

**SAFEGUARDING THE RIGHT  
TO A FAIR TRIAL DURING  
THE CORONAVIRUS PANDEMIC:  
REMOTE CRIMINAL JUSTICE  
PROCEEDINGS**

**Fair**

**Trials**

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## Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings

The Coronavirus (COVID-19) pandemic is now a global health emergency, affecting more than a billion people worldwide. In more and more countries, normal life has effectively been suspended, as sweeping measures are introduced to control the spread of the disease by way of 'lockdowns', bans on social gatherings, and the closure of public facilities. These measures have also had an impact on criminal justice systems, as access to courts and prisons have come under severe restrictions, and as non-essential travel has become almost impossible in many countries.

The administration of justice cannot come to a total standstill, whatever the circumstances. It is essential that states continue to carry out essential functions, including the processing of criminal cases, and safeguarding the rights and welfare of criminal defendants, especially those who are detained. Many states have temporarily postponed all non-urgent court hearings, but with no clear end of the crisis in sight, various jurisdictions across the world are seeking ways to keep the courts running through means of remote access, including via video-link or telephone hearings.

The increased use of remote justice proceedings might be introduced initially as a temporary measure, but once in place, there is every likelihood that they will be made permanent, especially if there are perceived costs and efficiency advantages. It is essential that states do not rush to adopt these measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence.

We welcome the fact that states are taking extraordinary measures to keep their criminal justice systems operational, preventing lengthy delays in criminal proceedings, and ensuring that urgent matters, such as pre-trial detention hearings, are not postponed. However, the human rights impact of remote justice procedures, and in particular, the implications on the right to a fair trial should not be ignored. Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns, and accompanied by appropriate safeguards to protect the rights of defendants.

Various human rights advocates have already outlined concerns about remote justice and its impact on the rights of defendants.<sup>1</sup> In this paper, Fair Trials summarises these concerns and provides practical recommendations to inform states that are either considering adopting or expanding the use of remote communications systems in criminal justice proceedings, or are in the process of implementing them.

<sup>1</sup> For example, Transform Justice '[Defendants on video – conveyor belt justice or a revolution in access?](#)'; Legal Education Foundation '[Briefing: Coronavirus Bill, Courts and the Rule of Law](#)'; Anne Wallace '[Courts and Coronavirus: Is Videoconferencing a Solution?](#)'; Advocates Gateway '[Planning to question someone using a remote link](#)'

## Remote or In-Person Hearings?

As a general rule, defendants should be able to participate in criminal justice proceedings in person, and it is especially crucial that they are physically present in the courtroom during trial. Defendants' absence from the courtroom seriously undermines their ability to participate in criminal justice proceedings effectively, and the exercise of the rights of the defence.

Even in these extreme and unusual circumstances, there should be strong preference for court proceedings to be conducted in person to safeguard the rights of defendants. Non-urgent criminal trials, in particular, should not take place if the defendant cannot be physically presented in court for public health reasons. However, we acknowledge that criminal justice systems need to continue to function during this global health crisis, and courts will need to resort to remote hearings to deal with urgent matters, and to prevent an unprecedented backlog of cases that could harm the effective administration of justice in the future.

When determining whether or not a court hearing should take place remotely, the following factors inter alia should be taken into consideration:

- the length of delays and their likely impact on the rights of defendants (particularly where the defendant's period in pre-trial detention is likely to be prolonged);<sup>2</sup>
- the nature of the hearing, including:
  - the complexity of the case and the matter being dealt with;
  - the need to call witnesses; and
  - the likely impact of the hearing on the rights of the defendant (for example, if it puts the defendant at risk of deprivation of liberty);
- the availability and quality of equipment and systems used for communication between the court and the defendant; and
- the existence of impairments or other factors that could negatively affect the defendant's ability to participate effectively in court proceedings.

Where there are strong justifications that mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place that address various threats to the right to a fair trial.

## Issue 1: Access to a lawyer and effective legal assistance

### a) Access to legal assistance for defendants in detention

In response to the COVID-19 pandemic, prisons and detention centres across the world have been limiting or banning visits, leaving detainees further isolated from the outside world. These measures are no doubt understandable given the need to protect both detainees and prison staff, but they are interfering with the right of access to essential sources of support, including legal assistance.

