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United Nations Office on Drugs and Crime



Manual on Videoconferencing

Legal and Practical Use in Criminal Cases

UNITED NATIONS OFFICE ON DRUGS AND CRIME
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Manual on Videoconferencing

Legal and Practical Use in Criminal Cases



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I. INTRODUCTION

The Initiative

In decision 4/2,¹ the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (COP), “took note of the recommendation of the working group to consider the use of videoconferencing and the giving of evidence by video link, and its encouragement of States Parties to provide in their domestic legal systems for that type of cooperation, which had various benefits, including its cost-effectiveness and potential for the protection of witnesses.” The Conference of the Parties further “requested the Secretariat to seek ways to support such use of videoconferencing and assist States in overcoming technical and legal obstacles, and to report to the Conference, at its fifth session, on the provision of such assistance.”² Subsequently, an informal expert group meeting was held on the Technical and Legal Obstacles to the Use of Videoconferencing. The outcome was a report which summarizes the main points made during the meeting.³ The Working Group on International Cooperation of the COP recommended that UNODC should develop a guide for practitioners on the use of videoconferencing testimony, considering the main points made during the expert group meeting and reflecting both the advantages and the challenges of videoconferencing.⁴

Against this background, and with a view to foster international cooperation in criminal matters, as well as to seek ways to support such use of videoconferencing and to assist States in overcoming technical and legal obstacles in this regard, the UNODC Global Programme for Strengthening Capacities to Prevent and Combat Organized and Serious Crime (GPTOC), with funding from the Government of the United States of America, decided to develop a Manual on the Legal and Practical Use of Videoconferencing in Criminal Cases.

Purpose of the Manual

This Manual aims to promote the use of videoconferencing in cross-border and national legal procedures, to distribute information on good practices and experiences in different countries to encourage judges, prosecutors, other legal practitioners and decision makers in general to implement and use videoconferencing. It is and will be in the future increasingly common to have trials involving experts, witnesses, victims and defendants living in different countries or remote areas far away from capital cities.

¹ Decision 4/2, “Implementation of the provisions on international cooperation of the United Nations Convention against Transnational Organized Crime”, section I, letter (d), report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008.

² *Ibid.*, section I, letter (e).

³ Report by the Secretariat, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010.

⁴ Report on the meeting of the Working Group on International Cooperation held in Vienna on 20 and 21 October 2010, para. 3(i).

In particular, the global situation due to COVID-19 has demonstrated the enormous potential of technologies for domestic and international criminal procedures. Videoconferencing has been a valuable technological tool for justice in a historic moment where cities and countries have had to impose lockdown measures to constrain the virus. Because proceedings must continue, videoconferencing has now become the norm in legal contexts. The main objective is to base the virtual hearing on the principles of due process like orality, cross-examination, openness to the public –when on trial-, concentration, timeliness, procedural equality of the parties, and the adversarial principle. Furthermore, the defendant must have effective and immediate access to his/her defense counsel along with diligence.

Criminal activities, in particular transnational organized crime and cybercrime, affect many people, including the most vulnerable groups, where women and children are often the largely affected population. Videoconferencing is an important facilitator in domestic criminal proceedings, but also a potentially very important tool within the framework of judicial cooperation in all different kinds of matters. It significantly enhances collaboration with other countries, especially for the taking of testimony.⁵ In many different jurisdictions, videoconferencing is widely accepted and worldwide recognized as a very effective instrument. It is often videoconferencing that makes a prosecution possible by permitting the taking and preventing the loss of evidence. Simultaneously, when victims are recorded, it spares them of repeated examinations and protects them if their welfare is at risk when required to testify in the same room with the accused.⁶

This Manual explains and describes different uses of videoconferencing in general, its advantages and challenges, its use in criminal proceedings, technical aspects and practical considerations. It gives examples of national legislation as well as regional and international treaties and instruments containing relevant provisions on videoconferencing. Further, it looks briefly at its use among international courts and tribunals. Methods employed include the analysis of international and national legislation, jurisprudence, questionnaires and self-assessments requested from countries from different regions and with distinct legal systems. The Manual illustrates how videoconferencing is used in many different places of the world, aiming on advising and guiding legal professionals, practitioners and countries with no legislation or practice regarding its use.

What is videoconferencing and video link?

Videoconferencing is a set of interactive telecommunication technologies which allow two or more locations to interact via two-way video and audio transmissions. This technology enables an individual to speak in real time to the judicial or competent authority via closed-circuit television through an audiovisual link, even if they are not located in the same place or territory. Videoconferencing entitles all parties to be part of the diligence and assists

⁵ *Ibid.*, para. 7.

⁶ Report by the Secretariat, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010, para 11.

virtually when it is not possible to do it in person or when it is possible but not appropriate, as in the case of the defendant when they need to be notified of a resolution from a competent authority.

In cross-border settings or even domestically, videoconferencing allows the virtual presence of the person in the territory over which the competent authority has jurisdiction, allowing the witness to be questioned by all parties, the prosecutor, a defence attorney, the plaintiff, the civil parties and the judge, who usually are in a different location.⁷

Videoconferencing equipment may also allow the concurrent transmission of computer images, such as documents and PowerPoint presentations. Documents can be viewed and discussed in a videoconference using a document camera. A document camera can display the document on the screen in both locations so that the witness in the Requested State and the parties at the Requesting State location can view the document simultaneously⁸. This functionality, for example, facilitates the statement of the defendant by videoconferencing (whenever possible) under the national law of the requested State and/or requesting State. Most countries require the consent of the defendant to assist virtually to a trial, in particular, when facing charges of serious crimes.

Although sometimes used synonymously in linguistic usage and some legal texts, videoconferencing is strictly speaking different from video link technology, which can be used for multiple purposes and does not necessarily refer to real time transmission. An example of such use, is when a deposition of a witness is recorded on video for later use during trial, but even though the deposition can be recorded for later use, if the interview was done in two or more territories simultaneously with the intervention of the judicial authorities for cross-examination of the witness using a video link technology, it is considered, for the purposes of this manual, as videoconferencing. In any case, the recorded video will be reproduced on trial

The main difference is that video link technology refers only to recording the diligence and videoconferencing refers to simultaneous interaction of two or more parties located in different territories by an interactive communication technology that includes video and sound that can be or not be recorded.

On the other hand, it is important to acknowledge that, in many countries, video link evidence is synonymous with videoconferencing. For example, and as already stated in this manual, in the UK, video link evidence refers to videoconferencing.

Therefore, it is recommended, before issuing a request for mutual legal assistance for videoconferencing, to clarify the terminology used in the countries involved as well as the legal implications in order to make sure they both refer to videoconferencing in the same legal terms.

⁷ Ibid., para. 10.

⁸ Ibid., para. 24

II. THE USE OF VIDEOCONFERENCING IN LEGAL PROCEEDINGS

A. Examples of different uses of videoconferencing

Videoconferencing can be used in any stage of the investigation and criminal procedure. For example, during the investigation, the competent authority might need to interview a witness in order to ensure the extent to which his/her testimony is relevant to the criminal investigation, or to obtain information to conduct the investigation. During pre-trial proceedings, the videoconference can be necessary, as well, to provide the grounds for a Court decision or to meet some legal requirements. Finally, the videoconference can be used when a testimony must be given before a trial court.

The videoconference can be conducted informally or through formal channels (police cooperation or mutual legal assistance), depending on the national legislation and on the procedural needs (mere information, preliminary assessment, valid evidence or grounds for a Court decision)

As a preliminary technical assessment of evidence, videoconference allows all parties involved in the legal procedure to ask questions to the person being interviewed and see and hear their answers and demeanour in real-time transmission. In cross-border settings or even domestically, videoconferencing allows the virtual presence of the person in the territory over which the court or authority has jurisdiction, making it possible for the witness to be questioned by the party, who might be in a different location.⁹ Videoconferencing equipment may also allow the concurrent transmission of computer images such as documents and PowerPoint presentations, so that a video displays on one screen and computer data on another. This also facilitates the statement of the defendant by videoconferencing whenever possible, under the national law of the requesting and requested State.

During trials and pre-trial proceedings, when it is necessary to hear formally witnesses and experts, taking their testimonies becomes more complicated when several States or nationalities are involved. Physical distance between the court and the person to be examined as well as legal differences between jurisdictions can create barriers for judicial proceedings. This is where videoconferencing comes into play to overcome such obstacles. The efficiency of justice is demonstrated by the capacity to conduct trials within a reasonable amount of time. The globalization of crime and the expanse of the territory of some states can both be tackled using videoconferencing.

Videoconferencing is a very useful tool in national and transnational criminal, civil and commercial matters. It enables the gathering of testimony from witnesses living far away from the court and lacking the ability to travel or to hear people in special facilities such as hospitals, asylum centres and prisons. Some prisons notify the defendant of imprisonment

⁹ *Ibid.*, para. 10.

by videoconferencing and grant the imprisoned defendant the ability to attend trial hearings by videoconferencing, in particular, when there is a history of violence or strong evidence that the defendant could escape.

Moreover, many of its technical aspects are more generally applicable to its wider use within the field of justice. For example, the same equipment can support law enforcement officers to contact undercover agents or informants that may be located far away. Once purchased, the videoconferencing equipment may also serve academic purposes in university settings, at international conferences and in all kinds of trainings. Finally, it can provide additional operational and administrative support to public authorities, e.g., for press conferences or inter-institutional meetings and briefings. It is therefore well worth undertaking the necessary investments that easily pay off given the large scope of application. At the international level, the use of videoconferencing has increased through the work and jurisprudence of the international criminal courts and tribunals.

B. Advantages

Videoconferencing has multiple advantages in general, and particularly in criminal proceedings, as it is the most efficient way to obtain evidence directly when otherwise not possible. First, an important value consists in the protection of vulnerable and/or intimidated witnesses, whose welfare could be at risk when forced to testify in the same room as the accused. In criminal cases of sexual, mental, or physical child abuse or aggression, videoconferencing is widely used in courts. Another example is when dealing with police-protected witnesses, where, videoconferencing is safer than moving them to court. Physical security and psychological well-being of the witness is extremely important when searching for the truth. Through videoconferencing, direct contact between witnesses and the accused can be avoided and reliability of the trial is increased, as it encourages witnesses to contribute with true evidence. Stress and discomfort are lowered and vulnerable groups, such as minors or persons under medical treatment are better shielded. Videoconferencing provides extra protection for these groups and minimizes the risks of traumas as it puts less pressure on the witness through the creation of a safer environment. Furthermore, when victims are recorded, videoconferencing can generally spare them the burden of repeated examinations.

Regarding experts, their (lack of) availability has been identified as one cause of delays both in civil and criminal cases. Videoconferencing provides courts with greater flexibility as to when and how experts from other states or parts of the country are required to give evidence. Sometimes it is difficult to make them appear before the court, simply because of the distance and a busy work schedule. However, their contribution is extremely important to disentangle a case. Expert hearings conducted via videoconferencing have ensured a more effective use of resources as the experts can continue working in their usual environment, at a university or hospital for example, before and after being heard, instead of losing precious time while travelling.

The Interamerican Court in Human Rights -CIDH- allows the reception of testimonies by videoconference. Article 51.11 of the Regulations of the CIDH allow the reception of "testimonial, expert, or alleged victim statements by audio-visual electronic media." With this regulation, the Court has carried out videoconferences¹⁰ to receive testimonial evidence when presented with exceptional reasons, and considering these videoconferences, for all purposes, adequate because they allow to question and cross-examine the witness and appreciate the testimony of the deponent as if he/she was physically present at the hearing with the judges.

From the accused's perspective, a hearing by videoconference is also an effective, proportionate and less intrusive measure than extraditing the accused or, in the European context, issuing a European Arrest Warrant. This is particularly the case when the suspect's presence before the judicial authority is not absolutely necessary yet, for example at an early stage of the proceedings, as it is the case in many jurisdictions. For a suspect under investigation located in a different country from which the investigation is being performed, videoconferencing can be a more convenient method of testifying and exercising his/her defense without the suspect needing to travel to the country in which the process is being held. Through videoconferencing, the suspect is allowed to exercise his/her right to counsel by testifying or refraining from testifying, thereby allowing the process to continue its natural course and offering the suspect under investigation the possibility of remaining linked to the process without the risk of him/her being considered in default. Besides, it should be borne in mind that extradition remains a highly technical and specialized field of law with some countries facing resource constraints. A hearing by videoconferencing for the purpose of mutual legal assistance is a means to resolve this issue.

Moreover, if an inmate must be heard by a court, videoconferencing makes the process safer by allowing him/her to remain within the prison premises. It neutralizes the risk of escape and associated problems, such as physical threat to magistrates, witnesses, police forces and the necessity of police deployment.

Today, considering its possible multiple uses, the cost of the equipment is easily offset. Videoconferencing technology used to be expensive, but costs have followed a decreasing trend over the years. The experience countries have gained using Videoconferencing during the COVID-19 health crisis combined with the reducing cost and increased availability of various video conferencing systems enables competent authorities to more effectively deploy video conferencing than ever before. Moreover, the use of videoconferencing, particularly in cross-border cases, avoids spending money in transportation of witnesses, inmates or experts. On the other hand, on-site inspections by the court and the related costs can be avoided too as the judge does not need to move from the courtroom. Plus, accommodation and witness protection abroad become less necessary and related costs can be saved.

Mobile videoconferencing equipment, typically consisting of a screen, a camera, a speaker and a microphone, is also readily available and has the advantage that its use does not need

¹⁰ Some examples are: Cruz Sánchez otros vs. Perú case and Norín Catrimán vs. Chile case.

to be limited to one location but can be used by multiple courts or government offices. It is a flexible tool for the hearing of witnesses, victims, and experts, even in places outside the courtrooms, such as hospitals and nursing homes. But again, the current market is full of options that only require a computer with a camera, microphone, and internet access to establish a connection with an application that supports videoconferencing

Once installed, videoconferencing technology can be used for a variety of other purposes such as training, communication, education or even telemedicine in prisons, minimizing inmate transportation costs. Therefore, the feedback from many professionals shows that the use of videoconferencing has grown as it proves its value in being a reliable, efficient and cost saving tool, not only for the taking of testimony of remote witnesses, but also for a wide range of other uses. Communication is made easier, and distance and travel times are no longer an issue. The need to save time is omnipresent and videoconferencing clearly reduces the delays of trials.

C. Challenges

In some ways, videoconferencing appears to pose a challenge for states. Firstly, there is the need to become familiar with the technology and its use in a court setting. In this regard, it is important to note that the technology is rapidly advancing and nowadays high-definition images are sufficiently clear to easily observe all aspects of the demeanour of a witness.¹¹ Legal issues continue to be the bigger obstacle. But it is necessary to emphasize that, even when a country does not have a specific regulation or national law that enables the use of videoconferencing, the United Nations Conventions enable and encourage its use, and this, of course, affects all States Parties. Often, these are rooted in the fundamental principles of most legal systems, particularly the defendant's right to be confronted with evidence against them (i.e., to confront and cross-examine witnesses). This is, however, not an absolute right and certain limitations may be acceptable, provided that such limitations are prescribed by law, pursue a legitimate aim, are necessary in a democratic society and are proportionate. The principle of proportionality entails the notion that there is a reasonable relationship between a particular objective to be achieved and the employed means to that effect. In other words, the "interest of justice" justifies allowing some witnesses to testify remotely against defendants in criminal cases. In countries where videoconferencing is permitted, usually exceptional circumstances must be given (e.g., distance or vulnerability of the witness) for its use instead of appearing in person before the court.

More generally, the defendants' right to a fair trial and due process and representation by counsel are asserted besides the right to confrontation of witnesses.¹² This line of reasoning is based on the practical limitations of videoconferencing due to the physical distance of

¹¹ Note by the Secretariat, "The technical and legal obstacles to the use of videoconferencing", CTOC/COP/2010/CRP.2, 13 September 2010, para. 14.

¹² See in particular the United States' law and regulations about video conferencing, notably the *United States versus Yates* case and the Sixth Amendment Confrontation Clause, as well as restrictions applicable in Germany.

the persons involved (in particular when the defence attorney cannot be in the courtroom and with the defendant at the remote location at the same time), as well as assumptions about the effects of videoconferencing on the behaviour and perceptions of the defendant, the judge, and other persons involved in the trial. It has been asserted in this context that remote testimony does not provide the court and a possible jury with the same opportunity as live testimony to assess the demeanour, movements, body language, and nuance of voices, thus the witness' truthfulness in general. In this regard, there is currently no empirical information available about the impact of videoconferencing on the behaviour of participants and the actual outcome of court proceedings. The consolidated jurisprudence of constitutional courts and courts of appeals in several countries has concluded that the principle of immediacy in obtaining testimony by videoconference is not violated if the rules of due process are followed. How the videoconference is carried out will be, as in the case of an in-person statement, subject to the assessment of the judge and the control of legality. Even more complex is the treatment of the statement of the investigated or accused, that in States in which it is pertinent, their consent is also required to participate in the diligence, and their effective access to legal assistance must also be guaranteed at all times.¹³ In addition, these concerns are outweighed by the above mentioned "interest of justice" and exceptional circumstances that justify the use of videoconferencing, as it is the case of the COVID-19.

The main obstacle to cooperation between States or between different courts of the same state in this area is the lack of domestic legislation authorising or regulating the use of videoconferencing. On the other hand, a lot of states have already included relevant provisions in their Code of Criminal Procedures or Mutual Legal Assistance Laws. When videoconferencing is used as a means of mutual legal assistance between two different jurisdictions, questions arise as to whether judges must be present on both sides of the videoconference, whose law should apply to the taking of testimony, the actual conduct of the examination, etc. It is worth noting that even where states do not allow videoconferencing at the domestic level, some may allow it for mutual legal assistance, provided that the testimony or evidence will be admissible in the requesting state.

Organisational and procedural challenges must be considered too. The judge must be the manager of the videoconferencing session. Participants should be made aware of the other courts/locations connected via the videoconference system and the way to proceed envisaged by the court. There may be cases where a party wishes to consult with his lawyer (if needed by an interpreter) without the judge or another party overhearing. For such scenarios, the means of consultation should be explained beforehand. If the party and his lawyer are not present at the same site, private communication between them must take place, for example over a secure phone line or mobile phone or, less frequently, but, if possible, separate videoconferencing equipment. In the event of failures of the audio-visual system and/or the network, it is for the judge to decide whether to proceed with the hearing or not. At the same time, as with any other diligence, the parties can make their allegations

¹³ Sentences of the European Court of Human Rights as the Shulepov case in Russia on June 26, 2008 and the Sakhnovskiy case in Russia on November 2, 2010.

if they consider any right to be violated and it is the judge or the authority in charge of the diligence who will resolve it.

Technical difficulties can also be caused by unintentional or intentional manipulation of videoconferencing tools. Judges, prosecutors and lawyers might not be very familiar in the beginning. Although using the technology has certainly become much easier, it still requires a good mastering. A court cannot afford to lose a testimony that might be a key element in a case because of technical challenges. Poor sound quality, image discontinuance, freezing etc. should be avoided. In order to anticipate this kind of problems, technical assistance is seen as good practice and as an insurance against malfunction.

On a more subjective note, some law professionals have reported that individuals participating in trials through videoconference sometimes feel as though they are not being sufficiently involved. Practically, they intervene only when they are asked to. Despite videoconferencing being a major improvement, they feel like they are not fully participating in the proceedings as they have the impression of being more on the side-lines of the debate rather than in it. These concerns can be best managed by well-organized trials where the judge also assumes the role of a moderator. Clearly, videoconferencing cannot and does not want to replace oral hearings, but it is a way to manage the successful taking of evidence where the latter would not be possible otherwise.

We need to consider that the market price of systems or applications available for videoconferencing has been significantly reduced, making these technologies more accessible to various institutions. However, it is important to not lose sight of the cost-benefit-safety ratio. The cost of the systems cannot come at the expense of the security required for the treatment of the information that is presented in a videoconference on criminal matters. And while such security also comes at a price, it is feasible to find affordable and secure platforms on the market. Likewise, the use of an affordable platform should not impede compliance with minimum rules that ensure that the rights of the person who testifies are respected and that guarantee, for the purposes of the process, that the testimony is not manipulated or influenced. Such circumstances, and the identity of the declarant, must be guaranteed in all cases. For this, the participation of a competent authority of the requested country is essential to keep a record of the monitoring and verification of these conditions.

There are some controversial aspects when a testimony is received by videoconference that not all national laws and treaties give a clear answer. In particular, we refer to two of them:

- a. When the witness or expert is compelled to give testimony and does not do so; and
- b. When the witness or expert must give their statement under oath and, as a consequence of providing a false statement, to determine the country that should prosecute the crime of perjury.

In both cases, the country that is deemed competent is the one responsible for adopting the pertinent measures, either by making the witness and/or expert appear by force and/or by initiating a criminal proceeding for perjury.

In this regard, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Second Additional Protocol of the European Convention on Mutual Legal Assistance in Criminal Matters (Convention of the Council of Europe) give the same treatment that, “where witnesses or experts are being heard within its territory, in accordance with this article, and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure”.

In that sense, the Explanatory Report to the Second Additional Protocol states in paragraphs 79 and 80 that “*efficiency commands that the law applicable be the law of the State where the person is (...) This will normally imply that the authority of the requesting Party conducting the hearing as soon as possible provides the authority of the requested Party with the information necessary to enable the latter to take appropriate measures against the witness or expert.*”

Therefore, it is important that countries that have no regulations for this aspect or that have them but are not clear enough, proceed to do so. Particularly, and for each case, the competent authorities of the countries involved should agree on the exact procedure to follow, sooner or later, when perjury is detected.

On top of these specific challenges related to videoconferencing, we must also note broader challenges related to international legal cooperation.

In this regard, international legal cooperation remains slow. Whilst progress has been made in the last decade, there is still a lot of work to be done. It is necessary to improve the efficiency of transnational cooperation. Some of the reason for this may be due to legal practitioners lacking in knowledge of international treaties or national law.

Cooperation is continuously being tested in the face of the diversity of legal systems, languages, traditions, and ways of thinking. The systems for processing international requests must evolve. We must advance from physical to electronic communication, using secure platforms equipped with electronic certification and digital signature that guarantee data protection, ensure the legitimacy of the parties involved, and allows the documentation to have full legal effects in judicial procedures. It is time for international legal cooperation to fully adopt the new digital era.

The networks composed of judges, prosecutors, and central authorities, committed to improving and strengthening international legal cooperation are very powerful tools. These networks are hardly known in some regions and highly developed in others. Despite difficulties, they could improve their effectiveness if they were incorporated into institutional strategies as useful mechanisms in the fight against transnational organized crime.

Networks, by mission, are the ones that promote informal cooperation to ensure the efficiency and effectiveness of formal cooperation. Working methodologies in cooperation need to continue to evolve. Formal cooperation must be used in cases where it is strictly necessary and followed by informal international coordination work that guarantees:

- i. the suitable international instrument granting the cooperation request.
- ii. the most efficient channel of transmission,
- iii. the necessary information for the success of the request; avoiding possible obstacles in advance; and
- iv. effective collaboration among States to complete the request of assistance.

It is necessary to evolve from casuistic international cooperation to one guided by a strategy.

Therefore, we concentrate our efforts in this Manual to strengthen the use of videoconferencing in international cooperation in criminal matters, but without losing sight of the broad spectrum of globalized legal cooperation.

III. HOW DOES VIDEOCONFERENCING WORK?

A. Technical aspects

Equipment for videoconferencing is nowadays very flexible and easy to operate. The technology needed is relatively simple. A screen plus a camera with a microphone are required at each location and any form of screen can be used. Before introducing videoconferencing, however, the telecommunication- and ITC-infrastructure at the operating area and the regional communications network situation must be considered. Traditionally, the preferred and most widely used technology for videoconferencing is the Integrated Services Digital Network (ISDN). This technology was designed for fast two-channel signal transfer within digital end-to-end telecommunication networks. An ISDN telephone line is used to transmit the pictures and sound electronically between the locations. Connection is made by dialing the telephone number allocated to the relevant location. ISDN-technology provides simultaneous connections in any combination of data, voice, video and fax.

Videoconferencing technology using ISDN has advanced and allows for transmission of voice video, data, and other network services without interruption or delay. It is deemed to be reliable and relatively easy to use. Notably, the transmission can be also encrypted to prevent the identification of the locations of the videoconference. In remote areas where

ISDN is not available, satellite or GSM based systems may be an alternative, but they are more costly, and transmission is less reliable.¹⁴

Moreover, there is also the possibility of videoconferencing over the internet (IP networks, i.e., Internet Leased Lines). Overall, ISDN technology is recognized for its good price/quality relation, but the number of IP connections has also increased over the last years. They can be a good option for frequent videoconferences as mostly there is no usage or time-based restriction and the distance to the other videoconferencing location does not play a role in the calculation of the fees. With ISDN, the charges increase with increasing distance between the two locations. However, a significant advantage of ISDN services is that they are available wherever basic phone services exist. In contrast, Internet Leased Lines are not available everywhere. These considerations must be taken into account when looking for the optimal solution for the implementation of a videoconferencing system.

Despite nowadays flexibility of equipment, all its components should as far as possible be standardised and have the same configurations. The material used should comply with recommended technical standards, at least the minimum industry standards for the facilitation of interoperability, in particular for cross-border connections. When an IP connection is at issue, the partner-network may be protected by firewalls. Therefore, gateway solutions or “virtual rooms” may be required. In general, and irrespective of the type of connection, it should be ensured that there is no possibility to intercept the transmission signal. If possible, the equipment could be integrated in the existing courtroom infrastructure. Additional sets of mobile equipment (screen, camera, speaker, microphone, accessories) could increase flexibility.

B. Practical considerations

When videoconferencing is used, the objective is to render the procedure as close as possible to the taking of evidence in open court. It is crucial that gestures and facial expressions of the heard persons are clearly perceptible. Attention should be paid that no shots are taken from above or below because this can distort the picture of the displayed person. The system should be user-friendly and as simple as possible, i.e., be reduced to the core functions, such as login/logout, turning on and off cameras and microphones, a selection menu for the connection and an applications menu for the set-up and easy termination of the connection.

1. Necessary preparations

Videoconferencing, whether in national or cross-border proceedings, requires appropriate preparation. It is advisable to provide legal staff and interpreters involved with the necessary training in handling the videoconference equipment. Typically, a point-to-point

¹⁴ Report by the Secretariat, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010, para. 8.

connection which links two destinations with each other will be given. However, in some cases, a multipoint connection between more than two locations at the same time is established. Videoconferencing rooms with the necessary equipment must be booked. Some countries have introduced electronic booking systems in this regard.

It is good practice to adequately prepare a witness for video testimony and, if possible, by showing him/her in advance the videoconferencing room/equipment and explaining the set-up. Thereby, he/she gets an idea how it will work, who the parties to the videoconference are, and their various roles. This is especially important when dealing with protected witnesses. Jurisdictions where it is not permissible to conduct pre-trial interviews or to review a witness' statement before trial should ensure that they do not infringe upon these prohibitions when preparing a witness for the videoconference. When expert witnesses are heard, it is advisable to contact the expert before the hearing, in order to check what kind of technical equipment might be needed during the hearing.

In international criminal matters, the requesting state should propose a date and time for the videoconference, thereby keeping in mind a possible time difference between the locations.¹⁵ In practice and depending on the applicable law, the judicial authority of the requested State serves summons on the person to appear in accordance with its law. In cross-border proceedings, the requested state's role is primarily that of a facilitator. Good practices for mutual legal assistance in general should be followed. The requested state applies the rules of its own country taking into consideration the necessary procedural requirements of the requesting state.

In general, as in any other court proceedings, it is expected that parties anticipate which documents will be required during trial and that they make copies available in advance to the court, the parties and if need be, any participating experts. Subject to advance discussion with the judge, documents should be sent well in advance by the requesting state to the requested state to be shown to the witness testifying in the requested states. Numbering and highlighting relevant passages of documents to be shown to the witness will ensure that the requested authority is easily able to identify the documents needed for the witness.

From a further practical point of view, good technical support is recommended to achieve fitting technical parameters enabling a videoconference with sufficient video and audio quality. Technicians of both locations should exchange the technical parameters, such as the type of connection (IP or ISDN), ISDN-number or IP-address, parameters for bandwidth to be used, parameters for the video and audio quality and passwords for gateway-solutions. They should test the transmission and equipment a few days prior to the videoconference.

The positioning of microphones should ensure that all speakers are clearly understandable without disruptions. Those involved in a videoconferencing session need to be aware that, even with the most advanced systems currently available, slight delays may occur between

¹⁵ Report by the Secretariat, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010, para. 29-31.

the receipt of the picture and the accompanying sound. The quality of the latter must be continuous without any interference or crackling. Lip synchronicity should be ensured whereas a delay of less than 0.15 could be tolerated. The participants must be made aware of this fact because otherwise, they risk to “speak over” the witness, whose voice may continue to be heard for a fraction of a second after he/she appears on the screen to have finished speaking. Moreover, picture quality can easily be enhanced if those appearing on monitors are instructed to keep their movements to a minimum. Only one microphone should be on at the same time as a simultaneous use can result in distortions. Microphones should ideally be direction-sensitive, eavesdropping-proof and fitted with a mute-button.

Attention must be paid that the picture of the person to be heard displays the full upper body, including the hands to convey an adequate impression. If possible, it may be useful to have pre-set positions for the equipment so that panning, tilting and zooming can be easily handled by the operating person which guarantees minimum disruption of the proceedings. Finally, the session must be recorded, and a protected copy of the entire videoconference should be maintained for the records.¹⁶

2. Protected witnesses

In case of protected witnesses, attention should be paid that no home-call number is displayed in the courtroom. Ideally, the contact number should always be a mobile phone. Additionally, it is recommended to remove any distinctive background items that could hint to the location. During the preparation of the witness, it is crucial to make them aware not to disclose any information about their surroundings that would unveil their cover.

