

Videoconferencing, Courts and COVID-19

Recommendations Based on International Standards

November 2020

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26 November 2020

Introduction

This briefing note supplements more general guidance on the Courts and COVID-19 issued in May 2020. It adds further detailed analysis and recommendations on the use of video-conferencing and similar technologies in court proceedings, including as a health protection measure during the COVID-19 pandemic.¹

While State institutions, including the judiciary and court services, must adopt measures to protect the right to life and right to health during health emergencies,² such measures must also respect the criteria for limitation or derogation of human rights, including among other things requirements of legality, non-discrimination, necessity, and proportionality (and time-limitedness, particularly for derogations).³ The UN Human Rights Council has, in the context of the COVID-19 pandemic, both affirmed this as a general rule and in the specific context of the administration of justice.⁴

The ICJ general guidance on the Courts and COVID-19 emphasised the special role of courts in securing human rights and the rule of law, particularly in situations of emergency.⁵ Ensuring that judicial institutions can continue to function effectively at all times is essential to the right to fair trial by an independent and impartial court; the right to judicial control of deprivation of liberty; the right to an effective remedy; and to ensuring that all branches of government act lawfully.

The Inter-American Commission on Human Rights, for instance, has stated as follows regarding guarantees for democracy and the rule of law during the COVID-19 pandemic:⁶

...access to justice is a fundamental pillar of democracy, the exercise and functioning of which cannot be suspended or limited. This implies that the current emergency cannot be used as a reason to suspend judicial proceedings that guarantee the exercise of rights and freedoms, particularly those that seek to oversee or check the actions of

¹ ICJ, "The Courts and COVID-19" (5 May 2020), available at: <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>.

² See, more generally, ICJ, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses* (1 September 2020), <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

³ See e.g. Human Rights Committee, General Comment no 29 on States of Emergency (2001), <https://undocs.org/CCPR/C/21/Rev.1/Add.11>; and Statement on derogations from the Covenant in connection with the COVID-19 pandemic (24 April 2020), <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>. See also Inter-American Commission of Human Rights, resolution No 1 of 2020 (10 April 2020), "Pandemic and Human Rights in the Americas", operative paragraph 3(g), <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

⁴ See Human Rights Council, Presidential Statement 43/1 (29 May 2020), "Human rights implications of the COVID-19 pandemic" <https://undocs.org/en/A/HRC/PRST/43/1>, Preamble; and Resolution 44/9 (16 July 2020), "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers" <https://undocs.org/en/A/HRC/RES/44/9>, Preamble.

⁵ See <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>. See also ICJ, Legal Commentary to the Geneva Declaration (2011), <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>.

⁶ Inter-American Commission of Human Rights, "IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic" (10 June 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/130.asp.

authorities during this time. It is therefore essential that states ensure there are suitable, flexible means available for filing appeals that seek to oversee and keep check on provisions and rulings that are issued during emergency situations. In this regard, all public institutions must be able to oversee and keep check on each of the temporary measures adopted that suspend or restrict rights. States must also adopt measures to protect judicial personnel and ensure judicial services continue to operate.

Indeed, while State institutions must recognize and respect, protect and fulfil the right to life and the right to health of judges⁷ (as well as prosecutors, lawyers, and others involved in court hearings), the essential character of judicial functions is such that judges may be called upon to assume some risks to their life or health that might not be justified in relation to other persons.

⁷ Some legal systems distinguish between “judges” and “magistrates” or other kinds of judicial authorities. In this briefing paper, unless the context indicates otherwise, “judge” refers to any authority that is empowered by national law to exercise judicial power, with the requisite independence and impartiality.

Videoconferencing and Judicial Proceedings: General Considerations

In most criminal or civil trials (as distinct from procedural hearings and appeals), the individual parties (or, in criminal matters, the prosecutors and accused) and their lawyers normally appear physically in person before the Court. The same is true when a person arrested or detained on a criminal charge is first brought before a judicial authority within the first hours or days after arrest.

