The Right to be Present Online

Introduction

All around the world criminal trials presume the presence of the defendant at trial. The trial has been shaped on the basis of the defendant being there. Criminal justice systems may provide exceptions to the rule, but these are exceptions and they do not alter the fact that the design for all criminal justice systems is a trial in the presence of the defendant.

This presence has without further ado always been understood as a presence in person, a physical presence. For a long time this was regarded as self-evident. It is the technological development of the last decades and especially the recent experiences in covid-times with proceedings with online presence of participants that raise the question whether presence is physical presence only or whether one can be present at trial via a videolink. Is there a right for the defendant to opt for digital presence? How can the defendant participate online? What conditions ought to be in place to realise this? What stands in the way of having the defendant remotely connected to the court room? What problem does that solve? These are just some of the questions that will be posed.

I will limit my quest to the presence at the trial in which the charge and/or the sentence is dealt with. The focus is thus on the trial on the merits and not on potential other use of online presence, such as scheduling, bail or remand hearings. I will also presume that technical standards are in place that allow both the defendant and the other participants to see and hear without any problem what happens in the court room or at the location of the defendant. In that sense optimal technical conditions are a pre-condition. Another limitation is that I will focus on the (remote) presence of the defendant only, and not deal with the numerous constellations of partial presence of some participants.
in court and others at different locations. I will look at these questions from the angle of the dominant norms of Article 6 ECHR and Article 8 Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Reasons for Real Presence

When criminal justice systems designed their trials, they did not think of anything else than physical presence. The safeguards were also designed on the conditions and limitations of physical presence. The reasons to have the defendant there relate to his rights to participate. It is not only a right to be there and to participate, but also to produce evidence, examine and cross-examine witnesses and experts. One can do that best where everything happens: at the trial, where also all other participants are. The presence of the defendant is also important for giving an impression of the person of the defendant to the trier of fact, regardless of whether that is a judge, a court or a jury.

The degree to which criminal justice systems need the presence of the defendant at trial differs a lot. The main dividing line seems to be between common law and civil law. In common law, the presentation of evidence takes place at the trial. There may be investigations before, but only when presented at the trial, evidence is admissible. There is a clear sequence of presentation of the evidence. The prosecution starts and after it has presented all its evidence, the defence will present its case. If the defendant would not be there, the trial would only be half. For the defendant, to take the stand at trial is the only way to contribute to evidence himself. Although common law has stipulated a right to be present, it has given it the appearance of an obligation to be present. Common law jurisdictions have severe difficulties with conducting trials without the presence of the defendant.

This seems to be entirely different for most civil law jurisdictions.¹ This is very much related to the fact that evidence is collected in a different way and the defence does not have a prominent role on how evidence is dealt with at trial. Much evidence is collected by the police already before the trial has started and at the trial, it is the court that leads the way through the evidence. The defence may suggest to take further evidence, summon witnesses or may make statements himself. However, if the defendant does not do so, the case

¹ Christina Peristeridou and André Klip (eds.), Comparative Perspectives of Criminal Procedure, Intersentia Cambridge 2024, especially Chapter 7 The Trial, p. 155–182.
can still be completed. The right to be present is definitely understood as a right for the defendant that he can waive for motives of his choice. He does not need to be there personally to give evidence that is admissible as this may have been taken before. For a defendant in a civil law system, his presence at trial is less crucial to the course of the proceedings and the outcome. In all criminal justice systems, suspects and accused persons can make choices already on the main feature of the trial. In common law they may enter a plea, conclude an agreement or opt for a jury trial. In civil law they may opt for a trial in absentia. Does this mean that an accused person can also opt for something else?

