

# COVID-19 REMOTE COURT HEARINGS

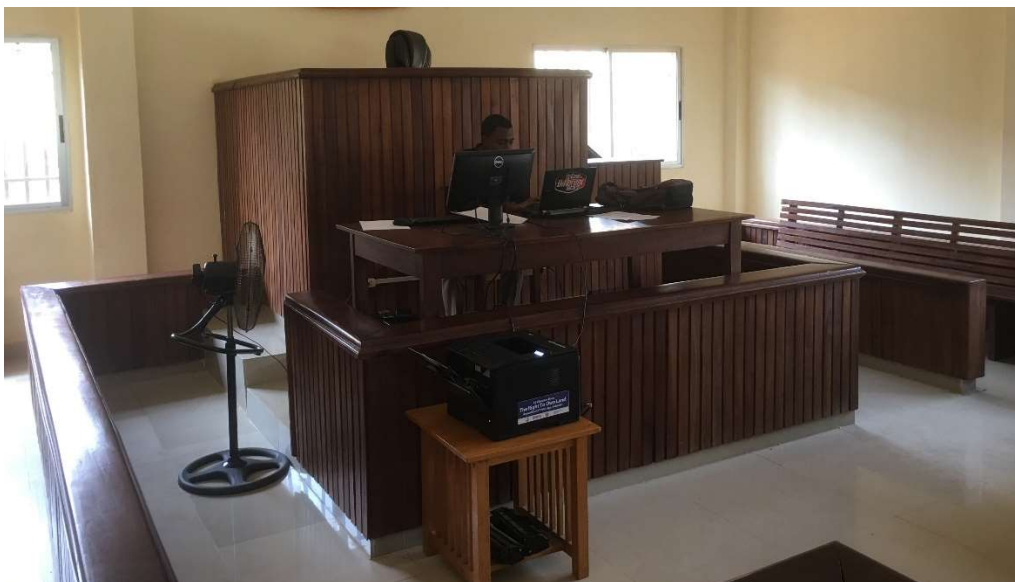


## Remote Court Hearings and Judicial Processes in Response to COVID-19 in Mission and other Fragile Settings

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*This paper is part of a series of communication tools, guidance and analysis issued by the Justice and Corrections Service (JCS), in the Office of Rule of Law and Security Institutions of the Department of Peace Operations, to address the rule of law aspects of COVID-19. These include **guidance on the Decongestion of Prisons**, issued on 1 April 2020, and a **Guidance and Operational Toolbox for Use in Prisons and other Places of Detention**, published in response to the pandemic. While the material has been developed with a particular focus on United Nations peacekeeping operations, special political missions (“Missions”) and other fragile settings, it may also be of utility to a broader range of contexts. In peacekeeping contexts, supporting national authorities to establish remote alternatives to court hearings and judicial proceedings accords with the spirit of the Action for Peacekeeping (A4P) Declaration of Shared Commitment, and the call by the Secretary-General to explore innovative approaches that are fit for the future. This paper has been consulted with United Nations partners through the Global Focal Point for the Rule of Law and with mission counterparts. It should be read in conjunction with the related UNDP/UNODC paper, “Ensuring Access to Justice in the Context of COVID-19”.*



This paper focuses on the use of video-conferencing facilities and other technologies to conduct court hearings and other judicial processes remotely to mitigate COVID-19 risks in United Nations mission and other fragile settings, and the corresponding safeguards that need to be put in place. Such measures should be considered not only as an immediate response to the crisis but also in the context of medium and longer-term planning in support of the progressive resumption of full judicial services. In the aftermath of COVID-19, the establishment of remote alternatives to court hearings and judicial processes may help improve access to justice in contexts where insecurity, limited transport, logistical and other obstacles may continue to severely hamper the delivery of justice services.