3. Interpretation

In cross-border videoconferencing, there may be a need to have an interpreter either at the requesting court or at the requested court or at a third location. The use of interpretation during the videoconferencing may be a challenge to the participants in the hearing and to the interpreter. Real-time translation is highly recommended. The judge, under whose responsibility the hearing takes place, should assess whether the interpreter provides assistance of sufficient quality.

Although there are no rules on where interpreters should be located, in criminal cases, it is advisable to have them in the same room as the person whose speech is translated (witness, accused, expert). However, having the interpreter in a third location remains a possibility where the aforementioned scenario is not possible, but special attention must be paid to the control over equipment. It is essential for remote interpretation that adequate view and tone

¹⁶ Report by the Secretariat, Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010, para. 29-31.

transmission is ensured. In this context, it is once again advisable to timely test in advance the technical equipment and the connection before the hearing.

Another aspect that needs to be considered in cross-border proceedings are differing qualifications for court interpreters that may vary from country to country. The interpreter must have mastery of the source and target languages, especially in legal jargon, court procedures and regarding documents. He/she must be quick to adapt to the speech pattern of the speaker and translate the uses of idiomatic expressions, proverbs and so forth. The use of interpretation during the videoconferencing is a challenge to the participants, because the witness may not be used to working with interpreters. Appropriate explanations can remedy this situation.

Taking of evidence is usually conducted with consecutive interpretation. Thereby, the judge plays a central role in administering the interpretation and in giving instructions to the witness or the interpreter during the hearing, in particular as regards the order in which the parties involved speak¹⁷. The use of simultaneous interpretation is more demanding, because it requires the use of earphones by the participants and precise control of microphones.

4. Hearing

The examination of the witness at the remote site should follow as closely as possible the practice adopted when a witness is in the courtroom. During examination, the witness and the person asking questions or making statements regarding his/her testimony must be able to see each other. Unless it is a particularly vulnerable victim, such as a minor who does not want to see his/her aggressor, it is important to know the opinion of special victims, even if it is through virtual means, so it is recommended to address this issue before the videoconference. The court must take action during testimony to ensure that witnesses can testify free of intimidation or fear for their life; such measures include, but are not limited to, videoconferencing, voice and face distortion techniques and the withholding of details of a witness's identity¹⁸; in cases where the law of the involved States allows it¹⁹.

There are countries where the use of electronic means to hide the witness's facial or other characteristics is not allowed because they are considered to limit the right of face-to-face confrontation and to prevent the jury or magistrates from gaining an impression of the witness's relevant physical attributes, for example in cases where it is claimed that the defendant used force to restrain the witness²⁰.

¹⁷ Guide on videoconferencing in cross-border proceedings, General Secretariat of the Council of Europe, page 11

¹⁸ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, UNODC, Page 5.

¹⁹ In article 18, paragraph 18, of the Organized Crime Convention, State Parties are called to introduce domestic legislation to allow testimony by videoconference or through other technological means, such as devices and software for image and voice distortion, to prevent revealing the witness' identity to the defendant and the public. *Idem*, page 36.

²⁰ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, UNODC, Page 38

All communications should be intelligible. The quality of the sound must be continuous without any extraneous interference or crackling sounds. The above-mentioned requirements regarding lip synchronicity must be met. In addition, echo cancellation, background noise and reverberation must be reduced as much as possible. It is desirable for the judge and court clerk to be able to adjust the volume in order to compensate for differences in speech level.

5. Costs

In cross-border videoconferencing, generally, legislation and practice establish that unless otherwise agreed, the requesting state bears all costs associated with the videoconference.²¹ In practice, some countries often do not seek reimbursement. On a general basis, costs of both the equipment and the costs for transmission time (ISDN line) continue to decrease.

6. Document sharing

Previously shared documents could be presented by using a separate document camera during the videoconference. In the long term, videoconferencing could be supplemented with shared document repositories or document servers. These capabilities are increasingly being used for the sharing of information. Within the justice context, however, extra care needs to be taken to ensure that any such repository is secure and only accessible by the authorized parties involved in the case.

IV. THE LEGAL FRAMEWORK FOR THE USE OF VIDEOCONFERENCING

A. INTERNATIONAL CONVENTIONS

Videoconferencing can be requested through bi-lateral treaties or through regional and international conventions. The following sections will demonstrate some examples of these international conventions which encourage countries to use this tool.

1. The United Nations Convention against Transnational Organized Crime

The United Nations Convention Against Transnational Organized Crime (UNTOC) aims at assisting Member States by providing legal and operational standards that can

²¹ Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, United Nations publications, Sales No. E.06.V.5. p 199.

successfully be used in addressing the many facets and forms of transnational organized crime. At the operational level, the Convention provides various tools to facilitate international cooperation in criminal matters. Since criminal groups use all forms of technology to their advantage, it is crucial that also judicial and competent authorities of the affected countries employ technology to prosecute them. Articles 18 and 24 are two provisions governing the use of videoconferencing by the States Parties for two important purposes: mutual legal assistance and witness protection.

Article 18. Mutual legal assistance

(...)

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by **video conference** if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

Article 24. Protection of witnesses

(...)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(...)

- (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as **video links** or other adequate means.

The Travaux Préparatoires to the UNTOC provide further explanations on the understanding of Article 18(18).²² Accordingly, the following guidelines for the implementation of this provision should be considered:

(a) The judicial authority of the requested State Party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;

(b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he/she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;

²² Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto United Nations publications, Sales No. E.06.V.5. p 199.

(c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;

(d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;

(e) All the costs of the video conference shall be borne by the requesting State Party, which may also provide as necessary for technical equipment.

2. The United Nations Convention against Corruption

In the United Nations Convention against Corruption (UNCAC) countries agreed to cooperate with each other in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. States Parties are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. They also must undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. This convention provides in Articles 32 and 46 rules on the use of videoconferencing by States Parties for witness protection and mutual legal assistance. The wording is the same as in the UNTOC except that Article 32 also refers to expert testimony:

Article 32. Protection of witnesses, experts and victims

(...)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(...)

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as **video** or other adequate means.

Article 46. Mutual legal assistance

(...)

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by **video conference** if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

B. REGIONAL CONVENTIONS

Several regional conventions, protocols and good practices guides provide for the use of videoconferencing. Regional harmonization facilitates and improves cooperation as it allows the respective countries to better counter crimes committed by criminal groups whose illicit activities often follow a regional pattern. The examples enumerated below demonstrate that nowadays videoconferencing in criminal proceedings is recognized and widely spread in many different regions of the world.

1. AFRICA

African regional instruments on mutual legal assistance and against corruption allow for the use of videoconferencing. For example, the ECOWAS Protocol on the Fight against Corruption²³ of 2001 contains a similar provision as the UNCAC and UNTOC Conventions when dealing with witness protection affirming that a witness has the possibility to testify through video links:

Article 8 – Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection to witnesses in criminal proceedings who give testimony concerning offences covered by this Protocol from potential retaliation or intimidation and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this Article may include, (...)
 - b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as **video** links or other adequate means.

In addition, the 2008 Convention on Mutual Legal Assistance and Extradition against Terrorism signed by the French Speaking Countries of Africa²⁴ contains an article on testimonies and declarations by videoconference.

²³ Economic Community of West African States Protocol A/P.3/12/01 on the Fight against Corruption; ratified by Benin, Burkina Faso, Gambia, Ghana, Guinea, Guinea Bissau, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

²⁴ Convention de l'entraide judiciaire et d'extradition contre le terrorisme, adopted in Rabat during the Fifth Conference of Ministers of Justice of the French speaking countries of Africa (Benin, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Madagascar, Mali, Mauritania, Morocco, Niger, Rwanda, Sao Tomé et Príncipe, Togo, Tunisia.)

Article 29 – Obtaining evidence and statements by videoconference

1. The competent authority of the requesting State Party may request the use of video or telephone transmissions to obtain evidence, to deliver statements, to identify persons or property, or to provide any other form of assistance.
2. The costs for establishing and maintaining a **video** or telephone link in the requested State Party shall be borne by the requesting State Party, unless otherwise agreed.

Moreover, the Pact on Security, Stability and Development for the Great Lakes Region²⁵ provides in two of its integral protocols the possibility to use videoconferencing:

Protocol on the Prevention and Suppression of Sexual Violence against Women and Children

Article 6 – Regional Responses to Sexual Violence

(...)

5. Member States agree that criminal procedures for the prosecution of persons accused of crimes of sexual violence shall be sensitive to the emotional state of the victims and survivors of such crimes. Under these procedures, such victims and survivors shall give evidence in camera, or by **video** links, and they shall neither be compelled nor required to give evidence in open criminal proceedings, nor shall the casting of aspersions on their character and integrity be permitted as part of the defence of any person charged with a crime of sexual violence.

Protocol against the Illegal Exploitation of Natural Resources

Article 14 – Protection of Witnesses

(...) 2. Such measures may include:

(...) (b) Formulating rules of procedure which permit witnesses to give testimony in a manner that ensures their safety, such as permitting testimony to be given through the use of communications technology, such as **video** or other suitable means.

2. CENTRAL ASIA

The Kishinev Convention on Legal Assistance and Conflicts of Law in Matters of Civil, Family and Criminal Law²⁶ deals with videoconferencing. It followed the Minsk Convention of 1993 on Mutual Legal Assistance in civil, family and criminal matters that

²⁵ International Conference on the Great Lakes Region, Protocol No. 9 on the Prevention and Suppression of Sexual Violence against Women and Children to the Pact on Security, Stability and Development for the Great Lakes Region

²⁶ Convention on Legal Assistance and Conflicts of Law in Matters of Civil, Family and Criminal Law (The Kishinev Convention) of 7 October 2002, Commonwealth of Independent States.

had not mentioned videoconferencing yet. All the Member States of the Commonwealth of Independent States (CIS) and the Russian Federation are signatory countries.

Article 6. Scope of the Legal Assistance

The Parties of the Convention shall provide mutual legal assistance by performing procedural and other actions set by the legislation of the requested Party, in particular, drafting, forwarding and serving the addressee of documents; conducting of examinations, searches, seizures; transfer of material evidences; conducting forensic examinations; interrogating parties of the criminal case, third parties, suspects, accused persons, victims, witnesses, civil plaintiffs, civil defendants, their representatives, legal representatives of the accused persons, experts, presentation for identification, including with the use of **video communication, video recording** and other technical means; the search for persons; the implementation of operational-search measures within the framework of the criminal case under investigation, criminal prosecution; the extradition of persons to prosecute or enforce a sentence; search for and arrest (seizure) of funds and property obtained by criminal means, as well as income from criminal activity; search for property and funds of civil defendants for the execution of decisions in civil cases, commercial and other economic disputes; recognition and execution of executive notices, court decisions in civil cases and sentences...

Article 105

For the provision of legal assistance, the competent authorities of the Contracting Parties can, through a mutual agreement, use **video** tools. The use of **video** tools shall be authorized with respect to domestic law of the Contracting States.

3. THE COMMONWEALTH

The Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth was originally adopted by Commonwealth Law Ministers at their 1986 meeting, held in Harare, Zimbabwe. The Scheme was subsequently revised by Law Ministers in April 1990, November 2002, and October 2005. The Secretariat proceeded to convene a Working Group Meeting of Senior Officials and Practitioners of Commonwealth countries at Marlborough House, London, in January 2010. The revised Scheme was considered by Law Ministers at their meeting held 11-14 July 2011 in Sydney, Australia.

At that meeting, Law Ministers adopted amendments²⁷ to the Scheme including new provisions as to the interception of telecommunications and postal items; covert electronic surveillance; the use of live video links in the course of investigations and judicial procedures; and asset recovery.

The principal regulations are:

Paragraph 7: Costs

(...)

(3) For the purposes of subparagraph (2), substantial or extraordinary expenses may include but are not limited to:

(...)

(d) the costs of establishing and operating live video links or other audiovisual means, and the interpretation and transcription of such proceedings²⁸; (...)

Paragraph 14: Taking Statements or Evidence From Persons

(...)

(2) In addition to the information required by paragraph 4, a request under this paragraph shall also specify:

(...)

(d) whether the request is for the person to give a statement or evidence in the course of judicial proceedings through live video link or other audiovisual means.

(3) Where the request is for the person to be questioned other than in the course of judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances of the case permit:

(a) the questions to be put to the person or the subject matter about which the person is to be questioned;

(b) whether the person is to provide a written statement;

(c) whether the person is to take an oath or make a solemn affirmation;

(d) any requirement of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country;

(e) whether any official of the requesting country wishes to be present and to participate in the execution of the request;

(4) Where the request is for a person to give evidence in judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances permit the requirements in subparagraph (3) above, and the following shall also apply²⁹:

²⁷ Available at: https://www.ejn-crimjust.europa.eu/ejnupload/Partners/P15370_13_ROL_Schemes_Int_Cooperation.pdf

²⁸ Subparagraph 7(3) sets out the types of expenses that can properly be regarded as “of substantial or extraordinary nature”. These include the costs of establishing and operating live video links or other audiovisual means, and the costs of interpretation and transcription of such proceedings, the costs incurred for the interception of communications and the costs incurred for conducting surveillance. However, the list is not exhaustive and is left to states to determine. Reference can also be made to the Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters as adopted by Law Ministers in 1999, especially in view of the concerns of various small jurisdictions on the costs associated with the provision of assistance.

²⁹ Where a witness gives evidence by means of live video link while present in the requested country, he is nevertheless participating in a hearing which takes place in the requesting country. Accordingly, subparagraph 2(b) provides that the hearing is conducted directly by the court (or other judicial authority) of the requesting country. It follows that the procedure is that of the requesting country, although

- (a) measures for the protection of the person to be heard shall be agreed, where necessary, between the requesting and requested countries;
 - (b) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting country to the extent that it does not contravene the law of the requested country;
 - (c) where the requesting country or the person to be heard so requests, the requested country shall ensure, in so far as possible, that the person to be heard is assisted by an interpreter, if necessary; and
 - (d) without prejudice to any measures agreed for the protection of the person, where a judicial authority of the requested country is present during the hearing, that judicial authority shall at the conclusion of the hearing ensure that there is a record available to the requesting country indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested country participating in the hearing, and any oath or affirmation made.
- (5) The person from whom a statement or evidence is sought shall be entitled to claim any right not to make a statement or to give evidence which would accrue to that person under the law of either the requested or the requesting country.
- (6) Each country shall take the necessary measures to ensure that, where witnesses are being heard within its territory through live video link or other audiovisual means from requested countries and refuse to give evidence when under an obligation to do so or do not give evidence according to the truth, its domestic law applies in the same way as if the hearing took place in a domestic court and was subject to domestic procedure.

4. THE EUROPEAN LEGAL FRAMEWORK

Videoconference is part of the European justice system and it is frequently used in cross-border trials. Various uses of videoconferencing can be considered under the existing European legislation, in particular conducting witness', expert's or victim's hearings via videoconferencing, in accordance with some legal instruments.

a. Council of Europe

- The *Second Additional Protocol* (8 November 2001) of the *European Convention on Mutual Legal Assistance in Criminal Matters* (20 April 1959), (Convention of the Council of Europe):³⁰

the hearing must not contravene the law of the requested country. There is no requirement that the judicial authorities or any other representative of the requested country be present when the person is heard although subparagraph 3 provides that if they are present, they must make a record of the hearing available to the requesting country.

³⁰ Council of Europe, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182.

Article 9 – Hearing by video conference

1. If a person is in one Party's territory and has to be heard as a witness or expert by the judicial authorities of another Party, 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 hearing take place by **video conference**, as provided for in paragraphs 2 to 7

(...)

7. Each Party shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory, in accordance with this article, and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.

8. Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving the accused person or the suspect. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent.

(...)

In relation with paragraph 7 the Explanatory Report to the Second Additional Protocol, states in paragraphs 79 and 80:

79. Concerning paragraph 7, efficiency commands that the law applicable be the law of the State where the person is, i.e., the place where the person may immediately, without further steps, be prosecuted, if appropriate, for perjury. Moreover, this paragraph is intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences similar to those applicable in a domestic case not involving videoconference.

80. Where the difficulties mentioned in paragraph 7 occur, the requesting and the requested Parties may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the requesting Party conducting the hearing as soon as possible provides the authority of the requested Party with the information necessary to enable the latter to take appropriate measures against the witness or expert.

The Council of Europe has developed a “*Model for Mutual Legal Assistance Request Form*” and Guidelines that can be downloaded from its website³¹. The

³¹ www.coe.int; Council of Europe Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters (PC-OC), Model Request Form for Mutual Assistance in Criminal Matters, PC-OC Mod (2014) 10rev.6.

request must include information on the requesting authority, the object and reason for the request, where possible, the identity and nationality of the person concerned, and address for serving. Moreover, information must be provided explaining why the person concerned cannot or should not attend in person, the name of the judicial authority conducting the hearing, details concerning practical arrangements (technical information on available means, proposals concerning payment of costs, contact details for technical contact person, etc.), notification of rights and obligations of the person to be heard and dates/time proposed. In the request, the requesting court also specifies the language to be used so that appropriate arrangements regarding interpreters can be made.

- On the other hand, the latest draft³² of the “*Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence*” provides for:
 - a) Direct cooperation with service providers (Article 6) and entities providing domain name registration services (Article 7) in other Parties for the disclosure of information to identify suspects;
 - b) Expedited forms of cooperation between Parties for the disclosure of subscriber information and traffic data (Article 8);
 - c) Expedited cooperation and disclosure in emergency situations (Articles 9 and 10);
 - d) Additional tools for mutual assistance (Articles 11 and 12), including videoconferencing
 - e) Data protection and other rules of law safeguards (Articles 13 and 14).

The scope of this Protocol – like that of the Convention on Cybercrime – is limited “*to specific criminal investigations or proceedings concerning criminal offenses related to computer systems and data, and to the collection of evidence in electronic form of a criminal offense*”.

The draft also comprises an Explanatory Report that is intended to guide and assist Parties in the application of this Protocol and reflects the understanding of the drafters as to its operation.³³

Article 11, like Article 12 in this Protocol, “*applies where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. The provisions of Section 5 shall not apply where such treaty or arrangement exists, except as provided in Article 12, paragraph 7. However, the Parties concerned may mutually determine to apply the provisions of Section 5 in lieu thereof, if the treaty or arrangement does not prohibit it.*”

³² Version 12 April 2021. T-CY(2020)7_PDP_Protocol_v2b (PDP 12 April 2021).

³³ Paragraphs 188-202, pages 61-65.

b. European Union

- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (“Mutual Legal Assistance Convention”) (29 May 2000)³⁴:

Article 10 – Hearing by videoconference

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

(...)

8. Each Member State shall take the necessary measures to ensure that, where witnesses or experts are being heard within its territory in accordance with this Article and refuse to testify when under an obligation to testify or do not testify according to the truth, its national law applies in the same way as if the hearing took place in a national procedure.

9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

(...)

If the European Investigation Order (see further details below) is not fully implemented in all EU Member States, this Convention remains applicable. The wording “not desirable” in Article 10(1) refers for example to very young or old witnesses, or those who are in poor health, but also witnesses facing substantial danger when appearing before the court in the requesting country.

Article 10(9) stipulates that Member States may at their discretion also use videoconferencing, where appropriate and with the agreement of their competent judicial authorities, for hearings of the accused. In such cases, it is foreseen that the Member States concerned reach an agreement on the details of the videoconference in line with their national law and relevant international human rights instruments. Some Member States made reservations to this provision.³⁵

³⁴ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ [2000] C197/3.

³⁵ Such reservations to the MLA Convention have been made, for example, by The Netherlands, and the United Kingdom do not allow videoconferencing for the accused or investigated. France does not allow it for statements of the accused in oral trials. And Germany and Hungary only admit it in case of consent of the accused. Spain has not made any reservations, although it is possible that after

A model request form is contained in one of the tools developed by the EJN, the Compendium.³⁶ The requested Member State must consent to the videoconferencing provided that its use does not contradict fundamental principles of its law and if it has the necessary technical means for such a hearing. If this is not the case, the requesting court must cover the costs for transmission and hiring of equipment/technical personnel as well as remuneration of interpreters, unless the requested court waives the refunding. As a next step, a summons is served in accordance with the requested Member State's domestic law.

Article 10(8) provides that a witness can refuse to give testimony if there is a corresponding right in the law of the requesting or the requested state. Furthermore, coercive measures can be applied to execute the mutual legal assistance request (typically summons and sanctions if not followed) if the offence is also punishable in the requested state.

The court or judicial authority of the requesting Member State is in charge of the hearing by videoconference and its national law applies. The judicial authority of the requested Member State shall be present during the hearing as well. It is responsible for the identification of the person to be heard and the respect of fundamental principles of law of the requested state. It should also draw up the minutes and forward them to the competent authority of the requesting Member State.

- Mutual legal assistance Agreements: Most of the international agreements on mutual legal assistance signed between the European Union and third States also include a legal provision dealing with videoconferencing, such as, for example, the Agreement between the EU and Japan on mutual legal assistance in criminal matters³⁷ and the Agreement on mutual legal assistance between the EU and the United States of America.³⁸
- Council Framework Decision on the standing of victims in criminal proceedings (15 March 2001)³⁹:

Article 11 – Victims resident in another Member State

1. Each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred, particularly with regard to the organisation of the proceedings. For this purpose, its authorities should, in particular, be in a position:

(...)

the approval of the draft Law 3/2020, of the Draft Law on procedural efficiency measures for the public justice service, it would have to do so.

³⁶ Details are available under www.ejn-crimjust.europa.eu

³⁷ OJ [2010] L39/20, Article 16.

³⁸ OJ [2003] L181/34, Article 6.

³⁹ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ [2001] L82/1.

– to have recourse as far as possible to the provisions on **video conferencing** and telephone conference calls laid down in Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 for the purpose of hearing victims resident abroad.

- Directive (EU) 2014/41/EU regarding the European Investigation Order in criminal matters (3 April 2014):⁴⁰

Article 24 – Hearing by videoconference or other audio-visual transmission

1. Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by **videoconference** or other audio-visual transmission (...). The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by **videoconference** or other audio-visual transmission.
2. In addition to the grounds for non-recognition or non-execution referred to in Article 11, execution of an EIO may be refused if either:
 - (a) the suspected or accused person does not consent; or
 - (b) the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.
3. The issuing authority and the executing authority shall agree the practical arrangements. (...)
4. If in circumstances of a particular case the executing authority has no access to technical means for a hearing held by videoconference, such means may be made available to it by the issuing State by mutual agreement.

The European Investigation Order (EIO) Directive was clearly based on the previous Conventions. The difference that the EIO is issued by a judicial authority of a Member State and must be executed based on the principle of mutual recognition in another Member State.⁴¹

The deadline for the implementation into national legislations was 22 May 2017.⁴² The 26⁴³ participating Member States⁴⁴ have implemented it in their respective national legislations.

According to Article 24(5) both Member States shall agree on measures for the protection of the person to be heard, the hearing shall be conducted directly by, or under the direction of, the competent authority of the issuing State in accordance with its own laws, the executing State shall ensure that the person to be heard is

⁴⁰ Directive (EU) 2014/41/EU regarding the European Investigation Order in criminal matters, OJ [2014] L 130/1.

⁴¹ Directive (EU) 2014/41/EU regarding the European Investigation Order in criminal matters, OJ [2014] L 130/1, Art. 1(1) and (2).

⁴² Directive (EU) 2014/41/EU regarding the European Investigation Order in criminal matters, OJ [2014] L 130/1, Art. 38.

⁴³ Information available at: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusireOfImpByCat.aspx?CategoryId=120

⁴⁴ Denmark and Ireland opted out.

assisted by an interpreter, if necessary. The suspected or accused should be informed prior to their hearing about their procedural rights, including the right not to testify, under the law of the executing State and the issuing State. Similarly, witnesses and experts shall be informed in advance about their right not to testify (under the law of either the executing or the issuing State).

- Council Directive relating to compensation to crime victims (29 April 2004)⁴⁵:

Article 9 – Hearing of the applicant

1. If the deciding authority decides, in accordance with the law of its Member State, to hear the applicant or any other person such as a witness or an expert, it may contact the assisting authority for the purpose of arranging for:
(a) the person(s) to be heard directly by the deciding authority, in accordance with the law of its Member State, through the use in particular of telephone- or **videoconferencing**; (...)

- Council Regulation (EC) on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (28 May 2001):⁴⁶

Article 10 – General provisions on the execution of the request

(...) 4. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using **videoconference** (...)

Article 17 – Direct taking of evidence by the requesting court

(...) 4. (...) The central body or the competent authority shall encourage the use of communications technology, such as **videoconferences** and teleconferences.

- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, amended by Regulation (EU) 2015/2421:⁴⁷

Article 8 – Oral hearing

1. Where an oral hearing is considered necessary in accordance with Article 5(1a), it shall be held by making use of any appropriate distance communication technology, such as **videoconference** or teleconference, available to the court or tribunal, unless the use of such technology, on account of the particular

⁴⁵ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ [2004] L261/15.

⁴⁶ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ [2001] L174/1. The Regulation does not apply to Denmark.

⁴⁷ Regulation (EU) 2015/2421 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ [2015] L341/1. The European Small Claims Procedure is available to litigants as an alternative to the procedures existing under the laws of the Member States. A judgment given in the European Small Claims Procedure is recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

circumstances of the case, is not appropriate for the fair conduct of the proceedings.

- AVIDICUS projects.

There are three European collaborative projects focused on Video-Mediated Interpreting (VMI) in legal proceedings that were carried out from 2008 to 2016 with financial support from the European Commission’s Directorate-General for Justice. AVIDICUS stands for Assessment of Video-Mediated Interpreting in the Criminal Justice System. Most of the resources developed in these projects are available on a website devoted to the practice of, and research on, VMI, i.e., different methods of distance interpreting whereby the participants and/or the interpreter(s) are connected by video link.⁴⁸

5. THE IBERO-AMERICAN REGION

a. Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems and its Additional Protocol Related to Costs, Linguistic Regime, and Submission of Requests.

The Conference of Ministers of Justice of the Ibero-American Countries (COMJIB), specifically, in connection with work on “*New Technologies Applied to the Administration of Justice*” adopted the *Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems*⁴⁹ (Here in after the “Ibero-American Convention”) and its Additional Protocol on 3 December 2010. The Convention promotes the use of videoconferencing between the competent authorities of Latin American countries, as a practical means to strengthen and accelerate cooperation. The signatory countries are: Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Spain, Panama, Paraguay, Portugal, Dominican Republic, Ecuador and Mexico. Any other country may accede to the agreement at any time. It entered into force on 17 July 2014 and has been ratified by Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Paraguay, and Spain. The Protocol⁵⁰ became effective on August 24, 2016, and it is currently effective for the same seven countries as the Convention.

⁴⁸ Available at: <http://wp.videoconference-interpreting.net/>

⁴⁹ Convenio Iberoamericano sobre el uso de la Videoconferencia en la Cooperación Internacional entre Sistemas de Justicia y el Protocolo Adicional al Convenio Iberoamericano sobre el Uso de Videoconferencia en la Cooperación Internacional entre Sistemas de Justicia Relacionado con los Costos, Régimen Lingüístico y Remisión de Solicitudes.

⁵⁰ The Protocol was signed by the same countries that signed the Convention, with the exception of Portugal.

Argentina approved the Convention and its Protocol by law 27162 of July 15, 2015, published in the Official Gazette on July 29, 2015. However, to date, it has not been formally ratified. El Salvador is in a similar situation, in that it approved the Convention and its Protocol by law on January 26, 2011, but has not yet been formally ratified either.

Article 1. Purpose of the agreement

This Agreement promotes the use of **videoconferencing** between competent authorities of the Parties as a specific means to strengthen and accelerate mutual cooperation in civil, commercial and criminal law, and other matters by express agreement between the parties.

The agreement contains the possibility to hear a person via videoconferencing as a party, witness, or expert during a trial or during preliminary investigations when he/she is located in another state.

The videoconferencing will be carried out by the competent authority of the requesting State or under its direction, under the terms of its internal law. The competent authority of the requested State shall be present and, if necessary, the authority of the requesting State, and accompanied by an interpreter, should it be required. It is the responsibility of the requested authority to identify the person to be examined.

The authorities may apply protective measures to the people to be examined according to the applicable law in the States involved.

The authority of the requested party is required to take the minutes of the videoconference proceedings stating the date and location, the identity and signature of the person examined when appropriated, the identity and signature of all others who participated, the possible taking of oaths or promises, and the technical conditions in which the diligence took place. The minutes must be sent to the requesting State subject to any protective measures such as identity protection that has been agreed upon.

In certain cases, in order to expedite the process, the request could be made by any means that allows a written record of the transmission. In such case and when appropriate the request will be later formalized to the requested authority.

In this regard, the *Ibero-American Network for International Legal Cooperation - IberRed-* has a secure communication system called Iber@, through which international legal assistance requests can be send, including those related to videoconferencing requests. It is appropriate to mention that the COMJIB agreed to another relevant treaty in July 2019 title “*Treaty Relating to the Electronic Transmission of Requests for International Legal Cooperation among Central Authorities*”, known as the Medellín Treaty⁵¹. This treaty allows communications made between central authorities through

⁵¹ To date, it has been signed by Argentina, Brazil, Chile, Colombia, Spain, Paraguay, Portugal, and Uruguay; and Andorra and Cuba have joined, so it needs the ratification or accession of a third country for the Treaty to become effective. This Treaty broadens the spectrum of cooperation by allowing the Third States that are not from the Ibero-American region the accession to this instrument.