**Consequence of Absence**

The consequences of the defendant not being there play out in a different way for the major systems. Whereas for common law jurisdictions and for civil law systems that strongly adhere to the principle of orality, such as Germany, absence means that the trial cannot start and that one must wait until the presence of the accused can be secured, most civil law systems are more at ease on this. For these civil law systems, the absence of the defendant at trial does neither stand in the way of the trial to be opened nor to be continued. These systems refer to presence as a right for the defendant, not an obligation, and as something that can be waived. They have created legal possibilities to conduct trials in absentia. Some systems have done that to such an extreme that they presume that the accused has waived his right to be present once it is clear that he was duly summoned and, despite that, does not show up. For many systems, a trial without the defendant being there, is no longer a very rare exception to the rule, but has become common practice.

The pros and cons of either systems are interchangeable. Common law systems may have to wait a long time until it is possible to get hold of the defendant. This may cost time and resources, he might be a fugitive abroad, extradition proceedings may be necessary. All of this costs time and it is well known that the lapse of time is no good news for preserving evidence. Evidence may get lost, memory becomes weaker by the day. The society in which the offence occurred has to wait longer, victims have to wait for compensation. Civil law countries move on, for them it may be important to state that it should not be in the hands of the accused to lame the proceedings by not showing up or even by fleeing justice. It has the advantage that evidence is preserved as soon as possible as there is no need to wait for the trial. It may be so that the absence of the defendant has an impact on how the case is framed and presented in court, but that is regarded as a logical consequence of him deciding not to be there.
On-line Presence

A presence online is different from a presence in court. Both the defendant as well as other participants depend on the technique that connects them. Of course it is a pre-condition that the link is secure and that there is no doubt on the identity of the defendant. However, other than when present in court himself, the defendant may not be able to see and hear everything that occurs in the courtroom and only have access to what the camera and the microphone transmits. This is of course the same for those that are present in the courtroom: they will only see and hear what the camera and microphone at the location of the defendant allows them to note. It is basically these two elements on which real presence differs, the participant can determine himself where to give attention to, but will also be confronted with what happens in the courtroom. One cannot unhear what is being said and cannot unsee what happens in the courtroom. That is different online, it is possible to mute the audio and to switch off the camera. This dependence also makes clear that online presence is not the same as presence in the courtroom and that this goes both ways. Both for what the defendant can observe as well as how the defendant can be observed by all other participants in the courtroom.

Having established that interaction through online presence is not the same as physical presence the logical question is whether that needs to be so. Does online presence have to be equal to physical presence? I do not think that the law requires this. What counts is not whether things are the same, but whether the values, rights and interests at stake are properly served. The comparison with real presence as the standard is a non-starter for any debate. Many of the arguments brought against online presence come down to the fact that it is not the same and that we are not used to work in such an environment.2 It strikes me that many voices claim that ‘in presence’ is better without having had experience with online presence.3 I am not so sure that physical presence is always

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2 See for instance numerous examples given in a report prepared by the Stanford Criminal Justice Center of Stanford Law School, Virtual Justice? A national study analysing the transition to remote criminal court, August 2021. Quite some experience was gathered with a panoply of different online participations during the pandemic. I note that these were all temporary rules and emergency formats, not procedures designed for a structural and permanent format for the trial.

3 JUSTICE posed the question whether it is possible to hold dispersed or virtual trials in which the principles of fairness, accuracy of evidence and certainty can be met. It organised four virtual trials to test this. See Linda Mulcahy, Emma Rowden and Wend Tender, Exploring the case for Virtual Jury Trials during the COVID-19 crisis. An evaluation of a pilot study conducted by JUSTICE, April 2020. See also the second report by the same authors: Testing
better and for sure online presence may be the better alternative to absence. Exactly because of the fact that online presence is not the same at all, it will require a new design of the trial. The question for instance is not whether effective legal assistance digitally is the same as sitting near the defendant, but what conditions effective counseling requires in the circumstance of online presence of the defendant. That might be the power for counsel to mute his client, the availability of a break out room for confidential conversation etc.