However, in response to the COVID-19 outbreak, many judiciaries are making available an option, or imposing a requirement, that individuals and their lawyers appear at such hearings only by video-conferencing or similar substitutes for physical presence.⁸ Indeed, the UN Human Rights Council, in a resolution adopted by consensus in July 2020:

Urges States to ensure that judiciaries have the necessary resources and capacity to help to maintain functionality, accountability, transparency and integrity, and to ensure due process and the continuity of judicial activities, including efficient access to justice consistent with the right to a fair trial and other fundamental rights and freedoms, during extraordinary situations, including the COVID-19 pandemic and other crisis situations;

Encourages States to make available to judiciaries current information and communications technology and innovative online solutions, enabling digital connectivity, to help to ensure access to justice and respect for the right to a fair trial and other procedural rights, including in extraordinary situations, such as the COVID-19 pandemic and other crisis situations, and to ensure that judicial and any other relevant national authorities are able to elaborate the necessary procedural framework and technical solutions to this end;⁹

As a starting point, whenever all the parties give their free and fully informed consent to the use of video-conferencing in any given judicial proceedings, its use in such circumstances would appear not to give rise to concerns under international human rights law and rule of law standards. In providing for and evaluating whether consent is freely given and fully informed, regard must be given to the particular situation of women, children, older persons, persons with disabilities, persons deprived of liberty, and others who may be in a situation where they may be forced or manipulated into providing consent that is not fully voluntary and informed.

⁸ See on this, and more generally, Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights ("OSCE ODIHR"), "The functioning of courts in the Covid-19 pandemic" (2 Nov 2020), <https://www.osce.org/odihr/469170>, pp 13, 20-28.

⁹ Resolution 44/9 (16 July 2020), "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers" <https://undocs.org/en/A/HRC/RES/44/9>, paras 17-18.

As the next section will discuss, the requirement of publicity of hearings must also be respected when such technologies are used.

As concerns the imposition of videoconferencing as a substitute for physical presence of an individual party (including, in criminal proceedings, the accused person) in a judicial hearing, without the party's consent, the situation is more complex.¹⁰

An initial question is whether, for the type of hearing concerned, international law confers a right of the individual to be physically present; if so, the next question is whether international law permits the right to be limited in some circumstances, including through a derogation in situations of emergency, and whether the applicable criteria for such a limitation or derogation are met.

As will be described in the sections that follow, international law clearly contemplates a right of the accused to be physically present for his or her criminal trial, and the right of a person arrested or detained on criminal charges to be physically present for his or her initial hearing before the judge. The broader right of anyone deprived of liberty on any ground to challenge the lawfulness of his or her detention before a court may also imply the right to be brought physically before the court.

Even if international law does not confer a right of individuals to be physically present for the type of hearing in question, if such a right is provided for by national law, then the question must also be considered whether the imposition of videoconferencing in the circumstances is permitted under national law and whether it is being applied in a manner that fully respects the right of the individual to confidential communication with their lawyer, as well as rights of non-discrimination and equal access to justice.¹¹

In hearings other than those for which international law and standards contemplate a right of physical presence, the non-consensual imposition of videoconferencing on a judicial hearing may be permissible if it is based in law, non-discriminatory, time-limited and demonstrably necessary and proportionate in the local circumstances of the COVID-19 pandemic and the specific characteristics of the individual case, and is implemented with safeguards to address the other fair trial rights of the affected person.¹²

For example, the European Court of Human Rights has held that participation by videoconferencing may generally be acceptable in criminal appellate hearings¹³ and hearings in civil matters,¹⁴ if certain conditions and safeguards are in place (with a secure means of

¹⁰ This briefing note only addresses the imposition of videoconferencing against the wishes of an individual party or accused who wishes to be physically present for the hearing, it does not address the use of videoconferencing for the examination and cross-examination of witnesses.

¹¹ See e.g. European Court of Human Rights ("ECtHR"), *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, para 68.

¹² See also Fair Trials, "Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings" (30 March 2020) available at <https://www.fairtrials.org/news/safeguarding-right-fair-trial-during-coronavirus-pandemic-remote-criminal-justice-proceedings>, and see <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>.