Iber@ to have full legal validity. This implies that the documentation that central authorities sent through Iber@ must be considered, for all purposes, as original and/or authentic in judicial processes that has full legal effect. Warranting personal data protection and preventing information leakage. On this secure platform, central authorities have an electronic signature and a certification system.

In this way, the economic cost associated with the traditional physical shipment of international requests for mutual legal assistance between central authorities is considerably reduced and instantaneous processing is enabled.

The platform will also have a fully secured videoconferencing system for both formal communications between central authorities and informal communications among network contact points.

As a consequence of the Medellín Treaty, requests for videoconference based on the *Ibero-American Agreement*, the United Nations Agreements, or any bilateral or multilateral treaty between the Parties and involving central authorities, may be sent by Iber@ with full legal effect without the need for shipments by postal service.

Per this *Ibero-American Convention*, the provisions for the testimony of witnesses and experts by videoconference apply to the examination of a defendant or accused person, under the domestic law of each Party. Respect for all procedural rights and guarantees is enforced; in particular, the right to have legal assistance. It is agreed that the Parties may choose not to apply this Convention to the examination by videoconference of the defendant or accused. However, to date, none of the countries have made a reservation on that respect.

The *Additional Protocol* clarifies that all costs are to be borne by the requesting State Party. Likewise, requests for a hearing by videoconference sent by the authorities of the requesting State to the requested State may be in Spanish or Portuguese, regardless of the official language of the requested or requesting Party. In case a Party only agrees to receive requests in a certain language, it may make a statement to that effect.

b. Guide to Good Practices on the Use of Videoconferencing of the Ibero-American Network for International Legal Cooperation -IberRed-

The Guide is aimed at legal practitioners working in the areas of civil and criminal matters in Ibero-America and at Contact Points and Liaisons that make up the "*Ibero-American Network for International Legal Cooperation*" (*IberRed*), which play a fundamental role in streamlining and coordinating requests for international assistance and, therefore, in facilitating videoconference. The Guide considers the "*Ibero-American Convention*" and its *Additional Protocol*; the work carried out by the *Hague Conference on the Convention on Obtaining of Evidence and on the Use of*

Videoconferencing; the *Asuncion Guide on the Use of videoconferencing* adopted by the Specialized Meeting of Public Ministries of Mercosur; and the *Practical Guide on videoconferencing* prepared by the European Judicial Network on civil and commercial matters.

In technological aspects, among others, it is recommended to use the IP technology due to a lower cost compared to the ISDN. For communication by IP, the existing Internet link in each institution is used, if the requirements indicated in the Guide are met. It is important to mention that complete technological security cannot be guaranteed. However, when it comes to videoconferencing, since it is carried out using hardware, that is, with a point-to-point computer connection and where information travels encrypted, risks are minimized.

In operational aspects, among others, flexibility with the dates indicated is recommended, proposing alternative dates.

In legal aspects, in section 7, it is advisable to highlight the following two recommendations:

- a. In cases where a consul, in accordance with his/her national law, carries out the videoconference and witness summons for that purpose, it is recommended that he/she verifies in advance with the competent authorities of the requested State if such intervention is admissible and if a letter rogatory for such purposes is necessary.

In this regard, it is worth mentioning that, although not common, some countries grant broad functions to their consular delegations in matters of international judicial cooperation and, in particular, regulate consular videoconferencing in the procedural field and, even, as in the case of Costa Rica, require the presence of the consul in the requested videoconference through international judicial assistance, even if it is practiced before the judicial authority⁵². Therefore, the recommendation is especially important when reminding legal operators of the need to comply with the legislation of the requested country and the existing treaties between the parties, so that an intervention by a consular officer must have the authorization of the requested country. It is also important to remember that the hearing of a person from abroad without resorting to international judicial assistance (...) is an irregular practice that does not guarantee the intangibility and veracity of the evidence and could lead to diplomatic problems with the country from which the statement is made.⁵³

- b. It is recommended to include in the request copies of the documents that must be exhibited to the declarant in the videoconference, the documents should be properly

⁵² Ruling 1/21 on the use of videoconferencing in international judicial cooperation in criminal matters, Office of the Attorney General of the State of Spain, p. 14

⁵³ *Idem*, p. 17.

translated and/or certified, if necessary, under the applicable international legal instrument or under the law of the required and/or requesting country.

It is proposed that the request must contain, at least, the following indications:

- a) Identification of the requesting authority, the number and/or reference page of the process, and, if possible, the identification of the requested authority.
- b) Nature, object, or facts of which a statement is requested.
- c) The name and position of the authority that will direct the proceeding.
- d) The name and address of the parties involved in the process and of their representatives.
- e) Documents or other objects to be examined.
- f) The personal details and address of the people to be heard.
- g) The evidence to be obtained or any legal actions to be performed.
- h) Obligation to take an oath or promise to tell the truth.
- i) The need or obligation of an interpreter, regardless of the person to be heard (witness, expert, or defendant), as well as the language to be used.
- j) Indication as to whether the person to testify must be accompanied by a lawyer and, in that case, the manner and time of intervention of a said lawyer.
- k) Obligation to declare or to provide expertise and consequences of refusal to do so.
- l) The reference to a possible right of objection, privileges or immunities, and possible consequences of the refusal to testify, as established in the law of the requesting Party.
- m) Information if it is a protected witness and what additional measures must be taken (distortion of voice, image, or both; different placement of the cameras, etc.). Likewise, in the case of victims of certain crimes such as violence against women, minors, or sexual abuse.
- n) Information on the costs of the videoconference (within the framework of the general principle of cooperation, they should be covered by the requesting authority).
- o) Testimony of victims to the different procedural moments (criminal).

c. Ibero-American Association of Attorneys General (AIAMP)

The “*Santiago Guides*” was approved at the XVI Ordinary General Assembly of AIAMP in the Dominican Republic in July 2008, and contains specific recommendations essentially addressed to the Prosecution offices of the region on the

conditions provided in a timely, comprehensive, and efficient manner to ensure due protection to victims and witnesses.

In relation to foreign victims, it establishes that the intervention must be characterized by the speed and streamlining of international cooperation mechanisms, using of technologies. It is understood that videoconferencing is an optimal tool for achieving this purpose.

d. Ibero-American Judicial Summit

The Ibero-American Judicial Summit on its XVIII session, that took place in Chile in 2014 approved the *International Judicial Cooperation Protocol*⁵⁴. These are some of the main recommendations of this Protocol⁵⁵:

- Dissemination and implementation of the “Ibero-American Convention” and its Protocol.
- Promote its ratification or accession of the Ibero-American Convention, so that: i) the necessary means for its application are available both domestically and internationally, and ii) the necessary trust is generated for the use of the tool by the judges.
- Without prejudice to the legal adjustments that may be necessary, the use of videoconferencing is implemented through administrative regulations.

6. MERCOSUR

During the *VII Specialized Meeting of Public Ministries of Mercosur and Associated States*, held on May 29, 2009, in the city of Asuncion, Republic of Paraguay, they approved the “*Asuncion Guide on the Use of Videoconferencing in Criminal Proceedings*”.

This guide establishes the need to harmonize legislative, technical, and operational guidelines for the use of videoconferencing.

According to this guide some relevant legislative measures on videoconferencing may include:

- to be used, both in the investigative stage as well as in the trial,
- to be carried out according to the requirements of the requesting State, if it does not violate fundamental rights,

⁵⁴ Protocolo de Cooperación Judicial Internacional, Cumbre Judicial Iberoamericana:
<file:///C:/Users/amuri/Downloads/03%20ANEXO%20III%20GRUPO%20COOPERACION%20JUDICIAL.pdf>

⁵⁵ International Judicial Cooperation Protocol, p. 5 and 6

- that the request for assistance to conduct a videoconference can be advanced by informal means, without prejudice to the subsequent formal request.

In the technical aspects, they urge prosecution offices lacking of the technological means to establish collaboration agreements with other institutions or organizations that could provide the necessary technology.

In the operational aspects, it is worth highlighting the recommendation that each prosecution office should designate a national coordinator for the use of videoconferencing, who acts as the contact point for the requesting countries and as a facilitator with the rest of the national institutions to guarantee the necessary coordination for the success of the videoconference. They urge both parties, requesting and requested, to be as flexible as possible when setting the time of the videoconference and its duration, especially attending to the differences in time zones. And to the extent possible the requested authority makes contact and ensures the presence of the declarant in the place, day, and time of the videoconference.

7. SOUTHEAST ASIA

The Treaty on Mutual Legal Assistance in Criminal Matters signed in 2004 in Kuala Lumpur contains several articles permitting videoconferencing. All ASEAN members, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam have ratified it.

Article 11 – Obtaining of evidence

1. The Requested Party shall, subject to its domestic laws, arrange to have evidence, including sworn or affirmed testimony, documents or records taken or obtained from witnesses for the purpose of a criminal matter for transmission to the Requesting Party. (...) 3. Nothing in this Article shall prevent the use of **live video** or live television links or other appropriate communication facilities (...).

Article 12 - Right to decline to give evidence

1. A person who is required to give sworn or affirmed testimony or produce documents, records or other evidence under Article 11 of this Treaty in the Requested Party pursuant to a request for assistance may decline to do so where -
(a) the law of the Requested Party permits or requires that person to decline to do so in similar circumstances in proceedings originating in the Requested Party; or
(b) the law of the Requesting Party permits or requires that person to decline to do so in similar circumstances in proceedings originating in the Requesting Party.

2. If the person claims that there is a right to decline to give sworn or affirmed testimony or produce documents, records or other evidence under Article 11 of this Treaty under the law of the Requesting Party, the Requesting Party shall, if so

requested, provide a certificate to the Requested Party as to the existence or otherwise of that right.

Article 14 – Attendance of person in the requesting party

1. The Requested Party may, subject to its domestic laws and practices, assist in arranging the attendance of a person in the Requested Party, subject to his consent, in the Requesting Party

(a) to assist in the investigations in relation to a criminal matter in the Requesting Party; or

(b) to appear in proceedings in relation to a criminal matter in the Requesting Party unless that person is the person charged (...)

4. Nothing in this Article shall prevent the use of **live video** or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party if it is expedient in the interests of justice to do so.

Article 15

1. The Requested Party may, subject to its domestic laws and practices, agree to allow a person in custody in the Requested Party, subject to his consent, to be temporarily transferred to the Requesting Party to give evidence or to assist in the investigations. (...)

7. Nothing in this Article shall prevent the use of **live video** or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party if it is expedient in the interests of justice to do so.

Article 25

(...) 2. The cost of establishing **live video** or television links or other appropriate communications facilities, the costs related to the servicing (...) the facilities, (...) shall be refunded by the Requesting Party to the Requested Party, unless the Parties mutually agree otherwise.

In addition, the ASEAN Convention on Counterterrorism⁵⁶ of 2007 affirms:

Article VI – Areas of Cooperation

1. “The areas of cooperation under this Convention may, in conformity with the domestic laws of the respective Parties, include appropriate measures, among others, to:

(...)

1. Encourage the use of **video conference** or teleconference facilities for court proceedings, where appropriate;”

⁵⁶ Association of Southeast Asian Nations Convention on Counter-Terrorism (ACCT). This Convention has been ratified by all ASEAN members.

B. NATIONAL LAWS AND PROCEDURE ON VIDEOCONFERENCING

Many national legislations worldwide contain provisions on the use of videoconferencing in criminal proceedings. While in certain regions videoconferencing tools are widespread, other parts of the world do not benefit from this technology yet. An interesting distinction can be observed between countries which have a common law system and civil law countries. Almost all countries with Anglo-Saxon legal systems use widely videoconferencing. Australia, Canada, New Zealand, the United Kingdom and the United States have very comprehensive legislation on the use of videoconferencing for mutual legal assistance at both the national and international level. Although videoconferencing is widely used in these countries, it still remains an exception to the general rule of immediacy of court proceedings from which it should be deviated only for very specific reasons. In comparison to common law countries, civil law countries are more reluctant in the use of videoconferencing. Many of these countries do not use videoconferencing in national and mutual legal assistance cases, with the notable exception of European countries. The following examples⁵⁷ show the diversity of national legislations in terms of videoconferencing but allow observing common patterns and similarities of rules and practices.

I. AFRICA

1. Cape Verde

Videoconferencing is possible in the field of international cooperation in criminal matters. It is regulated by Law No. 54/VI/2005, of January 10.

The use of the videoconferencing for international cooperation is established in Law No. 6/VII/2011, of August 29, in the Articles 141.º, No. 2, al. d) e No. 3, related to article 345 of the Criminal Procedure Code of Cape Verde.

The law that regulates videoconferencing stipulates its use in criminal proceedings only for the taking of testimony of attendees, civil parties, witnesses, and experts.

The requesting authority is the one who formulates the questions, and it corresponds to the judge of the requested country, “*ordering, by appropriate means, to appear*”, “*receiving the oaths and commitments*”, and “*taking preventive, disciplinary and coercive measures, legally admissible, that are necessary*”.

⁵⁷ To update this Guide, UNODC sent a thematic questionnaire to the States through their central authorities on mutual legal assistance and operational networks in March 2021. Information on the States that answered the questionnaire was provided by the competent and central authorities.

It is up to the requesting country to allow the lawyers to intervene during the videoconference. In such case, the Cape Verdean Law allows lawyers to ask questions to the participants.

Well in advance, the compatibility of the videoconferencing systems should be tested. The requesting country must indicate in its request the details of a contact person, preferably email, to arrange the completion of this test.

Not all courts have videoconferencing equipment in Cape Verde. When a court is not equipped with videoconferencing system, the law is silent on the possibility of taking the videoconference to a different location. The Office of the Attorney General, which is the central authority, reports not knowing specific cases of this nature.

If the requesting State provides equipment for mobile videoconferencing, the Cape Verde central authority considers that, although the Law does not regulate this situation specifically, we can affirm that, in principle, this is not prohibited.

2. Egypt

The Egyptian Parliament's Defence and National Security Committee has pushed for videoconferencing technology to be used in court sessions to cut costs, instead of having to transfer prisoners to the courts.

Following the digital transformation policy in Egypt, the General Prosecutor's Office has witnessed a remarkable development of videoconferencing to fulfil its mission. The Egyptian Prosecutor's Office shall comply with multilateral or bilateral treaties, with the understanding that, if the request is not prohibited by law, as in the case of videoconferencing, then it is possible to carry it out. In Egypt, the judicial authority is in charge of executing a mutual legal assistance request, which acts on behalf of the State. For this reason, no one can intervene in the diligence except if the treaty on which the cooperation is based allows it. It is also understood that this involves the participation of lawyers in the requesting country.

It is not possible to conduct hearings by videoconference using mobile equipment provided by the requesting State since the Egyptian Prosecutor's Office relies on the Information Center of the Prosecutor's Office, which specializes in all technical issues and provides prosecutors with all facilities and equipment needed to communicate through videoconferencing.

3. Gambia

There is no legal base concerning videoconferencing on mutual legal assistance in The Gambia. The conventional approach to judicial cooperation in The Gambia is through

reciprocity or formal agreements between The Gambia and the country concerned. Requests made by letters, emails, and other established channels of communication are allowed. Since there is no law prohibiting judicial cooperation by videoconferencing, such cooperation is available in The Gambia subject to approval case by case.

The Chief Justice in 2020 issued a directive in accordance with the Courts Act Vol. II CAP 6:01 Revised laws of the Gambia, regulating the use of videoconferencing in limited court cases due to the COVID-19 pandemic. The facility is mostly used in criminal cases, particularly in bail applications. The initiative was well received by members of the Bar association and the general. Criminal cases using videoconferencing are notably quick and this has reduced the number of pending cases, as well as helped to decongest the prisons. The initiative, therefore, is very productive and effective.

There has not been established a guide to facilitate Judicial cooperation in The Gambia; cases are treated on a case-by-case basis as this depends on their nature and peculiarities.

There are no virtual hearing facilities in any part of the country; it is only available within the Greater Banjul area in two courts. Where the videoconferencing equipment is not available in the Court, it is possible to conduct a videoconference in a different location.

Likewise, it is possible to conduct hearings by videoconference using mobile equipment provided by the requesting State. The eligibility of a videoconference requested by a State will be resolved by the Gambian authorities on a case-by-case basis.

4. Ghana

The use of videoconference is possible in Ghana, for the purposes of judicial cooperation according to the Mutual Legal Assistance Act, 2010 (Act 807).

Section 40 of Act 807 states:

Request for hearing by means of technology

“If a person has to be heard as a witness or expert by the judicial authorities of a foreign State, or a foreign entity, the Central Authority of that foreign State or the competent authority of that foreign entity may make a request for a hearing by video conference or any other means of technology designated by the Minister.”

Section 41 (1) of Act 807 states:

Evidence-gathering by video conference

“Where the Minister approves a request by the Central Authority of a foreign State or the competent authority of a foreign entity for a witness or expert to provide evidence on oath or otherwise by means of video conference that permits the virtual presence of the person in the territory over which the foreign State has jurisdiction, or in the forum of the foreign entity that permits the parties and the court to hear and examine the witness, the Minister may apply without notice for an order to take the evidence of the person in private.”

Section 42 (1) of Act 807 states:

Hearing of accused person by video conference

“The Central Authority may after consultation with the Central Authority of a foreign State or with the competent authority of a foreign entity where applicable, grant a hearing by video conference.”

There are no limitations on the use of videoconferencing. For instance, videoconference is permitted for interviews with witnesses and experts, as well as hearings.

In addition, section 14 (1) of Act 807 permits a defence request for mutual legal assistance. This may be done by videoconference. Section 14 (1) states as follows:

Defence request for mutual legal assistance

“Where criminal proceedings have been instituted against a person, or a person is joined in criminal proceedings, the Central Authority of the foreign State or competent authority of the foreign entity concerned may on application by

- (a) that person, or*
- (b) that person’s legal representative,*

issue a request for assistance to the Central Authority of another foreign State.”

Section 8 (c) of Act 807 requires the requesting authority, when making a request for mutual legal assistance, to indicate details of any procedure it wishes to be followed by Ghana. Thus, the intervention of the requesting authority may be considered in the execution of a request to be done by videoconference.

Section 8 (c) states as follows:

“A request for mutual legal assistance shall indicate details of any particular formality or procedure that the foreign State or foreign entity wishes to be followed by Ghana.”

Section 41 (4) (b) of Act 807 states:

“An evidence-gathering order to use video conference shall summon or make arrangements for the person to answer a question put to the person by the authorities of the foreign State or foreign entity or by a person authorised by those authorities in accordance with the law applicable to that State...”

A list of questions is required to be sent with the letter rogatory prior to the date of execution, where the requesting authority wishes to examine a witness before a competent court of Ghana which is exercising jurisdiction over a criminal matter. This has been stated in section 26 (1) (b) of Act 807. It states as follows:

“A request by the Central Authority of a foreign State or by the competent authority of a foreign entity for assistance to examine a witness before a competent court of the Republic which is exercising jurisdiction over a criminal matter shall specify as appropriate the questions relating to the subject matter to be put to the witness to be examined orally or in writing.”

Lawyers from the requesting State can make questions according to section 41 (4) (b) of Act 807. It states:

“An evidence-gathering order to use video conference shall summon or make arrangements for the person to answer a question put to the person by the authorities of the foreign State or foreign entity or by a person authorised by those authorities in accordance with the law applicable to that State...”

Regarding the use of videoconferencing facilities at the High Court are only available in Accra the capital, and Ghana’s second largest city. A test with the remote site is arranged at least 24 hours before the date of the videoconferencing.

The law does not specifically provide regulation for using mobile equipment provided by the requesting country. However, it may be possible with the consent of the court.

5. Guinea Bissau

The Guinea-Bissau law does not regulate the taking of statements in criminal proceedings by videoconference. The procedural acts in the criminal law of the country must be carried out in the presence of the accused and the accused must be present before the authorities to testify. There are no precedents of a person to be heard by judicial bodies by videoconference.

In a request for judicial assistance in criminal matters, it must be requested by means of a letter rogatory indicating the motivation for the measure or facts under investigation, and including the questions to be made from the requested authority. Due to a lack of legal authorization, lawyers from the requesting state are not able to participate in the videoconference.

The country does not have a videoconferencing system for criminal proceedings. This is a topic whose discussion has arisen due to the COVID-19 pandemic.

There are courts with computing means and internet access, but despite this, it is not appropriate for the court or the judicial authorities to move to another place belonging to political or diplomatic bodies to listen to the people who are there. In the case of embassies or consulates, the diplomatic laws signed by the country prevent them from entering an embassy or consulate of a foreign country, since they are considered, for all purposes, territories of a foreign country.

6. Kenia

The Kenyan Code of Criminal Procedure does not contain a provision on videoconferencing. In 2011, however, the High Court allowed the taking of evidence by videoconference in a criminal trial. The case involved two witnesses residing in the United States who expressed their reluctance to travel to Kenya to give evidence, because they feared for their safety. The High Court ruled that the magistrate's court was wrong in declining an application by the prosecution to have the evidence taken by videoconference and allowed videoconferencing between the Kenyan embassy in the United States and a Nairobi court.

7. Mali

It is not possible to guarantee cooperation in criminal matters to receive testimony by videoconference in Mali, although exceptionally, it was accepted to hear by videoconference a victim that was as civil party.

8. Niger

Per the provisions of article 649.52 of the Code of Criminal Procedure of Niger, "the Ministry of Justice accepts any request for assistance from a requesting State that is made by any means that leaves a written record and as indicative and non-exhaustive, by email, fax or through the judicial cooperation Networks.

In cases of emergency, the ministry accepts an oral request if it is confirmed by any means that leaves a record. Article 649.62 establishes that any witness, victim, or expert who is in the national territory may address the judicial authorities of a requesting State by videoconferencing. To date, there is no jurisprudential precedents on the use of

videoconferencing. There is no limitation whatsoever to questioning the accused. Lawyers in the requesting state may ask questions during the videoconference under the cited articles and the principle of reciprocity. Videoconferencing equipment is available in major cities, but the difficulty is that internet access is very limited. Occasionally, the Nigerian authority could consider holding the videoconference outside the Court or agreeing that the Requesting State provides mobile videoconferencing equipment.

9. South Africa

Section 158 of the South African Criminal Procedure Act⁵⁸ provides those criminal proceedings take place in the presence of the accused. An exception is provided for in Section 158(2), according to which a court may on its own initiative or upon application by the public prosecutor order (subject to Article 153 that deals with vulnerable witnesses) that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed-circuit television or similar electronic media.

A court may issue a similar order upon the application of an accused or a witness. Pursuant to Article 153(3) of the Criminal Procedure Act, the prerequisite for such a decision is that the facilities are readily available or obtainable and (a) it helps the court to prevent unreasonable delay or (b) to save costs, or (c) is convenient, or (d) is in the interest of the security of the State or of public safety or in the interests of justice or the public, or (e) prevents the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

Article 159A of the Criminal Procedure Act provides for the possibility of videoconferencing of the accused under certain limited circumstances, namely when he is in custody, has already appeared before the court, and a hearing has been postponed before, when the hearing concerns a further postponement of the case or consideration of release on bail.

There is no clarity in South African law regarding evidence via videoconferencing from witnesses abroad. In the South African case “*Project Yield*”⁵⁹, the taking of evidence was argued based on an interpretation of Section 2(1)⁶⁰ of the International Co-operation in Criminal Matters Act (ICCMA)⁶¹ in conjunction with Sections 153 and 158 of the Criminal Procedure Act⁶². However, the judge denied the prosecutor’s application on the facts, not on a legal point, which left the prosecution in a position where no appeal was possible.

⁵⁸ Criminal Procedure Act 51 of 1977.

⁵⁹ See UNODC SHERLOCK case law data base, UNODC No.: ZAFx003.

⁶⁰ “If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.”

⁶¹ International Co-operation in Criminal Matters Act - Act No. 75 of 1996.

⁶² Act No. 51 of 1977

Due to the current legal situation, the party bringing the application will very often be confronted with an objection from the defence. Because of these grey areas in South African law, recommendations have been made to the law commission for an amendment to the ICCMA to align it with international law and provide a clear legal basis.

The prevailing position of South African Courts established four major aspects for the authorization of the use of videoconferencing:

- (i) A successful application indicating why the witness is not available;
- (ii) Funding by the National Prosecuting Authority;
- (iii) Compliance with the legal requirements of the requested country; and
- (iv) a willing witness.

10. Chad

Videoconferencing is frequently used in Chad, particularly since the COVID-19 health crisis. As there is no legislation on regard videoconferencing, it is applicable if it does not disturb public order. It has been carried out informally between the focal points of the WACAP Network of prosecutors.

The Prosecutor's Office of Chad considers that there is a risk derived from videoconferencing with the possibility of making available to the public information that could constitute a violation of information secrecy.

There is no videoconferencing system available in the provincial capitals due to electricity problems, which works intermittently.

11. Togo

Videoconferencing in international criminal cooperation is not regulated in the legal system of Togo. However, the new Criminal Procedure Code is currently under discussion and drafting, which does stipulate a detailed regime to regulate videoconferencing.

Videoconferencing was used in a criminal case, as part of passive judicial cooperation. In execution of letter rogatory issued from Italy and whose objective was to meet by videoconference five Togolese citizens as victims, in a criminal process for sexual abuse open against a natural person of Italian nationality.

The interrogation of a defendant or accused by videoconference must respect the same conditions as the execution of this act in person, according to the provisions of the code of criminal procedure of Togo. Therefore, the interrogation must be carried out following the

guiding principles of the criminal process; in this case, the presumption of innocence and respect for the rights of the defense.

In the case carried out by Togo in cooperation with Italy, the Italian magistrate was the only one who asked questions with the help of a translator. The competent judicial authorities of Togo only ensured the organization of the session.

The Ministry of Justice, which is the central authority of Togo, considers that the current code of criminal procedure authorizes lawyers to intervene in criminal proceedings; therefore, lawyers would also be authorized in the framework of judicial cooperation by videoconference.

All questions related to technical aspects of the organization of the videoconference are carried out with the Central Authority of Togo; in this case, the Directorate of Criminal Affairs and Pardons of the Ministry of Justice and Legislation. This central authority oversees organizing a videoconference throughout the national territory. The central authority may organize the videoconference with the arbitrage of an Embassy, as was done in the case of Italy, with the collaboration of the French Embassy in Togo.

In general, any measure of international criminal assistance that does not conflict with a legislative or regulatory provision in force in Togo could be carried out in practice.

II. MIDDLE EAST AND ASIA

1. Bahrain

The Office of the Attorney General reports that Article 82 of Law No. 7 of 2020 amended some provisions of the Criminal Procedure Law (Decree-Law No. 46 of 2002). According to this article, the Public Prosecution of the Kingdom of Bahrain may record the investigation procedures, whether with a defendant or witness. Moreover, the law allows for investigation via online broadcasting at all stages of criminal proceedings (preliminary investigation, final investigation before the court, and in the consideration of arrest warrants/pre-trial detention).

The use of modern technology for taking testimony by videoconferencing emerges mainly in the context of investigations or trials that take place in a country other than the country where the witness is located and there are physical obstacles to his/her travel, as well as in the case of personal obstacles that impede attending Court to give evidence. According to the substantive scope of the letter rogatory, the requesting authority may ask questions to

interrogate the witness or the defendant in the presence of a member of the Public Prosecution. These questions shall be included in the request of mutual legal assistance and the witness, or the defendant must be informed of the content of these questions before the videoconference starts.

Videoconferencing has been allowed in several requests of mutual legal assistance in Bahrain. Lawyers from the requesting State may participate in the videoconference if they are allowed by the judicial authority in the requesting State.

There are videoconferencing systems available in the Prosecution offices throughout the entire country. However, if it is necessary to be carried out outside the national headquarters, the authority in charge will allow it if the new location is qualified and appropriate to conduct an interrogation without interfering with the testimony of the defendant or witness. Under the same considerations, it is possible to conduct hearings by videoconference by using mobile equipment provided by the requesting country. In any case, before the scheduled session for the videoconference, the requested and the requesting States must ensure compatibility of the systems involved.

2. China Special Administrative Region of Hong Kong

The Prosecution Office of China Special Administrative Region of Hong Kong has provided information on legal provisions and recommendations to implement videoconferencing for mutual legal assistance with their country, as follows:

- a. Providing assistance to foreign jurisdictions in criminal matters:

Videoconferencing, also known as live television link⁶³ in Hong Kong is available to assist foreign jurisdictions in taking evidence in respect of foreign criminal matters.

As an overview, the Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525 of the Laws of Hong Kong, the “MLAO”) and Part VIII of the Evidence Ordinance (Chapter 8 of the Laws of Hong Kong, the “EO”) govern the provision of mutual legal assistance (“MLA”) and court-to-court Letter of Request respectively and they both provide for the taking of evidence by way of live television link. Multilateral conventions, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, which expressly provide for the rendering of mutual legal assistance by means of video conference, are applicable to Hong Kong. A number of bilateral mutual legal assistance agreements that Hong Kong concluded also contain expressed provisions on the taking of testimony by means of video conference.

⁶³ “Live television link” meaning a system in which two places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time.

Assistance in taking evidence by means of live television link can be rendered in respect of a wide range of criminal matters, including criminal investigations, prosecutions, as well as ancillary criminal matters, namely, relating to recovery of proceeds of crime. The request may be made pursuant to bilateral mutual legal assistance agreement, applicable multilateral convention, or on the basis of a reciprocity undertaking provided by the requesting place for rendering similar assistance to Hong Kong in the future. The request can be sent to the Secretary for Justice, which is the central authority of Hong Kong in mutual legal assistance matters.

