



HORIZONTAL FACILITY FOR THE WESTERN BALKANS AND TURKEY 2019-2022

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TOWARDS
EUROPEAN STANDARDS*

“Videoconference in court proceedings: human rights standards”

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- **Serbia's experience**

- Legal basis for hearing by VC

- **Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters** (ratified by Serbia on August 1, 2007) - Article 9 (hearing by video conference)
- **Criminal Procedure Code** - the Court may decide to examine a witness by video link, phone conference connection, or by using equipment for audio or video recording (Article 104, examination of specially vulnerable witness)
- **General Administrative Procedure Act** - provides possibility to organize a video conference hearing (Article 111)

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• State of emergency (COVID-19 crisis)

- Proclaimed on March 15, 2020 and lasted until 6th May 2020
- March 17, **Ministry of Justice** - recommendation on the functioning of courts and prosecutorial offices - to work from home, except in *emergency cases: to decide in detention cases, illegal trade (Article 235 of the CC), failure to act pursuant to health regulations during epidemic (Article 248 of the CC), transmitting contagious disease (Article 249), in cases against minors, domestic violence, cases where there is a risk of obsolence, and for other criminal acts for which greater number of criminal charges were submitted and are executed during a state of emergency.* In other cases hearings were postponed.
- March 18, 2020 **High Judicial Council** - confirmed the list of urgent cases
- March 19, 2020 **Bar Association** - lawyers will represent clients only in emergency cases

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- March 26, 2020 – **the Ministry of Justice issued a recommendation** to organize proceedings against persons who violated self-isolation order through the Skype
- April 1, 2020 - **Decree on the manner of participation of the accused in the main trial in the criminal proceedings during the state of emergency** - in a first instance criminal procedure, when the judge finds that securing the presence at the hearing of the accused who is in a custody is difficult due to the danger of spreading a contagious disease, his/her participation can be ensured through technical means for the transmission of sound and images.
- April 9, 2020 - **Conclusion of the High Judicial Council** - the Decree applies only to defendants who are in a custody in connection with three criminal offenses: failure to comply with health regulations during the time of the epidemic, the spread of a contagious disease and illicit trafficking.

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- The accused is in a detention, while other participants (judge, prosecutor and the lawyer) are in the courtroom
- Detention facilities in Vršac, Požarevac and Pirot
- First decision was issued on 27 March 2020 by the Basic court of Dimitrovgrad for the failure to act pursuant to health regulations during epidemic. Sentence was maximum according to Article 248 of the CC - 3 years of imprisonment
- The decision was delivered before a Decree was issued
- In another two cases, the Basic court in Zrenjanin for the same criminal act issued a fine 680 euro, and 850 euro
- Until April 22, around 105 Skype hearings were organized

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- Open questions:

- The legality of Skype hearings
- The nature of the right to a fair trial
- Communication with the lawyer and equality of arms
- No public hearings
- Different range of penalties: from imprisonment, house arrest to a fine
- All persons were sentenced – the issue of presumption of innocence?
- The quality of technical equipment and privacy issues
- **No guidelines for future videoconference hearings**

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- **1. Remote participation of witnesses and victims and assessment of testimonies**

- Article 6 of the ECHR - *Everyone charged with a criminal offence has the right 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*

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- ECHR standards

- Witnesses should, as a general rule, give evidence during the trial and all reasonable efforts should be made to secure their attendance
- Admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he/she should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his/her presence, either at the time the witness was making the statement or at a later stage in the proceedings
- (*Seton v. the United Kingdom (2016)*; *Dimović v. Serbia (2016)*; *T.K. v. Lithuania (2018)*)

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- Reasons of introducing VC:
- the need to save time and money; countries with a large territory
- the need to protect minors and other vulnerable witness from confrontation with the suspect (victims of sexual abuse or protected witnesses)
- the reduced risk of escapes
- increasing the quality of the process and reducing delays : witnesses who otherwise would not be able to contribute to the hearing, are now available to the parties and the judge

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- International criminal courts: the ICTY and the ICC - the judge can take measures to protect victims and witnesses pursuant to the Rules of Procedures and Evidence
- - the use of videoconferencing is increasing all the time within the EU as a result of the EU convention on mutual legal assistance in criminal matters

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• Possible problems:

- the technical quality of VC is mainly a matter of funds and a good connection is a prerequisite for the quality and effectiveness of the hearing
- the judge is less able to control the proceeding
- communication is complicated and legal assistance to the defendant can be negatively influenced
- the judge is better able to respond to the body language of the witness
- it is plausible that a witness is less inclined to lie during a direct confrontation

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- **Some practical considerations:**

- to define in which cases it should be used
- the witness should provide his/her brief of evidence and copies of all documents to be referred to or relied on
- all documents supplied for the use of the remote witness must be identified in the same way in which they are to be identified when produced in Court
- The witness and victims should use special working space from which they will give evidence without distraction