¹³ E.g. *Sakniovskiy v Russia* [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-101568>, paras 94 to 98; *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, paras 64 to 72; and *Golubev v Russia* (decision, 2006), <http://hudoc.echr.coe.int/eng?i=001-78357>.

¹⁴ *Yevdokimov v Russia* (2016), <http://hudoc.echr.coe.int/eng?i=001-160620> paras 40 to 43.

confidential communication between the affected person and his or her lawyer being particularly important in this regard, as will be described in a later section of this paper).

While the law may make general provision for the adoption of such procedures in such cases, the decision whether actually to adopt them in any particular case should be made by the judge on a case-by-case basis. The European Court of Human Rights has for instance held that even for categories of hearings where physical presence of the individual is not always necessary, the character of a particular hearing may make physical presence indispensable, such as matters where testimony of the person, and assessments of credibility, are key. The Court has found violations of the European Convention on Human Rights where the courts did not appear to have conducted an adequate substantive analysis, with published reasons, on whether physical presence was necessary to the fairness of the particular hearing, what options existed apart from total exclusion if physical presence was not strictly required, and what compensating measures would be needed to counter-balance any prejudice to the relevant party.¹⁵

To ensure independence of the judiciary and avoid issues with perceived security of communications with counsel, any decision to implement a system for non-consensual imposition of videoconferencing for judicial proceedings, as well as decisions to use it in particular cases, should be within the exclusive jurisdiction and operational oversight of the judiciary itself and not persons or entities within the executive branch of government.

¹⁵ Yevdokimov v Russia (2016), <http://hudoc.echr.coe.int/eng?i=001-160620> paras 22-26, 33-53; Vladimir Vasilyev v Russia (2012), <http://hudoc.echr.coe.int/eng?i=001-108478>, paras 75-90.

Videoconferencing and the Publicity of Hearings

International human rights law, including the International Covenant on Civil and Political Rights (ICCPR), incorporates the right to a “public hearing” in all determinations of criminal charges or of a person’s “rights and obligations in a suit at law.”¹⁶ The publicity of hearings “ensures the transparency of proceedings and thus, provides an important safeguard for the interest of the individual and of society at large.” Accordingly, “Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.”¹⁷

However, the requirement of a public hearing “does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities”. Courts also “have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice”. Apart from such exceptional circumstances, however, “a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons”.¹⁸

“Public health” is not listed as a ground for excluding publicity of proceedings, despite being listed as a ground for limiting other rights under the ICCPR. In many cases, it may be possible to preserve publicity of proceedings by video and audio broadcasting or allowing particular individuals to have access to a video and audio feed. On the other hand, generally limiting or excluding public access to court proceedings on health grounds, without any such substitutes, may require a derogation where the requirements for such measures are met.

¹⁶ ICCPR, article 14(1). Similar provisions appear in regional human rights treaties; however, in some cases differences in the wording of the regional instruments has generated different nuances to the application of the right by the relevant regional bodies. For instance, the general fair trial provision in article 8(1) of the American Convention on Human Rights refers to “the right to be heard” (*derecho a ser oída*) in the official Spanish version, though the phrase “right to a hearing” is used in the English version, and furthermore the American Convention explicitly mentions the publicity of the proceeding only in relation to criminal proceedings, in its article 8(5). Nevertheless, a State that is party to both the ICCPR and the American Convention must in any event implement its obligation under the ICCPR to provide for the publicity of all hearings covered by article 14.

¹⁷ Human Rights Committee, General Comment no 32 on Article 14: Right to equality before courts and tribunals and to a fair trial (2007), <https://undocs.org/CCPR/C/GC/32>, para 28.

¹⁸ General Comment no 32, <https://undocs.org/CCPR/C/GC/32>, para 29.

Videoconferencing and Criminal Trials

The right to fair trial under international human rights law, including as set out in the ICCPR, applies to all criminal cases and civil lawsuits. The general requirement of fairness is further elaborated upon by a set of specific guarantees in criminal proceedings. For instance, article 14(3) of the ICCPR provides in part:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...

