stage of emergency but these restrictions should be justified and then gradually lifted.

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<sup>27</sup> *Yam v. the United Kingdom*, no. 31295/11, 16 January 2020, para 55-57.