In response to the spread of COVID-19, many countries are now implementing or exploring the possibility of introducing internet-based virtual courtrooms or proceedings. In mission settings, certain cases may need to proceed because of their impact on the peace and security dynamics, in order, for instance, to protect civilians and combat impunity for atrocities committed by armed groups or members of state security forces. Judicial processes may also need to take place to facilitate the release of eligible detainees, including those in pre-trial detention who are not considered a threat to public safety and other context specific processes where judicial intervention is considered an imperative, including to protect those in society who are the most vulnerable.

This paper focuses on providing guidance for use in lower resourced contexts. It discusses a non-exhaustive list of the elements that national authorities may need to consider in relation to the conduct of remote judicial processes and draws upon examples of measures being undertaken in different settings. This not only includes a review of existing remote justice practices but also of the measures most recently introduced in a number of countries to expand the use of remote court hearings in response to COVID-19.

Implementing many of the measures highlighted below will undoubtedly be far more challenging in countries with limited resources, capacity and security. Lack of funding, limited access or exposure to technology, limited or no access to electricity, and low levels of literacy and poor access to justice or legal rights, will inevitably raise barriers to recourse to remote hearings. Legal frameworks and institutional cultures will also play an important role in facilitating or impeding the implementation of such measures. Their introduction may only be practical in some courts and in some parts of the country. However, some measures can, in many contexts, be implemented incrementally, supported by the Mission with partners in the Global Focal Point for the Rule of Law and in collaboration with external United Nations partners. Where technologies and appropriate processes and arrangements are established, remote work will help limit the need for in-person contact and mitigate the consequences of the reduced ability of courts to discharge their regular functions due to COVID-19.

### ***Deciding on the modality of the hearing***

In many court proceedings, the in-person presence of judges, prosecutors, lawyers, the accused, parties and witnesses is expected, necessary or even obligatory. Documents very often have to be filed in person at a court. To prevent the spread of COVID-19, courts are delaying trials and even temporarily closing. However, this balancing of public safety with due process could leave many cases in limbo for weeks, if not months, leading to increased backlogs and exacerbating the number of persons in pre-trial detention.

If legally, procedurally and technologically permissible, courts will need to carefully consider which cases they can postpone, which they should prioritize, and which can and should proceed remotely or in person. In some

cases, postponement may not have a significant detrimental impact on the proceedings. In others, denial of the right to a hearing without undue delay, will be a serious concern, particularly where it impacts the right to an effective remedy in cases of alleged violations of human rights and constitutional rights, involving irreparable harm, including to those persons deprived of their liberty, to women, children and other vulnerable groups, such as asylum-seekers/refugees. Postponement or delays in judicial proceedings may also compromise the safety of victims, witnesses and their families and possibly result in witnesses quitting important judicial procedures altogether.

As long as adequate protection is put in place with regard to COVID-19, there should be a strong preference for court proceedings to be conducted in person to safeguard the rights of all parties in criminal matters, as well as the publicity of hearings to ensure the transparency of proceedings.<sup>1</sup> Where cases are not capable of being postponed, special capacity and suitable arrangements for these hearings will need to be put in place, including physical distancing and necessary hygiene measures at the place of the hearing and transport to and from the court to minimize the risks of COVID-19 transmission.

In some instances, courts may have no choice but to introduce alternatives, such as telephone and videoconferencing, in order to address urgent issues and tackle backlogs. The suitability of such remote hearings, including their limitations, may need to be determined on a case-by-case basis. If they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the COVID-19 outbreak, such alternative modalities can, in principle, be deemed an appropriate response to the crisis.<sup>2</sup> They must be exceptional, temporary and accompanied by appropriate safeguards.