The Human Rights Committee has articulated certain limits to the scope for derogations from article 14 in situations of emergency. It has said that, "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole" and that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".¹⁹ Furthermore, the Committee has emphasised:

States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. ... Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.²⁰

In cases potentially leading to the imposition of the death penalty, the non-derogable right to life (and not to be arbitrarily deprived thereof), including under article 6 of the ICCPR, is also engaged. Since, as the Human Rights Committee has held, "the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights", and "as article 6 of the Covenant is non-derogable in its entirety," consequently "any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14." Accordingly in all circumstances, including the COVID-19 pandemic and other public emergencies, "In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of

¹⁹ General Comment no 29 on States of Emergency (article 4) (2001), <https://undocs.org/CCPR/C/21/Rev.1/Add.11>, paras 15-16.

²⁰ General Comment no 32, <https://undocs.org/CCPR/C/GC/32>, para 6. See also Inter-American Commission on Human Rights, "IACHR Calls on the OAS States to Ensure That the Emergency Measures They Adopt to Address the COVID-19 Pandemic Are Compatible with Their International Obligations" (17 April 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/076.asp.

death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)."²¹

Article 14(3)(d) of the ICCPR, as shown above, specifically recognizes the right of a person, in full equality, "to be tried in his presence".

The European Convention on Human Rights does not contain a provision specifically providing for the right "to be tried in one's presence".²² However, the European Court of Human Rights judgments that contemplate use of videoconferencing in civil proceedings or criminal appeal hearings, specifically contrast such proceedings with criminal trials, in respect of which the Court repeatedly emphasises the need for physical presence.²³ The Court has affirmed that, "In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial",²⁴ and that, "the right to be present at the trial is one of the cornerstone rights of an accused".²⁵

The African Charter on Human and Peoples' Rights makes a general provision for fair trial in its article 7. The African Commission on Human and Peoples' Rights elaborated on this in its 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, affirming that: "In criminal proceedings, the accused has the right to be tried in his or her presence" and, "The accused has the right to appear in person before the judicial body."²⁶

Article 16(3) of the Arab Charter on Human Rights provides that everyone charged with a criminal offence has "The right to be tried in his presence".²⁷

Clearly, the potential scope for imposition of videoconferencing against the wishes of the person is at its narrowest in criminal trials. Indeed, given the provisions and judicial reasoning set out above, it is difficult to see how non-consensual videoconferencing of the accused and his or her lawyer could ever be compatible with the safeguards required of a criminal trial, particularly recalling the Human Rights Committee's above-noted affirmation that, "Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."

The ICJ is unaware of any case in which the Human Rights Committee, the European Court of Human Rights or any other regional human rights court has found the non-consensual imposition of videoconferencing on the accused and/or his lawyer in a criminal trial, to be compatible with the right to a fair trial.

²¹ General Comment no 32, paras 6 and 59; General Comment no 36 on article 6 right to life (2019), <https://undocs.org/CCPR/C/GC/36>, paras 41 to 42, 67.

²² Article 6(3)(c) instead refers to the right, "to defend himself in person or through legal assistance of his own choosing". American Convention on Human Rights, article 8(2)(d) is similar.

²³ E.g. *Sakhnovskiy v Russia* [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-101568>, para 96; *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, para 50; and *Golubev v Russia* (decision, 2006), <http://hudoc.echr.coe.int/eng?i=001-78357>.

²⁴ *Marcello Viola v Italy* (2006), <http://hudoc.echr.coe.int/eng?i=001-77246>, para 50.

²⁵ *Golubev v Russia* (decision, 2006), <http://hudoc.echr.coe.int/eng?i=001-78357>, citing *Colozza v Italy* (1985), Series A no 89, para 27.

²⁶ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf, para N(6)(c).

²⁷ The American Convention on Human Rights makes general provision for fair trial under its article 8 (more particularly, the "right to be heard"), but does not specifically address whether the person should be tried in his or her presence.