Restrictions and bans on in-person visits are making defendants increasingly reliant on telephones and other forms of remote communication to maintain contact with their lawyers. Reports suggest, however, that prisoners in some jurisdictions are facing additional restrictions on phone calls as a result of the COVID-19 pandemic (for example, due to concerns that prison staff will be exposed to health risks by having to accompany prisoners to telephones). Phone calls from prisons in some countries are also not free of charge, meaning that many prisoners will also be significantly disincentivised if not outright prevented from communicating with their lawyers.

There is also a risk that reliance on remote communications will undermine the quality of legal assistance. Restrictions on the frequency and length of telephone calls, for example, could affect the ability to provide and obtain legal advice, and the lack of in-person meetings might make it harder for lawyers to establish rapport and a strong working relationship with their clients.

<sup>2</sup> See Fair Trials' [Practical Guidance on Pre-Trial Detention during the COVID-19 outbreak](#).

## Recommendations:

- All prisons and detention facilities should have adequate facilities to make sure that all detainees have effective and frequent access to telephones (and other permissible forms of instant communication). This may include updating, or increasing the number of equipment to cope with increased demand.
- Prisons and detention facilities should aim to make video-conferencing facilities available for defendants.
- Strict confidentiality of defendant-lawyer communications should be respected. Defendants should have access to secure spaces for confidential discussions, out of earshot from prison staff and police. Communication channels should be secure, so that calls cannot be intercepted or recorded.
- Where there are restrictions on client-defendant correspondence (including, for example, the frequency and length of phone calls), these should be significantly relaxed to compensate for the reduction of in-person legal visits.
- The use of telephones (and other permissible forms of instant communication) should be made available free of charge to prisoners when communicating with their lawyers.

### **b) Effective legal assistance before, during, and after remote court hearings**

Video-link hearings can make it very challenging for lawyers and defendants to interact with each other, and this could have serious implications on the quality and effectiveness of legal assistance. Video-link hearings deprive the opportunity for defendants to meet their lawyers in person, in secure, private environments where confidential discussions can take place. They can also make it much harder for lawyers and defendants to communicate discreetly during the hearing.

Where consultations between a defence lawyer and the defendant are made possible before or during the hearing through a courtroom video conference equipment or phone, there are concerns about the confidentiality of these consultations (given the possible presence of court or prison staff at either end), and possible pressure or time limits on the consultations.

## Recommendations:

- Defendants should be given sufficient time before, during, and after court hearings to consult their lawyers.
- Courts should be equipped with adequate facilities to enable confidential video-conferencing or telephone calls between defence lawyers and defendants without undue time pressure. These might include separate spaces in courts with video-conferencing equipment for lawyer-defendant consultations.
- Defendants should be given access to secure rooms or areas, before, during and after hearings, where they can communicate with their lawyers confidentially.

## Issue 2: Effective participation



Technological developments in recent years have made significant improvements to video-conferencing systems, but the physical absence of the defendant from the courtroom is likely to have an impact on their ability to participate fully and effectively in their own criminal proceedings. This is a particularly serious challenge, where the defendant is unrepresented, and has no-one physically present in the courtroom to advocate on their behalf. Without legal assistance, defendants are likely to find remote hearings even more isolating, stressful, and disorienting.

Limitations in video-conferencing systems could mean that defendants not only find it more difficult to follow and understand the proceedings, but that they are also prevented from observing the courtroom in its entirety. Defendants might be deprived of the possibility of reading nonverbal cues from other courtroom participants, for example, to ascertain the mood of the jury or judges. They may also be limited in their ability to confer confidentially with counsel during proceedings. There are likely to be significant challenges where hearings involve the filing or assessment of evidence. Unless there are adequate facilities for defendants to file and inspect evidence during court proceedings, they will be deprived of their ability to defend themselves.

Defendants could also be prevented from participating in their court proceedings where there are technical issues affecting the quality of audio or video such as delays, echoes or interruptions.

