

# DE VERDACHTE IN BEELD

## *THE ACCUSED ON VIDEOCONFERENCE*

EISEN EN WAARBORGEN VOOR HET GEBRUIK VAN VIDEOCONFERENTIE TEN  
AANZIEN VAN DE VERDACHTE IN HET NEDERLANDSE STRAFPROCES IN  
RECHTSVERGELIJKEND PERSPECTIEF

*REQUIREMENTS AND GUARANTEES FOR THE USE OF VIDEOCONFERENCE FOR  
THE ACCUSED IN DUTCH CRIMINAL PROCEEDINGS IN  
COMPARATIVE PERSPECTIVE*

dr. mr. Marieke de Hoon  
prof. mr. Marianne Hirsch Ballin  
Sofie Bollen, LLB, BA

Vrije Universiteit Amsterdam  
Department Criminal Law and Criminology

12 October 2020

### ENGLISH SUMMARY

#### INTRODUCTION

Through technological developments, legal systems increasingly apply videoconference in their criminal proceedings. Videoconference enables a direct video and audio connection between those involved in criminal proceedings. With the improvement of videoconference technology, it is more and more considered as a reasonable alternative to physical appearance.

The application of videoconference had in recent years already increased. The global COVID-19 pandemic prompted a heightened focus in the Netherlands as well as everywhere else in the world on the potential to hold criminal proceedings despite having to limit physical contact through the use of videoconference. This generated a need for further research for particularly its application for the accused, considering the implications for guaranteeing the rights of the accused and fundamental principles like immediacy and the public nature of a trial. The main question of this research is:

“What can the Netherlands learn from national and international standards and practice of the use of videoconference for the accused with a view to its standardization and policy development in Dutch criminal legal practice?”

National and international standards and practice have been mapped out by researching the regulations and practices of the Netherlands, Italy, France, Canada, Switzerland, Germany and international and transnational criminal law.

The main research question was answered on the basis of the following seven sub-questions:

1. What international and European rules apply to the Netherlands?
2. How does the application of videoconference with regard to the accused in criminal proceedings relate to the rights of the accused, in particular the right to attend trial and the principle of immediacy, and to fundamental principles of Dutch criminal procedure law?
3. To what extent and in what way is video conference used with regard to the accused in criminal proceedings in Dutch, foreign, international and transnational practice?
4. How far does the accused's right of consent extend with the application of videoconferencing?
5. What requirements and guarantees must be met when using videoconferencing with regard to the accused in criminal proceedings?
6. To what extent should with above aspects be differentiated between the different phases of the criminal proceedings (preliminary investigation, investigation in court) and the different types of hearings (examining magistrate, in chambers, pro forma hearings, merits in first instance, merits in appeal)?
7. To what extent should this be differentiated depending on other factors, such as the gravity of the offence or crime, the accused, the role of victims, or other circumstances (such as security and COVID-19)?

The increasing use of video conferencing is due in part to a need for more international cooperation, saving costs and limiting time-consuming logistical operations to ensure the simultaneous presence of all involved in the courtroom at the same time. Moreover, the use of video conferencing can offer solutions where alternatives do not exist or are undesirable.

Before the corona crisis, videoconferencing in the Netherlands was mainly used to hear witnesses and experts, to assist interpreters, in decisions on pre-trial detention, and to request legal assistance for hearing witnesses in the context of international cooperation. In recent years in the Netherlands – just as abroad, in the context of mutual legal assistance and in international criminal law – the possibilities for a broader application of videoconferencing in criminal proceedings have been increasingly explored. Moreover, this broader application was discussed in connection with the possible trial of suspects for involvement in the downing of Flight MH17. In the agreement concluded in 2018 between the Netherlands and Ukraine on the trial of possible accused for the downing of flight MH17, it is agreed that any suspects who are on Ukrainian territory and cannot be extradited to the Netherlands can be tried by videoconference, provided that the suspect agrees to this.

However, the extension to the use of videoconferencing to allow suspects to participate in criminal proceedings in the various stages of the proceedings is not self-evident. In principle, the accused has the right to be present at the hearing – the right to be tried in his presence – unless he waives that right. The right to be present at the trial is related to the immediacy or confrontation principle. The immediacy or confrontation principle requires that evidence, and thus also statements made by witnesses or the accused, should in principle be discussed during the investigation in court. This makes the accused better able to exercise his

defense rights. The judgment of the Dutch Supreme Court of 14 May 2019 showed that – in exceptional cases – an accused may participate in the investigation by videoconference, but that this is not seen as equivalent to the (physical) presence of the suspect.<sup>1</sup> The question that follows is which circumstances could justify participation via videoconference, which safeguards are important in this respect, and to what extent the consent of the accused is required. Moreover, to what extent can videoconference be used in other stages of the process (in particular police interrogation, hearings with the examining magistrate or prosecutor), and to what extent a different approach should apply during trial. This study also considers whether this should be possible in all types of criminal cases and whether a distinction should be made between types of suspects (adult or minor, or on the basis of a risk criterion).

## FUNDAMENTAL RIGHTS AND PRINCIPLES

Chapter 2 of the report charts the tensions that may arise from the use of videoconference for the suspect with defense rights, with the rights of the victim, and with the general interest of proper criminal justice. It follows from case law and literature that this concerns in particular the suspect's right to attend and, in relation to that right, the right to an effective defense and the principles of immediacy and transparency of the criminal proceedings. In this chapter, these rights and principles are analyzed in the context of the use of videoconference for the accused. On the basis of the relevant case law of the ECtHR and the Netherlands, a first step is also given for the assessment framework for the relevant factors in order to arrive at a decision whether or not to use videoconference in a specific case. This assessment framework is further elaborated in chapter 6.6. In addition, Chapter 2 deduces from case law which reasons may give rise to the use of videoconference and which safeguards must be observed in its application.