The categories of cases or types of proceedings where physical presence may not be deemed necessary should be established on a case-by-case basis informed by context-specific factors, and the interests of justice. Examples may include:

- ❖ **Detention/remand hearings:** release from or placement in pre-trial detention and early release, determination of bail or other non-custodial measures.
- ❖ **Delivery of judgements/sentencing**, particularly in circumstances where trial proceedings or any appellate hearings have already taken place.
- ❖ **Characteristically short, interlocutory or non-witness applications** may also be possible in some countries
- ❖ **Petty/minor crimes or misdemeanors** that usually carry lower custodial sentences and are often dealt with alternative measures; pre-trial cases involving such crimes could be prioritized. Consideration should be given to withdrawing minor cases altogether to enable courts to direct limited and strained resources on the most pressing and serious cases, including those related to the deprivation of liberty.
- ❖ **Cases being heard by mobile courts or other interlocutory matters** where witnesses or defendants do not need to be or opt out of being present.
- ❖ **Presentation of evidence** or provision of statements by witnesses.

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<sup>1</sup> In criminal matters, see ICCPR article 14(3)(d) right 'to be tried in his presence', and article 9(3) right to 'be brought promptly before a judge'.

<sup>2</sup> See "The Courts and COVID-19", International Commission of Jurists, 6 April 2020



## **Ensuring procedural guarantees and safeguards during remote hearings**

Care will need to be taken to ensure that the measures introduced do not undermine compliance with international fair trial norms and standards, including the rights of the accused, victims, witnesses and civil parties. In this regard, due consideration should be given to:

- **Sensitizing the judiciary and other stakeholders to the potential risks of remote hearings**, and highlighting the need for appropriate fair trial safeguards, including transparency, the right of defence and presumption of innocence, will be important.
- **Ensure effective access to lawyers, particularly for those in detention**, in a way that also protects attorney-client privilege. Defence counsel may find it more difficult to effectively represent, advise and interact with their clients privately and confidentially while defendants, victims, witnesses and civil parties may struggle to understand the proceedings and to participate. Victims/witnesses of sexual violence will still require the necessary legal and other support.
- **Ensuring access of the general public to proceedings**, including members of the media, and must not, for instance, be limited to a particular category of persons. Remote hearings, so far as possible, should remain public in nature, including through available technologies.
- **Communicating promptly, clearly and accurately** through accessible means and formats to the general public, to defendants, witnesses, victims, civil parties and lawyers. Such communication should include information regarding the nature, legal basis and time frame of the measures, while also setting out competencies for recourse or review.
- **Ensuring data security**, while procedural accommodations should continue to be made for persons with disabilities to ensure their effective participation on an equal basis with others. All such alternatives should be limited in time to the emergency situation and reviewed regularly including through the participation of the users.
- **Exercising due diligence on issues such as credibility of witnesses and defendants**, as nuances may be undetected and misunderstandings may, more easily, go unnoticed. In some jurisdictions, judges have reported that defendants can appear disengaged and remote and not engage with the proceedings to the extent they might usually in a courtroom setting.

## **Examples of current practice**

In many countries, criminal and civil procedural codes, judiciary acts or other legislation explicitly foresee or allow remote hearings, many of which are being increasingly relied upon during the pandemic. In addition, as an immediate response to COVID-19, new processes, arrangements, guidance and protocols have been introduced and implemented:

**Kenya** - a number of measures have been implemented to prevent the spread of COVID-19. Examples include implementation of e-filing for parties to cases, video-linked detention hearings in prisons, the delivery of judgements and rulings by video-link and transmission of written decisions to the parties by email. Court communication, including on scheduling, new electronic processes and other decisions or rulings are uploaded on a daily basis to the judiciary's website.

**Morocco** - initial steps towards the establishment of a remote court have been piloted since 2018.

**Uganda** - the Chief Justice issued a circular with a number of measures to be taken by the judiciary, which included allowing for judgments and rulings to be issued to parties online or via email and for matters related to prisoners or pre-trial detainees to be handled by video link, where possible.

**South Africa** - the Chief Justice issued a delegation of authority to all Heads of Court in the lower courts to issue such directives as would enable access to courts in relation to any urgent matters, bail applications, domestic violence related matters and cases involving children.