For the design of the trial with online presence all kinds of questions come up that demonstrate that an encompassing rethinking is needed. It is interesting to see that various innovations need some time to adjust to the new circumstances. Hundred years ago the first cars had the shape of a carriage. Now we see that digital files look the same as paper files of the past, even to the extent that information that initially is available in digital format, is printed, sent to another official, scanned and uploaded in a digital system again. Can the trial still be regarded as a public trial? One possibility would be that the trial is streamed, which would widen the group of people that may watch the trial. However, this raises the question whether that does not create a side effect of the defendant being exposed to a potentially global audience. Victims and the public may want to see the defendant standing trial publicly and not via the screen. Is the acceptance of online presence not the first step towards a fully online procedure in which none of the participants is at the same location? Do we need to have authorities at the location of the defendant? Is it thinkable that physical courtrooms are no longer needed? What about the authority of the court? Some voices stated that defendants at home also behave like at home and that this may lead to embarrassing situations.

Numerous other questions can be raised that all underline the urgency of designing such a trial from scratch. This urgency is further triggered by the rights that defendants may invoke.

4 It is obvious that if there is no possibility to have a confidential moment with the lawyer, there is no fair trial. See ECtHR Shulepov v. Russia, 15435/03, 26 June 2008, par. 35: “the applicant appeared before the appeal court by videoconference from the prison facility and the prosecutor appeared in the courtroom in person, hence the applicant’s communication with the court without any representation in the courtroom was at a certain disadvantage”; Idem ECtHR Shugayev v. Russia, 11020/03, 14 January 2010, par. 54 and ECtHR Slashchev v. Russia, 24996/05, 31 January 2012, par. 57.

5 JUSTICE noted that there may be a lack of sense of gravitas. See footnote 3.
Can the Defendant be Obliged to be Present Online?

In a case in which the applicant submitted that he had been denied a fair hearing by the Court of Appeal inasmuch as he had not been enabled to attend the hearing in the Netherlands in person alongside his counsel in order to dispute evidence, present an alternative version of the facts, make requests for further investigations and cross-examine witnesses directly, the ECtHR held that there was no violation of his rights. The ECtHR took note of the fact that (temporary) surrender of the defendant detained in Peru was impossible on the basis of Peruvian law and that the applicant had waived the right to take part in the hearing by videoconference instead of attending in person. The ECtHR held: “that although the defendant’s participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on it to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.”

My reading of this decision is that when the state cannot offer the physical presence to defendant, the online presence is an acceptable alternative that can also offer a fair trial. In a case in which the defendant participated at the hearing via a video-link, the ECtHR reiterated: “that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole (...). Furthermore, although the defendant’s participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention (...). It must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments (...).”

In other words, a hearing via videolink is at such possible. However, as any other proceedings (in absentia, physical presence) the way in which the videolink hearing is offered must meet the standards of a fair trial. There are many ways in which that can be delivered as the right to a fair trial is not a right