Chapter 2 concludes that videoconference may only be used if sufficient safeguards are observed to guarantee the rights of the accused, but also that videoconference may only be used if it serves a legitimate purpose. A number of examples of legitimate objectives follow from case law, namely the protection of public order, security measures, the risk that the detainee may have contact with criminal connections, the prevention of crime, risk of flight, witness and victim protection, compliance with the reasonable time requirements, and the importance of expeditious handling of criminal proceedings, also with a view to the court's caseload. If there is such a legitimate purpose and there are safeguards that ensure that the suspect is not restricted in exercising his defense rights, the opinion of the suspect (when not consenting to the use of video conference) may be ignored. However, domestic, foreign and international practice shows that there is a high reluctance to apply videoconference when the accused insists on physical presence.

With regard to the safeguards that are important for guaranteeing the rights of the suspect in the use of videoconference, the essential point is that the accused can practically exercise his defense rights and is not materially disadvantaged by the participation via videoconference. The role of counsel is very important here. The right to possibly have counsel at both the location where the suspect is located and in the courtroom is considered of great importance in case law. The suspect must also have sufficient time and opportunity to consult with his counsel. In addition, the accused must be able to communicate confidentially with his lawyer without running the risk of being tapped. Specifically, it must be possible for the lawyer to receive confidential instructions without any supervision. It must also be ensured that the line used for the videoconference is protected against tapping or other types of eavesdropping. It is also important that the accused is able to see and hear those present in the courtroom and that the suspect can be seen and heard by the other parties, the judge, the witnesses and the public. It is also important that the suspect has the opportunity to address the court and be heard in order to comply with the immediacy principle. It is moreover essential that the

---

<sup>1</sup> Hoge Raad 14 May 2019, ECLI:NL:HR:2019:709, NJ 2019/290, annotated by P.A.M. Mevis.

connection between the courtroom and the place where the suspect is located is of sufficient quality and does not cause any problems for the transmission of image and sound, such as delay or that the synchronization between image and sound is too divergent.

## APPLICABLE INTERNATIONAL AND EUROPEAN REGULATIONS

After this introductory analysis of the normative framework in which videoconferencing is used when it comes to suspect participation, Chapter 3 discusses the applicable international and European regulations. This analysis shows that international and European legal regulations have often been developed to regulate the use of videoconference in criminal proceedings for the hearing of witnesses and experts in the context of mutual legal assistance. The participation of the accused via video conference is less self-evident. In most treaties, member states may opt-out on applying the use of videoconference to the accused when being asked to provide international legal assistance and there is usually a right of consent for the accused. Only if both states and the accused agree, videoconferencing can be used for questioning the accused, provided this is done in accordance with international law, including the ECHR. However, although the consent requirement in European legislation was a starting point for a long time, as in international legislation, Article 24 (2) of the EU Directive on the European Investigation Order (EIO) from 2014 provides that the execution of the EIO can be refused if the suspect or accused person does not agree. Where in previous EU regulations (such as Article 9 of the EU MLA Convention of 2000) consent of the suspect was still required, this EU Directive from 2014 thus deals less absolutely with the right of consent of the suspect. Chapter 3 concludes with a discussion of the MH17 convention between the Netherlands and Ukraine, which regulates how a suspect can be brought to trial via video conference.

The chapter analyzes three relevant developments in international and European regulations. Firstly, through regulations, guidelines, technical standards and policy, the application of videoconferencing in legal proceedings is stimulated in a broad sense, both with regard to domestic application and to facilitate mutual legal assistance. A second development is that the scope of application of videoconferencing in criminal proceedings has been broadened from an initial focus on the participation of particularly witnesses and experts to a broader application, including the accused. A third development relates to the accused's consent requirement. According to most regulation, the accused must consent to the use of video conference. However, within the European Union, the 2014 EIO Directive is less absolute.

## PRACTICE

Chapters 4 and 5 discuss the regulation and practice of the use of videoconferencing for the accused with regard to the Netherlands, Italy, France, Canada, Switzerland, Germany and the International Criminal Court. The next section offers a brief summary.

---

## NETHERLANDS

In the Dutch regulation, the core of which consists of the identical Articles 78a of the Dutch Criminal Code and 131a of the Dutch Criminal Code of Procedure (DCCP) and the Videoconference Decree,<sup>2</sup> in principle videoconferencing can be used in all situation where a person is heard.<sup>3</sup> However, there is no obligation to use

---

<sup>2</sup> Besluit videoconferentie, *Stb.* 2006, 275 (amended in *Stb.* 2006, 609, *Stb.* 2006, 610 and *Stb.* 2020, 101).