Videoconferencing and Judicial Review of Deprivation of Liberty

Another type of judicial hearing where physical presence has been recognized as being particularly important is the review of the lawfulness of deprivation of liberty, with physical presence being especially important at the mandatory automatic hearing at the outset of arrest or detention on criminal charges.

Article 9(3) of ICCPR provides in part that, "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." The Human Rights committee has interpreted this requirement as applying "even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity".²⁸ Similar provisions are included in the European Convention on Human Rights (article 5(3)); American Convention on Human Rights (article 7(5)); Arab Charter on Human Rights (article 14(5)). Article 6 of the African Charter on Human and Peoples' Rights has been interpreted to similar effect.²⁹

A number of non-treaty instruments affirm more broadly the right of any person deprived of liberty on any grounds to be brought before a court. Principles 32 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, for instance, provides:³⁰

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearances similarly provides that, "Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention."³¹

The fundamental character of these provision is reinforced by the essential preventive role that judicial control of deprivation of liberty plays in ensuring respect for the non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment.³² This in turn has led human rights courts and treaty bodies to regard certain procedural guarantees,

²⁸ Human Rights Committee, General Comment no 35 on Article 9 (Liberty and security of person) (2014) <https://undocs.org/CCPR/C/GC/35>, para 32.

²⁹ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M(3)(a); Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, Principles 7(b)(2) and 11(f).

³⁰ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf>.

³¹ Declaration on the Protection of all Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992, <https://www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx>.

³² Committee against Torture, General Comment no 2 on Implementation of article 2 by States parties (2008), <https://undocs.org/CAT/C/GC/2>, para 13.

particularly the right to have access to a court to challenge any deprivation of liberty³³ and the right of persons deprived of liberty on criminal law grounds to be promptly brought before a judge,³⁴ as non-derogable including in situations of public emergency.³⁵

The judicial role is important across the wide range of forms of deprivation of liberty, whether in police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes or in compulsory quarantine for reasons of public health protection.

Various bodies have emphasized that, for the judiciary to be able to effectively fulfil this role in preventing torture and other ill-treatment, it is necessary for the person deprived of liberty to be physically before the judicial authority. The judge is likely to be less able to detect any indicia of abuse if the review is based solely on documents or conducted by telephone or videoconference hearing. Perhaps most importantly, physical appearance before a judge creates a temporary break in the absolute or near-absolute control that detaining authorities often otherwise exercise over a person deprived of liberty. Being physically present before an independent judge may create a sense of relative safety in which the person may be more likely to speak up about any abuse, than if he or she remains linked to an outside authority only by a video screen. The knowledge that the person must be brought physically before an independent judge, and thus temporarily outside of their exclusive control, may also have a preventive effect on detaining authorities who would otherwise engage in abuse.

In the process leading to adoption of the UN Human Rights Committee General Comment on Article 9 of the ICCPR, several States submitted that the Committee should interpret the article to allow use of video-conferencing as a substitute for physical presence. In response, after noting that “physical presence was often needed to verify the well-being of detained persons”, Committee members remarked that “it would be dangerous to replace that requirement with a hearing via video link.”³⁶ The relevant final text of the General Comment reads, as regards the obligation under Article 9(3) of the ICCPR to automatically bring a person arrested or detained on criminal grounds, before a judicial authority:³⁷

The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment.

As regards the distinct right of any person deprived of liberty on any grounds, not restricted to the criminal law context, to apply for judicial review of detention, as provided for under article 9(4), the Human Rights Committee has held that:³⁸

In general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where

³³ E.g. ICCPR article 9(4) and similar provisions.

³⁴ E.g. ICCPR article 9(3) and similar provisions.

³⁵ Human Rights Committee, General Comment no 29, para 16; General Comment no 35, paras 64-67. Inter-American Court of Human Rights, Advisory Opinion on Habeas Corpus, http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf.

³⁶ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14901&LangID=E>.

³⁷ Human Rights Committee, General Comment no 35 on Article 9 (Liberty and security of person) (2014) <https://undocs.org/CCPR/C/GC/35>, para 34 (footnotes deleted).