### Recommendations:

- Where a defendant is unrepresented in a remote hearing, judges, prosecutors, or court staff (as appropriate) should proactively assist the defendant to ensure that they have access to legal assistance.
- Legal aid eligibility rules should be reviewed to ensure that no defendant taking part in remote court hearings is unrepresented for financial reasons.
- Video-link equipment should imitate courtroom participation as much as possible. Defendants should be able to get a full view of the courtroom, and be able to observe all courtroom participants.
- Where remote hearings involve the filing or review of evidence, the defendant should be given access to facilities that enable them inspect evidence and submit evidence during the hearing.
- Equipment and communications systems used for remote hearings should provide continuously reliable sound and video.
- Hearings should be halted where connection is interrupted, and only continue once the problem has been fixed.
- Technical support should be readily available at courts and detention facilities to fix faults that affect the quality and reliability of audio and visual communications.
- Defendants should be able to contact their lawyer confidentially during proceedings to ask for clarifications or to confer and provide instructions.

## Issue 3: Access to information



Defendants could face further restrictions on their access to information, and in particular, access to the materials regarding their case, as a result of measures introduced to control the spread of the coronavirus. This is a particular challenge in jurisdictions where defendants can only access case files at specific sites (such as police stations or courthouses), or they are reliant on case files to be brought to places of detention. Restrictions on travel, and the closure of certain facilities (such as courthouses) could have a significant impact on the right of access to information, particularly for defendants in detention.

### Recommendations:

- Defendants and defence lawyers should be given access to case files in a way that enables defendants to exercise their defence rights effectively.
- Defendants should be given physical or electronic access to the case file, free of charge.

## Issue 4: Presumption of innocence



The fact that a defendant is not physically produced in court should have no impact on how they are presented in court proceedings. However, if defendants do not physically leave their places of detention to attend their hearings, there is an increased likelihood that they will appear in court, via video-link, as 'prisoners'. They might, for example, still be wearing prison clothes, or they could appear on screens with a background clearly showing that they are in prison.

### Recommendations:

- Defendants in detention should be presented in clothing appropriate for court hearings, and they should be given access to facilities that allow them to wear appropriate clothing.
- Defendants should be presented during video-link hearings with a neutral backdrop, that does not suggest that they have been deprived of their liberty.

## Issue 5: Vulnerable defendants and other defendants with special needs

Remote justice procedures have implications on the rights of all defendants, but their impact is no doubt especially severe for vulnerable defendants, and those with other special needs (such as interpretation and translation needs).

Defendants with mental impairments, in particular, face serious barriers to effective legal assistance and to effective participation in most normal court settings. Depending on the defendant and the type of impairment, remote justice procedures could severely worsen these challenges, making it even more difficult for them to understand and follow court proceedings. There are similar challenges for those with language assistance needs, who face additional barriers to communication.

### Recommendations:

- Defendants taking part in remote criminal justice proceedings should be subject to an individualised needs assessment, so that any impairments that affect their ability to participate effectively can be identified.
- Depending on the type of vulnerability or impairment, remote justice proceedings might not be appropriate at all. If they are, individualised procedural adjustments should be made to facilitate effective participation.
- Defendants with language or other communication assistance needs should be given access to suitably qualified professionals to aid communication with the court and with their lawyers. As far as possible, language and communication assistance professionals should be present in the same room as the defendant during court proceedings.

## Issue 6: Data Collection and Impact Assessment

The unprecedented circumstances brought about by the COVID-19 pandemic are likely to result in the expansion of the use of video-conferencing technology into new areas of criminal proceedings, and into more jurisdictions. The real impact of video-link and other forms of remote communications systems on criminal justice outcomes and on the fairness of criminal justice proceedings needs to be better understood.

The reliability of the equipment and systems used for remote justice proceedings should also be monitored, so that it is possible to evaluate whether or not systems being used are fit for purpose. Any decisions on the continuation or further expansion of remote justice procedures should be based on solid evidence.

### Recommendations:

- Data should be collected to monitor the impact of remote justice procedures on criminal justice outcomes and fairness of criminal justice proceedings.
- The reliability of equipment and systems used for remote justice proceedings should be monitored.



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