<sup>3</sup> *NvT*, *Stb.* 2006, 610, p. 4.

video conferencing. It is up to the authority responsible for the situation to consult with other parties involved and to decide whether or not to make use of the option to use videoconferencing.<sup>4</sup> The term videoconference does not prescribe any particular technique in Dutch law, so that the legal text is future-proof for any other techniques that may develop, as long as a direct video and audio connection is established.<sup>5</sup>

In accordance with Dutch law, videoconferencing can be applied in any stage of criminal proceedings, nor is the use of videoconference made dependent on the type of criminal offense. The judge or official in charge of the hearing decides whether to use videoconferencing. Before deciding, the person to be heard or his counsel and, where appropriate, the public prosecutor, are given the opportunity to express their opinion on the use of videoconference. Pursuant to Article 2(1) of the Videoconference Decree, the accused has a right of consent as a condition for the use of videoconference in his arraignment and in the substantive hearing before the three-judge chamber. However, even if the accused does not give his consent, Article 2(3) of the Videoconferencing Decree provides that the judge(s) may decide that videoconferencing will be used anyway if necessary for security reasons. Furthermore, the use of videoconferencing is excluded if the person to be heard has such an auditory or visual disability that it can reasonably be assumed that videoconference will impair his contribution or position in the criminal proceedings, or the rights of other participants in the proceedings (Article 2(2)).

As a result of the measures to prevent the spread of the COVID-19 virus, the already planned amendment to the Videoconferencing Decree entered into force more expeditiously on 25 March 2020.<sup>6</sup> This has expanded the application scope of videoconference in criminal proceedings by eliminating a number of categorical exceptional cases from the original Videoconference Decree. Furthermore, with the Temporary Law COVID-19 Justice and Security, which came into force on 24 April 2020, the scope of application has been temporarily expanded even further. Among other things, this law has temporarily arranged that the right to consent does not apply, that in addition to video conference, a telephone conversation can also suffice for the hearing, interrogation or questioning of persons, and that physical sessions in criminal proceedings can be completely replaced by oral treatment via (group) telephony or video conference.<sup>7</sup>

In the modernization of the Code of Criminal Procedure that is currently under consideration, the use of videoconferencing will be regulated in a new provision. The legislative proposal's version of July 2020 shows that Article 131a will be replaced with Articles 1.11.3 and 1.11.5 DCCP, whereby the Videoconference Decree is contained in the new Article 1.11.4 DCCP.<sup>8</sup> In the proposed legal text, the starting point is that the final judgment on the use of videoconference rests with the responsible official or judge, while the law more explicitly enshrines the legal position of the involved trial participants, who are asked for their opinion in more situations. It is also included, for example, that victims are given more opportunities to be heard or to make use of the right to speak in order to avoid undesirable eye contact with the accused. Furthermore, the accused's right of consent will be extended from only in the hearing by the three-judge panel to "trial" in general. This means that the use of videoconference in any hearing that determines the merits against an accused, in first instance or appeal, by multi-judge or single-judge panel, requires the accused's consent. The explanatory memorandum explains that the extension of the right of consent to the single-judge chamber does justice to the interests that are also at stake there for the suspect. It is further emphasized that it is up to the judge to determine that the physical presence of the suspect is desirable, even in the situation where the

---

<sup>4</sup> NvT, *Stb.* 2006, 610, p. 5-6.

<sup>5</sup> *Kamerstukken II*, 2004/05, 29 828, nr. 3, p. 11 (MvT), see also M.A.H. van der Woude, in: *T&C Strafrecht*, commentaar op art. 78a Sr.

<sup>6</sup> *Stb.* 2020, 101.

<sup>7</sup> *Stb.* 2020, 124.

<sup>8</sup> Wetsvoorstel tot vaststelling van het nieuwe Wetboek van Strafvordering (ambtelijke versie juli 2020), available via <https://www.rijksoverheid.nl/documenten/publicaties/2017/11/13/documenten-modernisering-wetboek-van-strafvordering>.

suspect consents or even requests to participate via videoconference. Moreover, when the accused has the right to consent, this only applies to his own participation, but not with regard to the participation of another person via videoconference during the proceedings.<sup>9</sup>

In the Netherlands, the main objective to start applying videoconferencing in criminal proceedings was to save time and money. In particular, the use of videoconference was considered helpful to reduce transport problems of suspects and the associated costs, travel costs for rogatory commissions, and enabling to include (foreign) expert testimony who would otherwise not be heard due to time pressure and practical obstacles.<sup>10</sup> Currently, due to the outbreak of the COVID-19 pandemic, videoconferencing is widely used and, as discussed above, the legal basis for this has been temporarily extended.

The study shows that Dutch legal practice supports that videoconference can offer a reasonable alternative for situations in which it is not possible or desirable to organize physical presence if other interests such as the progress of the trial are considered more important, but that there is a clear difference in quality in the use of videoconferencing compared to physical presence, that physical presence is preferred and that videoconference is not regarded as a full-fledged alternative. Especially for criminal cases, non-verbal communication is important and this is limited via video conference. The application of videoconferencing also takes more time in practice than the physical participation of suspects. In addition, the quality of the equipment, connection and layout of the suspect's location leaves much to be desired and often does not meet the required standards. The recommendations for this study provide guidance on bringing the implementation of practical aspects in line with the required standards.