The taking of evidence by way of live television link may be conducted before a magistrate pursuant to section 10 of the MLAO, which provides, *inter alia*, the following:

Section 10. Requests to Hong Kong for taking of evidence, etc.

(1) Where a request is made by an appropriate authority of a place outside Hong Kong that:

- (a) evidence be taken in Hong Kong;
 - (b) evidence be taken by way of a **live television link** from a person in Hong Kong; or
 - (c) a thing (including a thing belonging to a class of things) in Hong Kong be produced, for the purposes of a criminal matter in the place, the Secretary for Justice may authorize in writing
 - (i) where paragraph (a) applies, the taking of evidence and the transmission of the evidence to that place;
 - (ii) where paragraph (b) applies, the taking of evidence by way of a **live television link** from the person concerned; or
 - (iii) where paragraph (c) applies, the production of the thing and, subject to subsection (14), the transmission of the thing to that place.
- (...)

If the requesting place does not require the proceeding to be presided by a judicial officer in court, and subject to the consent of the witness to giving evidence outside court, the taking of evidence by live television link can be conducted at a private conferencing facility. Law enforcement officer of Hong Kong would usually be present at the private conferencing facility during the evidence taking, to ensure that it is conducted with the witness' consent. As the taking of evidence by live television link may be conducted at private commercial premises, other than in court, if the requesting State offers a place to conduct the videoconferencing the requesting place shall make necessary liaison with the alternative venue provider (e.g., private service provider) and communicate with Hong Kong authorities on the necessary logistics. Video conference for taking evidence in criminal matters should not be conducted on consular premises in China Special Administrative Region of Hong Kong.

On Letter of Request made by a foreign court or tribunal to obtain evidence in Hong Kong for foreign criminal proceedings having been instituted or likely to be instituted if the evidence is obtained, sections 76 and 75 of the EO, as read with section 77B of the EO, empower the Court of First Instance of HKC to make an order for examination of witnesses by means, including live television link. The relevant provisions of sections 75, 76 and 77B of the EO are extracted as follows:

Section 76 Power of a court in Hong Kong to give effect to an application for assistance

- (1) Subject to this section, the Court of First Instance shall have power, on any such application as is mentioned in section 75, by order to make such provision for obtaining evidence in Hong Kong as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court considers appropriate for that purpose.
- (2) Without prejudice to the generality of subsection (1) but subject to this section, an order under this section may, in particular, make provision
 - (a) for the examination of witnesses by any means, including by way of a **live television link**;
 - (b) for the production of documents;
 - (...)

Section 75 Application to the Court of First Instance for assistance in obtaining evidence for civil proceedings⁶⁴ in another court

Where an application is made to the Court of First Instance for an order for evidence to be obtained in Hong Kong and the court is satisfied

- (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (the requesting court) exercising jurisdiction in a country or territory outside Hong Kong; and
- (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the Court of First Instance shall have the powers conferred on it by this Part.

⁶⁴ This section is also made applicable to criminal proceedings by virtue of section 77B

Section 77B Power of Hong Kong court to assist in obtaining evidence for criminal proceedings in an overseas court

- (1) The provisions of sections 75, 76 and 77 shall have effect in relation to the obtaining of evidence for the purposes of criminal proceedings as they have effect in relation to the obtaining of evidence for the purposes of civil proceedings except that
 - a) section 75(b) shall apply only to proceedings which have been instituted or whose institution is likely if the evidence is obtained; and
 - b) an order under section 76 shall not make provision for any matter other than a matter referred to in section 76(2)(a) or (b).
- (2) In its application by virtue of subsection (1), section 77(1)(a) and (b) shall have effect as if for the words “civil proceedings” there were substituted the words “criminal proceedings”.
- (3) Nothing in this section applies in the case of criminal proceedings of a political character.

The court in China Special Administrative Region of Hong Kong may permit the appropriate authority of the requesting place to appear, or to have legal representation, or both, at the proceeding at which the evidence is taken. Questions may be put by the legal representative of the requesting authority who has right of audience in court in the requesting place.

The request should specify, at least, a concrete scope of the subject matter about which the witness is to be examined, if the list of questions to be put cannot be feasibly specified in the request.

Prior arrangement may be made to conduct pre-hearing tests to ensure smooth and successful connections with overseas destinations.

Hong Kong is a special administrative region of the People’s Republic of China. It is a city of comparatively smaller geographical size. Videoconferencing facilities are available in more than one court buildings in Hong Kong and they are at very conveniently accessible locations in the city.

To conduct hearings by videoconference by using mobile equipment provided by the requesting State the requesting place may discuss with authorities of China Special Administrative Region of Hong Kong on the feasibility of using its designated mobile equipment for conducting the video conference and such request shall be considered on a case-by-case basis. There may be greater flexibility, if the video conference is to take place at private commercial premises.

As with the practice in many other jurisdictions, MLA request is a government-to-government arrangement and is, therefore, not an avenue available to a private party. For MLA requests to China Special Administrative Region of Hong Kong, to take evidence from a defendant or a suspect to whom the criminal matter relates, in general, the defendant or suspect is competent, but not compellable to give evidence, and is subject to the arrangement in the relevant bilateral MLA agreement, if any.

For requests to China Special Administrative Region of Hong Kong to take evidence by live television link for foreign criminal proceedings, local authorities may assist the requesting place in consulting the court on compatibility of equipment, based on the specifications as provided by the requesting place. In general, end-to-end encryption is required for the connection with the court. Details on the technical specifications of the video conferencing facilities of the Technology Court can be found at the website of the judiciary of Hong Kong at:

https://www.judiciary.hk/en/court_services_facilities/tech_cop.html

b. Obtaining assistance from foreign jurisdictions in criminal matters:

Hong Kong may also seek assistance from foreign jurisdictions to obtain evidence from overseas witnesses by way of a live television link in respect of domestic criminal matters.

Under section 79I of the Criminal Procedure Ordinance (Chapter 221 of the Laws of Hong Kong), subject to certain conditions, a court of Hong Kong may, on the application of a party to any criminal proceedings, permit a person, other than a person who is a defendant in the proceedings concerned, to give evidence to the court by way of a live television link from a place outside Hong Kong. The MLAO and EO contain respectively the provisions for the making of government-to-government MLA requests and court-to-court Letters of Requests to foreign jurisdictions for taking of evidence by way of television link.

Section 9 of the MLAO provides that the Secretary for Justice may request an appropriate foreign authority to arrange for evidence to be taken by way of a live television link from a person at that place:

9. Requests by Hong Kong for taking of evidence, etc.

(1) The Secretary for Justice may request an appropriate authority of a place outside Hong Kong to arrange for

(a) evidence to be taken in the place and the transmission of the evidence to Hong Kong;

(aa) evidence to be taken by way of a **live television link** from a person at the place; or

(b) a thing (including a thing belonging to a class of things) in the place to be produced and the transmission of the thing to Hong Kong, for the purposes of a criminal matter in Hong Kong.

Part VIIIA of the EO also allows the Court of First Instance to seek assistance from foreign court or tribunal by issuing a Letter of Request to request for examination of witness by way of live television link. Section 77E of the EO provides, inter alia, the following:

77E. Issue of letter of request to obtain evidence in criminal proceedings

(1) Where it appears to the Court of First Instance that any criminal proceedings

(a) have been instituted in Hong Kong; or

(b) are likely to be instituted in Hong Kong if evidence is obtained for the purposes of those criminal proceedings by virtue of an order made under this section, the Court of First Instance may order that a letter of request shall be issued and transmitted in such manner as the Court of First Instance may direct to a court or tribunal specified in the order and exercising jurisdiction in a place outside Hong Kong, requesting such court or tribunal to assist in obtaining evidence for the purposes of those criminal proceedings.

(2) An order under this section shall specify the evidence to be obtained and, in the case of evidence to be obtained

(a) by the examination of any person as a witness by any means (including by way of a live television link), the name and particulars of such person or such other particulars by reference to his office or employment as may be sufficient to ascertain his identity; or

(b) by the production of any document or thing, the nature of such document or thing or a description thereof.

(...)

For requests by Hong Kong to obtain evidence overseas by live television link for domestic criminal proceedings, the said section 79I of the Criminal Procedure Ordinance, which permits the giving of evidence to the court by way of a live television link from abroad, does not apply to a defendant in the proceedings concerned.

For proceeding to be conducted in court, Technology Court has been set up to provide court users technology-based facilities, including video conferencing system for taking evidence from witnesses abroad.

3. India

The legal basis on which courts rely for the use of videoconferencing is Section 275(1) of the Code of Criminal Procedure, according to which a witness testimony may be recorded by electronic audio and video means in presence of the lawyer of the accused. India's federal government has asked its states to link their prisons with courts through videoconferencing for speedy trials and to save costs of transferring persons in custody to courts.

In order to overcome problems of overcrowded jails by more expedited criminal justice decisions, 186 videoconferencing units were planned to be installed in all courts in Maharashtra until the end of 2017. Notably, of 2,200 courts in the State, only 248 courts did not have such a facility. Currently, in locations where videoconferencing is not available yet, it is difficult to make the accused appear before court because of lack of police personnel to escort them, or non-availability of transportation. Videoconferencing facilities would accelerate the closing of cases and reduce the costs accrued by transferring the accused to court.

4. Japan

Japan allows examinations of witnesses by videoconference where they reside in remote locations or where it is necessary to protect intimidated witnesses. It also uses videoconferencing when performing cross-border witness hearings in Mutual Legal Assistance cases. An example in this regard is the “*Agreement on Mutual Legal Assistance between the European Union and Japan*”, which entered into force on 2 January 2011. The purpose of the Agreement is to establish a more effective cooperation between the Member States and Japan in the area of mutual legal assistance in criminal matters. Therein, it is specified, amongst others, that request may consist of taking testimonies or statements and hearings by videoconference.⁶⁵ Moreover, Japan has also established videoconferencing in 12 national universities which spares experts time and travel costs.

5. Kazakhstan

Kazakhstan uses videoconferencing in national and international criminal proceedings. The legal bases are provided in the Code of Criminal Procedure. Videoconferencing can be used for pre-trial and trial hearings and for witness protection purposes:

⁶⁵ OJ [2010] L39/20, Articles 3(a),(b), 15 and 16.

Article 56. General conditions for the exercise of powers by the investigating judge

(...)

2. The investigating judge considers matters, within his (her) competence, alone without a court session.

If it is necessary to explore the circumstances, relevant for a legitimate and reasoned decision, the investigating judge shall decide to hold a court session with the participation of the persons concerned and the procurator. (...)

By order of the investigating judge, a court session may be held in the form of **videoconferencing**. The protocol shall be kept during the court session.

Article 98. Ensuring the safety of the persons, involved in court proceedings

(...)

2. The court may, at the request of the protected person, the prosecution party, as well as on his (her) own initiative in order to ensure the safety of the person, his (her) family members and close relatives, issue an order on the interrogation of a witness: (...)

3) without a visual observation of him (her) by other participants in the court proceedings, including by **videoconference**.

Article 213. Features of interrogation with using scientific and technological means in video communication mode (remote interrogation)

1. Interrogation of a victim or witness may be produced by using scientific and technological means in **video communication** mode (remote interrogation) with their calling to the body of the pre-trial investigation of the area or region, city of republican significance, capital, where they are located or reside. During the remote interrogation, the participants in the procedural action live directly perceive the testimony of the interrogated person.

Remote interrogation is conducted in the following cases:

1) the inability of a person to arrive to the body, conducting the criminal proceedings at the place of investigation (review) of the criminal case for health or other valid reasons;

2) the need to ensure security of the person;

3) the interrogation of a minor or under-age witness or victim;

4) the need to ensure the compliance with the periods of pre-trial investigation, judicial proceedings;

5) the availability of the reasons that give reason to believe that the interrogation will be difficult or associated with unnecessary costs.

Article 576. Conducting procedural actions via video

1. Procedural actions at the request of the competent authority of a foreign state shall be conducted at the location of a person using a **video** in the following cases:

- 1) the impossibility of arriving of the called persons to the competent authority of a foreign state;
- 2) to ensure the safety of persons;
- 3) other grounds, provided by international treaty of the Republic of Kazakhstan.

6. Malaysia

Malaysia allows videoconferencing in criminal proceedings for the taking of evidence but not for the hearing of the accused or defendant. Since an amendment in 2006, the Malaysian Criminal Procedure Code contains a relevant provision on videoconferencing:

Evidence through live video or live television links – Article 272b.

- (1) Notwithstanding any other provision of this Code or the Evidence Act 1950, a person, other than the accused, may, with leave of the Court, give video or live evidence through a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so.
- (2) The Court may, in the exercise of its power under subsection (1), make an order on any or all of the following matters:
 - a) the persons who may be present at the place where the witness is giving evidence;
 - b) that a person be excluded from the place while the witness is giving evidence;
 - c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness, and by the persons with the witness;
 - d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;
 - e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;
 - f) the stages in the proceedings during which a specified part of the order is to have effect;
 - g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and
 - h) any other order the Court considers necessary in the interest of justice.
- (3) The Court shall not give leave under subsection (1) or make an order under subsection (2) if, in the opinion of the Court, to do so would be inconsistent with the Court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.
- (4) Evidence given by a witness through live video or live television link by virtue of this section shall be deemed for the purposes of sections 193, 194,

195, 196, 205 and 209 of the Penal Code as having been given in the proceedings in which it is given.
(...)

The use of videoconferencing systems has benefited courts and different actors involved in the court proceedings in terms of costs and timesaving considering the vast extension of the territory.

7. Singapore

There is no written law in Singapore governing requests from foreign authorities requesting testimony by videoconference⁶⁶ from a witness in Singapore in criminal court proceedings. Singapore, however, can facilitate such requests on an informal basis.

As such requests fall outside the scope of the Mutual Assistance in Criminal Matters Act of Singapore, the authorities do not require a formal mutual legal assistance request to be sent. An electronic copy of the request can be sent by email to AGC_CentralAuthority@agc.gov.sg and the original request must be sent to the central authority. Although requests may be sent via diplomatic channels.

As Singapore has issued and received requests for the giving of evidence by video-link, Singapore has been involved in both “active” and “passive” cooperation.

For pre-trial interviews of witnesses outside Singapore via remote means (e.g., for trial preparation), Singapore law does not impose any limitations or requirements on the position of the person to be interviewed.

As for taking the testimonies from witnesses outside Singapore for court proceedings, different limitations and requirements apply depending on the type of witness concerned. For example, if the accused person is outside Singapore, the proceedings will not proceed, and he/she is not allowed to testify by video-link from overseas. In addition, the taking of evidence by video link of witnesses of fact requires the consent of all parties to the proceedings while this condition is not required for expert witnesses.

The Singapore authorities will generally not be involved, other than being present to observe the proceedings. The requesting authority has the liberty to conduct the videoconference and may ask the witness questions directly during the videoconference.

⁶⁶ videoconference refers to the formal taking of witnesses’ evidence in criminal court proceedings

A request to take evidence by video-link from a witness in Singapore should generally be accompanied with a list of questions, or if that is not available, the broad areas of questioning.

Lawyers from the requesting country may ask questions to the witnesses, experts or defendants if the laws of the requesting State allow it.

For requests of videoconferencing to Singapore, the foreign authority may approach commercial vendors who are known to provide venues for such purposes. Such checks for technical compatibility may be made in advance with the commercial vendor arranged by the requesting State.

For requests made by Singapore, the ZOOM video-conferencing software is used by Singapore Courts. Should a witness situated outside Singapore be required to give evidence in Singapore court proceedings, a test run involving the witness outside Singapore and the Singapore Courts will be conducted before court proceedings are held to ensure that the videoconferencing systems are compatible. Singapore does not generally require the assistance of the foreign country's authorities to set up the ZOOM video call, unless it is a requirement under that foreign country's laws. As the Singapore Courts are able to use ZOOM for videoconferencing, no special equipment is required apart from a device that can access to internet, such as a laptop.

For requests made to Singapore, there is no requirement that the witness testify from a Singapore Court. The witness may give evidence from premises operated by a commercial vendor or other private premises. However, the witness may not give evidence from an Embassy or Consulate of the requesting country.

In principle, it is possible to conduct hearings by videoconference by using mobile equipment provided by the requesting State, but the central authority encourages requesting countries to engage the services of commercial vendors, which provide premises and the necessary equipment for such purposes.

Videoconferencing is used in national and transnational criminal proceedings in Singapore to hear witnesses (including expert witnesses). In some limited cases, e.g., in bail hearings, the accused can participate via videoconferencing, unless he/she requests to be heard in person. In domestic criminal proceedings, evidence taken abroad through videoconferencing is not admitted as the relevant provision of the Criminal Procedure Code explicitly only refers to the hearing of persons in Singapore. This was clarified by a Supreme Court decision.⁶⁷

Article 281. Evidence through video or television links

(1) Notwithstanding any provision of this Code or of any other written law, but subject to the provisions of this section, the court may allow the evidence of a person

⁶⁷ Court of Appeal (upper division of the Supreme Court of Singapore), *Kim Gwang Seok v Public Prosecutor* [2012] SGCA 51.

in Singapore (except the accused) to be given through a live video or live television link in any trial, inquiry, appeal or other proceedings if

- (a) the witness is below the age of 16 years;
- (b) the offence charged is an offence specified in subsection (2);
- (c) the court is satisfied that it is in the interests of justice to do so; or
- (d) the Minister certifies that it is in the public interest to do so.

(2) The offences for the purposes of subsection (1)(b) are

- (a) an offence that involves an assault on or injury or a threat of injury to persons;
- (b) an offence (...) (relating to protection of children and young persons);
- (c) an offence under sections 354 to 358 and sections 375 to 377B of the Penal Code;
- (ca) an offence punishable under the Organised Crime Act 2015; (...)
- (d) an offence (...) (relating to offences against women and girls); and
- (e) any other offence that the Minister may, (...) prescribe.

(3) (...) the court may order an accused to appear before it through a live video or live television link while in remand in Singapore in proceedings for any of the following matters:

- (a) an application for bail or release on personal bond at any time after an accused is first produced before a Magistrate (...);
- (b) an extension of the remand of an accused under section 238; and
- (c) any other matters that the Minister may (...) prescribe.

(4) (...) an accused who is not a juvenile may appear before the court through a live video or live television link while in remand in Singapore in proceedings for an application for remand or for bail or for release on personal bond when he is first produced before a Magistrate (...).

8. Thailand

Section 87(1) of the Thai Code of Criminal Procedure provides that if the public prosecutor applies and the accused does not object, the court may allow the accused to be heard or evidence to be taken by videoconferencing according to a regulation to be issued by the President of the Supreme Court of Justice and approved by the Plenary Session of the Supreme Court of Justice. Such hearing is deemed as if it were conducted in a courtroom. In 2016, the Supreme Court allowed five foreigners to testify via videoconferencing in a corruption case. The latest innovation for court interpretation is the “E-Justice Conference Centre”, located on the 6th floor of the Criminal Court on Ratchada Road in Bangkok. The opening ceremony took place on 24 February 2016 and was presided over by the Supreme Court President. The Centre aims at boosting public access to judicial procedures as well as to save time and money for those attending hearings in criminal cases. Witnesses in the

provinces will be able to give testimony in local courthouses, which will be connected by video link to courts in Bangkok via the centre.

Interpretation will be provided into foreign languages, local languages as well as sign language through a videoconferencing system. This also helps witnesses to feel more at ease, as they could be overwhelmed by a larger court in Bangkok, not to mention the stress of traveling to and staying in an unfamiliar city. Testimony through videoconferencing protects witness against intimidation, a serious problem for witnesses of sensitive or violent crimes.

Videoconferencing may be applied to overseas witnesses as well as witnesses in the provinces, depending on the type of case. Logistics such as time difference and system availability must be taken into consideration in such situations. The E-Justice Conference Centre is expected to bring about a new era of convenience and safety in court testimony.

9. Turkey

A relevant provision on videoconferencing is contained in the Code of Criminal Procedure:

Article 180

- (1) In cases where a witness or an expert is not able to appear at the trial for a long time period, the duration of which is unknown beforehand, because of an illness, disability or because of another reason that cannot be overcome, then the court may rule that he shall be heard by a member of the court or by letter rogatory.
- (2) This provision shall also apply in cases, where the witness and the expert are residing in a location outside of the jurisdiction of the competent court, and therefore it would be difficult to summon them.
(...)
- (5) If available, the witness or the expert shall be heard through a simultaneously vision and voice transmitting **video-conference** link. Principles and procedure of establishing the videoconference link and how to use this technology shall be regulated in an internal regulation.

Videoconferencing was also part of the e-justice project “UYAP” developed by the IT Department of the Ministry of Justice of Turkey. It consisted of the implementation of an e-justice system to ensure a fast, reliable, and accurate judicial system. It implemented a central information system covering all of the judicial institutions and other governmental departments. All judicial units were fully equipped with computers, case and document

management software and other updated hardware. Another important feature was the installation of video conferencing systems in 225 criminal courts all over Turkey with the aim of questioning witnesses, victims or offenders who live far away from the court.

Turkey is a candidate country to become a member of the European Union, however, there is no information available about Turkey at “The Fiches Belges” on the EJM website.

10. United Arab Emirates

A draft law allowing courts to use videoconferencing for the questioning of juveniles, witnesses and experts was passed by the Federal National Council in February 2017. The law aims to facilitate trial procedures when it is inconvenient for the involved parties to attend a hearing. Juveniles and children should benefit most. The law also includes cooperation with other countries. It is expected that the number of cases a court is capable to decide in a certain period will double. At the same time, it will provide judicial authorities with the capacity to deal with more cases and opens the door for more legislative steps to follow. It will save time and effort and provide privacy to parties involved in penal cases. A further advantage is a more secure way to communicate with prisoners involved in sensitive cases, such as terrorism or in general those suffering from diseases. By avoiding children having to appear before court, psychological traumas are prevented. Finally, the country’s courts are already equipped to begin using videoconferencing once the law comes into effect.

III. EUROPE

A. European Union

Within the European Judicial Network, there are several tools for mutual legal assistance. One of them is “The Fiches Belges⁶⁸”, which gives practical information per Member State on measures requested through judicial cooperation within the framework of Mutual Legal Assistance or Mutual Recognition Instruments. In the section of each Member State of the European Union displayed below, we provide the corresponding link, in accordance with “The Fiches Belges” on information related to the hearings of witness and the hearing of suspects, or people accused, both by videoconferencing, as well as information that has been provided (when provided) by the central and/or competent authorities.

⁶⁸ Available at: https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelges.aspx

1. Austria

Since 2005, the Austrian Code of Criminal Procedure⁶⁹ provides a legal framework for the use of videoconferencing to hear witnesses, parties, experts, and interpreters in criminal proceedings. Austria is one of the EU Member States that allow videoconferencing with the defendant only in limited circumstances in criminal matters, namely in preliminary proceedings, as it is seen as being in conflict with the principle of immediacy.

Videoconferences are a means to timely conduct (i.e., within the required 48 hours after the arrest) the preliminary hearing of the accused pursuant to Section 172(1) of the Code of Criminal Procedure. Usually, such hearings are held in the prison of the competent court. However, if this is not possible because of the distance of the place of arrest or because of sickness or injury of the accused, the Court may take recourse to videoconferencing and pronounce its decision on pre-trial custody this way.

For preliminary proceedings, Section 153(4) of the Code of Criminal Procedure stipulates that, witnesses or accused having their domicile outside the jurisdiction of the competent court may be heard before the Court or Prosecutor's Office in whose jurisdiction they reside by using videoconferencing.

In addition, Section 165(3) of the Code of Criminal Procedure explicitly refers to the possibility of a hearing of vulnerable victims or witnesses in need of protection via videoconference to avoid the presence of the accused during the preliminary proceedings.

For the main proceedings, Section 247a of the Code of Criminal Procedure provides for the use of videoconferencing regarding old or sick witnesses or any other person that due to compelling reasons is unable to testify. Videoconferencing may also be used for witnesses residing abroad provided that the foreign authority provides legal assistance. These rules also apply to cases related to international mutual legal assistance according to section 9 of the Extradition and Mutual Assistance Act⁷⁰ that provides that the Code of Criminal Procedure shall be applied in analogy in the absence of deviating rules.

Since 2011, videoconferencing systems are available in all courts, public prosecution offices and prisons as well as in the Federal Ministry of Justice and more recently, also in Administrative Courts. From a practical point of view, Austria recognizes the substantial time and cost savings as a result of shorter travel times. At the same time, judges get through the video screen a direct impression of the person. In terms of good practices, it is worth mentioning that Austria has created a centralized booking system for videoconferencing. The system is available for all courts and enables direct bookings of courtrooms with videoconferencing equipment.

Austria as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Austria can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/223/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/223/-1

2. Belgium

Belgium as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Belgium can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/230/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/230/-1

3. Bulgaria

Videoconferencing is regulated on the Penal Procedure Code of Bulgaria

Interrogation of persons through videoconference or telephone conference is regulated under article 474:

(1⁷¹) A Court authority of another state may carry out through videoconferencing or telephone conference the interrogation of a person who is a witness or an expert in penal procedure and is in the Republic of Bulgaria, as well as the questioning, with the

⁷¹ Amend. - SG 32/10, in force from 28.05.2010

participation of a defendant, only if this does not breach the primary principles of the Bulgarian law. An interrogation through videoconferencing with the participation of a defendant may only be carried out with his/her consent and after the participating Bulgarian Court authorities and the Court authorities of the other state have agreed on how to conduct the videoconference.

(2) The request for interrogation from the Court authority of the other state shall contain:

1. the reason for which the presence of the person is undesirable or impossible;
2. the name of the Court authority of the other state;
3. the data of the people who will carry out the interrogation;
4. the consent of the person who will be interrogated as a witness or an expert through a telephone conference;
5. the consent of the defendant who will participate in a hearing for interrogation through a videoconference.

(3)⁷² The Bulgarian competent authorities in penal procedure shall execute requests for interrogation through videoconference or telephone conference. For pre-trial procedures, a request for interrogation through video conference or telephone conference shall be executed by the National Investigation Service. For Court procedures, a request for interrogation through telephone conference shall be executed by a judge of equal degree at the place of residence of the person, and for interrogation through videoconferencing, by a judge of the Court of Appeal at the place of residence of the person. The competent Bulgarian authority may require the requesting state to ensure the technical means of interrogation.

(4) The interrogation shall be held directly by the Court authority of the requesting state or under its direction in accordance with its legislation.

(5) Prior to the interrogation, the Bulgarian competent authority shall establish the identity of the person to be interrogated. After the interrogation, a protocol shall be drawn up, reflecting:

1. the date and place of the interrogation;
2. the personal details of the interrogated person and his/her consent, should this be required;
3. the personal details of the people participating from the Bulgarian side in Bulgaria;
4. the fulfilment of other terms accepted by the Bulgarian side.

⁷² In force from 05.11.2017

(6) A person from abroad may be interrogated by a competent Bulgarian authority or under its direction through videoconference or telephone conference when the legislation of the other state allows this. The interrogation shall be carried out in accordance with the Bulgarian legislation and the provisions of the international treaties to which the Republic of Bulgaria is a party, regulating the means of interrogation.

(7) Interrogation through videoconference or telephone conference under Para. 6 in the pre-trial procedure shall be carried out by an investigator from the National Investigation Service, and in the Court procedure by the Court.

(8) The provisions of paragraph 1 - 5 shall also be applied respectively to the interrogation of the people under paragraph 6.

According to Bulgarian law, lawyers from the requesting State may interview witnesses, experts, and the defendant, only if the appropriate consent has been obtained. The requesting authority may ask questions online or sent them in writing in advance. In any case, they must pass through the requested authority. The questions will be asked by the Bulgarian investigator or the judge.

Bulgaria as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Bulgaria can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/239/-1

Hearing of suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/239/-1

4. Croatia

Croatia as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Croatia can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/432/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/432/-1

5. Republic of Cyprus

Cyprus as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Austria can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/258/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/258/-1

6. Czech Republic

Czech Republic as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Czech Republic can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/259/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/259/-1

7. Denmark

Denmark is not bound by the Directive 2014/41/EU regarding the European Investigation Order in criminal matters. As it cannot opt-in to this directive, it will not transpose it⁷³.

Information about videoconference in Denmark can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/260/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/260/-1

8. Estonia

Estonia as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Estonia can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/269/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/269/-1

9. Finland

Finland as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Finland can be found at “The Fiches Belges” on the EJN website, available through the following links:

⁷³ Available at: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/272/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/272/-1

10. France

French criminal courts started to use videoconferencing for the first time in 2005 when the “*Tribunal Correctionnel de Nanterre*” used such a system in a drug trafficking case. The corresponding legal basis was introduced in 2006. Article 706-71 of the French Code of Criminal Procedure⁷⁴ constitutes the legal basis for the use of videoconferencing. It was further specified by a decree introducing provision A38-1 of the Code of Criminal Procedure. Already before, videoconferencing had been used in overseas territories for expert consultations and witness testimonies. Nowadays, videoconferencing is widespread in the French judicial system in general, criminal courts included.