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6 ECtHR Dijkhuizen v. The Netherlands, 61591/16, 8 June 2021, par. 53.
7 ECtHR Ulimayev v. Russia, 23324/04, 21 February 2017, par. 37 (references omitted). Idem ECtHR Marcello Viola v. Italy, no. 45106/04, 5 October 2006, par. 67; ECtHR Sakhnovskiy v. Russia, 2 November 2010, 21272/03, par. 98 and ECtHR Trepashkin v. Russia, 14248/05, 16 December 2010, par. 150.
to a perfect trial, but a right to proceedings, that as a whole, are fair. In the
case of Asciutto the applicant participated via videoconference for the entire
proceedings in his case. He complained that this put him in a disadvantaged
position. The ECtHR noted that the applicant belonged to a specific category
of detainees (mafia) for whom transport to the court house caused serious
problems of security. The ECtHR sets out the standards applicable to a video
hearing: “À la lumière de ce qui précède, la Cour estime que la participation du
requérant aux audiences par vidéoconférence poursuivait des buts légitimes à
l’égard de la Convention, à savoir la défense de l’ordre public, la prévention du
crime, la protection des droits à la vie, à la liberté et à la sûreté des témoins et
des victimes des infractions, ainsi que le respect de l’exigence du « délai raison-
nable » de la durée des procédures judiciaires. Il reste à vérifier si ses modalités
de déroulement ont respecté les droits de la défense. La Cour observe que, en
application du paragraphe 3 de l’article 146 bis des dispositions d’exécution
du CPP, le requérant a pu bénéficier d’une liaison audiovisuelle avec la salle
d’audience, ce qui lui a permis de voir les personnes qui y étaient présentes
et d’entendre ce qui était dit. Il était également vu et entendu par les autres
parties, par le juge et par les témoins, et avait le loisir de faire des déclarations
à la cour depuis son lieu de détention. Certes, il est possible que, à cause de
problèmes de nature technique, la liaison entre la salle d’audience et le lieu
de détention ne soit pas idéale, ce qui peut entraîner des difficultés de trans-
mision de la voix ou des images. Cependant, en l’espèce, à aucun moment
des débats d’appel le requérant n’essaya, lui-même ou par le truchement de
ses défenseurs, d’informer le juge de ses difficultés d’audition ou de vision
(voir, mutatis mutandis, Stanford précité, p. 11, § 27). La Cour souligne enfin
que le défenseur du requérant avait le droit d’être présent à l’endroit où se
trouvait son client et de s’entretenir avec lui de manière confidentielle. Cette
possibilité était reconnue également au défenseur présent dans la salle d’au-
dience (voir le paragraphe 4 de l’article 146 bis des dispositions d’exécution
du CPP; paragraphe 19 ci-dessus). Rien ne démontre qu’en l’espèce le droit du
requérant de communiquer avec son avocat hors de portée d’écoute d’un tiers
ait été méconnu. Dans ces conditions, la Cour estime que la participation du
requérant aux audiences devant la cour d’assises et la cour d’assises d’appel de
Turin par vidéoconférence n’a pas placé la défense dans une position de désa-
vantage substantiel par rapport aux autres parties au procès et que l’intéressé
a eu la possibilité d’exercer les droits et facultés inhérents à la notion de procès
équitable, telle que résultant de l’article 6 de la Convention.”

8 ECtHR Asciutto c. Italie, 35795/02, 27 novembre 2007, par. 68–72.
Also in the case of Bivolaru, it was not the accused who applied for presence online, but the authorities who offered this to him as the only available option. Bivolaru was abroad and refused to participate in a video-conference as he opined that this would not be equal to a physical presence. The ECtHR did not follow him on this: “À ce sujet, la Cour observe que, eu égard à l’absence physique du requérant au procès, la Haute Cour a eu recours à l’entraide judiciaire internationale. Dans le cadre de l’assistance judiciaire internationale en matière pénale, la loi no 302/2004 mettait à la disposition des autorités judiciaires deux voies aux fins de l’audition d’un inculpé se trouvant à l’étranger et ne pouvant pas comparaître en personne: la vidéoconférence et la commission rogatoire (paragraphes 103 à 105 ci-dessus). À cet égard, la Cour note que la Haute Cour a proposé au requérant de l’interroger par vidéoconférence – une forme de participation à la procédure qui n’est pas, en soi, incompatible avec la notion de procès équitable et public (Sakhnovski c. Russie [GC], no 21272/03, § 98, 2 novembre 2010, et Marcello Viola, précité, § 67) – et que l’intéressé, entouré par le conseil de ses avocats, a sciemment refusé d’être interrogé par vidéoconférence au motif que la loi interne lui permettait de ne pas consentir à une telle modalité d’audition (paragraphe 60 ci-dessus). S’il est vrai que le droit interne n’imposait pas à la personne refusant de donner son consentement à un interrogatoire par vidéoconférence de justifier sa position, il n’en reste pas moins que, dans la présente espèce – où le requérant reproche à la juridiction ayant prononcé sa condamnation de ne pas l’avoir interrogé –, cette modalité d’interrogatoire pouvait être, de l’avis de la Cour, un moyen approprié pour assurer l’audition directe et diligente de l’intéressé par la Haute Cour.”

Do the Authorities Have to Offer Online Presence?