---

## COMPARATIVE STATE PRACTICE

In Italy, the application of videoconferencing was developed in the context of the fight against the mafia, and the security of trials against suspects of mafia membership was a reason to introduce videoconference in criminal proceedings in 1992.<sup>11</sup> It was arranged that the suspect could be brought to trial by videoconference. In contrast to other countries where the use of videoconferencing has mostly been developed for witness interviews and has been expanded to (limited) use for suspects, the use of video conferencing in criminal proceedings has been introduced in Italy explicitly for use with regard to suspects. While it was previously a discretionary power of the judge to decide whether or not to use videoconferencing, with the Orlando reforms in 2017, the use of videoconferencing even became the starting point in certain cases from which the judge can only deviate with reasons. The accused's right of consent does not play a role in these cases and is generally limited in Italy. In Italian practice, the lawyer or his substitute always has the right to be present with the suspect, although here too the problem arises that the lawyer can only be at one location at a time and usually chooses to be in court. A court employee is present with the suspect who assists the trial judge during the interrogation, for example by establishing the identity of the suspect and to ensure that the quality of the connection and that there is the opportunity for the suspect to communicate confidentially with his lawyer. Similar as in other countries, there is a lot of criticism on the quality of the equipment and the connection in Italy. There is also the problem here that due to poorly organized technology, the possibility of confidential communication can be a real problem. In addition, there are criticisms about the extent to which the use of videoconferencing has become and is becoming more of a starting point than an exception.

---

<sup>9</sup> MvT for wetsvoorstel tot vaststelling van het nieuwe Wetboek van Strafvordering (ambtelijke versie juli 2020), available via <https://www.rijksoverheid.nl/documenten/publicaties/2020/07/30/ambtelijke-versie-juli-2020-memorie-van-toelichting-wetboek-van-strafvordering>.

<sup>10</sup> *Kamerstukken II*, 2004/05, 29 828, nr. 3, p. 1-11 (MvT); *Kamerstukken II*, 2004/05, 29 828, nr. 7, p. 3 (Nota naar aanleiding van het verslag); Veiligheidsprogramma *Naar een veiliger samenleving*, Ministry of Justice and Ministry of Internal and Kingdom Affairs, The Hage, October 2002, p. 46.

<sup>11</sup> Van der Vlis, 2011, p. 18.

Similar criticisms could also be heard in France as the scope of application there was increasingly stretched and legal practice resisted this development towards videoconference as a starting point rather than exception. In France, the application of videoconferencing was initially developed for use in overseas territories because there were too few judges there to ensure that different judges would judge at different stages of the proceedings. Meanwhile, the ratio is mainly cost savings – especially for the transfers of detained suspects to court – and video conferencing can be used for each participant and in a large number of trial stages and types of hearings, but not for more serious charges. The right of consent is not absolute and can also be ignored if, for example, the transport of the suspect has to be avoided due to a serious risk of disturbance of public order or escape. In France, too, concerns about the quality of the connection and the equipment arise from practice, as a result of which the quality of image and sound is (too) often insufficient for proper process participation. The difficult position for the lawyer who cannot perform all his functions if the suspect is not physically present in the courtroom is also identified as a serious problem. Reference is moreover made to the human aspect of a suspect who has to undergo trial in isolation and without legal assistance.

Canada is another example of a country that started applying new technologies in the legal system relatively early, including with regard to the accused. This is mainly because this was seen to be of great practical added value due to the size of the country and the often remote locations of detention centers.<sup>12</sup> In Canada, all trial participants can participate in criminal proceedings by videoconference. There are different provisions with regard to the use of videoconferencing per process component and process participant. In general, it is important to note that the Canadian system is very reluctant to allow the suspect to participate in a trial where evidence is considered. The use of videoconference is excluded if witnesses are heard at a hearing: the suspect must be present in order to adhere to the principle of immediacy. This is in line with the more adversary nature of Canadian criminal law compared to the Netherlands and some of the other countries in this study. In practice, however, it also plays a role that here too technology often falters and judges and prosecutors are concerned that this could be a ground for lodging an appeal if this occurs during a hearing where evidence plays a role. Nor does it fit in the Canadian system to quickly disregard the wish of the suspect: if the suspect insists on being physically present, the judge will only reject this in exceptional situations. It is also noteworthy that in Canadian courts, it has been a longstanding practice that the audio is recorded and stored by default. It is therefore natural to also preserve video conference footage for the sake of the public nature and the immediacy principle.

The use of videoconference with regard to the suspect is also legally possible in Switzerland. In this country the immediacy principle plays a less important role than in Canada and its application is therefore less likely to be perceived as objectionable as an alternative to physical presence during the substantive handling of the case. The Public Prosecution Service or the competent court may decide to use videoconferencing if the person to be questioned is unable to attend the hearing in person, or if this is only possible at disproportionate costs or practical obstacles. In principle, the suspect has no right of consent. However, a judge interviewed for this investigation indicates that also in Switzerland it is considered highly undesirable to ignore the wish of the suspect if he does not want to participate via video conference and that judges in Switzerland are also extremely cautious about this. Although the legal framework thus permits a wide use of videoconferencing, physical presence is also preferred in Switzerland and in practice, videoconferencing is used only to a limited extent with regard to the accused. In Switzerland, sound and image of the video conference must be stored on a data carrier that is added to the file.