According to Article 706-71 of the Code of Criminal Procedure, where the needs of the inquiry or investigation justify it, the hearing or the interrogation of a person may be carried out in one or more different parts of the French national territory (or between the French national territory and a Member State of the European Union in the course of the execution of a European Investigation Order) which are linked by means of telecommunication guaranteeing the confidentiality of the transmission.⁷⁵

These provisions apply to the hearing of witnesses and experts (and victims that acceded the trial with their civil claims). In addition, they also apply to the interrogation of a detained person during pre-trial custody hearings or early release hearings.⁷⁶ With regard to hearings of the accused, it is further clarified that if the accused is represented by a lawyer, the latter may place himself either with the competent court or with the person concerned. If he/she is at court, he/she must be able to speak with his client in a confidential setting.⁷⁷

Article A38-1 of the Code of Criminal Procedure specifies the technical characteristics of the videoconferencing equipment to be used for the application of Article 706-71 of the Code of Criminal Procedure. It states, among other technical details, that videoconferencing must follow international norms.⁷⁸

⁷⁴ Code de procédure pénale.

⁷⁵ Code de procédure pénale, Article 706-71 paragraph 1.

⁷⁶ Code de procédure pénale, Article 706-71 paragraph 2.

⁷⁷ Code de procédure pénale Article 706-71 paragraph 5.

⁷⁸ International Telecommunication Union (ITU) H320 or H323.

France as a Member State of the European Union has implemented⁷⁹ the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in France can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/273/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/273/-1

11. Germany

Sections 58b (examination outside the main hearing), 168e (separate examination) and 247a (witness examination in another place) of the German Code of Criminal Procedure⁸⁰ govern the use of videoconferencing in criminal proceedings. Moreover, Section 58a provides for the examination by audio-visual medium of minors that need to be protected as well as of persons who as children or juveniles have been aggrieved as a result of a criminal offence against life, freedom or sexual integrity. The same method can be used where there is a concern that it will not be possible to examine the witness during the main hearing and the recording is required in order to have enough evidence.

Any lawyer, defence counsel or prosecutor can apply for a videoconference. Section 58b stipulates in general that the examination of a witness outside the main hearing can be affected in such a way that the witness is located in another place than the person being examined and the examination is simultaneously transmitted audio-visually to the place where the witness is located and to the examination room. Yet, it is considered as exception to normal court proceeding. It is also important to add that videoconferencing is allowed for witness testimony only and not for the accused. The principle of immediacy remains a cornerstone of the German Code of Criminal Procedure.

According to Section 168 e (1), if there is an imminent risk of serious detriment to the well-being of the witness when examined in the presence of persons entitled to be present (i.e. the accused) and if that risk cannot be averted in some other way, a videoconference shall be conducted. Such a course of action is typically chosen if a psychological assessment confirms possible disadvantages to the health situation or the recovering process of a traumatised person. Pursuant to Section 168(2), the court may order the examination of an expert located in another place by videoconferencing.

⁷⁹ Décret n° 2017-511 du 7 avril 2017 relatif à la décision d'enquête européenne en matière pénale.

⁸⁰ Strafprozeßordnung.

Section 247a of the Code of Criminal Procedure contains a corresponding provision as regards the main hearing, where the court may order a hearing via videoconference as well. The decision shall be incontestable. A simultaneous audio-visual transmission of the testimony shall be provided in the courtroom. The testimony shall be recorded if there is a concern that the witness will not be available for examination at a future main hearing and the recording is necessary to establish the truth. A practical example of the application of this provision would be an unavailable witness residing abroad and not able or willing to come to Germany.

A simultaneous interpreting facility has occasionally been inserted into the videoconferencing equipment, so that an interpreter can be used in proceedings in which a number of defendants speak a foreign language. In administrative court proceedings, interpreters have also been involved via a videoconference link in order to reduce costs.

Germany as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Germany can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/277/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/277/-1

12. Greece

Greece as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Greece can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/279/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/279/-1

13. Hungary

Under Article 67 of the Act XXXVIII of 1996 on international criminal cooperation, on request of the requesting party, the Hungarian court or prosecution office shall order the hearing of the defendant, witness, and expert using a telecommunication device. Therefore, hearing through videoconferencing for judicial cooperation is a legal option under the Hungarian jurisdiction.

The hearing can be conducted in two different ways:

- By an audio-visual device, in case of the defendant, the witness, and the expert. To fulfil the mutual legal assistance request, consent of the defendant is required.
- By telephone conference, apply for witness and experts. To fulfil the mutual legal assistance request, consent of both, the witness and the expert is required.

If the Hungarian court or the prosecution office ordered to execute the mutual legal assistance request using a telecommunication device, the hearing shall be conducted by the requesting judicial authority, under the jurisdiction of the requesting party. The restrictions and immunities of the hearing under the Hungarian jurisdiction also apply. The only task of the member of the executing Hungarian authority is to check the identity of the person to be interviewed and to provide an interpreter (if needed).

Since the mutual legal assistance request will be executed under the jurisdiction of the requesting party, the possibility of the lawyers to participate in the videoconference is up to the legal regulations of the requesting party. Hungarian legal rules do not apply to this option.

There are videoconferencing systems available throughout the entire country. Therefore, there is no need for the requesting State to provide any equipment.

Hungary as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Hungary can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/287/-1

Hearing of suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/287/-1

14. Ireland

Ireland is not bound by the Directive 2014/41/EU regarding the European Investigation Order in criminal matters, as it did not take part in the adoption of this Directive; however, the issue of opting in remains under consideration⁸¹.

Information about videoconference in Ireland can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/293/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/293/-1

15. Italy

Italy as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Italy can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/295/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/295/-1

16. Latvia

Latvia as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

⁸¹ Available at: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120

More information about videoconference in Latvia can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/295/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/307/-1

17. Lithuania

Lithuania as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Lithuania can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/313/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/313/-1

18. Luxembourg

Luxembourg as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Luxembourg can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/314/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/314/-1

19. Malta

Malta as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Malta can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/321/-1

Hearing of suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/321/-1

20. Netherlands

Videoconferencing is frequently used in legal proceedings in the Netherlands. The article 131a of the Dutch Code of Criminal Procedure⁸² states that whenever authority is granted to hear, examine or question persons, this shall also include hearings or questioning by way of videoconferencing. The “true to life” principle applies, according to which a courtroom is an area where interaction between different parties in proceedings is of primary importance and where certain legal and procedural aspects play an important role, meaning that certain rules must be respected: The persons concerned should have an accurate picture of what is happening in the other room and they should be able to consult and exchange documents with their lawyers without third parties overhearing. The audio-visual solution must be highly reliable and protected against loss, intrusion or any unlawful form of processing. In addition, the system should be easily linkable to other countries’ systems, taking interoperability and compatibility into account. Dutch courts have emphasized this principle in instructions concerning the use of videoconferencing for court sessions. It is considered a good practice in videoconferencing to imitate, as far as possible, eye contact when controlling the camera.

Netherlands as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

⁸² Wetboek van Strafvordering.

More information about videoconference in Netherlands can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/337/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/337/-1

21. Poland

Poland as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Poland can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/351/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/351/-1

22. Portugal

The Article 5 and 29(b) of Law no. 93/99⁸³ on the protection of witnesses in criminal proceedings foresee the use of videoconferencing in cases of danger to the witness’ physical or psychological integrity, freedom or property of considerably high value. A respective request can be submitted by the Public Prosecutor, the defendant or the witness⁸⁴. In addition, image or voice distortion can be employed to avoid the recognition of the witness.

Law no. 112/2009 on the prevention of domestic violence and the protection and assistance of victims⁸⁵ provides in Article 32 that statements and testimonies of victims can be given

⁸³ Lei n.º 93/99, de 14 de Julho, LEI DE PROTECÇÃO DE TESTEMUNHAS.

⁸⁴ Article 6 of Law No 93/99.

⁸⁵ Lei n.º 112/2009 de 16 de Setembro Estabelece o regime jurídico aplicável à prevenção da violência doméstica, à protecção e à assistência das suas vítimas e revoga a Lei n.º 107/99, de 3 de Agosto, e o Decreto-Lei n.º 323/2000, de 19 de Dezembro.

by videoconference, if the court, upon request by the victim, deems it necessary to ensure that the statement is made without constraints.

Portugal as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Portugal can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/352/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/352/-1

23. Romania

According to Article 106 of the Code of Criminal Procedure⁸⁶, a detained person may be heard at the detention facility through videoconference in exceptional situations and if judicial bodies decide that this neither harms the proper course of trial nor the rights and interests of the parties. Article 126(1)(d) and 127(d) in conjunction with Article 129 provide for hearings by videoconference of persons, who have been granted the status of threatened witness during criminal investigations and trial. The competent judicial authorities to execute a mutual legal assistance request concerning videoconferencing are the courts of appeal at trial stage and the prosecutor’s offices attached to the courts of appeal. Romanian law provides for the use of videoconferencing also in Article 165 of the law on international judicial co-operation in criminal matters.⁸⁷

After receiving the mutual legal assistance request, the authority that received it, confirms the receipt of the request. Contact details are exchanged between the requesting state and the requested one. Two or three days before the actual day of the videoconference, the connection is tested by IT specialists from the two states to make sure that the equipment is functioning properly (cameras, microphones, screens, ISDN lines).

During a videoconference session, the examination of the witness, expert or accused is conducted by the judge of the requesting authority. The competent Romanian judge or prosecutor shall be present during the hearing, assisted by an interpreter where necessary,

⁸⁶ Codul de procedură penală.

⁸⁷ LAW No. 302 of 28 June 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law No. 224/2006

and shall also be responsible for ensuring both the identification of the person to be heard and to safeguard fundamental principles of Romanian law.

Romania as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Romania can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/354/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/354/-1

24. Slovakia

Slovakia as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Slovakia can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/368/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/368/-1

25. Slovenia

Slovenia as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Slovenia can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/369/-1

Hearing suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/369/-1

26. Spain

In Spain, videoconferencing is used by judges and prosecutors and is based on a principle of necessity with the criteria of utility, security and possible damage for the individual who testifies. It can be used both during the investigation and the trial stage. The applicable legal provision of the Spanish Code of Criminal Procedure⁸⁸ is article 731.bis:

“The Court can, on its own initiative or upon request, for reasons of utility, safety or public order, and in those cases in which the presence of the one intervening as a defendant, witness, expert, or in other capacity has serious or harmful effects, especially in the case of a minor, agree that it is to be conducted by videoconference according to article 229(3) of the Organic Law of the Judiciary”.

Article 229 of the of the said Organizational Law for the Judiciary⁸⁹ establishes that judicial proceedings shall be predominantly oral, especially in criminal cases. Paragraph 3 sets out however, that testimony can be taken by videoconference provided that it is ensured at all times that the parties may discuss with each other and that their right of defence is upheld.

Moreover, further internal rules are stipulated in Instruction 3/2002 of the Attorney General regarding procedural steps that can be taken via videoconferencing⁹⁰ and in Instruction 1/2002 of 7 February on the decision to hold oral hearings by videoconference in criminal proceedings⁹¹.

From the internal point of view and especially during the pandemic, recognition rounds are being held in which the witness participates via videoconference. The Supreme Court pronounced itself by order of February 2, 2012, not facing obstacles when stating that *“Regarding the identity parade carried out by videoconference, but this does not invalidate them as claimed by the appellants. Therefore, as it is reasoned in the sentence, faced with*

⁸⁸ Art. 731bis of the *Ley de Enjuiciamiento Criminal* (ES LECrim), Published at “Boletín Oficial del Estado” (BOE) n. 260, 17.9.1882.

⁸⁹ Ley Orgánica 6/1985, de 1 de Julio, del Poder Judicial, Published at “Boletín Oficial del Estado” (BOE) n. 157, 2.7.1985.

⁹⁰ Fiscalía General del Estado, Instrucción 3/2002, de 1 de marzo de 2002, sobre actos procesales que pueden celebrarse a través de videoconferencia.

⁹¹ Fiscalía General del Estado, Instrucción 1/2002, de 7 de febrero, acerca de la posibilidad de celebrar juicios orales penales por videoconferencia.

the same report made in the instance, that way of practicing them obeys or is justified by the difficulty or impossibility of finding people in small towns who bear similarities to the suspects, and in any case, all guarantees were respected and carried out in the presence of the Judge and the lawyer who assisted the detainees, who did not express any objection or made any protests".

The Prosecutor's Office considers that avoiding the witness' displacement from abroad may be one reason to use videoconferencing for this diligence both from the active and passive point of view.⁹²

The General Council for the Judiciary adopted the Guide for the holding of telematic judicial proceedings, on the occasion of the health crisis due to COVID-19. In paragraph 30, it recommends that for the specific case of documentary evidence, to foresee the possibility of an exhibition to the lawyers of the parties prior to the decision of the judge or court so that the download of the documents on their computers can only take place once the decision to admit the documents has been made.

And in paragraph 45, it establishes that, according to art. 19 of RDL 16/2020, the declaration of those accused of serious crime will be conducted in person⁹³. Only in situations of a clear impossibility of an in-person holding, and as long as the suspension and postponement are not indicated, it is advisable to carry out the celebration telematically, for which compliance with the defense requirements and procedural guarantees considered by the jurisprudence shall be enforced⁹⁴.

Spain as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Spain can be found at “The Fiches Belges” on the EJM website, available through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/373/-1

Hearing of suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/373/-1

⁹² Fiscalía General del Estado 3/2002, Idem, page 37-38.

⁹³ CGPJ, Idem, para. 45.

⁹⁴ Judgments of the Constitutional Court 2/2010, of January 11; of the European Court of Human Rights of November 2, 2007 -Zagaria v. Italy- or October 5, 2006 -Marcello v. Italy- and of the Supreme Court 161/2015 of March 17 -ROJ: STS 812 / 2015- and 678/2005 of May 16 -ROJ: STS 3116 / 2005-.

27. Sweden

Sweden considers videoconferencing to be a potentially very important and useful tool within the framework of judicial cooperation in criminal matters. The Swedish Code of Judicial Procedure⁹⁵ Chapter 5, Section 10 provides for the possibility of giving testimony through video-link technology in court proceedings. Also, the Swedish International Legal Assistance in Criminal Matters Act⁹⁶ contains such a possibility to assist states in this regard by providing the taking of evidence through video-link technology. Swedish courts and prosecutors may seek such assistance abroad.

Sweden as a Member State of the European Union has implemented the European Investigation Order Directive which contains in its article 24 a relevant provision on videoconferencing.

More information about videoconference in Sweden can be found at “The Fiches Belges” on the EJN website, available through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/378/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/378/-1

B. Other European States

1. Andorra

The Ministry of Justice and Interior of Andorra, in its condition of a central authority, informs that videoconferencing in criminal proceedings is possible in cases of emergency and that Andorra has jurisprudence to support it. Similarly, due to the health crisis caused by COVID-19, laws 3/2020 of March 23, 5/2020 of April 18, and 16/2020 of December 4, dispose that the law foresees the possibility of carrying out all proceedings before the judges and Courts by videoconference in conditions that comply with the guarantees required in the process. All courts of justice, government and police offices, as well as embassies, are equipped with videoconferencing equipment.

Videoconferences are widely accepted in international judicial cooperation, actively and passively, without any limitation to the person to be examined, except for the accused, who

⁹⁵ SFS 1942:740.

⁹⁶ SFS 2000:562.

must express their consent. In the request for assistance, it is not necessary to advance a list of questions, but at the time of the interrogation, the judge may consider it impertinent once formulated and, therefore, inadmissible. All procedural parties participate in the videoconference and can ask the questions that the relevant Andorran authorities consider appropriate.

Before executing the request for international assistance, it is necessary to verify that the systems to be used in the videoconference are compatible in all places involved.

2. Bosnia and Herzegovina

Videoconferencing in Bosnia and Herzegovina is contained in the provisions of Article 16a. and 16b. of the Law on Mutual Legal Assistance in Criminal Matters. These legal provisions stipulate that when the direct examination of witnesses and experts from Bosnia and Herzegovina is not possible on another state, the examination may be conducted by videoconferencing at the request of the judicial authorities of that state.

The request must be made in writing and contain all the elements prescribed by the law, as well as an explanation of the difficulties for the witnesses or experts to appear before the authorities in the requesting country. It is not necessary to submit a list of questions in advance for each witness and/or defendant with the letter rogatory. The request must indicate the name of the judicial authorities and the people attending the hearing in the requesting country.

The request of a foreign state under this article will be approved if it is not in conflict with the principles of criminal legislation of Bosnia and Herzegovina, and it will be executed by a judicial body that has the technical means for this type of hearing, regardless of whether it is competent to provide legal assistance. The summons to the hearing shall be delivered to the witnesses and experts by the judicial body conducting the hearing. The judicial body of the state, at whose request the hearing is conducted, is responsible for determining the identity of the person being questioned and, if necessary, it will also provide an interpreter and conduct the hearing directly in accordance with its legislation. Exceptionally, the hearing may also be conducted by a judicial authority in Bosnia and Herzegovina upon the instructions of the judicial authority of the requesting State with the provision of an interpreter, but only upon the request of the requesting State.

A witness and an expert witness may refuse to testify under the Criminal Code of Bosnia and Herzegovina, as well as under the criminal code of the requesting state. The judicial authority in Bosnia and Herzegovina conducting the hearing, in compliance with the protection measures on the hearing, shall make a minute or recording under the Criminal Code of Bosnia and Herzegovina and submit it to the judicial authority of the requesting State. If this witness or expert refuses to testify, no coercive measures can be applied to

him/her. Lawyers from the requesting State may pose questions during the videoconferencing.

In addition, the judicial authorities of another state may conduct the questioning of a suspect or accused person located in Bosnia and Herzegovina by videoconference and through the judicial authorities of Bosnia and Herzegovina, only if the person so agrees. The judicial authority in Bosnia and Herzegovina responsible to conduct the questioning and the judicial authority of the requesting State shall agree on the conditions and manner of the questioning in accordance with the national criminal code and international instruments. If the suspect or accused refuses to testify, no coercive measures can be applied to him/her. There is a list of courts and prosecutors' offices equipped with videoconferencing systems and this list may also be obtained from the High Judicial and Prosecutorial Council of Bosnia and Herzegovina. The compatibility check of systems between the requesting and requested State is not addressed by any rule. In practice, the department of information and communication technology or similar service of the domestic and foreign judicial body needs to make contact before the date of the videoconference to ensure that a proper connection can be established.

When the videoconferencing equipment is not available in Court, it is not possible to conduct a videoconference in a different location, such as an Embassy, nor is it possible to conduct hearings by videoconference by using mobile equipment provided by the requesting State.

3. Georgia

According to the International Cooperation in Criminal Matters Act of 2010, videoconference is legally possible in Georgia. According to the Georgian legislation the following persons can be interviewed through videoconference: a) witness, b) expert, c) victim, and d) defendant.

The requesting authority is able to conduct the interview itself and ask the questions directly. Although, if it is more convenient to the requesting State, the Georgian authority can conduct the interview. Prior submission of the list of questions is not mandatory. Lawyers from the requesting country may intervene by asking question to the person from whom the statement is taken in the execution of a judicial cooperation request by videoconference, including asking questions.

It is recommended that a representative from the requesting authority contacts the representative of the Georgian central authority in advance to make the proper arrangements, including checking the compatibility of the videoconferencing systems.

There are videoconferencing systems available in all the provincial capitals of Georgia. Likewise, the videoconference can be conducted at the Prosecutor's Offices and, if demanded by the requesting State, it is possible to conduct hearings by videoconference using mobile equipment provided by the requesting State.

4. Montenegro

Videoconferencing is regulated by the International Legal Assistance in Criminal Matters Law of Montenegro in Article 42, as well as Article 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Hereinafter: the Second Additional Protocol).

There are limitations with regard to the defendants. According to Article 9 paragraph 8 of the Second Additional Protocol stipulates that the **interrogation** of defendants and suspects is allowed **only with their consent**.

The requesting authority may ask questions via videoconferencing if requested and it would be desirable that requesting State send the questions with the letter rogatory. Article 9, paragraph 5 (c) of the Second Additional Protocol provides that the hearing shall be conducted directly by the judicial authority of the requesting country in accordance with **its own laws** or conducted in accordance with the instructions of that authority.

Article 9, paragraph 2 of the Second Additional Protocol provides, *inter alia*, that the requested Party shall agree to the hearing by video conference provided that it has the technical means to carry out the hearing. Therefore, it is accordingly necessary to establish first whether technical requirements for this kind of international cooperation are met.

Videoconferencing is no available in all Montenegro. It is available for international cooperation in the southern, northern and central regions of the country, where videoconferencing system is installed in the Supreme State Prosecutor's Office, Special State Prosecutor's Office, High State Prosecutor's Office in Podgorica, High State Prosecutor's Office in Bijelo Polje, Basic State Prosecutor's Office in Podgorica and Basic State Prosecutor's Office in Kotor.

Neither the Law on International Legal Assistance in Criminal Matters of Montenegro nor the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters provide the possibility to conduct a videoconference in a different location than the above describe. Article 10, paragraph 2, of the Second Additional Protocol provides that if the requested party does not have the necessary technical means, such means may be made available to it by the requesting party **by mutual agreement**.

Montenegro is a candidate country to become a member of the European Union, however, there is no information available about Montenegro at “The Fiches Belges” on the EJN website.

5. Norway

Norway is an associated country to the European Union. Information about videoconference in Norway can be found at “The Fiches Belges” on the EJN website through the following links:

Hearing of a witness:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/703/342/-1

Hearing of suspects/person accused:

https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/711/342/-1

6. Russia

Article 240(4) of the Code of Criminal Procedure states that a witness may be examined by way of videoconferencing:

Article 278.1. The Specifics of an Examination of a Witness by Way of Using Videoconferencing Systems

1. A court trying a criminal case may, where necessary to render the decision, decide to examine a witness by way of using **videoconferencing** systems.
2. The court trying a criminal case may entrust the court at the witness's location to arrange the witness's examination by way of using **videoconferencing** systems.
3. The witness shall be examined according to the general rules established by Article 278 of this Code.
4. Before the start of the examination a judge of the court at the witness's location, on the instructions of the person presiding in the session of the court trying the criminal, shall certify the witness's identity. The judge of the court at the witness's location shall forward to the person presiding over the session of the court trying the criminal case the witness's signed statement to the effect that his/her rights, duties and liabilities provided for by Article 56 of this Code have been explained to him/her and the documents filed by the witness.

The Supreme Court of Russia has saved a lot of money in travel costs by using videoconferencing systems. The Court uses this technology for trials, consultations, meetings with the President and Government, and communication among lawyers and relatives of the accused. The benefits have also attracted other countries, which have sent delegations to observe the use of information technologies in the Russian judiciary system.

7. Serbia

According to Articles 357 and 404 of the Code of Criminal Procedure contain the legal basis to examine exceptionally witnesses or experts who cannot attend the trial because of illness or other justified reasons and substantial difficulties to appear. Article 447 of the Code of Criminal Procedure states that in exceptional cases (e.g., for security reasons), a defendant who is in detention may participate in the session via videoconference.

Article 83(3) of the Law on Mutual Legal Assistance in Criminal Matters states that videoconferencing can be the subject of a request for mutual legal assistance. According to Article 16 of the Serbian Constitution, international conventions form an integral part of the Serbian legal system and are directly applicable. Serbia ratified the Council of Europe's Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (see above). Accordingly, and because Serbia did not make any reservation, videoconferencing can be used for hearings of the accused, witnesses, victims and experts. Furthermore, rules on videoconferencing are explicitly included in many bi-lateral treaties on legal assistance in civil and criminal matters, such as for example, the treaty with Montenegro or with Bosnia and Herzegovina.

The above-mentioned provisions of the Code of Criminal Procedure, the Law on Mutual Legal Assistance in Criminal Matters and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters were used to conduct videoconference hearings in the past. An additional rule on hearings via videoconferencing can be found in Article 14 of the Law on Organization and Jurisdiction of the State Authorities in the War Crimes Proceedings.

Videoconferencing is recognized for its opportunity to directly ask questions, hear the answers and observe the conduct, making it an acceptable form of conducting certain procedural activities. Therefore, Serbia has been using it in practice in criminal proceedings.

Serbia also requested and successfully completed mutual legal assistance in the form of videoconferencing for the taking of testimony in criminal cases for example in war crimes cases when witnesses testified from the court premises in Bosnia and Herzegovina. In a general jurisdiction case, a U.S. witness-expert testified from the U.S. by videoconferencing.

Serbia is a candidate country to become a member of the European Union, however, there is no information available about Serbia at “The Fiches Belges” on the EJN website.

8. United Kingdom

Videoconferencing is used very often by English courts to interview witnesses and prisoners. The Access to Justice Act 1999 allows the use of videoconferencing for civil hearings, case management conferences, ancillary relief hearings, overseas or remote witness hearings or in any civil case in which the court directs the use of video and the parties involved consent to its use.

In 2002, some cases involving videoconferencing were decided, which established provisions creating the Criminal Justice Act 2003, specifically for live links during preliminary and sentencing hearings, as well as for the Court of Appeal Criminal Division.

Nowadays, numerous English Courts have videoconferencing equipment, making it possible to connect with different and multiple locations, as the network is extremely flexible. A list of courts equipped with such videoconferencing tools is available at the website of the Ministry of Justice.⁹⁷

Some good practices include the assistance to vulnerable witnesses, where videoconferencing links have been installed in many Victims Support Offices and Police premises. It has proved to be an asset particularly in cases involving domestic violence. The procurement of the necessary equipment has also helped reducing delays as a video connection with police stations has made it possible to deal with first hearings within 2-3 hours of charge in simple cases and enables the conduct of a significant number of first hearings on the same day and witnesses are expected to receive a more responsive service.

Furthermore, Care Centres have jurisdiction to perform hearings through videoconferencing of cases under the Public Law Children Act, specifically to address the problem of delays in childcare and supervision cases. Considering that the availability of expert witnesses has been identified as one major cause of delay, videoconferencing equipment provides courts with greater flexibility for when and how (particularly medical) expert witnesses are required to submit evidence.

Care Centers have been equipped with mobile video conferencing units and a national directory of suitable sites at hospitals, medical institutions and universities, that can be used by expert witnesses, is being developed. This means, hearing dates can be arranged more easily, and cases can be concluded more quickly. As a result, costs can be reduced. It also means that experts will have to spend less time travelling to and from court and less time waiting for their case to be heard.

⁹⁷ Available at : <http://www.justice.gov.uk/courts/video-conferences>

Finally, people wishing to make use of the videoconference equipment should make their request to the court before the Case Management Conference (CMC) or as soon as practicable before the full hearing. At the CMC itself any necessary practical issues can then be agreed, such as: remote location, who will administer the oath and any other special arrangements required to ensure that witnesses are able to give their evidence freely.

When Member State of the European Union, the United Kingdom implemented the European Investigation Order Directive that contains in its article 24 a relevant provision on videoconferencing.

More information available about the UK, as a third country of UE, can be found at “The Fiches Belges” on the EJM website through the following links:

Hearing of a witness:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/703/395/-1

Hearing of suspects/person accused:

https://www.ejm-crimjust.europa.eu/ejm/EJM_FichesBelgesResult/EN/711/395/-1

IV. Latin American and Caribbean States

1. Argentina

Since 2009, Argentina has been using videoconferencing. The first leading case involved an accused residing in Buenos Aires who was heard by the Federal Court of Formosa via videoconferencing because he was not able to appear before the court. During this trial, almost 1000 hours of hearings were performed by videoconference. Currently, several courts collect statements from suspects and witnesses through videoconferencing. A lot of cases involve elderly having difficulties to appear before the court because of health problems.

The general legal basis is contained in Article 297 of the Argentinian Federal Code of Criminal Procedure⁹⁸ which states that witnesses and experts unable to testify (for any serious reason that can only be overcome with difficulty) can be heard and cross-examined by videoconference.

Article 164 (e) of the Federal Code of Criminal Procedure contains a more specific legal basis. It stipulates with regard to under 16-year-olds, victims of human trafficking or severe

⁹⁸ Código Procesal Penal Federal.

human rights violations and disabled persons that they shall be heard by videoconferencing if the victim is unable to appear before the court (i) for health reasons or (ii) because they live far away or (iii) to guarantee their safety protection.

It is important to highlight that the Federal Criminal Procedure Code of Argentina is currently only in force for the provinces of Salta and Jujuy. The entry into force for the rest of the territory is gradually stipulated according to a schedule established by a Bicameral Commission. The entry into force for the rest of the provinces cannot be known with certainty.

However, the Prosecution Office of Argentina considers that the legal basis for the use of videoconferencing throughout the country lies in articles 18 and 75, paragraph 22, of the National Constitution; the procedural codes in force, paragraph 18 of article 18 of the United Nations Convention against Transnational Organized Crime; Article 32.2.b. of the United Nations Convention against Corruption; Rule 74 of the 100 Brasilia Rules on Access to Justice for Vulnerable Persons and the “Ibero-American Convention on the use of videoconferencing in International Cooperation among Justice Systems” and its Additional Protocol Related to Costs, Linguistic Regime, and Submission of Requests.

Argentina has implemented a “national network of videoconference” due to equipment provided by the Supreme Court of Justice and the Council of Magistrates that covers all federal jurisdictions of the country.

In 2011, the Supreme Court created the Investment Executive Committee of the Judiciary whose functions are, *inter alia*, to develop planning with regard to investment, mainly in infrastructure and technology. The Supreme Court has now an Institutional Strengthening Plan aiming to encourage the inclusion of advanced audiovisual and communication techniques, including videoconferencing, to conduct hearings in criminal cases. In 2013, the Supreme Court also adopted practical rules for courts as guidelines for the application of videoconferencing.⁹⁹ Also, the Federal Board of Courts and Superior Courts of Justice of the Argentine Provinces and the Autonomous City of Buenos Aires (Ju.Fe.Jus.) approved in February 2014 a "Videoconferencing Protocol".