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- The Courts Remote Participation Act 2010 New Zealand
- General criteria:
 - (a) The nature of the proceeding
 - (b) The availability and the quality of the technology that is to be used
 - (c) The potential impact of the use of the technology on the effect of maintenance of the rights of other parties to the proceedings including:
 - i. The ability to assess the credibility of witnesses and the reliability of the evidence presented to the court
 - ii. The level of contact with other participants

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- Criteria for witnesses

- The age or maturity of the witness
- The physical, intellectual, physiological or psychiatric impairment of the witness
- The trauma suffered by the witness
- The witnesses fear of intimidation
- The linguistical, cultural background or religious beliefs of the witness
- The nature of the proceeding
- The nature of the evidence that the witness is expected to give
- The relationship of the witness to any party in the proceeding
- The absence or likely absence of the witness from New Zealand

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- **2. Public nature of hearings and access of the general public and mass media**

- Two aspects:

1. to protect litigants against the administration of justice in secret with no public scrutiny - judges are aware that their activity can be known and scrutinized and

2. to maintain confidence in the courts

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- Importance of public hearing
- Article 6 ECHR - *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*
- The Supreme Court of Canada has repeatedly stated that “[p]ublicity is the very soul of justice” *Attorney General of Nova Scotia v MacIntyre*, (1982) and that open courts are “a hallmark of a democratic society. *Vancouver Sun (Re)*, (2004)
- The Court has confirmed that “the open court principle requires that court proceedings presumptively be open and accessible to the public and to the media” *A.B. v. Bragg Communications Inc.* (2012)

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- Exemptions:

- Public can be exempted from some hearings (Article 6 of the ECHR - *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*)
- There are practical physical and temporal barriers to open courts
- There are also potential informational and psychological barriers

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• **Advantages of using VC:**

- virtual hearings have the potential to mitigate or eliminate many of the non-legal barriers to open courts
- many people will be able to access hearings from the comfort of their homes
- if online hearings are recorded, there is the possibility that the public can access court proceedings at the time of their choosing
- Youtube livestream over Zoom - the number of people accessing livestream amounted to many times more than could have fit in the courtroom
- Webinar format which can accommodate up to 500 members

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- Issues of concern:

- not every proceeding receives media coverage, while in this manner more people will be able to access it
- privacy matter - it places parties' and witnesses' personal information that is contained in those records within relatively easy reach of those who, legally or illegally, seek to realize financial gain from that information satisfying a voyeuristic rather than educational function

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- **Practical considerations:**

- the listing information for virtual hearings need to be available online
- the public has access to view virtual hearings in “real-time” or, if this is not possible, to access a recording upon request
- it is necessary both to identify privacy invasions as a potential concern in the context of virtual hearings, and to understand the specific nature of these risks in order to put optimal protections in place

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- **4. Interpretation** (*Article 6 of the ECHR – Everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and to have the free assistance of an interpreter if he cannot understand or speak the language used in court*)
- The evolution of communication technologies has created ample opportunities for distance communication in real time and has led to alternative ways for delivering interpreting services - for simultaneous, consecutive and dialogue interpreting, as well as for both spoken and sign-language interpreting

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- Different methods of delivering interpretation services:
- **1. Video-Mediated Interpreting (VMI):**
 - a) **Video Remote Interpreting** - the use of video links to gain access to an interpreter in another room and to link him/her to the primary participants, who are together at one site, or across two or more sites (a three-way or multi-point videoconference)
 - b) **Video Conference Interpreting** - interpreting in a setting whereby the participants themselves are distributed across two or more sites, and the interpreter is located at one of these sites. The interpreter is co-located with the speaker representing the authority and the other whereby the interpreter shares the location of the minority language speaker
- **2. Telephone-Mediated Interpreting**

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- The benefits of distance interpretation:
 - speeding up the proceedings - time efficiency
 - possibility of having regional interpreters - access to qualified interpreter
 - cost reduction, especially travel costs
 - improving public security by avoiding prisoner transport to courts

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• Challenges:

- VC interpreting often magnifies communication and interpreting problems
- it can influence the quality of the interpretation and the communicative dynamics of the proceedings
- platform needs to be sufficiently reliable for legal communication
- defendants can have difficulties in making themselves 'heard' by the court and in understanding the content of their own trials
- interpreting in criminal cases requires additional skills
- Not suitable for long or complex proceedings



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• Practical considerations:

- VC is useful for short proceedings involving a small number of participants
- The responsibility for managing the flow of communication and interaction between participants lies with the legal professional who is responsible for the proceedings
- At the beginning of the VC the legal professional responsible for the proceedings should check that all participants can see/be seen and hear/be heard clearly
- The legal professional in charge should agree communication procedures with the interpreter before the VC session starts
- The interpreter is responsible for coordinating the communication and interaction only to the extent that this is necessary to ensure there is no loss of information
- The interpreter should be given space and time to interpret and to carry out his/her task effectively

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