Of the countries surveyed, Germany is the most reluctant to use videoconferencing for the suspect: it is virtually excluded from law. In the German criminal proceedings, the suspect has an obligation to attend rather than merely a right. This is related to the principle of immediacy, which plays a major role in German

---

<sup>12</sup> Schellhammer, 2013, p. 53-56.

criminal proceedings and in particular at the trial. The obligation to attend and the principle of immediacy have led to the starting point that both the suspect and any witnesses are physically present at the trial. The judge must have heard the suspect personally and the possibility of trial in absentia is therefore also very limited in Germany. The principle of immediacy is expressed in German criminal proceedings by the fact that the trial mainly takes place on the basis of an oral hearing. Germany is much more reluctant to accept written statements as evidence than the Netherlands. By way of exception, it is possible to read a written statement at the court hearing, such as a confession under Article 245 StPO or a statement by a witness, expert or co-suspect under Article 251 StPO. This statement must have been made before a judge during the preliminary investigation. However, the starting point is that the judge makes the determination of the evidence himself, and this on the basis of the original source (*Originalbeweis*).<sup>13</sup> The idea is thus that the verdict should be based on evidence presented at the hearing, which is seen as a guarantee for the substantive correctness of the evidence and the evidentiary decisions. Under Article 247a of the StPO there is a possibility for witnesses and experts to be heard in court by videoconference, but only if there is an urgent danger to the well-being of the witness or expert to be heard. In Germany, the obligation to attend and the immediacy principle are therefore understood in such a way that this cannot be replaced by allowing the suspect to participate via video conference.

In Germany, there is also a reluctance to participate by the suspect via videoconference because this is not considered a fully-fledged way of exercising defense rights and is therefore a violation of the possibility to practically exercise these rights. In addition, the reluctance to use videoconferencing is also related to process-economic reasons, in which the experience is that the duration of the substantive hearing in court is shortest when all relevant persons are present. The presence of the suspect is particularly important so that he can answer questions about the facts or circumstances of the case. Furthermore, psychological reasons in Germany underlie the reluctance to use videoconferencing with regard to suspects, because judges fear that the use of videoconference will distort the way the person comes across and that non-verbal communication could be less perceived and thus the credibility of the person being heard is affected.

---

## INTERNATIONAL CRIMINAL COURT

At the ICC, suspects have not yet been brought to trial via videoconference as such, but this is possible (legally and practically) and it is considered for current and future cases. Hearing witnesses by videoconference is “daily practice” at the ICC and each courtroom is designed for the use of videoconference, with an adjoining “control room” in which video and audio communication as well as evidence presentation via monitors are directed. Given the large number of member states at the ICC (123 countries) and the geographic distribution and diversity of legal traditions of those countries, what is agreed by states in the context of the ICC can provide a good indication of which standards with regard to criminal proceedings and the rights of defense prevail in the international legal order. Also, the court cases at the ICC are closely monitored for observance of the right to a fair trial by commentators from different legal traditions.

Although the possibility of hearing witnesses has been regulated since the establishment of the ICC’s founding treaty in 1998, only since 2013 has it been included in rule 134bis Rules of Procedure and Evidence that suspects may request to be tried by video conference during parts of their trial and that it is up to the judges to consider in each situation whether this is appropriate.<sup>14</sup> The ICC had already been allowed for some time to

---

<sup>13</sup> Mevis, 2018.

<sup>14</sup> Assembly of States Parties of the International Criminal Court, Resolution ICC-ASP/12/Res.7, 27 November 2013. The text of Rule 134bis Rules of Procedure and Evidence “Presence through the use of video technology” provides: “1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through

hold a session on a possible reduction of the sentence by videoconference “under exceptional circumstances”.<sup>15</sup> The ICC is not the only international criminal court that allows video conferencing of suspects. The more recently established Special Tribunal for Lebanon and the Kosovo Specialist Chambers also have the possibility of the accused participating by videoconference.

On June 23, 2020, a guideline for the holding of hearings during the COVID-19 pandemic was promulgated, emphasizing that on a case-by-case basis, judges can consider using videoconference for necessary hearings.<sup>16</sup> In doing so, the judges must conclude that the proposed form of hearing is in accordance with the applicable regulations and the rights of the accused. The situation and restrictions in the country where persons who may be participating via videoconference are located must also be considered. The guidelines also establish a protocol requiring that if judges wish to use videoconference, they should coordinate well in advance with the various departments of the Registry to ensure clarity on all technical aspects, which may include agreements such as that the scope of the session is clearly delineated and any technical problems are anticipated. The document concludes with the consideration that these guidelines are intended to be temporary.

In international criminal law, there is a reluctance to use videoconference for the accused, especially for court proceedings where evidence is considered. Here also, it is up to the judges to decide whether and to what extent videoconferencing will be used for suspects and to refuse this. The logic at the ICC is that the point is not so much that the court or the office of the prosecutor should direct the use of video conference, but that the suspect would rather attend hearings remotely from his own country than have to appear in The Hague. In principle, there are no restrictions on the possibilities of using videoconferencing with regard to the stage in the criminal proceedings. The interviewed ICC employees do indicate that they expect that judges will be more cautious about videoconference in the merits phase, especially when evidence is discussed, than when it comes to hearings in the pre-trial phase, about compensation (reparations) or appeal. The main concern here is whether the rights of the defense can be sufficiently guaranteed, tension with the principle of immediacy and the importance of making contact with the suspect. However, the ICC has every possibility to apply videoconference to the trial participation of the accused and given the international context also many practical reasons to organize at least certain sessions via videoconference, and it seems a matter of time before this will take place.

The infrastructure and technical capabilities at the ICC may be of the highest quality of any court in the world, but here too the quality of the connection is a real challenge. The weakest link determines the quality of the connection and what options there are to guarantee the necessary legal guarantees for the accused’s right to a fair trial. For reasons of quality and safety, the ICC tries to keep as much control as possible and, for example, sends its own personnel and equipment to the interview location. In addition to quality, the safety of the person being heard and their family, and the safety of the connection, is also a point of special attention.