Argentina conducted a pilot project of a new videoconferencing system for hearings in prisons with the aim of reducing transfers of detainees to the court. The goal is to implement such systems in all penitentiaries of the Buenos Aires region and thereby accelerating criminal proceedings while simultaneously reducing mileage and maintenance of transfer vehicles. Considering the 33,000 detainees and approximately 500 transfers per day, this allows to more efficiently allocate personal resources that would otherwise be lost “on the way”.

The Attorney General of the Republic of Argentine reports in 2021 that “*Argentine jurisprudence is peaceful in maintaining that there is no collision between*

⁹⁹ Argentinan Supreme Court, 2 July 2013, Acordada N° 20/13, Expediente N° 2267/13, Reglas Prácticas para la Aplicación de Videoconferencia en Causas en Trámite.

videoconferencing and the principles that inform the development of evidentiary acts, such as orality, immediacy, publicity and the immediate contradiction, in guarantee of the right of defense". They consider that there are no limitations based on the procedural position of the declarant; what is relevant is to comply with the current criminal procedural regulations that safeguard the right to non-self-incrimination of the accused provided in art. 18 of the National Constitution and have a technical lawyer (public or private) to advise it.

The competent judicial authority of Argentina, in charge of executing the request for legal assistance, has to expressly state its authorization for the videoconferencing.

Videoconferences are held in rooms specifically equipped with the necessary audio and video material, which have notebooks to make the system more dynamic and flexible. These notebooks are used when the accused must participate in a trial, and they are admitted to a hospital or serving house arrest for health reasons. However, if circumstances merit it, the videoconference may take place outside the rooms. The Council of the Magistracy of the Nation has mobile videoconferencing systems that can be used by judicial agencies or by whoever requests it.

In all videoconferences in which testimonial statements are received, an Ad-Hoc court clerk intervenes to ensure the validity of the procedural act, helping to avoid any irregularity that may arise.

As a consequence of the COVID-19 pandemic, the Public Prosecutor's Office of the Nation issued various general instructions through Res. PGN No. 35/2020, considering as a guiding principle that prosecutors comply with urgent acts to guarantee the justice service in all those actions courts that do not admit delay, remotely, using information and communication technologies, to facilitate the holding of hearings in an agile and efficient way, respecting the constitutional guarantees of the parties involved.

2. Brazil

Initially, videoconferencing evolved through practical use in Brazil. As a result of the lack of corresponding legislation, opinions were divided whether videoconferencing should be admissible or not. In 2009, a legal basis was introduced in the Code of Criminal Procedure¹⁰⁰.

Article 185

(...)

§ 2 Exceptionally, the judge by reasoned decision, ex officio or at the request of the parties, may conduct the interrogation of the arrested accused using a **videoconferencing** system or other technology resources for the transmission of

¹⁰⁰ Código de Processo Penal.

sounds and images in real time, as long as the measure is necessary to meet the following purposes:

I – to prevent risk to public safety when there is reason to believe that the prisoner is a member of a criminal organization or that, for other reasons, he could escape during the transfer;

II – to facilitate the participation of the defendant in procedural acts, when he faces significant difficulty to appear before the court because of illness or other personal circumstances;

III – to prevent the defendant's influence on the witness' or victim's opinion

IV – to respond to the very serious matter of public order.

The above cited legal provision governs the hearing of the accused. The decision to conduct a videoconferencing must be communicated to the parties at least 10 days prior (Article 185 § 3 of the Code of Criminal Procedure).

On the other hand, according to Article 217, if the judge finds that the presence of the defendant may cause humiliation, fear, or serious embarrassment to the witness or victim, so as to prejudice the truth of the testimony, they can also be heard by using videoconferencing.

The possibility that lawyers of the requesting State may intervene in the execution of a judicial cooperation request by videoconferencing, asking questions to the witnesses, experts, or defendant, depends on the existence of specific provisions in the treaty. For instance, the central authority of Brazil argues that the Treaty on Mutual Legal Assistance Treaty in Criminal Matters between the Government of the Federative Republic of Brazil and the Government of the United States of America does not contemplate that situation. Therefore, the US central authority understands that cooperation on that basis, according to the treaty, does not include requests from the defence. In this case, a request for a videoconference hearing coming from the defence might be rejected. However, according to the Brazilian Constitution and Criminal Procedure Law, the defendant has the right to a full defence, which includes asking questions to witnesses, experts, and other defendants. Therefore, the possibility of such intervention stands on reciprocity backgrounds.

Currently, Brazil is using videoconferencing both on the Federal and the State level as well as in domestic and cross-border cases. A deposition by videoconferencing can be particularly useful to hear a witness located in a different county.

The Brazilian central authority is the Ministry of Justice and Public Security, they confirm that videoconference can legally be used for international legal cooperation in Brazil. In some treaties it is expressly provided the regulation on videoconferencing, for instance the Treaty on Mutual Legal Assistance in Criminal Matters between the Federative Republic of Brazil and the Swiss Confederation, while in others not provision is made, but there is usually a clause according to which any assistance that is not prohibited by the Contracting States' legislation may be provided. On the other hand, there can be limitations in the treaty, such as the impossibility of conducting the interrogation of the defendant through videoconference.

The requesting authority may intervene according to the provisions of the treaty, when applicable. Lacking a treaty, the possibility depends upon guarantees of reciprocity and procedural requirements under the law of both the requesting and the requested State. In general, the requesting authority is able to ask questions and it is not necessary to send them in advance.

The possibility that lawyers of the requesting State may intervene in the execution of a judicial cooperation request by videoconferencing, asking questions to the witnesses, experts, or defendant, depends on the existence of specific provisions in the treaty or on the reciprocity.

The central authority requires at least 90 (ninety) days in advance for a request of hearings by videoconferencing and technical specifications must be sent beforehand. Also, it is important that contact information of the technicians involved in preparing the equipment is sent with the request, so that the competent authorities in Brazil can get in touch with them directly. Nonetheless, the prosecution office of Brazil considers that handling the questions in advance by the requesting State eases the proceedings.

Courts in Brazil are equipped with videoconferencing in the case videoconferencing is needed. Same as for the federal authorities, the Federal Prosecution Services, and the Brazilian Federal Justice, videoconferencing systems are available in all capitals of each State as well as in larger cities. It might be possible, if needed by the requesting State, to conduct hearings by videoconferencing using mobile equipment provided by the requesting country. However, the Brazilian central authority has no record of such a procedure being carried out in Brazil.

3. Chile

Regulation for testimony by videoconferencing regarding witness and experts in trial hearings is foreseen in paragraph 7 of Article 329 of the Code of Criminal Procedure.¹⁰¹ This is an exception to the general principle of immediacy, which ensures that the court has direct access to the evidence presented by the parties at trial. However, in some situations, witnesses and/or experts may be unable to attend the hearing. For such scenarios, the law establishes:

Article 329

(...) Witnesses and experts who, for some serious and difficult reason to overcome are unable to appear to testify at the trial hearing, may do so via **videoconference** or by any other suitable technology for questioning and cross-examination. The

¹⁰¹ Código de Procedimiento Penal (Ley N° 1853, modificada por la Ley N° 20.217 del 12 de noviembre de 2007).

submitting party must justify the request in a previous hearing and will be separately notified to that effect by the court with criminal jurisdiction closest to where they are currently located.”

Likewise, the following treaties are considered law of the Republic, allowing videoconferencing as a mechanism of international cooperation: UNTOC, UNCAC, European Convention on Mutual Legal Assistance in Criminal Matters, Interamerican Convention on Mutual Legal Assistance in Criminal Matters, and the Protocol on Mutual Legal Assistance in Criminal Matters of the MERCOSUR.

Additionally, article 192 of the Criminal Procedure Code rules “Anticipation of Testimony abroad. If the witness is currently abroad and is not in service for the country, the Prosecutor may ask the judge to receive his declaration in advance.

For that purpose, the testimony will be received either by the Chilean Consul or a Judge of the foreign country, whichever is more convenient. (...) the rest of the participants in the trial should be called to attend the hearing in which the testimony is received, and they may exercise all the prerogatives they are entitled to as if it were trial.”

Article 192 does not mention videoconference in the text, but it is understood that videoconferencing is the only way to gather the testimony according to that article.

There is no regulation for passive videoconferencing other than what is regulated in the multilateral treaties. Nonetheless, they have successfully performed 60 passive videoconferencing and 220 active videoconferencing in the period of 2010-2021. Depending on the requirements of the Requesting State, the videoconferencing can be held by a prosecutor or before a judge. Nevertheless, the prosecution office may arrange the videoconference in another place, like the Court Office, if required by the requesting State. They have never had a case where the Requesting State provides equipment for videoconferencing. In case the Requesting State needs their diplomatic representative to be present in the videoconference, they must state it in the request of mutual legal assistance (MLA). The Requesting State should coordinate with its agent his presence in the videoconference.

Like any other mutual legal assistance request, it will be executed according to the Chilean procedural law. The authorities of the requesting state may ask questions directly to the witness. It is not necessary to send the questions in advance. The Chilean authorities will take all the necessary measures to guarantee the presence of the witness, facilitate the physical space where the videoconferencing will be held, and provide technical assistance. If necessary, a professional from the Witnesses and Victims Service will be provided by Chilean authorities to assist the witness/victim.

The same standards of review and cross-examination apply to testimonies by videoconference and judges guarantee an adequate exercise of the rights of the parties as well as the access to information.

In practice, videoconferencing is considered in Chile as an efficient tool. It is applied mostly in cases where experts have their residence far away from the court and when it is impossible or difficult to physically relocate them.

Different supporting institutions (police, legal medical service, public health institute) are saving significant human and material resources, as videoconferencing allows them to perform their normal functions while at the same time presenting their expertise in trials held in remote locations of the country.

Different support systems for videoconferencing are available in Chile. The request is transmitted in advance to the IT team of the Prosecutors' Office, which will coordinate with the IT team of the Requesting Authority. A session for testing may be scheduled with the requesting state. Therefore, the mutual legal assistance must indicate the contact details of the IT team or the requesting authority. Videoconferencing systems are available in the capital of every province and at all Prosecution Offices. Due to the pandemic, the witness or suspect might attend audiences before the authorities by videoconferencing from his/her house. The prosecutors will get connected from their offices.

One of the main tasks of the Prosecution is the protection of victims and witnesses. These are ruled in articles 6, 78 and 308(2) of the Code of Criminal Procedure. The first two provisions govern the protection of crime victims during all stages of criminal proceedings, whereas the last one focuses on witness protection. Protective measures for a maximum protection of their physical and psychological integrity are fundamental. Videoconferencing is an effective means in this regard. The prosecutor can request it on trial.

Chile is able to use both IP and ISDN technologies, although the use of the second one is preferred. Videoconferencing is also frequently used in Chilean Courts to avoid transfers for preliminary hearings of dangerous persons in custody. Recently, the operational phase of a pilot project has started that foresees the pronouncement of judgments of the Criminal Tribunal of Los Angeles by using videoconferencing. Several prisons centers were connected to the Court. Videoconferencing has further been applied in sentence review hearings with the defense counsel usually being present at court and the convicted remaining in prison. The main advantages are reduction of costs and risk minimization.

There are limits to videoconferencing with minor witnesses. The interview of minors is regulated by Law N° 21.057 of Videotape Interviews¹⁰². Under this law, minors will be interviewed once during the investigative phase by a certified interviewer in a special room, and the interview will be videotaped. During the trial, the child will be interviewed in a special room by a facilitator and neither the judge nor the lawyer can ask questions directly to the minor.

However, adolescents, when they express it freely and voluntarily, may testify without the intervention of an interviewer. The court, before authorizing the request of the adolescent

¹⁰² Available at : <https://www.bcn.cl/leychile/navegar?idNorma=1113932>

must ensure that the adolescent is willing, and in a good physical and mental condition, to participate in the trial. The prosecutor, the victim, the plaintiff, and the guardian ad litem may request the judicial declaration of the minor in advance. This can be done once the formalization of the investigation is completed and up until the start of the trial hearing, and it must always be contemplated and developed before the judge of warranty. The participants will direct their questions to the judge, who, where appropriate, will relay them to the interviewer.

4. Colombia

The Colombian judicial system provides for in Act 270 of 1996, Statutory Law of the Administration of Justice, that technology must be at the service of the administration of justice. Meanwhile, article 486 of the Colombian Criminal Procedural Code, Act 906 of 2004, establishes the following:

Transfer of witnesses and experts. Once all the possible technical means have been used such as audio-video device or any other similar one, the competent authority shall request the presence of witnesses and experts that are relevant and necessary to the investigation and judgment, but the interested party shall pay for the expenses.

Witnesses and experts shall declare in oral trials observing the provisions of this Code.

Judges or district attorneys, pursuant to the provisions set forth in this code and observance of all legal established channels, may request to travel abroad to conduct any proceedings of their competence. For such effect, this shall be conducted once all the procedures set forth in the foregoing item have been used and through all the possible technical means. In all cases, the trip abroad shall be requested, and authorization shall be given by the competent foreign authorities.

Similarly, Judges and district attorneys during the investigation and prosecution and within the framework of their competence may request directly the Colombian diplomatic and consul officials abroad to obtain evidentiary material element or the execution of procedures that may be necessary, within the scope of their powers, and which do not infringe this code.

The Attorney General might authorize the presence of foreign official on Colombian territory to carry out legal activities and procedures under the direction and coordination of a delegate district attorney and the participation of a representative from the Public Ministry.

As central authority in criminal matters, the Office of the Attorney General of Colombia receives petitions for judicial assistance that are forwarded by foreign authorities, where it is requested to conduct proceedings using the videoconference tool. Likewise, mutual legal assistance issued by Colombian district attorneys sometimes require carrying out proceedings through videoconference without the need of traveling abroad.

The legal grounds of petitions for judicial assistance executed by foreign authorities and those elaborated by Colombian district attorneys are the bilateral and multilateral treaties from which the Colombian State is part of, or failing this, the principle of reciprocity is applied. On this regard, the Ministry of Justice and Law another central authority in Colombia, highlight Article 6 of Law 1179 of 2007, "*Additional Protocol to the Convention on Judicial Cooperation in Criminal Matters between the Republic of Colombia and the Kingdom of Spain*" or in the multilateral conventions such as the *Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems*, within the framework of COMJIB.

The procedural actions must be conducted bearing in mind the respect for fundamental rights of the individuals that intervene in it, safeguarding procedural rights and guarantees, as well as the due process and the right to defend themselves. These principles govern all criminal proceedings, including videoconferencing.

The Prosecutor in charge of the videoconferencing shall decide whether the videoconferencing is conducted by the requesting party making questions or if it is required that they must provide a questionnaire in advance. Lawyers from the requesting State may intervene in accordance with the nature of the proceeding requested.

The requesting and requested parties shall verify with the suitable technical support the means or appropriate platform to carry out the videoconferences and the compatibility of the systems involved for the videoconferencing.

The Office of the Attorney General of Colombia has a national virtual videoconference channel that allows the connection with all the Prosecutor's Offices on Colombian territory. Though there might be some places where the internet connection is unstable.

As well, the Judicial Documentation Centre of the Administrative Chamber of the Superior Council of the Judiciary - CENDOJ - well in advance of the date set for the respective videoconferencing, make contact with its counterpart in the requesting country and conducts a technical test which, among other aspects, determines the compatibility of the videoconferencing systems.

The Central Authority (CENDOJ) and the competent authorities of Colombia determines, according to the circumstances of each case, the appropriate site for holding the videoconference.

Where the videoconferencing equipment is not available in the Court, it is possible to conduct a videoconference in a different location (Police offices, Government Offices, or in the Embassy or Consulate of the requesting country), but the suitable place shall be

verified to carry out the requested proceeding. If the person required for the videoconferencing is deprived of his/her freedom, the detention centre shall be the site to conduct the virtual hearing requested instead of the Court premises.

The Colombian judicial authorities have the power to resort to consular channels to carry out virtual proceedings with Colombian nationals abroad, in this case the proceedings are carried out from the respective consular headquarters.

5. Costa Rica

The Code of Criminal Procedure of Costa Rica does not explicitly regulate videoconferencing. However, it is promoted as an ideal instrument to ensure the declarations of the parties.

The Office of the Attorney General of the Republic, in its capacity of central authority, informs that the Code of Criminal Procedure prescribes the possibility of using the available technological means to ensure the reception of the testimony, even in article 71 on Rights and Duties of the victim, it mentions that:

*“(...) b) Procedural protection: when there is a risk to their life or physical integrity or those of their relatives, as a result of their complaint or intervention in the process, the victim will have the right to have their personal data confidential, such as name, identification card, address, telephone number, and place of work. The victim will also have the right for their personal data to not appear in the process documentation. In addition, in the exceptional cases indicated in article 204 bis of this Code, the victim will have the right that authorities keep confidentiality of their individualizing physical characteristics, when, due to the nature of the event, they are not known by the accused or other people related to the accused, without prejudice to the right of defense. To ensure the victim's testimony and protection of their life, the **available technological means such as videoconferencing or other similar** can be employed, to grant effective protection, both when the taking of evidence in advance of trial is made and in court, under the terms and according to the procedure regulated in articles 204 and 204 bis of this Code.”*

In addition, article 293 of the Code of Criminal Procedure Code contemplates the taking of evidence in advance of trial and mentions the following:

“When the practice of a definitive and irreproducible act that affects fundamental rights is necessary, or when a statement must be received that, due to obstacles difficult to overcome, it is presumed that it will not be received during the trial, or, when due to the complexity of the matter, there is the probability that the witness forgets essential circumstances about what they know or when it is related to people who must leave the country, the Prosecution Office or any of the parties may require the judge to carry it out or receive it. In the case of a witness or a victim whose safety, life, or physical integrity are

*at risk due to their participation in the process and it is reasonably presumed that their statement in court will not be possible, since the risk will not be reduced or it could even increase, the Prosecution Office, the plaintiff or the defense will request the judge to order the reception of their testimony in advance. (...) For the receipt of the taking of evidence in advance of trial, the **technological means available can be used, such as videoconferencing, recordings, closed television circuits, filming, or any other means, in order to guarantee the purity of the act and the validity of the principles of immediacy and orality of the trial, as well as the right of defense. (...)**".*

On the other hand, by executive decree No. 39415 of December 3, 2015, the Republic of Costa Rica ratified the *Ibero-American Convention on the use of videoconferencing in International Cooperation between Justice Systems and its Protocol related to costs, linguistic regime, and submission of requests*. This treaty states that: "*the present Agreement favors the use of videoconferencing among the competent authorities of the Parties as a concrete means to strengthen and expedite mutual cooperation in civil, commercial and criminal matters, and in other matters that the Parties expressly agree.*"

In its article 2, it states that the following should be understood by "videoconference": "*'Videoconference' shall be understood, within the scope of this Agreement, as an interactive communication system that transmits, simultaneously and in real time, image, sound, and data at a distance from one or more people who make a statement, located in a different place from the competent authority, for a process, to allow the taking of statements under the terms of the applicable law of the States involved.*"

Videoconferencing in Costa Rica is used in different areas, such as for the collection of testimony, to pronounce judgments or for trainings. The technology used is a high-speed IP connection. The legal basis for criminal proceedings is Article 71(2)(b) of the Code of Criminal Procedure¹⁰³ that allows the use of videoconferencing to protect the victim's life. Article 293 of the Code of Criminal Procedure contains a rule for pre-trial taking of testimony via videoconferencing. In order to use videoconferencing, a formal request must be issued to the Executive Director of the Judiciary or the President of the Court, indicating the reason for the videoconference and the goals. The same procedure shall be used for trainings and judgments, whether national or international. Finally, hearings by videoconference are also accepted upon request of foreign judicial authorities according to the Organic Act on the Judiciary.¹⁰⁴

The central authority reports that videoconferencing is frequently used in Costa Rica. The majority of processed videoconferences have had positive results, but in a smaller percentage, they are not carried out with success due to the following considerations:

1. It is not possible to locate the person to be requested through videoconference; or,
2. The person is located but no willing to participate.

¹⁰³ Código Procesal Penal, No.7594.

¹⁰⁴ Article 43 A, Act No. 8 of 29 November 1937; see also vote No. 682-2007 of 29 June 2007 of Chamber III of the Supreme Court of Justice.

The prosecution facilitates active or passive judicial cooperation. In the case of active judicial cooperation, in which Costa Rica requests the collaboration, there are two possibilities:

- Videoconference is requested to a country, and if the Prosecution Office has the means to locate the person required, they contact them and if the requested person is willing to collaborate, the prosecution makes all arrangements with the Consulate of Costa Rica in that country. This is the less complex mechanism.

- In case it is not possible to obtain the contact details of the requested person, international mutual legal assistance should be requested so that the authority of the requested country can locate the witness and verify if they are willing to participate and collaborate, in which case the authorities of the requested country will provide the place and the equipment for the videoconference or, failing that, the procedure is carried out at the nearest Costa Rican consulate.

When it comes to passive judicial cooperation, it is executed through international criminal assistance, the Costa Rican authorities locate the requested person and verify that they are willing to participate, provide the facilities and videoconference system or they are transferred to the consulate of the requesting country, if required.

It is not necessary to send a list of questions in advance if the testimony is taken on a trial. There is no obstacle in cooperating with a videoconference for an investigated or accused person to testify.

There are rooms properly equipped for videoconferencing in Costa Rica, although they are limited. In advance of the date of the videoconference, technical tests are carried out, for which technical data is requested so that the telematics department sends the polycom software. In general, and for privacy reasons, some countries are reluctant to use a different license or software than their own, so they communicate the application they prefer to use, which can cause delays. They have a portable video conferencing device to lend to the requesting State if needed, as long as the technology used is software free.

6. Dominican Republic

Article 200 of the Code of Criminal Procedure¹⁰⁵ authorizes videoconferencing, in line with the rules on judicial cooperation, in cases where the witness is abroad and needs to be heard by the court. The same applies to witnesses residing in the Dominican Republic where a foreign authority requests a hearing. Further possible uses are witness statements by minors that can be taken in a separate location outside the courtroom pursuant to Article 327 of the Code of Criminal Procedure.

¹⁰⁵ Código Procesal Penal de la República Dominicana.

Prosecutors and judges have to provide maximum cooperation and support to foreign authorities in accordance with international treaties and domestic legislation. International cooperation requests must contain the following: (a) date of cooperation, (b) authority issuing the request, (c) authority to whom the request is directed, (d) brief statement of the facts related to the investigation or proceeding for which cooperation is sought, (e) indication of International Legal Instrument under which cooperation is requested, (f) detailed information on what is required, (g) violated criminal laws and order of the court or competent authority on which the request for cooperation is based.

In 2016, the first videoconferencing room was inaugurated in Santo Domingo in an interview center for vulnerable persons. A similar facility was opened in February 2017 in Puerto Plata. Videoconferencing is recognized in the Dominican Republic for its positive effect regarding the protection of witnesses.

7. Ecuador

The use of videoconferencing in Ecuador began with a working meeting held among judicial authorities of the Pichincha province, aiming to coordinate the implementation of videoconferencing systems as a solution for experts and witnesses who were out of town and unable to attend hearings before courts.

The Code of Criminal Procedure¹⁰⁶ of Ecuador stipulates that the criminal court may dispose *ex officio* or upon request for reasons of safety or procedural utility, and in those cases where it is impossible or dangerous for the person who should testify at the trial hearing as accused, witness or expert, that such persons should be heard by videoconference or other similar technical means, provided that this allows a direct and reliable communication, both of image and sound, among those present at trial.¹⁰⁷

A parallel provision is Article 502(10) of the Organic Integral Criminal Code¹⁰⁸ that generally states that testimony can be taken via videoconference. Moreover, Article 504 of the same law allows for children, adolescents, handicapped or elderly to be heard by videoconferencing. Article 510(1) of the Organic Integral Criminal Code is a further legal basis for victims to give their testimony via videoconference to avoid direct confrontation with the accused. Moreover, Article 511 states that international experts can also be heard by videoconferencing. Article 565 contains a corresponding rule providing the possibility to use videoconferencing for international cooperation, security and procedural utility and in other cases where the person concerned is unable to attend the hearing before the court. The condition is that it must allow a real direct and reliable communication, as regards both image and sound, among those present at trial.

¹⁰⁶ Código de Procedimiento Penal 2000, Ley No. 000. RO/ Sup 360 de 13 de Enero del 2000.

¹⁰⁷ Article 254bis Código de Procedimiento Penal.

¹⁰⁸ Código Orgánico Integral Penal.

The criminal law of Ecuador establishes that the person being prosecuted must be physically present at the trial hearing. There is only one exception to this rule, through the Constitution, that allows the trial in the absence of the accused in the following crimes: bribery, extortion, embezzlement, and illicit enrichment. However, most judges do not allow the defendant to participate telematically in the arraignment hearing and on flagrant crime.

A letter rogatory must be issued requesting a videoconference. According to the central authority for the transferring of a sentence -SNAI-, in particular, when requesting for a videoconference for the transferring of sentenced persons.

The Prosecution Office requires, according to the practice of international legal cooperation, a list of questions from the requesting State that must be sent in advance of the videoconferencing because, according to its central authority, the domestic law and Article 4¹⁰⁹ of the United Nations Convention against Organized Crime, videoconferencing should be directed by the competent authority of State Ecuador. If the requesting State wants to participate and pose questions, it must be authorized by the competent authority of Ecuador.

Therefore, if the requesting authority needs to act in the proceeding, it requires authorization of the competent authority; otherwise, it must limit its participation as an observer. Lawyers from the requesting State may participate in the videoconference, making questions according to the principle of contradiction established in 454.3 of the Organic Integral Penal Code.

The 24 provincial courts are provided with the necessary equipment for videoconferencing using a technology called “Polycom system”. If the requesting State requires to conduct a videoconference in a different location, such as police offices, government offices, or the Embassy or Consulate of Ecuador, it is possible to do so by using diverse platforms such as Zoom, MS teams, Cisco WebEx, and Google Meet, among others. Likewise, the requesting State may provide a mobile system for videoconferencing.

The Judicial Council approved in July 2000 the Protocol for the holding of video hearings as a solution to the health crisis caused by COVID-19 with the following specific objectives:

- a. To provide guidelines for adequate coordination in logistical and technical aspects before, during, and after video hearings in courts, judicial units, tribunals, and provincial courts.
- b. To plan the use of the digital platforms available and authorized by the Council of the Judiciary.
- c. To establish coordination instructions for virtual assistance of interpreters, witnesses, and experts, if necessary.
- d. To define guidelines that guarantee access to video hearings, in compliance with the principle of publicity and based on the legal limitations.

¹⁰⁹ "Nothing in this Convention shall entitle a State Party to exercise, in the territory of another State, jurisdiction or functions that the domestic law of that State reserves exclusively to its authorities."

In general, connection tests are carried out prior to the date and time of the diligence, in order to check compatibility between the systems for videoconferencing and adopt the necessary measures to avoid any inconveniences. Electrical and electronic failures are the main limitation within the practice of videoconferencing in Ecuador; for example, on several occasions, the satellite internet signal and the programs used by the Council of the Judiciary (Polycom and Zoom) become saturated, causing interruptions in the signal and interfering with the video and audio, putting at risk the principles of due process and legal security.

8. El Salvador

The Code of Criminal Procedure¹¹⁰ of El Salvador regulates the use of videoconferencing as follows. Article 106 governs victims' rights and establishes that means shall be provided for them to give testimony through the use of video links in an informal and non-hostile environment, which will be recorded to facilitate public reproduction when necessary, and the victim shall not be questioned personally by the defendant, or confronted with him, when under twelve years of age.

Regarding the interrogation of minors, the following is stipulated:

Article 213

The questioning of a person underage shall be subject to the following modifications: (...)

b) If necessary, the court may authorize the examination of a child witness using electronic media or remote transmission when indispensable to safeguard their integrity (...)

Finally, El Salvador has also concluded a bilateral treaty with Brazil on videoconferencing for the purpose of mutual legal assistance in criminal matters.

9. Guatemala

Guatemala makes frequent use of videoconferencing. A legal basis was introduced in 2009 with the law on the strengthening of criminal prosecution that amended inter alia the Code of Criminal Procedure¹¹¹ and introduced Article 218 BIS and Article 218 TER.

¹¹⁰ Código Procesal Penal.

¹¹¹ Código Procesal Penal.

Videoconferencing can be used to hear protected witnesses, collaborators against organized crime and experts when there is a risk for their own or their families' integrity or life.

The Supreme Court issued rules for videoconferencing in criminal proceedings.¹¹² Accordingly, its use is possible upon request by the parties or ex officio with regard to persons abroad who are unable to appear in person because their lives are threatened.¹¹³ Moreover, videoconferencing may also be used for reasons of security or public order to maintain confidentiality of the location of the person testifying.¹¹⁴ Further scenarios are threats to or intimidation of the witness¹¹⁵ or a bad state of health.¹¹⁶ There is also a general clause for any other reason that the judge deems necessary to take into consideration.¹¹⁷ The rules also clarify and grant the defense counsel the possibility to decide whether to be with his client in the videoconference room or in the courtroom where the hearing is being transmitted.¹¹⁸

In its rules in Arrangement No. 24-2010, the Supreme Court deals with the possibility to conduct hearings with prisoners in penitentiaries, in particular when they pose a security risk or where there are limited resources for transferring them to court.¹¹⁹ In 2010, the first trial took place in this context. It concerned 14 alleged members of a criminal group. Two of the accused participated in the judicial proceedings through videoconferencing from a prison of maximum security.