**Lebanon** - the judiciary, in cooperation with the bar association in Beirut and North Lebanon, has accelerated the pace of investigations through virtual platforms.

**Colombia** - the Judiciary Act promotes the use of advanced technology in the administration of justice, and remote hearings are commonly used for high-risk inmates, hearings in remote areas or involving suspects located outside the country, or in an effort to decrease costs associated with in-situ hearings.

**Peru** - physical presence remains the rule, however exceptionally at the request of the prosecutor, the accused or a judge, videoconferencing may be used where the accused is deprived of liberty or where his/her transfer to a court presents a risk.

**France** - videoconferencing is permitted and foreseen in the criminal procedural code where physical presence is not deemed necessary, mainly for pre-trial detention or other detention matters. In such instances, defense counsel is physically present either with the accused or with the judge. However, courts have broadly closed due to the pandemic and are only hearing matters on an exceptional basis.

**The United Kingdom**<sup>3</sup> - video and audio hearings are taking place and a Remote Hearing Protocol has been issued which applies to hearings of all kinds, including trials. The Coronavirus Act 2020 expands the availability of video and audio link in court proceedings, including allowing specific civil cases related to infectious diseases / coronavirus to take place by phone or by video; expanding the availability of video and audio link in various criminal proceedings; and allowing public participation in court and tribunal proceedings through audio and video.

**Latvia** - survivors of domestic violence can apply for protection orders via email, using the electronic signature built into the new generation of ID cards.

**Australia** - the Magistrates Court of Queensland is allowing all domestic violence applications to have appearances by video link for prosecution and prisoners and on telephone links for solicitors and parties to applications. This keeps only two people in court (the magistrate and the court clerk) to comply with social distancing government policy.

In some jurisdictions, judges have broad discretion on the methods by which hearings are conducted, which may include resort to video links at various stages. In settings where national legislation does not anticipate the possibility of remote court hearings, consideration could be given to whether the government or the judiciary have the legal authority to issue a decree or other guidelines to provide for remote hearings, potentially in accordance with exceptional measures contained in legislation related to public health emergencies.

Several options are being considered in **Libya** by the Supreme Judicial Council and the Supreme Court to overcome the difficulties related to the suspension of all courts and public prosecution offices. Following the announcement of a State of Emergency on 17 March, consideration is currently being given to the issuance of a Supreme Judicial Council decision authorizing the implementation of pilot remote courts, one criminal and one civil. A first remote court hearing took place at Al-Jadiedah prison in Tripoli on 14 April. It was reported that the judge processed tens of urgent requests and that eight detainees were released on bail.

In **Somalia**, the Chief Justice issued new guidelines for courts on 6 April to help curb the spread of COVID-19, directing that criminal proceedings be conducted via video conference. He also extended the period for the suspension of hearing civilian cases, noting that simpler cases be handled and resolved within police stations.

Several other missions have received requests from national authorities for technical assistance including the development of rules of procedures to set up remote court hearings, in **Haiti** and **Afghanistan**, for example.

### ***Adapting court hearing methods and procedures***

The method by which court hearings are conducted must be carefully considered, and an effective, efficient and transparent process agreed for court summons, the scheduling of hearings, remote presence of parties, recording of proceedings, issuance of decisions, etc. In a number of countries, several elements of judicial work are

**Adopting court hearings: In England and Wales**, for example, the method by which remote hearings are conducted is always a matter for the judge and nothing derogates from the judge's duty to determine these issues in accordance with existing law. Before ordering a hearing by video link the judge must verify that there are suitable facilities and arrangements available and the parties will need to be more proactive in relation to upcoming hearings.

The Court will propose one of three solutions to the parties (i) a remote communications method for the hearing (e.g. conference call, video link, telephone call or another method); (ii) that the case will proceed in court with appropriate precautions to prevent transmission of COVID-19; (iii) adjournment because a remote hearing is not possible or desirable due to different factors such as the length of the proceedings, the number of parties, legal representatives and/or witnesses. If the parties disagree with the Court's proposal, then they may make submissions in writing as to what they consider to be a more appropriate proposal following which the judge will make a binding determination and issue directions.