---

## MUTUAL LEGAL ASSISTANCE

A special aspect that plays a role in both international criminal law and international criminal law cooperation between countries is that it can be difficult to cooperate with other countries. This factor always plays a role in the context of any type of mutual legal assistance, but is an additional complicating factor in the application of videoconferencing.

---

the use of video technology during part or parts of his or her trial. 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.”

<sup>15</sup> Rule 224 Rules of Procedure and Evidence, pursuant to article 110 Statuut van Rome.

<sup>16</sup> *Guidelines for the Judiciary concerning the holding of court hearings during the Covid-19 pandemic*, 23 June 2020, published on <https://www.icc-cpi.int/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf>.

The study shows that the use of videoconferencing in the international context raises all kinds of questions related to jurisdiction and responsibility, to who is in control and where the boundaries lie between the powers and obligations of both countries, to security, language, and about the quality of equipment and technology. The research concludes that although the use of videoconference is increasing in practice, it rarely occurs with regard to the suspect. Practitioners indicate that the international legal framework with regard to the practical application of videoconference is left quite open. In order to avoid ambiguities and issues during hearings, it is important that clearer agreements are made on details. It is particularly important here to work out more clearly what requirements are set for the quality of the technology, the guarantees that apply to the realization of the rights of the suspect, who is in charge, where the demarcation lies between the powers and obligations of both countries, to what extent and when magistrates may, and when they must, intervene back and forth, what the facilitating magistrate may or must do when he becomes aware of criminal offenses, whether the safety of the person to be heard is guaranteed and what responsibilities are involved, and to what extent it is desirable to cooperate with another country in the context of the trial of suspects via videoconference.

In addition to the need to make clear agreements between the parties prior to a hearing via videoconference, knowledge of and trust in each other's legal practice also plays an important role. The stimulation and facilitation of cooperation in the form of contact between prosecutors and judges is also important to further shape international cooperation with regard to the use of videoconferencing.

#### ASSESSMENT FRAMEWORK FOR RELEVANT FACTORS TO DECIDE ON USING VIDEOCONFERENCE IN A SPECIFIC CASE

On the basis of the research, an assessment framework has been formulated in Section 6.6 to provide guidance for deciding whether the use of videoconferencing is appropriate in a specific case. The main conclusion here is that with regard to the question to what extent there should be differentiated between different factors, customization is required. For example, the judge must weigh the situation and circumstances of the case at hand and take into account, among other things, the type of trial phase and hearing; what role the evidence plays and thus the immediacy principle; to what extent the use of videoconferencing suits the person and vulnerability of the suspect; whether the suspect consents to the use of videoconferencing; what alternatives are available and to what extent they should be preferred; and what role victims play in the proceedings and what their thoughts are regarding the use of videoconference with the suspect.

In light of the question of whether there is a justified restriction on the right of presence, it is crucial that the accused can adequately exercise his defense rights. In addition, there must be a legitimate purpose and a consideration of how important this legitimizing purpose is. This concerns circumstances such as the need for security of the hearing, the risk of flight, the protection of the rights of victims and / or witnesses, the importance of a prompt trial and public health, as is the case with the COVID-19-outbreak.

The relevant considerations are broken down into six types of factors that are elaborated in the assessment framework in Section 6.6, namely: 1) the possibility of physical presence; 2) compensatory safeguards in the way videoconferencing is applied; 3) the nature of the hearing and the process phase; 4) the gravity of the charge; 5) the opinion, the behavior and the person of the suspect; and 6) the importance of due criminal procedure and the interests of other litigants.

## CONCLUSIONS

In addition to the conclusions discussed above with regard to fundamental criminal legal principles and human rights (Chapter 2), international and European regulations (Chapter 3), the systems studied (Chapters 4 and 5) and the assessment framework for the application of videoconference in the specific case (Section 6.6), the report also contains conclusions on a number of themes that are discussed below and are elaborated in chapters 4, 5 and 6. For example, it follows from the study that a widely supported position is held in legal practice that videoconference can be a reasonable alternative to situations in which it is not possible or undesirable to organize the physical presence of the suspect and where other interests such as the progress of the trial are considered more important, but that there is a difference in quality in the use of videoconference compared to physical presence and that physical presence is in principle the preferred. Especially for criminal cases, non-verbal communication is important and this is limited via videoconference. In practice, the application of videoconferencing often also takes more time than the physical participation of suspects. This is because it takes longer to establish the connection, the conversation progresses more slowly, and simultaneous translation is usually not possible with the current facilities. In addition, all kinds of things go wrong that have a delaying effect, such as that suspects are not put in place at the scheduled time, that there is a (too) long delay in the quality of the line, which makes communication difficult, or that the connection is not established at all or is interrupted halfway. The quality of the equipment and connections and the inability for the lawyer to be with the accused as well as in the courtroom create serious problems that require further reflection and solutions to bring a wider application of the use of videoconferencing for the accused in accordance with fundamental rights and principles.

---

### PHYSICAL APPEARANCE AS STARTING POINT

In domestic, foreign and international practice, there is a clear desire to maintain the physical presence of the suspect as a starting point and keep the use of video conference as the exception. In countries where a move towards a premise of videoconferencing seemed to be moving too far, great concerns arose about the quality of and guarantees in the criminal proceedings and legal practitioners revolted.

However, it does follow from the legal frameworks and practice in the systems studied that the application of videoconferencing can offer a solution in situations in which it is not possible or undesirable for the suspect to be physically present at the trial.