³⁸ <https://undocs.org/CCPR/C/GC/35>, para 42.

questions regarding ill-treatment of the detainee arise. The court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear,

The Committee further reiterated that, in all situations of emergency, "The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights" and thus, "In order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation."³⁹

The UN Working Group on Arbitrary Detention's Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court,⁴⁰ similarly provides that: "The court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court."

A Grand Chamber of the European Court of Human Rights has similarly emphasized that the purpose of article 5(3) of the European Convention, nearly identical in its wording to article 9(3) ICCPR, is "to ensure that arrested persons are physically brought before a judicial officer promptly" and that, "Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment".⁴¹

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which acts under the European Convention for the Prevention of Torture, has also affirmed that, "all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue" and that, "Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment".⁴² This recommendation has been repeated since in country reports, such as the UK visit in 2016 where the CPT reiterated its long-standing recommendation that all persons detained under terrorism legislation be brought into the "direct physical presence of the judge responsible for deciding the question of the possible extension of their detention" instead of "the hearing being conducted via video-link".⁴³

As with criminal trials, courts have seen the physical presence of the detainee to be less essential on any appeal to a higher court from the initial decision on detention, than at the initial hearing itself. Thus, in 2010 the European Court of Human Rights found that, in the particular circumstances of the case, participation by the detainee in an appeal hearing via a video-link was compatible with the European Convention, while at the same time emphasizing

³⁹ <https://undocs.org/CCPR/C/GC/35>, para 67.

⁴⁰ UN Working Group on Arbitrary Detention, Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (2015) <https://undocs.org/A/HRC/30/37>, Principle 11.

⁴¹ Medvedyev and others v France [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-97979>, para 118.

⁴² European Committee for the Prevention of Torture, 12th General Report, CPT/Inf(2002)15-part, <http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2002-15-part-en-1>

⁴³ European Committee for the Prevention of Torture, Report of the 2016 visit to the United Kingdom, CPT/Inf (2017) 9, <http://hudoc.cpt.coe.int/eng?i=p-gbr-20160330-en-9>, para 13.

in this regard the fact that the detainee had been personally present at the hearing at first instance.⁴⁴

In 2013, the Inter-American Commission on Human Rights, in a general report on the Use Of Pretrial Detention In The Americas, while affirming that “The accused person shall have the possibility to appear at the proceedings where the application of pretrial detention will be decided”, nevertheless suggested that, “Under certain conditions, this requirement may be satisfied through the use of appropriate video links, provided that the right of defense is guaranteed.”⁴⁵ The Inter-American Commission does not appear to have formally revisited this position in the light of its apparent inconsistency with subsequent explicit pronouncements to the contrary by the Human Rights Committee. However, on 23 June 2020, in a series of tweets⁴⁶ the Commission highlighted the risks associated with the use of video conferencing for custody hearings in Brazil. The Commission warned that conducting videoconference hearings could negatively affect the detection of signs of torture and ill-treatment. In addition, the Commission added that the virtual environment could cause the persons deprived of liberty to feel intimidated or coerced. The Commission concluded by urging Brazil to guarantee the physical presence of persons deprived of liberty in custody hearings, in order to allow proper identification of signs of torture, and attendance at all times to respective protocols to avoid contagion of COVID-19.⁴⁷

⁴⁴ Trepashkin v Russia no. 2 (2010), <http://hudoc.echr.coe.int/eng?i=001-102282>, paras 147 to 155.

⁴⁵ <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf>, para 179.

⁴⁶ <https://twitter.com/CIDH/status/1275524680506576898>.

⁴⁷ See also similar expressions of concern from the Association for the Prevention of Torture (APT), <https://www.apr.ch/en/blog/covid-19-latin-america-new-risks-and-crucial-need-preventive-approach>.