In preparation for remote hearings, the parties are asked to prepare an electronic paginated bundle of essential documents and authorities which should be provided to the judge's clerk, court official or judge and to all other representatives / parties in advance of the hearing.

For the remote hearing itself, once the parties are logged into the remote communication facility, the judge will then be invited to join. Unless the judge directs otherwise, the proceedings will be recorded by: (i) recording the audio in the open court room using the court's recording systems; (ii) recording the hearing on the remote communication system used for the hearing; or (iii) recording the hearing in court using a mobile telephone to record the hearing. In any event, the parties must not record the hearing without the judge's permission.

<sup>3</sup> For additional information regarding the United Kingdom, see Civil Justice in England and Wales: Protocol Regarding Remote Hearings (26 March 2020). Available at: [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf)

**Adopting court hearings:** The model under consideration in **Libya** consists of assigning four judges (two criminal and two personal status), two public prosecutors and two clerks from the court in Tripoli for petty crimes and misdemeanors that are punishable by imprisonment for less than one year. Those selected will have considerable knowledge on how to use a laptop, Microsoft Word and Microsoft Teams.

Clerks would scan (i) all urgent matters, (ii) requests of release, (iii) orders of detention and (iv) case files. The clerk shall email them to the judge and the public prosecutor at home and notify the parties and defense to submit any memo, if they wish, within two days.

For the urgent requests and orders where parties are not required by law to be present, the judge has 24 hours to decide upon it, type the decision and email it back to the clerk in order to print it out on the court's letterhead, stamp it, and deliver it to the parties on the same day.

For misdemeanors, the judge sets a date, no later than two days after, to rule upon the case, and communicate it to the public prosecutor and the clerk who notifies the judicial police, the parties and the defense. The latter can be present in the court and communicate with the judge via Microsoft Teams to respond to any questions.

The judge shall type the verdict and email it back to the clerk who prints it out on the court's letterhead, stamp it and deliver it to the judicial police and all parties within 24 hours.

The pilot remote court initiative is being supported through the joint UNSMIL/UNDP Policing and Security Programme, which includes the provision of 15 laptops and training to support remote hearings by two pilot courts starting in April 2020.

now being conducted remotely due to COVID-19. Judges are opting to deliver judgements and rulings via email, subject to the consent of the parties, also giving them the option of deferring the matter until regular court business resumes.

In addition, judiciaries are utilizing dedicated websites to communicate information related to all judicial matters that are being dealt with electronically or remotely.<sup>4</sup>



### **Logistical considerations: a required level of technology needs to be in place**

Research suggests that how video conferencing facilities are used, their design and operation, can impact the outcome of judicial proceedings. Therefore, careful consideration, accounting for context specific factors and constraints, should be given to the type of technology and its place and method of use. Consideration should be given to at least four phases of the proceedings: (i) what happens before the day of the court appearance; (ii) what occurs at the remote space on the day of the court encounter, i.e. facilitating presence in and out of the remote room and connecting and disconnecting the video link to the court; (iii) what occurs over the course of the video link; and (iv) what occurs at the conclusion of the hearing.<sup>5</sup>

<sup>4</sup> See for example, <https://www.judiciary.go.ke/resources/judiciaryke-covid-19/>

<sup>5</sup> For additional information for example see pp. 45 – 86 Gateways to justice: design and operational guidelines for remote participation in court proceedings, available at: <https://researchdirect.westernsydney.edu.au/islandora/object/uws%3A15505/datastream/PDF/view>

Furthermore, remote hearings should ensure secure real-time, synchronized two-way audio and video communication that allows defendants and their counsel and where applicable victims and their legal representatives to fully follow and participate in the hearing. Minimum logistical and technical requirements would include stable and dedicated internet connection, video cameras, microphones, speakers, and a safe and secure communication platform that allows access to authorized persons only and guarantees the protection of the safety and rights of witnesses and victims. The limited bandwidth will be a challenge in many fragile countries.