10. Honduras

The Judiciary of Honduras has installed videoconferencing systems in the offices of the Reform Technical Unit (RTU) of the Judiciary, in order to interact with international organizations, allowing an alternative way to communicate in real time at a low cost. Article 237(5) of the Code of Criminal Procedure¹²⁰ contains a rule on the protection of witnesses and allows for the use of videoconferencing regarding witnesses, victims or experts who find themselves at risk. The same possibility exists with regard to vulnerable persons as described in Article 237A of the Code of Criminal Procedure. The latter category comprises, *inter alia*, minors, women being victims of domestic violence and persons with disabilities. Videoconferencing can be ordered upon request by the parties or ex officio. In addition, Article 12 of Decree No. 63-2007¹²¹ also enumerates videoconferencing as a means of witness protection.

¹¹² Corte Suprema de Justicia, Acuerdo No. 31-2009, Reglamento para el desarrollo de las Declaraciones por videoconferencia reguladas en las reformas al Código Procesal Penal, Decreto número 51-92 del Congreso de la República, contenidas en la Ley de Fortalecimiento de la Persecución Penal, Decreto número 17-2009 del Congreso de la República.

¹¹³ Corte Suprema de Justicia Acuerdo No. 31-2009, article 3(1).

¹¹⁴ Corte Suprema de Justicia Acuerdo No. 31-2009, article 3(2).

¹¹⁵ Corte Suprema de Justicia Acuerdo No. 31-2009, article 3(3).

¹¹⁶ Corte Suprema de Justicia Acuerdo No. 31-2009, article 3(4).

¹¹⁷ Corte Suprema de Justicia Acuerdo No. 31-2009, article 3(5).

¹¹⁸ Corte Suprema de Justicia Acuerdo No. 24-2010, article 3(1).

¹¹⁹ Corte Suprema de Justicia Acuerdo No. 24-2010, article 1(a) and (b).

¹²⁰ Código Procesal Penal.

¹²¹ Ley de Protección a testigos en el proceso penal, DECRETO No. 63-2007.

11. Mexico

The legal basis for the taking of evidence via videoconferencing can be found in Article 450 of the National Code of Criminal Procedures;

Article 450. Videoconference

The declaration of a witness can be taken by videoconferencing. For this purpose, the videoconference will be carried out under the current legislation in a hearing conducted by the Judicial Body. The fundamental rights and procedural guarantees provided in the Political Constitution of the United States of Mexico and the National Code of Criminal Procedures must have complied for each of the procedural subjects (accused, witnesses, victims, etc.).

Per the rules provided in the bilateral treaties on international legal assistance signed by Mexico, the interrogation (via videoconference) will be directed by the competent authority of the Requesting State without prejudice that the Mexican judicial or ministerial authority adopts the necessary measures to guarantee that, during the development of the videoconference hearing, the fundamental rights and procedural guarantees of the accused, witness, or victim are respected, under the provisions of the Constitution of Mexico. Therefore, the requesting authority is the one that decides if lawyers can participate. The Mexican authorities are intermediaries: they intervene to attest that people are not being coerced to respond.

The requesting authority must send in advance a list of questions for the videoconference to the Prosecution Office, without it being an obstacle that the requesting authority expands its questions during the videoconferencing. In such case, reformulate questions must be directed to the representative of the prosecution office.

The Office of the Attorney General of the Republic (FGR), which is the Central Authority in matters of international legal assistance in Mexico, with the collaboration of the General Directorate of Information and Communication Technologies (DGTIC) of the same institution, coordinates with the Central Authority of the Requesting State to carry out connection, audio and video tests before the date set for the hearing by videoconference. It also collaborates with The Ministry of Foreign Affairs, in particular, when there is intervention abroad by its Embassies.

Similarly, following the provisions of the General Agreement 2/2020 of the Plenary of the Federal Judiciary Council of the Federal Judicial Power (CJF/PJF) and in its Technical Addendum (Protocol for the Use of Videoconference), before the beginning of the hearing by videoconference, the technical manager and/or support staff of the General Directorate of Information Technologies of the CJF/PJF will carry out the tests to confirm the adequate quality of the audio and video for its development.

In Mexico, there is no specific system or technological platform at the national level for videoconference. However, these can be conducted anywhere in the country as long as there is an internet connection and devices that allow the simultaneous transmission of video, audio, and data through telecommunication infrastructures (videoconference codec, computers, tablets, smartphones, etc.). The videoconference does not need to take place in the judicial headquarters. However, according to the Ministry of Foreign Affairs, when the videoconferencing equipment is not available in the Court, it depends on the person who must be in the videoconference to make it possible to conduct a videoconference in a different location, because in the case of a person who is detained and must be guarded by armed security personnel, it is not possible for him/her/that person to appear before a Diplomatic or Consular Representation, since armed persons cannot access the offices and it is necessary to safeguard the security of the Representation staff and of the citizens who come every day to carry out procedures at these Offices.

The Ministry of Foreign Affairs considers that Mexican authorities must guarantee the identity of those who participate in the videoconference. In cases where minors or victims are involved or affected by the crimes of kidnapping, human trafficking or rape and they must participate in a diligence, the authority may order the assistance of family members or specialized experts and use the pertinent measures in order to avoid confrontation with the defendant.¹²²

In 2008, the Plenary Council of the Federal Judiciary confirmed in a General Arrangement that videoconferencing is an effective method in judicial proceedings.¹²³ The General Arrangement contains a description of videoconferencing and good practices to be followed when using it. Already before, the Federal Judicial Council had established a virtual private network (VPN) with adequate communication infrastructure to enable videoconferencing. Furthermore, the General Arrangement also contains a template for an order authorizing videoconferencing in its Annex I.

Additionally, Article 45 of the Federal Law for the Protection of Individuals Involved in Criminal Proceedings¹²⁴ regulates that, when the technical conditions allow for it and authorization is obtained from a judicial authority and/or the deputy of the prosecution office or equivalent administrative unit belonging to the Public Ministry in charge of the investigation, videoconferencing can be employed for the hearing of a person in Mexico, on proceedings abroad and vice versa. Besides, provisions on videoconferencing are also contained in the laws of the different federal states of Mexico.

Apart from the above mentioned *Ibero-American Convention*, Mexico has signed bilateral international legal instruments on cooperation and mutual legal assistance in criminal matters with countries like Brazil, India, Switzerland, Spain and Paraguay, providing for the use of videoconferencing. The General Prosecution Office of the Republic of Mexico uses videoconferencing also in communications with the Ministry of Justice.

¹²² Código Federal de Procedimientos Penales.

¹²³ ACUERDO General 74/2008 del Pleno del Consejo de la Judicatura Federal, que pone a disposición de los órganos jurisdiccionales el uso de la videoconferencia como un método alternativo para el desahogo de diligencias judiciales.

¹²⁴ Ley Federal para la Protección a Personas que Intervienen en el Procedimiento Penal.

Videoconferencing is considered as a substantial contribution to the efficiency of the courts, as long as in line with human rights standards and guarantees recognized by the Mexican Constitution. According to the Mexican experience, videoconference has the advantage of being inexpensive and very efficient for judicial purposes. Courts may refrain from taking recourse to traditional relief mechanisms. Moreover, the victim can avoid physical contact with the alleged perpetrator of the crime. Notably, it also means greater security for members of the judiciary, witnesses and victims to avoid transfers and their respective risks.

12. Nicaragua

There is no rule in the criminal procedural law that regulates the use of videoconferencing in Nicaragua. However, by agreement number 182 of October 24, 2013, the Supreme Court of Justice approved the Operating Regulations on the use of videoconferencing in criminal proceedings and, recently, through a Circular from the Supreme Court of Justice, of March 10, 2021, urges justice operators to comply with the use of videoconferencing that allows users of the criminal justice administration, witnesses, experts, victims, and defendants to hold a virtual meeting through the real-time transmission of video, sound, and data through the internet that allows jurisdictional procedural actions.

Articles 74 and 76 of Law 735 on the Prevention, Investigation and Prosecution of Organized Crime and the Administration of Seized Property¹²⁵ encourage the use of videoconferencing as a witness protection measure.

The Office of the Attorney General of the Republic considers that the criminal process is governed by principles such as the Purpose of the Criminal Procedure and orality, which have justified the use of videoconferencing for the admission of experts who are in remote areas of the country.

Allowing the admission of proof of charge to be assessed by the judicial authority, obtaining in, most cases, guilty verdicts.

Likewise, the videoconference tool has been used in active judicial cooperation in cases derived from extradition processes, in which the Supreme Court of Justice, criminal chamber, when the requested person is Nicaraguan and his extradition must be rejected. In these cases, it has been acted through International Criminal Assistance, protected in article 7, paragraph b, of the Inter-American Convention on Mutual Assistance in Criminal Matters and article 2, paragraph a), of the Treaty of Mutual Legal Assistance in Criminal Matters among the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

¹²⁵ Ley de Prevención, Investigación y Persecución del Crimen Organizado y de la Administración de los Bienes Incautados, Decomisados y Abandonados.

By the provisions of article 34 of our Political Constitution, the accused has the right to remain silent without this implying that he or she is guilty of the acts attributed to him/her. Therefore, he/she may only testify by videoconference voluntarily and with the advice of their defence attorney.

Based on the principle of orality, the requesting authority at the time of the videoconference may intervene by asking questions to the victims, witnesses, or experts. However, in cases in which the requesting authority sends the list of questions, the Public Ministry of Nicaragua asks these questions directly, as this is the way to enter the test; that is, through questioning.

The Prosecution Office of Nicaragua does not have the necessary equipment to carry out videoconferences; but the Judicial Power in the departments of Managua, the South Caribbean Coast Region, Rivas, and Estelí.

It is not possible to carry out a videoconference in any other place without the equipment authorized by the courts of law, nor is it possible for the requesting State to provide mobile equipment for videoconferencing.

13. Panama

Article 332(5) of the Code of Criminal Procedure contains a possibility to hear witnesses by videoconferencing. Further, Article 391 provides that minors or vulnerable persons may give their testimonies via videoconferencing. Article 393 governs hearings of witnesses abroad and states that they can be conducted by technological means.

Law 11 of March 31st, 2015, published in the Official Gazette 27752, which dictates provisions on international legal assistance in criminal matters, establishes through paragraph 10 of Article 7 that international legal assistance may be requested to conduct videoconferences for evidentiary purposes.

This law does not establish a specific procedure for videoconferencing. However, through Article 9, it establishes the minimum information that the request must contain:

- Name of the authority conducting the investigation, prosecution, or judicial proceeding related to the request, including details of the institution officer responsible for answering questions or queries that may arise from the request.
- A description of the criminal investigation or prosecution, including a summary of the facts and, if possible, the offenses and penalties involved.
- A description of the purposes of the request for assistance, as well as the nature of the assistance requested.

- If known, the identification, provided in detail, of the natural or fictitious persons under investigation. If the information is not sufficient, the competent authorities of the Republic of Panama may request the requesting State to provide additional information.

For its part, the request may specify any procedure for the execution thereof, as long as it is not contrary to the fundamental principles of the Law of the Republic of Panama. (Article 11 of Law 11 of March 31st, 2015).

However, for the specific case of the *Ibero-American Convention on the Use of Videoconferencing in the Legal Cooperation between Justice Systems* approved by Panama under Law 52 of May 10th, 2011, Article 5 raises what “execution of videoconferencing” refers to, indicating that the following rules apply:

- The examination shall be carried out directly by the competent authority of the requesting party or under its direction, following the terms outlined in its domestic law.

Per domestic legislation of Panama, the Code of Criminal Procedure of the Republic of Panama (articles 397 - 400), contemplates rules on testimony, interrogation, and cross-examination, which would apply in the case of an active request made by the Republic of Panama. In turn, the Panamanian criminal procedural system, due to its accusatory nature, guarantees the strict equality of the parties and the right to defence.

- The proceedings shall be conducted in the presence of the competent authority of the requested State and, if necessary, of the authority of the requesting State, accompanied, if necessary, by an interpreter.

- The requested authority shall identify the individual to be examined.

- The intervening authorities may, if necessary, apply protective measures to the individual to be examined.

- At the request of the requesting party or the individual to be examined, the requested Party shall provide, if necessary, the assistance of an interpreter.

- The room reserved for the proceedings by videoconference must guarantee the safety of the participants and preserve the publicity of the acts when appropriate.

Currently, videoconferencing is used in both active and passive cooperation.

There are no limitations based on the procedural position of the individual to be interviewed since our domestic legal system provides as principles of the process: the strict equality of the parties, due process, the right to defence, and others (Article 3 of the Code of Criminal Procedure of the Republic of Panama).

However, regarding the accused, it should be noted that the Political Constitution of the Republic of Panama establishes that “No person is obliged to testify against himself, his/her spouse, relatives to the fourth degree of consanguinity or second degree of affinity in criminal, correctional, or police proceedings”.

In addition, Article 321 of the Code of Criminal Procedure establishes that, during the investigation stage, the accused may be summoned by the Prosecutor when he/she deems it necessary for clarification of the facts, ensuring that they are assisted by an attorney.

In turn, Article 368 of the procedural regulations provides that the accused may give voluntary statements at any time during the oral trial and may be questioned by the defence counsel, the prosecution, and the plaintiff; in addition, the President of the Court may also ask him questions to clarify his statements.

The Republic of Panama has also approved several international treaties that regulate the matter to some extent; among them, we can mention the following:

- *The Ibero-American Convention on the Use of Videoconferencing in the Legal Cooperation between Justice Systems*, approved in Panama by Law 52 of May 10th, 2011, published in the Official Gazette N°26783-A dated May 12th, 2011.
- *The Additional Protocol to the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems Related to Costs, Linguistic Regime, and Remittance of Requests*, approved in Panama by Law 26 of July 1st, 2016, published in Official Gazette 28071-A.
- *The United Nations Convention against Transnational Organized Crime*, approved in Panama by Law 23 of July 7th, 2004, establishes the following in paragraph 18 of Article 18. The foregoing is in accordance with paragraph 18 of Article 46, of the *United Nations Convention against Corruption*, approved in Panama by Law 15 of May 10th, 2005.

Regarding Bilateral Treaties ratified by the Republic of Panama, although they do not regulate the videoconference, most of them establish that the assistance can be provided if agreed between the parties, which constitutes an opening so that they can be applied. Videoconferencing is especially feasible according to the Panamanian domestic legal system. Therefore, it is possible, as long as it is not contrary to the fundamental principles of the Law of the Republic of Panama.

There are no videoconferencing systems in any provinces of the country. However, videoconferences have been held through different technological platforms such as Microsoft Teams, Skype, WebEx, among others.

When videoconferencing equipment is not available in the Court, it is possible to conduct the videoconference in a different location (Police offices, Government Offices, or in the Embassy or Consulate) in accordance with the provisions of Article 393 of the Code of Criminal Procedure.

14. Paraguay

According to the Ministry of Justice of Paraguay, there is no legal provision on videoconferencing. Nonetheless, Paraguay passed the Law no. 6071/2018, approving the Ibero-American Agreement on the use of videoconferencing in international cooperation between justice systems and its Additional Protocol.

There are no legal limitations for a witness, expert, or defendant to receive a statement by videoconference. The requesting authority may formulate questions and it is desirable, but not necessary, for these questions to be submitted in advance. Lawyers from the requesting country may ask questions if the person testifying consents.

In Paraguay, only large cities have videoconferencing systems because small cities do not even have access to the internet. For this reason, the videoconference may be organised in a place, other than the court, where the diligence can be carried out and it is also possible that the requesting State provides mobile equipment for videoconferencing. Before the date of the videoconference, a session is organized to test the technical compatibility of the systems in both countries.

15. Peru

Over the last years, the use of videoconferencing has increased in Peru. Article 169 of the Code of Criminal Procedure provides that witnesses residing in a remote location or abroad may be heard via videoconferencing.

Article 169.- Witnesses residing outside the place or abroad

1. If the witness does not reside in or near the place where they must testify, whenever it is not possible to transfer them to the judicial office, their statement may be made by letter rogatory. If possible, and preferably, the most appropriate technological means may be used, such as videoconferencing or recording of their statement, which the Prosecutor and the parties' lawyers may attend or intervene, depending on the case.

2. If the witness is abroad, the rules on international judicial cooperation must be followed. In these cases, if possible, videoconferencing or recording of the statement will be used, with the intervention - if applicable - of the consul or another official specially authorized for this purpose.

Furthermore, article 248(2)(g) of the Code of Criminal Procedure enumerates the use of videoconferencing as a means for witness protection. In addition, according to its article

360(4), a judge may hear a sick witness or expert via videoconferencing. At the same time, videoconferencing also facilitates remote participation in academic activities and workshops, enabling the analysis, consultation and exchange of information between public defenders from different sites nationwide. Courts recently used videoconferencing to pronounce a sentence of a high-risk inmate residing in prison instead of having him transferred to court. Thereby time and money could be saved.

Article 119-A, paragraph 2, regulates the presence of the accused by videoconference that *“In exceptional cases, at the request of the prosecutor, the accused, or by order of the judge, videoconferencing may be used in cases where the accused is deprived of their liberty and their transfer to the place of the hearing poses difficulties due to the distance or a risk of escape”*.

Lawyers of the requesting country are allowed to ask questions directly to the witnesses or people under investigation in the videoconference.

The videoconference in International Judicial Cooperation is regulated in:

Article 508

1. The relationships of the Peruvian authorities with foreign authorities and with the International Criminal Court in matters of international judicial cooperation are governed by the International Treaties held by Peru and, failing that, by the principle of reciprocity within the framework of respect for human rights.

2. If there is a treaty, its rules will govern the international judicial cooperation process. Without prejudice to this, rules of domestic law, and especially this Code, will serve to interpret them and will be applied to everything that the Treaty does not specifically provide. In article 129.2, in urgent cases, they may be summoned verbally, by telephone, email, fax, telegram, or any other means of communication, which shall be recorded in the criminal file. Protection measures for videoconferencing may be ordered under article 248.

The Judiciary has adopted several administrative resolutions about the videoconference:

- Administrative Resolution No. 042-2013-CE-PJ dated March 13, 2013, which approves Directive No. 001-2013-CE-PJ. It regulates the Procedure for the Execution of Virtual Audiences, defines videoconferencing as a technology that provides a bidirectional audio, video, and data communication system that allows receiving and broadcasting offices to maintain simultaneous interactive communication in real time.
- Administrative Resolution 004-2014-CE-PJ dated January 7, 2014, approves Directive No. 001-2014-CE-PJ called Guidelines for the use of Videoconferencing in Criminal Proceedings. Its purpose is to regulate the use of this procedural tool for conducting hearings in criminal proceedings, when, due to specific

circumstances, the physical presence of a witness, expert, victim, and even the accused himself/herself is not possible.

- Administrative Resolution No. 233-2015-CE-PJ, which approves Directive No. 005-2015-CE-PJ. This norm guarantees the proper use of the equipment of the National Videoconferencing System and the communication lines of the National Videoconferencing System of the Judiciary, through the VPN platform - Virtual Private Network, already implemented by the Judiciary for this exclusive use, in order to optimize the development of audiences.
- Administrative Resolution No. 084-2018-CE-PJ, which approves Directive No. 002-2018-CE-PJ. It establishes "Guidelines for the Development and Installation of Hearings Held in Criminal Proceedings under the Scope of the New Criminal Procedure Code, through the Use of Videoconferencing and other Technological Applications of Communications - Social Networks" refers to international hearings via international judicial cooperation, mentioning that to carry out the diligence, the consul or other official authorized for this purpose will be summoned; in addition to an interpreter, if necessary. In Peru, it is possible to carry out the videoconference outside the Court at the request of the requesting country. For example, Chilean authorities usually conduct them at the Embassy with the presence of the Consul. It also establishes that the judicial authority can ask questions because videoconferencing is defined as a technology that allows simultaneous communication in real time.
- Res. 080-2020-CE-PJ. It stipulates the implementation of videoconferences in secondary offices of the higher courts of the country.
- Administrative Resolution No. 077-2020-CE-PJ. It stipulates the execution of the "Strengthening on the Courtrooms and Videoconferences of the Penitentiary Establishments at the National Level", following the proposal made by the Administrative Office of the Institutional Technical Equipment Unit of the Criminal Procedure Code.

There is jurisprudence of the Constitutional Court of Perú regarding the videoconference:

- File No. 02738-2014-PHC / TC. *“According to this court, the videoconference system does not prevent the defendant and the judge from being able to communicate orally; rather, it enables interaction and dialogue between the parties, and it can be observed that, when carried out under the appropriate technical conditions, it does not hinder sensory perception. Likewise, to the extent that access to the content of the audiences is allowed, publicity is not affected. While, regarding the contradiction, it is appreciated that with the parties communicated in real time, they can express themselves fluently, as if the defendant and the judge were physically present in the same environment.”* (Legal Basis 18)

16. Trinidad & Tobago

The judiciary of Trinidad and Tobago has been using videoconferencing since 2005. Examples are Case Management Conferences in civil cases, and remote witness testimony, both locally and internationally, in criminal cases.

For the past few years, efforts have been made to equip courts and prisons with videoconferencing systems. Videoconference rooms in prisons are considered as an extension of the courtroom, and although being at a remote location, all equipment is controlled by personnel at the Court.

V. OTHER STATES

1. Australia

Australia was among the first countries that accepted videoconferencing in courts. Initially, in the early 1990s, it was intended to take evidence from children, or other vulnerable parties, in particular victims of sexual assault, to spare them a confrontation with the accused in the courtroom and to diminish the risk of intimidation. The vastness of the country and its distance from other countries led its courts recognize the value of videoconferencing very early on as a real alternative to travel, or to not obtaining testimony at all. Nowadays, District, County, Family, Federal and Supreme Courts all use videoconferencing to take testimony. The country is internationally recognized for its effective use of videoconferencing. Australian courts use it as a standard tool for pre-trial, domestic and international court cases or prison probation hearings. Thus, it is not only a very helpful tool to gather evidence within Australia, but also overseas. Melbourne Law School even offers a Moot Court during which future lawyers are trained in all aspects of trials including videoconferencing.

A wide range of legislation provides the framework for the use of videoconferencing in court proceedings. Different regional laws exist with similar provisions. A good example is the Western Australian Evidence Act of 1906, which is of relevance because of the large territory of this state. It contains rules for civil and criminal proceedings. With regard to the latter, Section 25A of the Western Australian Evidence Act provides:

25A. Cross-examination by accused in person

(1) In any criminal proceeding where an accused person who is not represented by counsel wishes to cross-examine a witness, the court, having regard to the nature of

the charge, the wishes of the witness, and the availability of any necessary facilities or equipment, may (a) order that during the cross-examination the accused person and the witness are to be in separate rooms and that either

(i) the witness is to be in a room outside the courtroom that is connected to the courtroom by a **video link** as defined in section 120; or

(ii) the accused person is to be held in a room outside the courtroom that is connected to the courtroom by a **video link** as defined in section 120; (...).

Moreover, also Section 106N of the Western Australian Evidence Act contains a relevant provision regarding children's testimony:

106N. Video links or screening arrangements may be used

(2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the judge for the giving of evidence by the affected child

(a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of **video link** as defined in section 120; or

(b) while he or she is giving evidence the accused is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of **video link** as defined in section 120.

(3) Where subsection (2)(b) applies the accused is at all times to have the means of communicating with his or her counsel.

(3a) Where arrangements are made under subsection (2)(a) or (b) the affected child's evidence is to be recorded on a visual recording. (...).

In addition, the following general legal basis can be found in Section 121 of the Western Australian Evidence Act:

Section 121

A court may take evidence or receive submission by **video** or **audio link**, on its own initiative or on the application of a party, from a person at a place, whether in or outside the State. However, the court shall ensure that the **video link** or audio link is available or can reasonably be made available and it shall be refused if such a

direction is not in the interests of justice. The place from which the **video link** is received is considered to come under the jurisdiction of the court.

Laws of other Australian States contain similar provisions on the use of videoconferencing as well.¹²⁶

2. Canada

The Criminal Code, the Canada Evidence Act and the Mutual Legal Assistance in Criminal Matters Act provide for the use of videoconferencing in legal proceedings. Canadian law allows video testimony for example in case of vulnerable witnesses. This includes witnesses who are under 18 or who have a mental or physical disability, as well as witnesses involved in serious offenses such as terrorism and organized crime. Videoconferencing requests to that effect can be made under the UNTOC Convention or through other authority and they are admissible in Canadian criminal prosecutions. With the exception of the Supreme Court of Canada, video and audio recording and transmission, as well as cameras, are not allowed in courtrooms. The above-mentioned videoconferencing is an exception to this general rule.

The Canadian Criminal Code¹²⁷ contains the following relevant provisions:

Video and Audio Evidence

Video links, etc. — witness in Canada

714.1 A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the **virtual presence** of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness had to be physically present; and
- (c) the nature of the witness' anticipated evidence.

Video links, etc. — witness outside Canada

714.2 (1) A court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the **virtual presence** of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

¹²⁶ E.g. South Australia Evidence Act 1929, Section 59E(4) Taking of evidence outside the State by video link; Part 6 C – Use of audio and audio visual links; New South Wales Evidence (Audio and Audio Visual Links) Act 1998 No 105.

¹²⁷ Criminal Code, R.S.C., 1985, c. C-46.

Notice

(2) A party who wishes to call a witness to give evidence under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than ten days before the witness is scheduled to testify.

When a witness being outside of Canada gives evidence by videoconference, such evidence is deemed to be given in Canada for the purposes of the laws relating to evidence, procedure, perjury and contempt of court (Section 714.6 of the Criminal Code) and the costs associated with the use of the technology are borne by the party wishing to call a witness to give evidence in that form (Section 714.7 of the Criminal Code). Finally, a court may receive videoconferencing evidence if the parties consent (714.8 of the Criminal Code).

In Canada videoconferencing is legally possible for judicial cooperation. In two modalities:

a) Voluntary testimony: If the questioning of the witness in Canada on behalf of the foreign state can proceed on a voluntary basis, then the use of videoconferencing is possible. No legislative authority is necessary.

b) Compelled testimony: Where a court order is required to compel a witness to attend for examination in Canada, the Mutual Legal Assistance in Criminal Matters Act provides for videoconferencing for requests made pursuant to a bilateral treaty, multilateral agreement or administrative arrangement (one time agreement) between Canada and a non-treaty partner. The provision states as follows:

22.1 (1) If the Minister approves a request of a state or entity to compel a person to provide evidence or a statement regarding an offence by means of technology that permits the **virtual presence** of the person in the territory over which the state or entity has jurisdiction, or that permits the parties and the court to hear and examine the witness, the Minister shall provide a competent authority with any documents or information necessary to apply for the order.

(2) The competent authority who is provided with the documents or information shall apply ex parte to a judge of the province in which the person may be found for an order for the taking of the evidence or statement from the person under subsection (1).

22.2 (1) The judge may make the order if satisfied that there are reasonable grounds to believe that

(a) an offence has been committed; and

(b) the state or entity believes that the person's evidence or statement would be relevant to the investigation or prosecution of the offence. (...)

In order to obtain court-ordered attendance of witnesses to provide statements or testimony in response to a request for assistance from foreign countries, such as where no applicable mutual legal assistance treaty exists, it is also possible to use the Canada Evidence Act that contains the following relevant provision:

Order for examination of witness in Canada

46 (...) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

Video links, etc.

(2) For greater certainty, testimony for the purposes of subsection (1) may be given by means of technology that permits the **virtual presence** of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.

Laws about witnesses to apply — video links etc.

50 (...)

(1.1) Despite subsection (1), when a party or witness gives evidence under subsection 46(2), the evidence shall be given as though they were physically before the court or tribunal outside Canada, for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the Canadian law of non-disclosure of information or privilege.

In Canada, suspects and accused are protected against self-incrimination under Section 7, Section 11(c) and Section 13 of the Canadian Charter of Rights and Freedoms. If the request seeks the video-link testimony of a suspect or an accused, Canadian authorities will generally proceed on a voluntary basis.

Generally, according to the Department of Justice that is the central authority, the requesting authorities can participate in the videoconference and can ask questions. Canada requires the list of participants (i.e., the prosecutor, the investigator, defence counsel, etc...), a description of the subject matter of the requested testimony and/or a list of

questions. Participation of a Canadian official may also be necessary, depending on the circumstances.

The mutual legal assistance request should include contact information for an individual responsible for the technical aspect of the video-link. Compatibility tests are done routinely before the testimony takes place in order to avoid last minute complications.

Canada has several bilateral agreements on mutual legal assistance that provide for the use of video conferencing.¹²⁸ In general, videoconferencing is widely spread in Canada. It is possible to conduct a videoconference at a police office or another suitable facility. As well to conduct hearings by videoconference by using mobile equipment provided by the requesting country, but likely unnecessary as Canada has access to a wide variety of videoconferencing technologies. Each case will be assessed on a case-by-case basis.

Video technology is also used for example for inter-office communications. The Canadian Supreme Court has started using video links fairly commonly for interlocutory matters, to save counsel the expense of travelling to Ottawa. Additionally, Parliamentary committees use videoconferencing to hear witnesses.

3. New Zealand

Videoconferencing has become increasingly more common in New Zealand. Under the New Zealand High Court Rules, disputed questions of fact arising at trial are to be determined based on evidence given orally in open court, unless directed otherwise by the court. Evidence taking by videoconference may be allowed in certain cases. Courts have emphasized that such a decision involves considerations of potential costs and inconvenience to one party while ensuring that trials continue to be procedurally fair.