The very fact that online presence is an acceptable alternative comes with obligations for the authorities. They must offer this. In the case of Hokkeling, the accused who still faced proceedings before the Court of Appeal in the Netherlands was no longer free to attend as he had been caught red handed in Norway for a new criminal offence. The proceedings in the Netherlands continued without him as the Dutch authorities saw no possibilities for mutual assistance or postpone the trial. The ECtHR held that this amounted to a violation: “The refusal of the Court of Appeal to consider measures that would have enabled the applicant to make use of his right to attend the hearing on the merits is all the more difficult to understand given that the Court of

9 ECtHR Bivolaru v. Romania (no. 2), 66580/12, 2 October 2018, par. 137–139.
Appeal increased the applicant’s sentence from four years and six months to eight years, which meant that after returning to the Netherlands the applicant had to serve time in addition to the sentence of the Regional Court which he had already completed (see paragraphs 15 and 31 above). National criminal courts cannot ignore the possibility of hearing by means of a video link and must undertake an effort to realise this possibility.

In the case of Zubayrayev it appeared that if the national Code of Criminal procedure provides for a videolink. The ECtHR held: “In this regard the Court notes that, under Russian law, the applicant had an indisputable right to participate in the hearing, directly or by video link, on the condition that he made a request to participate (…). The Court considers that the requirement to make such request would not in itself contradict the guarantees of Article 6 if the procedure was clearly set out in the domestic law and complied with by all participants in the proceedings, including the courts (…). Admittedly, the applicant was detained in the Republic of Chechnya and the appeal hearing was to be held in Moscow, that is, some 1,770 kilometres away, and the applicant’s transfer for the purposes of his participation in the appeal hearing in person would have called for certain security measures and needed to be arranged in advance. The Court notes, however, that it was also open to the domestic judicial authorities to ensure the applicant’s participation in the appeal hearing by means of a video link prescribed by the domestic rules of criminal procedure and earlier found by the Court to be compatible with the requirements of Article 6 of the Convention (…). The Court notes that the Supreme Court did not discuss whether such an arrangement was feasible in the circumstances of the case.”

In sum, on the basis of ECHR states are under an obligation to undertake an effort to create participation via videolink if there is an unsurmountable impediment to presence in person. This seems to be the same standard that is applied by the ECJ. In the HN case the accused wanted to participate, however, he was subjected to an entry ban, which precluded him from doing so. The Court: “It follows from those considerations that the conditions to which Article 8(2) of Directive 2016/343 subjects the exercise of the option granted to the Member States by that provision of providing for the holding of a trial in the absence of the person concerned, in particular the requirement to inform that person, are intended to limit the exercise of that option to situations in

10 ECtHR Hokkeling v. the Netherlands, 33749/12, 14 February 2017, par. 61.
11 ECtHR Kozlitin v. Russia, 17092/04, 14 November 2013, par. 72.
12 ECtHR Sayd-Akhmed Zubayrayev v. Russia, 34653/04, 26 June 2012, par. 29 and 32 (references omitted).
which that person has had a genuine opportunity to attend, and voluntarily and unequivocally waived that option. A Member State which merely informs the person concerned, who is prohibited from entering its territory, of the holding of his or her trial, without providing, in such circumstances, for measures enabling that person to be authorised to enter that territory despite that prohibition, would deprive that person of any real possibility of actually exercising his or her right to be present at the trial and would thus deprive the conditions laid down in that provision of any practical effect. Such a situation differs from one in which the person concerned voluntarily and unequivocally waives his or her right to be present at the trial.”

Is There a Right to be Present Online?

To answer this question, it is first necessary to determine whether online presence is presence in the sense of Article 6 ECHR and Article 8 Directive 2016/343. Although the ECtHR has not explicitly stated so, its decisions imply that online presence is presence. This corresponds to several developments of courts that allow for a hearing with the presence of the accused via video. For instance the International Tribunal for the Former Yugoslavia (Rule 8bis Rules of Procedure and Evidence), the International Criminal Court (Rule 134bis Rules of Procedure and Evidence) and the Specialist Chambers for Kosovo (Rule 68 Rules of Procedure and Evidence). Also the Dutch District Court adjudicating the downing of flight MH17 had the possibility. It is interesting that none of these possibilities were applied in practice thusfar.