**Ethiopia** - As part of its Comprehensive Justice System Reform Program, an ambitious 'TeleCourt' system has been underway in Ethiopia for several years using information communications technologies (ICTs) in the justice sector as part of efforts to provide justice to the grassroots through improved service delivery and responsiveness. This has involved the establishment of a network of Telecourts that allows trials to take place between remote areas and regional or federal courts through videoconferencing and satellite Internet connection. Dedicated video facilities and, in some cases, dedicated spaces, were installed. The TeleCourt uses ICTs not only to transform the court itself (e.g. by improving recording and access to documentation) but in allowing courts in the center and in the periphery of the country to connect with one another and provide justice 'at a distance.' The first TeleCourt was launched back in 2006 in the Amhara Regional State, an area whose geographic location, hilly terrain and poor road conditions made the conventional justice system inaccessible and inefficient, especially during the rainy season. TeleCourts were subsequently extended to the other remaining regional states.

Source: <http://doi.org/10.5334/sta.fn>

Subject to applicable law and the prerogative of the presiding judge, remote court proceedings should be recorded as a record of the legal process, and if so, the recording should be placed on a secure server or other storage medium, under the custody of the presiding judge.

Ideally remote hearings should, so far as possible, still be public hearings in nature. Options to achieve this could include relaying the audio and (if available) video of the hearing via an official website or local radio channel; allowing journalists to log in to the remote hearing in an observer capacity; delayed release of the video or audio stream on the internet and communication of decisions via context-appropriate and accessible public platforms (print/electronic media, radio, television, public statements).

**Some potential issues that may need to be addressed to facilitate remote hearings** could include:

- ***Need for training*** on the use of both the hardware and software necessary to conduct remote hearings by all participants, including court personnel and members of the judiciary
- Difficulties in ***connecting to the internet or insufficient bandwidth*** to conduct video hearings
- Identification of ***secure video conferencing software*** that functions well with relatively low internet bandwidth
- ***Communicating with the public*** and the need to sensitize the public at large regarding how the courts will be operating during this time and where they can access information including on proceedings and how they can contact court officials and access judicial services, etc.
- ***Communicating with the parties to the proceedings***, to ensure that they are able to contact judges and court officials to convey information and filings on issues related to the fairness of the proceedings, data



and personal security issues and legal challenges or appeals on procedural grounds on the conduct of the remote hearings, or related to the authenticity/credibility of the evidence conveyed remotely.

### **Final remarks**

In order **to ensure access to justice during the COVID-19 pandemic, justice systems will need to adapt** the way they conduct their work, including through the adoption of remote operations. Physical distancing and other restrictions on movement in order to safeguard public health inevitably mean that in some instances remote access to justice may be necessary.

The response to **COVID-19 potentially presents an opportunity for courts to maintain or even enhance some of their operations**, improve the administration of justice and deliver greater access to justice, while ensuring that the rights of defendants are protected. While court operations, rules and practices may need to be adapted to address the immediate and urgent needs posed by the pandemic, national justice systems, supported by the United Nations and other partners, should not miss the opportunity to also think longer-term.

Where feasible, and with appropriate safeguards, **the use of remote technologies to conduct court hearings and other judicial proceedings may help facilitate access to justice**, for example, in settings where such services are not available in certain geographic areas as a result of poor infrastructure, adverse weather conditions, or due to lack of a secure environment. Remote court hearings can also help reduce processing, backlogs and pre-trial detention. They may also serve to facilitate the broader participation of individuals who may otherwise be unable to travel to court. In this regard, remote court hearings can complement other initiatives widely supported by missions to enhance access to justice, including, mobile courts.

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