However, this does not apply to Germany, where participation of the accused in criminal proceedings is almost entirely excluded (with a very small exception). It should also be noted that there is in general a great reluctance with regard to hearings where a lot depends on the suspect (arraignment, trial of more serious facts, hearings where evidence is discussed, including witness interviews), and the wishes of the parties to the proceedings and in particular that of the suspect plays an important role in the consideration of whether the use of videoconferencing is deemed appropriate.

---

### RIGHT TO CONSENT

It cannot be deduced from the case law of the ECtHR that the suspect has a clear right of consent. What matters is that there is a justified restriction on the right of presence due to a legitimate purpose and that the rights of defense can be sufficiently exercised when applied in the concrete situation. In the assessment that must be made in that regard, the consent of the accused does not specifically emerge as a requirement as such. However, practice shows that the consent of the accused is considered very important and that this

cannot simply be ignored without consideration or motivation. In each of the examined legal systems, the opinion of the accused is relevant in the consideration of whether videoconference will be applied, regardless of whether the legal framework has a formal consent requirement. In this respect, the more important the questioning or the more serious the charge is, the more effort must be made to enable the physical presence of the suspect objects. In conclusion, there is i) no general right of the suspect to consent, but ii) a right to express his opinion in this regard, and iii) the opinion of the suspect must be taken into account, since iv) there is reluctance to use videoconferencing if the suspect wants to be physically present at his criminal trial.

---

## CONTACT WITH THE ACCUSED AND DECORUM

On the basis of the research, we moreover conclude that legal practice indicates that the use of videoconference often hinders contact with the suspect too much. It is more difficult to observe non-verbal communication via video conference. It is also difficult to have an overview of who is in court or at the accused's location and at the same time be able to read expressions on faces or have eye contact. This concerns in particular i) the direct and personal contact that judges may have with suspects, especially when it concerns suspects with a low IQ or with psychological issue, ii) the possibilities of the suspect and his lawyer to convince the judge and in order to be able to respond effectively to what is charged and presented as evidence, and iii) to enable the suspect to follow the trial properly, especially if he participates in the proceedings without his lawyer next to him.

In addition, the research shows that the aspect of decorum is an important element in criminal justice and is often insufficiently addressed in the current practice of video conferencing. There is a risk that without the usual decorum the accused will take the hearing less seriously, which may also have adverse consequences for the accused. More consideration and organization is also needed on this aspect. Improving the decorum also benefits the extent to which videoconference can be an adequate alternative to physical presence. The loss of decorum can be partially overcome, but this will ideally require a second courtroom or a facility at the suspect's location that appears neutral, offering space for the lawyer and interpreter, whereby the suspect is shown as neutral as possible, and whereby parties can be in good contact with each other so that the situation in the courtroom is simulated as closely as possible.

---

## QUALITY OF TECHNIQUE AND ORGANISATION

Continuing on the above observation on the importance of contact with the accused, a striking conclusion from this study is that, without exception, all practitioners who were interviewed in the context of this study about their experiences with videoconferencing indicate that the quality of the equipment and the quality and reliability of the connection (too) often is deficient for making sufficient contact with the suspect and to practically exercise defense rights.

The right of presence at the trial requires that the suspect can adequately exercise his defense rights and that he is not materially disadvantaged in this respect by participating by videoconference. The suspect must be able to see and hear those present in the courtroom and the suspect must be seen and heard by the other parties, but also by the public in connection with the principle of public trial. It is seen as a good addition if there are multiple camera setups that also make it possible to have an overview of the other space as well as to have a view of the non-verbal communication of the persons involved, including facial expressions. The parties in the courtroom must be able to see the suspect well. The room in which he sits must also be clearly visible. This is important, among other things, to guarantee that there are no unwanted persons in the room.

It is moreover important that the design of the suspect's location is organized in such a way that it creates no (unconscious) negative effect on how the suspect appears. To that end, the size of the room is important, that it is arranged neutrally, that there is sufficient lighting and that consideration is given to the angle in which the person is filmed. The suspect must have a good view of the courtroom and the trial parties in order to understand and feel involved in what is happening in his trial. In practice, videoconference can make it harder for the accused to understand what is happening in the courtroom.

Furthermore, the accused should have the opportunity to address the court via video conference. It is important that communication can be established that approaches reality as closely as possible. The quality of the connection is essential for this. Outdated equipment and insufficient speed and reliability of the connection (too) often fail. Communication is then impeded because there is too much delay in the line or it stutters. The quality of the connection must be such that the judge is able to interrupt the suspect to ask questions.

In addition, the manner of assistance by legal counsel needs to be organized well. In view of the right to assistance by a counsel (Article 6 paragraph 3 sub d ECHR), the use of video conference should not impede adequate assistance by counsel. In that view, it may have to be considered that legal assistance is required at both the court room and the accused's location if, for example, a lot is at stake for the accused in the hearing at hand or in light of his vulnerability. The question then arises whether the additional costs of hiring two lawyers should be borne by the suspect. It seems justified that if counsel is required at both locations to adequately exercise the rights of defense, the additional costs for the second lawyer should also be reimbursed.

Having sufficient time and possibilities to consult with counsel is, in view of Article 6 paragraph 3 under d ECHR, a general requirement when using videoconference with regard to the suspect. This applies in particular if there is no lawyer present with the suspect. In addition, the suspect must be able to communicate with his lawyer without running the risk of being tapped. It must specifically be possible for the lawyer to receive confidential instructions without any supervision. It must also be ensured that the line used for the video conference is protected against eavesdropping. In current Dutch practice, the role of the lawyer is not always sufficiently included in the organization of the application of video conference. For example, there are situations where there is insufficient space for the lawyer at the interview location, where it is not possible to communicate with the suspect, where splash screens have not been considered for the lawyer to protect against COVID-19, or where the lawyer is asked to continue the court proceedings if the connection with the suspect is interrupted without the lawyer being able to know what the suspect's wish is at that moment.