Videoconferencing and the Right to a Lawyer

Where it has been concluded that video-conferencing is permissible for a particular hearing, care must still be taken to ensure full respect for the right of an accused or individual party to representation by and confidential communication with independent legal counsel. Again, the role that lawyers play in the protection of human rights and the rule of law remains just as important, if not even more important, in times of crisis or states of emergency such as the COVID-19 pandemic.⁴⁸

In particular, lawyers are recognized to play an important role in the protection of the right to a fair trial, the right to liberty, and the prevention of torture and other ill-treatment. Article 14(3)(b) of the ICCPR, for instance, provides for the right of everyone charged with a criminal offence “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. In its General Comment No. 32 (2007), the Human Rights Committee considered that the right to communicate with a lawyer of one’s own choosing, “in conditions that fully respect the confidentiality of their communications”, is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.⁴⁹ Similar considerations arise in relation to the effectiveness of challenges to the lawfulness of deprivation of liberty,⁵⁰ and protection of the rights of persons deprived of liberty more generally.⁵¹ The obligation of authorities to respect and ensure access to lawyers and the confidentiality of all communications between lawyers and clients is also recognised in the UN Basic Principles on the Role of Lawyers.⁵²

In a number of cases where participation in hearings by video-conferencing had been found, in principle, to be acceptable, the European Court has nevertheless found violations where insufficient attention was given to ensuring adequate confidential access of the accused or defendant to their lawyer before and during the hearing. For instance, in the 2010 Grand Chamber judgment and a subsequent 2018 regular chamber judgment in *Sakhnovskiy v Russia*, and in a 2016 judgment in *Gorbunov and Gorbachev v Russia*⁵³, a violation was found based on doubts about the privacy of a video-conferencing system installed and operated by the State, as the sole means permitted a person in remand prison to communicate with the lawyer for an appeal hearing. In *Sakhnovskiy*, the Court contrasted the case with the earlier *Marcello Viola* case, where there had been a separate direct phone connection between the person and his lawyer.

⁴⁸ ICJ, Legal Commentary to the Geneva Declaration, <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>, pp 112-113.

⁴⁹ HRC General Comment No 32, paras 32, 34.

⁵⁰ UN Human Rights Committee General Comment No. 35: Article 9 (Liberty and security of person), <https://undocs.org/CCPR/C/GC/35>, paras 35, 46.

⁵¹ CAT General Comment no 2, para 13; Body of Principles for the Protection of All Persons Deprived of Liberty, paras 15, 17, and 18.

⁵² UN Basic Principles on the Role of Lawyers, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>, principles 7, 8 and 22.

⁵³ ECtHR, *Sakhnovskiy v Russia* [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-101568>, paras 102 to 109; *Sakhnovskiy v Russia* (2018) <http://hudoc.echr.coe.int/eng?i=001-187831>, paras 45-48; *Gorbunov and Gorbachev v Russia* (2016), <http://hudoc.echr.coe.int/eng?i=001-160993>, paras 32-46.

Recommendations

Based on the international and regional treaty provisions, jurisprudence, and other standards summarized above, the ICJ recommends as follows:⁵⁴

- The right of any person to be physically present for his or her trial on criminal charges should be fully respected, including in situations of crisis or emergency such as the COVID-19 pandemic. In particular, national laws and rules should not permit, and in practice courts and other authorities should not proceed with, criminal trials in which an accused is denied the right to be physically present for the trial and is instead forced to participate by means of a video link or similar technology without his freely given and fully informed consent.
- The right of any person to be physically present for his or her initial appearance before the judicial authority following arrest or detention on criminal charges should be fully respected, including in situations of crisis or emergency such as the COVID-19 pandemic. In particular, national laws and rules should not permit, and in practice courts and other authorities should not proceed with, such hearings in which an accused is denied the right to be physically present for the hearing and is instead forced to participate only by means of a video link or similar technology without his freely given and fully informed consent. In principle, similar considerations apply more generally to the right to apply to a court to challenge the lawfulness of any deprivation of liberty.
- At the same time, governments, judiciaries, and others responsible for the conduct of criminal trials and judicial review of detention, should ensure, given the essential nature of such proceedings for the rule of law and human rights, that sufficient human and other resources, technological equipment, and practical arrangements, are in place to avoid undue delay of criminal proceedings or judicial review of detention. Governments and judiciaries should ensure the availability of appropriate videoconferencing technology for those litigants and accused who may, on the basis of freely given and fully informed consent in appropriate circumstances, choose to use it. In the event that undue delay nevertheless occurs, governments and judiciaries must give effect to the right of persons to be released.⁵⁵
- In any other type of hearing in which under national or international law a person would normally have the right to be physically present, a judge may decide that participation in the hearing should exceptionally take place via videoconferencing, without a party's consent, due to a public emergency including a public health emergency; however, such a decision should be taken only based on the judge's assessment, with reasons, that the imposition of such a measure is necessary and proportionate to the local circumstances of the emergency in question, and that the person's physical presence is