The first reported case on video evidence in New Zealand was *B v Dentists Disciplinary Tribunal*,¹²⁹ which contained a comprehensive discussion of the benefits of video link evidence and the circumstances in which it might be appropriate. Justice Williams reviewed the approach of foreign jurisdictions, noting that the Australian Courts had taken a progressive stance on video links and that videoconferencing had been encouraged in Canada since 1983. In view of the approach of these countries, he saw no reason not to embrace the new technology in New Zealand. Almost ten years after this case, Justice Harrison noted that by 2002,¹³⁰ evidence was frequently given by video link in the High Court of New Zealand. The latter noted that an application to give evidence by video link must be determined by balancing the cost and inconvenience to the witness against the

¹²⁸ Canada-Norway (2006), Art. 8.; Canada-China (2002), Art. 9; Canada-Peru (2000) Art. 6; Canada-Czech Rep (2000) Art. 6; Canada-Russian Federation (2000) Art. 7, Canada- Trinidad Tobago (2003), Art. 8; Canada-Uruguay (2002) Art. 8; Canada-India (1995) Art. 6; Canada-Thailand (1994) Art. 9; Canada-Italy (1995); Canada-South Africa (4 May 2001), Art. 9, Canada-Greece (14 Jan 1999) Art. 8; Canada-Romania (30 June 1999); Canada- Ukraine, Art. 7.

¹²⁹ (1994) 1 NZLR 95.

¹³⁰ (2002) 16 PRNZ 329.

natural justice obligations required of the processes of the court of law. These rules were later codified in the Evidence Act 2006 and the Courts (Remote Participation) Act 2010.

The Evidence Act states the following:

103 Directions about alternative ways of giving evidence

(1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

(2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of

- (a) the age or maturity of the witness
- (b) the physical, intellectual, psychological, or psychiatric impairment of the witness
- (c) the trauma suffered by the witness
- (d) the witness's fear of intimidation
- (e) the linguistic or cultural background or religious beliefs of the witness
- (f) the nature of the proceeding
- (g) the nature of the evidence that the witness is expected to give
- (h) the relationship of the witness to any party to the proceeding
- (i) the absence or likely absence of the witness from New Zealand
- (j) any other ground likely to promote the purpose of the Act.

(4) In giving directions under subsection (1), the Judge must have regard to

- (a) the need to ensure
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
 - (b) the views of the witness and
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.
- (...)

105 Alternative ways of giving evidence

(1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that

- (a) the witness gives evidence – (...)
- (ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; (...)

- (b) any appropriate practical and **technical means** may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence (...)
- (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise;
- (d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.

The Courts (Remote Participation) Act contains the following provisions:

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of **AVL** for the appearance of any participant in a proceeding:

- (a) the nature of the proceeding
- (b) the availability and quality of the technology that is to be used
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including –
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and
 - (ii) the level of contact with other participants;
- (d) any other relevant matters.

Additional criteria for allowing use of audio-visual links in criminal proceedings

A judicial officer or Registrar must also consider, when he or she is required to determine under this Act whether or not to allow the use of **AVL** for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing, and, in particular,

- (a) the ability of the defendant –
 - (i) to comprehend the proceedings; and
 - (ii) to participate effectively in the conduct of his or her defence; and
 - (iii) to consult and instruct counsel privately; and
 - (iv) to access relevant evidence; and
 - (v) to examine the witnesses for the prosecution; and
- (b) the level of contact the defendant has with other participants; and
- (c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.

There is no specific legislative provision for passive mutual legal assistance in the Mutual Assistance in Criminal Matters Act regarding videoconferencing. However, New Zealand provides formal assistance, if necessary, on an ad hoc basis if the witness is willing to give evidence.

As Central Authority, the Prosecution Office receives a number of requests from other countries to assist with witnesses giving evidence by video link. Normally these requests can be dealt with outside the mutual assistance process. Often required by the requesting State through Interpol. The videoconference may take place at a Central Police Station in the main cities. There are also a number of private companies available that can provide video conferencing facilities.

New Zealand authorities do not have any power to compel witnesses to give evidence by video link to court proceedings in other countries. Accordingly, the central authority is able to provide assistance when the witness is willing to give evidence.

The central authority does not get involved in the court proceeding if a witness agrees to give evidence, the hearing will proceed in the normal way in the requesting country.

As regards compatibility of the videoconferencing systems, if Interpol is involved, they will put the overseas-based AVL provider contact with the Police IT team so they can bridge the link and test it. If a private company is involved, they will be responsible for testing the link.

Videoconferencing facilities are available in all of major cities. Central authority has no objection to the requesting State providing mobile equipment for videoconference.

4. United States of America

The use of videoconferencing has also been increasing in the United States. All federal prosecutors' offices in the U.S. have the necessary equipment, as do many federal courts. Consequently, the U.S. is well prepared to respond to requests for video testimony by other states. However, the use of video testimony in U.S. criminal proceedings is limited by the Confrontation Clause of the sixth Amendment.

In *United States v. Yates* (2006), the 11th Circuit Court of Appeals ruled that taking testimony from witnesses located in Australia via video link, over the objection of the defendant, violated the Confrontation Clause of the sixth Amendment, i.e., the right to be in the same room and to see the witness face to face. There is no U.S. Supreme Court decision on this point and the law differs in certain states. Other Federal Circuit Courts have not adopted *Yates*.

The use of videoconferencing is widely accepted as permissible in initial, non-adversarial proceedings in criminal courts including first appearances and arraignments. Even in cases of general application of rules relative to videoconferencing, the use would still be subject to constitutional and fairness considerations (for example due process, the right to counsel, the right to be present, and the right to confront witnesses). Additionally, it is possible for defendants to consent to the use of videoconferencing.

Some state laws provide a very general rule for court appearances by videoconference¹³¹ and do not appear to limit videoconferencing to a particular hearing or appearance type as long as certain requirements are met, including having proper videoconferencing capabilities, a judge's order, and the individual's consent. Some states, such as Vermont do not allow videoconferencing in criminal trials. Other rules (see Michigan) specifically outline proceedings in which video technology is allowed in criminal proceedings, for example allowing it, amongst others, for initial arraignments on the warrant or complaint, pleas and sentencings for misdemeanour offenses.

With regard to bail hearings, the use of videoconferencing is subject to the same constitutional considerations. Jurisdictions are split on the allowance of videoconferencing in this regard. For plea hearings, courts, once again, take constitutional principles into consideration in making a determination on whether the use of videoconferencing is permissible.

The area where the use of video technology faces the highest scrutiny because the constitutional concerns of due process, the right to confront witnesses, the right to counsel, and the right to be present are the highest, are when the proceeding involves the presentation of evidence and witnesses to be cross-examined. As indicated above, case law is fragmented on whether to allow the use of videoconferencing for witness testimonies.¹³²

V. VIDEOCONFERENCING IN INTERNATIONAL CRIMINAL INSTITUTIONS

A. The International Criminal Tribunal for the former Yugoslavia (ICTY)

Article 22 of the ICTY Statute on the protection of victims and witnesses declares that protection measures shall include the conduct of camera proceedings. In addition, rule 81 bis states that at the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.¹³³

¹³¹ Indiana Code, Title 11, Article 8, Chapter 10, Section 1.

¹³² Affirmative: *People v. Buie*, 817 N.W.2d 33 (Mich. 2012).

¹³³ ICTY - Rules Of Procedure and Evidence.

However, jurisprudence has defined precise criteria for the authorization of videoconferencing.¹³⁴ Indeed, it must remain an exception to the general rule that witnesses shall be physically present at the seat of the ICTY in The Hague. The criteria used by the judges are that (i) the testimony of a witness being sufficiently important to render the proceedings unfair without it and (ii) a witness being unable or unwilling to come to the ICTY.

B. The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda used a videoconferencing system for witnesses in accordance with Article 21 of its Statute. It was employed for different reasons, mostly when witnesses could not appear in person because they were old, sick or hindered by personal circumstances (invalid travel documents, work, family reasons). However, it was not only used for witness protection purposes, but also for detained persons complicated to move to the court for safety reasons.

Article 21: Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in **camera** proceedings and the protection of the victim's identity.

Rule 71: Depositions

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

(B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the witness.

(D) The deposition may also be given by means of a **video-conference**.

¹³⁴ ICTY decision of 25 June 1996 in the Tadic case setting out guidelines for the giving of evidence by video-conference link.

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber.

Rule 90(A)

Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

The jurisprudence has identified criteria to guide the Chambers' in determining whether hearing the testimony of witnesses via video link is in the interests of justice. Such criteria include an assessment of (a) the importance of the evidence; (b) the inability or unwillingness of the witness to travel to Arusha; and (c) whether a good reason has been adduced for that inability and unwillingness. The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met. In the venue where the witness was, there frequently was also a member of the prosecution team and of the defence team to assure the integrity of the process.

The advantages of the use of videoconferencing for the ICTR is basically to provide prosecutors with the targeted evidence, which they wouldn't be able to receive unless through the use of videoconferencing. It avoids lost evidence by the prosecutor's office and contributes to search for the truth, besides, having the advantage of security and less psychological impact for the victim.

C. The International Criminal Court

The International Criminal Court (ICC) can also use videoconferencing or other technical means to ensure access to justice for witnesses and victims of criminal offences that are in the territory of remote third States. This is often the case for the victims of genocide, crimes against humanity or war crimes who do not have the possibility to report to the ICC about the crimes committed in their territory. Taking this issue into account, the use of videoconferencing is clearly recognized in the Rome Statute. In particular, its articles 68(2) and 69(2) allow the chambers of the Court to conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means, in order to protect victims and witnesses or an accused. However, the use of videoconferencing is seen as an exception to the principle of public hearings.

Article 68

Protection of the victims and witnesses and their participation in the proceeding

(...)

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Article 69

Evidence

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

Moreover, the Rule 67 of the Rules of Procedure and Evidence specifies the following

Rule 67

Live testimony by means of audio or video-link technology

(...) a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defense, and by the Chamber itself, at the time that the witness so testifies. (...) The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

According to the Office of the Prosecutor’s Policy on Children, Interviews of children will be video- and audio-recorded, unless exceptional circumstances require otherwise. Consideration may be given to introducing the recording as evidence at a later stage.¹³⁵

In addition, best practice guidelines indicate that direct contact, confrontation or interaction between a child victim or witness and the alleged perpetrator should be avoided, unless the child requests otherwise. Accordingly, the Office will consider whether there is a need to request that the Trial Chamber allows the child witness to testify via video link or from behind a screen, or that the accused be absent from the courtroom for the duration of the child’s testimony.¹³⁶

D. Statute Special Court Sierra Leone

A further example of videoconferencing rules can be found in the Statute and in the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

Statute:

Art. 17 Rights of the accused

(...) (2) The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

Rules of Procedure and Evidence:

Rule 85: Presentation of Evidence

(...) (D) Evidence may be given directly in court, or via such communications media, including **video**, closed-circuit television, as the Trial Chamber may order.

Rule 90: Testimony of Witnesses

(A) Witnesses may give evidence directly, or as described in Rules 71 and 85 (D).

E. Kosovo Specialist Chambers

Although not an international court in the technical sense, because the Kosovo Specialist Chambers and Specialist Prosecutor’s Office are part of the judicial system of Kosovo, they have their seat in The Hague and deal with crimes against humanity and war crimes. The recently adopted Kosovo Specialist Chambers Rules of Procedure and Evidence also follow the worldwide trend of videoconferencing:

¹³⁵ Office of the Prosecutor, Policy on Children, November 2016, para. 76.

¹³⁶ Office of the Prosecutor, Policy on Children, November 2016, para. 95.

Rule 141 Examination by Video-Conference

(1) Upon request by a Party or, where applicable, Victims' Counsel, or *proprio motu*, a Panel may order that testimony be received via video-conference, provided that such technology permits the witness to be properly examined.

(2) The Panel, with the assistance of the Registrar, shall ensure that the venue chosen for the conduct of the **video-conference** testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness. (...)

A deposition of the witness can also be taken by the pre-trial judge via videoconference in accordance with Rule 97(4) upon request by either Party. Moreover, Rule 10(5) provides for the possibility to hold plenaries of the chambers by videoconference. According to Rule 125(1), videoconferencing can be used to obtain evidence from a person being in detention. The same possibility is foreseen in the procedure for commutation pursuant to Rule 194(1). Rule 196(4) also contains an explicit provision allowing for individuals in custody of the Specialist Chambers to be heard by another court by way of videoconference and appropriate assistance.

VI. NETWORKS

Networks are very powerful tools, consisting of national contact points (practitioners) in each member state to facilitate judicial cooperation in criminal matters.

Each network gathers countries by region and similar law systems or languages with the same objective to strengthen the operational capacity and capabilities of the practitioners based on mutual trust to increase international legal cooperation.

The following are the most operational networks¹³⁷:

A. General Judicial Cooperation Networks and similar platforms or bodies**1. Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters (PC-OC), Council of Europe.**

The PC-OC is the forum in which experts elaborate ways to facilitate international cooperation in criminal matters and identify solutions to obstacles hampering the practical

¹³⁷ Information gathered by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters of the Council of Europe. Available at: <https://rm.coe.int/pc-ocmod-2020-03rev2-catalogue-of-judicial-networks/16809fa95c>

application of Council of European Treaties in the fields of extradition, mutual legal assistance, transfer of proceedings, transfer of sentenced persons, supervision of offenders, international validity of judgments, and seizure and confiscation of proceeds of crime.

The PC-OC provides lists of contact points in the State Parties to the Conventions within its remit for the application of these conventions. For example, the list of officials involved in the practical application of the

-European Convention on Extradition

-European Convention on Mutual Assistance in Criminal Matters

-Convention on the Transfer of Sentenced Persons

Member States:

Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, UK.

Other State Parties:

Australia, Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Ghana, Honduras, India, Israel, Japan, Kazakhstan, Korea, Mauritius, Mexico, Mongolia, Panama, South Africa, Tonga, Trinidad and Tobago, USA, Venezuela.

Website: www.coe.int/tcj

Secretariat e-mail: DGI-PC-OC@coe.int

2. Commonwealth Network of Contact Persons -CNCP-

The CNCP aims to improve and enhance international assistance and cooperation in criminal cases through facilitating co-operation between the Commonwealth Member States, including mutual legal assistance and extradition and through providing the legal and practical information necessary to the authorities in their own country and in the Commonwealth Member States wishing to invoke international cooperation.

Members: Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Samoa, Seychelles, Sierra Leone, Singapore, Solomon

Islands, South Africa, Sri Lanka, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, Zambia.

Secretariat e-mail: newyork@commonwealth.int

3. European Union Agency for Criminal Justice Cooperation -EUROJUST-

Judicial cooperation unit composed of national prosecutors, magistrates, or police officers of equivalent competences who have been detached from each Member State of European countries according to their own legal systems. It is not a network but a Union body with legal personality.

Aims to reinforce the fight against serious organised crime by initiating and assisting the coordination of investigations and prosecutions between the competent authorities in the Member States, in particular, by facilitating the execution of international mutual legal assistance and the implementation of extradition requests.

Assists investigations and prosecutions concerning a Member State and a non-Member State if a cooperation agreement has been concluded or if an essential interest in providing assistance is demonstrated.

Types of crime and offences covered: terrorism, drug trafficking, trafficking in human beings, counterfeiting, money laundering, fraud and corruption, criminal offences affecting the European community's financial interests, environmental crimes, participation in a criminal organization.

Eurojust has established contact points in 23 non-Member States: Albania, Argentina, Bosnia and Herzegovina, Canada, Egypt, Iceland, Israel, Japan, Korea, Liechtenstein, Moldova, Mongolia, Montenegro, North Macedonia, Norway, Russian Federation, Serbia, Singapore, Switzerland, Thailand, Turkey, Ukraine and the USA.

Website: www.eurojust.europa.eu

E-mail: info@eurojust.europa.eu

4. European Judicial Network (EJN)

The EJN is a network of national contact points for the facilitation of judicial cooperation in criminal matters.

National Contact points are designated by the central authorities competent in international judicial cooperation. They are specialists in judicial cooperation in criminal matters and

are active intermediaries in facilitating cooperation. They assist with identifying and establishing direct contacts between competent authorities and by providing legal and practical information necessary to prepare an effective request for judicial cooperation or to improve judicial cooperation in general. To improve the application/implementation of the EU and International legal instruments, the EJM Contact Points also provide trainings in their Member States and information to the EU Institutions on judicial cooperation topics.

Tools available on the EJM's website:

- Dedicated Areas for featured topics: Information on current international judicial cooperation topics, e.g., COVID-19, e-Evidence, European Arrest Warrant and European Investigation Order.
- The Fiches Belges: provide practical information on specific sets of measures that are covered by judicial cooperation in criminal matters, including the gathering of electronic evidence through mutual legal assistance procedures and voluntary cooperation.
- Judicial Atlas: establishes the competent authority to contact to request judicial cooperation in criminal matters, depending on the type of cooperation required, including for videoconferencing.
- Compendium: tool for drafting requests such as mutual legal assistance requests and freezing orders.
- Judicial Library: Repository for documents, legal instruments, case-law and information related to judicial cooperation. The *Library* also includes Status of implementation of all EU legal instruments, Member States notifications and word forms for Mutual Recognition instruments.

Members: approximately 400 national contact points in:

- Member States of the EU
- UK as a third country
- EU candidate countries: Albania, North Macedonia, Montenegro, Serbia and Turkey
- Associated countries: Iceland, Liechtenstein, Norway, Switzerland
- Non-EU countries: their method is to connect with other judicial networks.
- Nominated Contact Points in: Argentina, Bosnia and Herzegovina, Brazil, Canada, Chile, Israel, Japan, Kosovo*¹³⁸, Russia, Taiwan, Ukraine and United States of America

Website: www.ejm-crimjust.europa.eu

Secretariat e-mail: ejm@eurojust.europa.eu

¹³⁸ This designation is without prejudice to the positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

5. Euromed Justice CRIMEX GROUP

The CRIMEX GROUP was created in the framework of the EUROMED Justice Project. This is part of the European Neighbourhood Instrument -ENI- Eurojust Secretariat.

They aim to address the need to develop judicial cooperation.

Members: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia.

ENPI East Countries (not part of the Euromed Justice Projects): Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine.

6. Ibero-American Network of International Legal Cooperation -IberRed-

IberRed is the pioneer network within the Ibero-American Region in nonstop functioning since October 2004 with the purpose to gather all relevant actors in the international legal cooperation in civil and criminal matters. One for all concept combines in one single structure different competences allowing a more efficient and global approach to fight complex organised crime.

Each country member is represented by judges, prosecutors and experts of central authorities in related criminal matters such as: Extradition, Mutual Legal Assistance, Transfer of Sentenced Persons, UN Convention against Organised Transnational Crime, UN Convention against Corruption and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Working in the operational field as well in working groups according to the priorities defined by the members itself. Nowadays, implementing JITs (joint team investigations) and the use of IT are the main priorities of IberRed to fight crime.

IberRed subscribe in 2009 a Memoranda of Understanding with Eurojust to strength the relationship with a view to reinforce the fight of serious forms of organised crime. In 2010 EJA subscribed a Memoranda of Understanding with IberRed with the same aim as with Eurojust, additionally EJNs Memoranda is wider entitling the exchange of operational and non-operational information. On May 2020 Eurojust and IberRed signed an Implementing Arrangement to their 2009 Memorandum of Understanding¹³⁹, which will open up the system Iber@ to all National Desks in The Hague.

Members: Andorra, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua,

¹³⁹ Available at: https://www.eurojust.europa.eu/sites/default/files/InternationalAgreements/2020-05-28_Implementing-arrangement-EJ-IberRed.pdf

Panama, Paraguay, Peru, Portugal, Spain, Uruguay, Venezuela and the Supreme Court of Puerto Rico.

Website: <https://iberred.notariado.org/> www.iberred.org

Secretariat e-mail: secretaria.general@iberred.org

7. Judicial Cooperation Network for Central Asia and Southern Caucasus -CASC-

The Network aims to enhance the international judicial cooperation and to play the role of an inter-regional platform to facilitate the international judicial cooperation. It contributes towards inter alia; bridge the gaps between competent national authorities that handle requests for extradition, mutual legal assistance, and interregional level.

Members exchange know-how and come up with best practices to detect and investigate the laundering of crime proceeds from electronic money and other virtual currencies. The organization also forges cooperation for recovery of proceeds from organized crime and develops discussions using concrete cases.

Members: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan.

Secretariat e-mail: unodc-casc.secretariat@un.org

8. South East Asia Justice Network -SEAJust-

The SEAJust is a UNODC initiative implemented with the informal support of the Secretariat for the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries (ASEAN MLAT Secretariat). The main purpose is to facilitate the work of central and competent authorities and prosecutors and strengthen international cooperation in criminal matters within and outside of the South East Asian region. The SEAJust membership is open to all South East Asian states as well as other states or territories.

Members: Brunei Darussalam, Cambodia, Lao PDR, Myanmar, Singapore, Thailand, Timor-Leste and Viet Nam.

Secretariat e-mail: secretariat@selec.org

9. The Great Lakes Judicial Cooperation Network -GLCJN-

The Network aims to facilitate the administration of justice through judicial cooperation aiming to combat transnational crimes and terrorism in Africa's Great Lakes region. It tracks the implementation of the measures and also strengthens cooperation in extradition of accused persons, fugitives, and promotes mutual enforcement of justice.

The Network has modalities that assist and promote practical implementation of its protocol and reinforce commitment made by the Heads of State for the region. Accordingly, the aim of the organization is to ensure adoption of protocols that promote security, development, and stability in the Great Lakes Region.

Members: Angola, Burundi, Central African Republic, Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, South Sudan, Sudan, United Republic of Tanzania, Zambia.

10. West African Network of Central Authorities and Prosecutors against Organized Crime -WACAP-

WACAP is a UNODC initiative implemented with the support of the ECOWAS Commission and Court of Justice promoting mutual legal assistance among magistrates across countries. The main purpose is to strengthen the capacity of prosecutors and central authorities combating all forms of impunity and organized crime and develop a regional strategy to facilitate prosecution of persons involved in transnational organized crime.

It promotes better preparation and responses to mutual legal assistance requests, extradition, confiscation and seizure of proceed of crime.

Members: Benin, Burkina Faso, Cape Verde, Chad, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

Website: www.wacapnet.com

Secretariat e-mail: unodc-wacap@un.org

B. Specialised Networks

1. Genocide Network

The European Network of Contact Points in respect of responsible for the crime of genocide, crimes against humanity and war crimes ('the Genocide Network') promotes close cooperation between the national authorities to investigate and prosecute crimes against humanity, prosecute the crime of genocide, and war crimes.

The Network facilitates cooperation and assistance across the Member States who exchange information, investigate, and prosecute persons and suspects that commit or participate in commission of relevant crimes.

Each Member State designates a contact point facilitating the cooperation and for exchanging information between authorities.

Members: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

Observers: Bosnia-Herzegovina, Canada, Norway, Switzerland, UK, USA.

Website:

<https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network>

2. Ibero-American Networks of Public Prosecutors

The Ibero-American Association of Prosecutors hosts six specialized permanent networks:

- a. Network against Human Trafficking

<https://www.aiamp.info/index.php/redes-permanentes-aiamp/red-de-trata-de-personas>

- b. Network on Cybercrime <https://www.aiamp.info/index.php/redes-permanentes-aiamp/red-de-ciberdelincuencia>

- c. Network against Drug Trafficking <https://www.aiamp.info/index.php/redes-permanentes-aiamp/red-de-fiscales-antidroga>

- d. Network against Corruption <https://www.aiamp.info/index.php/redes-permanentes-aiamp/red-contra-la-corrupcion>
- e. Network on International Cooperation in Criminal Matters <https://www.aiamp.info/index.php/grupos-de-trabajo-aiamp/cooperacion-juridica-internacional>
- f. Network for Environmental Protection <https://www.aiamp.info/index.php/redes-permanentes-aiamp/red-de-proteccion-ambiental>

3. Sahel Judicial Platform

The Platform aims to strengthen judicial cooperation in criminal matters against terrorism by facilitating the transmission and execution of mutual legal assistance and extradition requests, keeping track of the cooperation requests processed, sharing experiences and best practices, and identifying technical assistance needs.

Members: Burkina Faso, Mali, Mauritania, Niger.

E-mail: Sahelplatform@unodc.org

4. South East European Prosecutors Advisory Group -SEEPAG-

SEEPAG is a network of experienced prosecutors which enhances the cooperation and coordination between national investigating and prosecuting authorities.

It assists SELEC countries (Southeast European Law Enforcement Centre) in operational matters and facilitates the exchange of information and evidence whilst also providing guidance, assistance, and feedback on justice and law enforcement matters.

Member states are represented in SEEPAG by an experienced prosecutor/judge working in international cooperation in criminal matters, nominated by the Prosecutor General and/or by the Minister of Justice of the respective country. It is composed of National Prosecutorial Focal Points established in each member state seeking to promote the timely exchange of information and evidence through the proper execution of mutual legal assistance requests and more informal channels of communication.

Members: Albania, Bosnia Herzegovina, Bulgaria, Greece, Hungary, Republic of Moldova, Montenegro, North Macedonia, Romania, Serbia, Turkey.

Website: www.selec.org/about-seepag/

Secretariat e-mail: secretariat@selec.org

VII. CONCLUSION

This manual demonstrates the expansion that videoconferencing has experienced globally in its use in justice systems. Many Justice systems having been willing to embrace greater and broader use of videoconferencing as costs of operation continue to reduce and there is increasing familiarity and comfort of its operation by all interested parties. This has led to more robust policies and protocols being developed to ensure an appropriate legal framework for its use. However, there is no global standard and some countries are more advanced in creating appropriate legislation for its operation.

Experience has shown that videoconference is a reliable, efficient, and cost saving tool for the taking of testimony of remote witnesses, experts, and defendants in all stages of criminal proceedings. Therefore, in international contexts, videoconferencing has become an essential tool for mutual legal assistance in criminal matters. Videoconferencing is often used for the hearings of witnesses and for their protection, especially in cases of vulnerability or intimidation, or where witnesses live far away from the court and lack the ability to travel. The use of videoconferencing enables competent authorities to avoid direct contact between the witnesses and the defendant. Likewise, videoconferencing has proved to be a powerful tool to hear experts, whose busy time schedule and lack of availability may constitute an obstacle for effective criminal prosecutions.

The use of videoconferencing allows for more efficient proceedings, mainly because it avoids travels of judges, lawyers, experts, witnesses, inmates to and from the courtroom. Communication is made easier and distance is no longer an issue. The need to save time is indeed a very important issue in legal proceedings, and videoconferencing can help to achieve this goal, which enables courts to reduce trial delays.

From the perspective of the person under investigation, in matters related to transnational cooperation, videoconferencing has multiple advantages, too. It is less intrusive and more cost-effective than extradition in some cases and the investigated may have the option to defend themselves without needing to travel to another country and incur expenses to appear before the requesting authorities to demonstrate their will to be subject to the process. Conventionally, the cost associated with their travel to give a statement is not reimbursed; not even when they are acquitted or their case is dismissed.

Many technical aspects regarding the use of videoconferencing are more generally applicable to its wider use. Videoconferencing is a very useful tool in legal proceedings and can be used for multiple purposes. It can also be used for hearings of detainees in prisons. The same equipment can, for example, support law enforcement officers or serve academic purposes in university settings, international conferences, and all kinds of training for judiciary staff. It can also provide additional operational and administrative support to public authorities.

Given the variety of national regulations on videoconferencing international cooperation is achieved through a combination of both formal and informal requests. More work is

required in developing international protocols that ensure appropriate compliance is followed so that a requesting state can receive in a timely manner a response to a request.

Although there is no consensus about the role of the consular delegations in international judicial cooperation, it is a fact that several countries grant broad functions by law to their consulate delegations. Some countries are very flexible about allowing foreign authorities to carry out a videoconference in their consulate for judicial purposes, and some of them do not even require communication beforehand. Meanwhile, other countries do not accept it at all. In between, we can find countries that accept it under certain circumstances. The problem arises when the foreign authorities proceed with the videoconference without any previous coordination with the national authorities. Therefore, it is recommended to establish a clear international procedure for these cases, in order to find a balance between the needs of the requesting State and respecting the sovereignty of the host State. As a minimum it would be highly recommended that national authorities establish clear administrative regulations to all consulates in their country so as to avoid any misunderstandings.

It is highly recommended to close the loop on the lack of protocols, more so in those countries where there is no legal basis for videoconferencing but its use is possible. This manual aims to be a compilation of good practices in that respect and provide in-sights into different jurisdictional approaches.

In recent years, the use of videoconferencing in domestic processes experienced a great increase due to its benefits of utility, security, and public order and, in particular, and its ability to overcome the difficulties derived from possible physical displacement; a scenario that becomes more apparent when we faced with a requirement with transnational elements. In the present context of the health crisis caused by COVID-19, which has added to the difficulties of displacement, the obligatory social distancing, and the restrictions on international mobility, a vast majority of countries have strengthened, in record time, the use of videoconferencing. It has also revealed countries that did not even have internal regulations or protocols in their institutions to harmonize its use among legal practitioners offering legal security.

This same global situation has led to a great variety of systems or technological applications to arise in the national and international market that facilitate, at very low costs, carrying out videoconferences without the need for large investments in equipment, as it was the case in the past. However, it is important to not lose sight of the cost-benefit-safety ratio. The cost of the systems cannot come at the expense of the security required for the treatment of the information that is presented in a videoconference on criminal matters. And while such security also comes at a price, it is feasible to find affordable and secure platforms on the market.

It is crucial for states to introduce clear legal bases on the use of videoconferencing and to promote and implement its use. Every State that has not yet done so is urged to develop a system for videoconferencing, taking advantage of the new low-cost technologies that have arisen in the global context of the pandemic. At the same time, this creates an opportunity

to entice all legal practitioners to develop infrastructures capable of using videoconferencing and the new technologies, with the goal of better serving the justice system.