13 ECJ 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20, par. 58–60.
14 Please note that this ICC Rule is called: Presence through the use of video technology.
15 Article 8 of the Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014 (Treaty Series of the Kingdom of the Netherlands 2017, 102): “Standing trial by videoconference

1 An accused person who is present in the territory of Ukraine and whose extradition to the Kingdom of the Netherlands has been refused, may stand trial in the Kingdom of the Netherlands via a videoconference link in accordance with this Agreement.

2 Standing trial by videoconference shall only be carried out with the consent of the accused person. The Parties shall make arrangements enabling the competent authority of the Kingdom of the Netherlands to inform the accused person of the consequences of consenting to the use of videoconference and to assure that the accused person expresses his or her consent voluntarily and in full awareness of
The ECJ has not yet given a definition of what presence exactly is. However, it has produced a consistent case law on the notion of “the trial” in Article 4a Framework Decision 2002/584 on the European Arrest Warrant for purposes of determining whether the requested person who is wanted for the execution of a judgment rendered in absentia was there. What counts is the absence/presence of the suspect at the hearing in which: “the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, (...) It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served.”

A recent reference of the Bulgarian Sofiyski gradski sad invites the ECJ to interpret whether the right to be present of Article 8(1) Directive 2016/343 is respected when the defendant is connected to the courtroom via videolink. In this case it was the defendant, present in the United Kingdom, who wished to participate via videolink and eventually did so in most of the pre-trial hearings.

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16 The header of Article 4a(1) reads: “1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State: (...)”.

17 ECJ 10 August 2017, Case C-270/17 PPU, proceedings relating to the execution of a European arrest warrant issued against Tadas Tupikas, par. 81 and 83. See more recently ECJ 21 December 2023, Case C-396/22, proceedings relating to the execution of a European arrest warrant, Generalstaatsanwaltschaft Berlin and ECJ 21 December 2023, Case C-397/22, proceedings relating to the execution of the European arrest warrant issued against LM intervening party: Generalstaatsanwaltschaft Berlin.
in his case. He also attended some of those in person in Bulgaria. However, the referring court was in doubt of whether the Directive gave the accused person a right to be present in an online way.

Does this mean that there is a right for the accused to be present online, even in a situation in which physical presence might be possible? It is good to look first at some general notions on the right to be presence given by the ECJ: "The right of an accused person to appear in person at the trial in criminal proceedings, which constitutes an essential element of the right to a fair trial enshrined in the second and third paragraphs of Article 47 and Article 48(2) of the Charter, requires the Member States to guarantee the accused the right to be present at the hearing during his trial (see, to that effect, judgment of 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20, EU:C:2022:679, paragraphs 54 to 56)."

In its judgment in the case of HN, the Court stated several rules that derive from Article 8(1) Directive. One is that national law may provide an obligation to be present. Another is that the Directive does not rule out in absentia trials, provided that certain conditions are met: "The context of those conditions is set out in recital 35 of Directive 2016/343, which makes it possible to cite the rationale used in Article 8(2) of that directive, according to which certain types of unambiguous conduct, reflecting the intention of the suspect or accused person to waive his or her right to be present at the trial, must make it possible to hold a trial in his or her absence (see, to that effect, judgment of 19 May 2022, C-760/22).

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18 In case C-760/22 the question referred for preliminary ruling is: "Is the right of a defendant to be present at his or her trial, as provided for in Article 8(1) of Directive 2016/343, infringed if, at his or her express request, he or she takes part in the court hearings being conducted in the criminal case in question via an online link, in a situation where he or she is defended by a lawyer mandated by him or her and present in the courtroom, and where that link enables him or her to follow the course of the proceedings and to adduce and be given access to evidence, where he or she can be heard without technical hindrances and he or she is guaranteed an effective and confidential means of conferring with his or her lawyer."