⁵⁴ For examples of ICJ analysis and recommendations on videoconferencing in particular countries, see: "Tunisia: Rights of judicial proceeding participants must be protected in Tunisia following COVID-19 lockdown" (8 June 2020), <https://www.icj.org/wp-content/uploads/2020/06/Tunisia-judicial-proceedings-pandemic-Advocacy-briefing-paper-2020-ENG.pdf>; "CIS region: The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan" (2020), <https://www.icj.org/wp-content/uploads/2020/06/CIS-Justice-and-coronavirus-Advocacy-Analysis-brief-ENG-2020.pdf>.

⁵⁵ See e.g. ICCPR article 9(3), "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." (emphasis added)

not required on the basis of a judicial assessment of the appropriateness of substitute methods of participation in light of the characteristics of the case and the interests of the parties, and with any guarantees necessary to ensure the fairness and integrity of the proceedings.

- Any time that videoconferencing or similar technologies are used as a substitute for physical presence, authorities must ensure that any individual party or accused that is deprived of liberty has access to legal counsel before, during and after the hearings, including a secure and confidential means of communication between the lawyer and client, including by:
 - (i) ensuring that the ability of all persons deprived of liberty to have regular and confidential access to their legal counsel of choice is maintained despite any broader restrictions on visits to places of detention, including those arising from the COVID-19 pandemic;
 - (ii) equipping courts and detention facilities with rooms and means to enable counsel to confidentially communicate with their clients during the course of remote proceedings, whether when they are physically present, or if they choose to communicate by other means; and
 - (iii) ensuring that litigants and others can be confident that authorities will fully respect the confidentiality of all such communications, including ensuring that such systems are not installed and operated by the State in a manner that could reasonably cause a person to doubt their confidentiality.
- Any time that videoconferencing or similar technologies are used as a substitute for physical presence, authorities must also ensure that individual parties / accused are able to effectively participate in the proceedings and provide confidential instructions to counsel where necessary, including by ensuring:
 - (i) the individual party or accused can see witnesses providing testimony and can (personally or through their lawyer) cross-examine and otherwise respond to them;
 - (ii) the accused or his lawyer can inspect and submit evidence during proceedings;
 - (iii) proceedings are suspended when interruptions in video-communications occur and until they are resolved; and
 - (iv) technical support is available at the court and detention facilities.
- Other considerations for the fairness and integrity of the proceedings, that would apply in an in-person hearing, should also be applied to a hearing by videoconference. For instance, an accused's appearance should be such as to ensure the maintenance of their right to the presumption of innocence, including by ensuring defendants do not appear in prison uniforms.
- The requirements of publicity of hearings must continue to be met despite any movement from in-person hearings to video-conferenced hearings, through options such as access to the video feed upon application by individual members of the public, or simultaneous broadcast of the proceedings.
- In the conduct of remote hearings, Courts should also ensure that categories of persons who may require particular consideration or accommodation are provided with additional support where needed, including victims of gender-based violence, children

and persons with disabilities. To that end, as part of the overall assessment of whether videoconferencing is appropriate to a particular hearing, Courts should assess individual needs on a case by case basis so that any issues that affect such persons' ability to participate effectively can be identified and procedural adjustments put in place. Where such measures cannot be implemented, consideration should be given to postponing proceedings provided the rights of the accused, victims and witnesses can be maintained. With respect to proceedings relating to gender-based violence and violence and other harm against children in particular, the judiciary should ensure victims can access appropriate temporary protection until such time as proceedings can recommence.

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