Moreover, in the interests of the internal principle of public access, it should be considered to save images for possible later reference; further consideration should be given to organizing interpretation; and there appear to be major differences between institutions as to the extent to which protocols exist for the use of videoconferencing and whether the persons involved have been instructed to do so. There has not been a central policy in this regard. In many situations there are uncertainties about who is responsible for what exactly, what is and what is not allowed, and what is possible. As a result, possibilities are not used in full, rules are not always properly applied, and the wheel is unnecessarily reinvented.

A practice in which video conferencing is used with regard to the suspect requires careful consideration of these practical aspects. Although the application of videoconferencing has been legally broadly applied in the Netherlands, this research concludes that its practical implementation still requires an additional organizational step in order to fully adhere to the requirements and guarantees necessary for criminal proceedings and the role and delicate position of the accused in it.

Another key conclusion from this research is that when applying videoconferencing for the accused, the attorney has to choose whether to be present in the courtroom or with the accused, while his role requires him to perform functions at both locations. In all the studied legal systems, this problem is considered a great concern with regard to the rights of the accused and his ability to actually exercise his defense rights when the stakes are high for the accused.

It raises the question whether in certain situations it should be a requirement to have a lawyer (or associate) at either location. This could remove many objections and provide guarantees for the exercise of the various defense rights. However, it also presents new practical challenges. It makes communication more complicated, both lawyers have to read the case file, be on the same page and be able to communicate confidentially. This also raises the question of what this means for the additional costs of the defense, and whether the accused should be compensated for the (additional) costs if the judge decides to use videoconferencing. These additional costs may increase considerably because several lawyers will all have to read the file and be able to consult with each other.

On the basis of this research, we conclude that the consideration of the extent to which this should be compensated is related to the consideration of what is at stake for the accused in the specific court session in question. In light of Article 6 ECHR, the presence of an attorney at either location can be necessary to sufficiently safeguard the rights of the defense when the interests of the accused increase with regard to what will be discussed at the specific hearing, the more severe the sanction to be imposed is, the vulnerability of the person justifies this, or there are other reasons for which it is no longer justified that there is no attorney in either court or with the accused.

In such a situation it is undesirable to let the engagement of two lawyers depend on whether the suspect can afford to do so. This requires not only thinking about the possibilities of financing, but also about how in the practical implementation the possibilities can be created for lawyers to consult and coordinate with each other with sufficient time. In addition, it is important to realize that if the defense interest requires a double defense, the application of videoconferencing is less likely to have any cost-saving effect.

Furthermore, the effective exercise of the rights of defense requires that the process must be set up in such a way that the suspect is tried in a language that he understands (as is also guaranteed in Article 6 paragraph 3 sub e ECHR). That is why a specially trained interpreter regularly participates in criminal proceedings. When using videoconference, consideration must also be given to how the interpretation can be organized. This may present challenges, especially from an organizational point of view. Simultaneous interpretation gives the suspect the opportunity to better follow the trial, ensures better interaction and communication between the parties, and enables the suspect and his counsel to better exercise the rights of defense. When there is no simultaneous interpretation, the conversation pauses during the hearing in anticipation of the interpretation, so that the interaction with the suspect is less realistic. It is more difficult for the accused to participate effectively in the proceedings with consecutive interpretation. When using video conference, simultaneous interpretation can be realized by having the interpreter present with the suspect. It must be considered whether the interpreter needs safety measures. Another option is to work with booths from which the interpreter can be heard by the litigants via headphones. However, simultaneous interpretation is both more expensive and puts an extra burden on the connection and thus its speed and reliability. International experiences also offer useful insights on this point of interpretation. For example, the ICC is considering whether in the future the interpreters will not be able to work from their own place of work instead of being present in the courtroom when the suspect himself also participates via video conference.

If the interpreter is present at the suspect's location, it is important that sufficient space is organized for the interpreter and that it is also considered whether the interpreter feels comfortable with the situation. The interpreter may also be needed during the confidential consultation between the lawyer and the client, and the possibility must be created for this both when the interpreter is located at the accused's location and remotely.

---

## FINANCIAL ASPECTS

In view of the experiences in practice that the quality of the technology, equipment, connection, the layout of the location of the suspect, protocols and training of personnel is (too) often insufficient to be able to consider the application of video conference as an adequate alternative to physical presence for the accused, such practical aspects require improvement.

Furthermore, the research into practice shows that a good insight into the costs and benefits of the application of videoconferencing is lacking. It is questionable whether the assumption that the application of videoconferencing is cost-effective applies when hearings require a second lawyer or when simultaneous interpretation is required to ensure that communication is of sufficient quality. It is also important to consider what hidden costs the application of videoconferencing entails, such as lost time due to making the connection, slower and more difficult communication, and technical interruptions.

## RECOMMENDATIONS

Chapter 7 answers the main research question by formulating recommendations for standardization and policy development in Dutch criminal law practice on the basis of five categories: 1) the structure, organization and technology of the application of video conference; 2) security; 3) legal guarantees; 4) protocols and personnel aspects; and 5) the importance of monitoring and researching the use of videoconferencing in criminal proceedings.