19 Also the questions of the Ekonomisko lietu tiesa (Latvia) ask for an interpretation of the right to be present of Article 8(1) Directive 2016/343 in criminal proceedings for which no less than 40 hearing days were scheduled and in which one of the accused lives in Germany. The German authorities refused to facilitate videoconference because under German law, the physical presence of the accused person during the trial stage is strictly necessary. The Latvian court wishes to know whether the videolink may only be arranged by the authorities of the state where the person is residing, or whether it may also be done by the authorities of the state conducting the criminal proceedings. By order of 21 July 2023 (joined cases C-255/23 and C-285/23), the president of the ECJ decided that both cases are subject to the expedited procedure.

20 ECJ 8 December 2022, European arrest warrant proceedings against CJ, C-492/22 PPU, par. 88.
Spetsializirana prokuratura (Trial of an absconded accused person), C-569/20, EU:C:2022:401, paragraph 35). The Court also held that there is no obligation to provide for in absentia proceedings. It is national law that determines to what extent there is an obligation to be present.

The right of Article 6 ECHR and Article 8 Directive 2016/343 is a right of the defendant. He may completely waive the right and decide that proceedings can continue without him. Does the defendant also have the right to determine that he will be present online, not physically in the courtroom? It is my opinion that a right can be derived from the case law of the two European courts. Even in cases of in absentia, Article 9 Directive 2016/343 gives the accused a right to a new trial. The fact that there is a right does not mean that the defendant can stipulate all conditions. In other words, there may be right to be present online, subject to certain conditions determined by the national court that need to safeguard the interests of justice. Some defendants for instance may not be fit to stand trial online as they cannot cope with the technique. In such a situation an online trial would not do justice to the defendant. The defendant must be fit to stand trial digitally. It is an assessment of the rights at stake and the interests of justice that will develop criteria on what kind of trials can only be done in the physical presence of the accused.

Defendants who do not want to run the risk of being arrested can participate without such a risk. In this context online presence serves the goals of the presumption of innocence as well as the free movement rights of EU nationals as no measures of restraining liberty might be taken. The proceedings may continue, there is no delay and this will be conducive to gathering the evidence as fresh as possible. There is no longer a need to hold trials in absentia, because a connection to the courtroom can be established from wherever the defendant is. It might not even be relevant to know where he is. Concerning fugitives, the presence may reduce the need for extradition severely. Defendants may do so because it is more convenient for them. Rights are there to be claimed and used.

21 ECJ 15 September 2022, HN (Trial of an accused person removed from the territory), C-420/20, par. 36.
22 Articles 8(4) and 9 Directive have direct effect. See 19 May 2022, C-569/20, criminal proceedings against IR, par. 28.
23 See Dorris de Vocht, Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice, China-EU Law Journal 2022, p. 38.
24 See for instance a Swiss practitioner in A.M. de Hoon, M.F.H. Hirsch Ballin, S.G.M.J. Bollen, Verdachte in beeld, Eisen en waarborgen voor het gebruik van videoconferentie ten aanzien van de verdachte in het Nederlandse strafproces in rechtsvergelijking perspectief, Vrije Universiteit Amsterdam 2020, WODC 2020, p. 169: “Most suspects don’t mind. For them, it’s easier to be questioned in the country where they stay at that moment, than to be transported.”
Conclusions

There is a certain nostalgia of the trial in the courtroom. If we look back at legal developments of the last centuries the format in which a trial is conducted has remained more or less the same. At the same time both in common law as in civil law many cases are not dealt with in a full trial in the presence of all. Both systems seems to have lost contact with the original meaning of the need to be present. Outside the courtroom our society has changed dramatically. That development has not yet impacted the shape of the trial. It would be good to prepare for a more modern criminal trial, and design it with the interests that are at stake as the dominant factors, and not with the goal to shape it in a format that resembles the physical courtroom presence as much as possible. This is needed as the accused can be offered only online presence, as well as that the accused himself can claim such online presence as a right.

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