



UNITED NATIONS  
HUMAN RIGHTS  
OFFICE OF THE HIGH COMMISSIONER

# On-Line hearings in justice systems

## INTRODUCTION

The use of on-line hearings<sup>1</sup> in justice systems around the world is expanding at a significant pace, hastened by the COVID-19 pandemic. During the pandemic, the use of on-line hearings allowed judicial systems to continue to function. Such hearings can improve access to justice and the efficiency of judicial institutions. On-line hearings can also ensure the safety and wellbeing of victims and witnesses and can be a form of reasonable accommodation for persons with disabilities.

However, they also bring many challenges, not least to the right to a fair trial. On-line hearings should be accompanied by particular conditions and safeguards.

In keeping with a people-centred approach to justice, the use of on-line hearings should start by considering the impact on the rights of the individual and not simply on possible efficiencies that on-line hearings might bring to the administration of justice.

This brief provides guidance on the types of hearings that may be appropriately dealt with on-line. It is based on current international human rights law, in particular the International Covenant on Civil and Political Rights (ICCPR).

<sup>1</sup> This brief uses the term on-line hearings to refer to judicial hearings that are heard through video conferencing, are not entirely heard in person, and could be hybrid hearings (some participants attending online).

## CHALLENGES

The challenges exposed by the practice of on-line hearings are many and raise issues under articles 7 (freedom from torture and ill-treatment), 9 (liberty and security of person), 14 (right to fair trial and due process) and 17 (right to privacy) of the ICCPR.<sup>2</sup>

- Difficulty in spotting signs of torture or cruel, inhuman, or degrading treatment or punishment of those in detention, including pre-trial detention.
- Lack of public access to and/or publicity for hearings, in particular with respect to fully virtual, as opposed to hybrid, hearings.
- Difficulty in having private and confidential communication with legal counsel on-line in places of detention and during on-line hearings.
- Limited access or no access to the internet and/or necessary equipment and technology, or unreliable technology, preventing effective participation in on-line hearings, in particular for certain groups such as indigenous peoples, people of African descent those living in rural areas and people living in poverty.
- Particular risks to women victims of domestic violence, when on-line hearings are heard in close proximity to their aggressors.
- Technical issues preventing defendants from making motions and presenting arguments.
- Rushed trials affecting the equality of arms.
- Lack of interpreters, or difficulties in the use of interpreters, including for confidential communication between parties and their legal counsel.
- Difficulties in: verifying the identity of the parties to the proceedings and the witnesses; filing and inspecting evidence; preventing witnesses or other parties from being influenced or receiving instructions from third parties while providing their testimony; cross-examining witnesses.
- Difficulties in managing the parties to the proceedings, in moderating the hearings, and in conducting on-line hearings with the necessary empathy and humanity.

## GUIDANCE<sup>3</sup>

Some hearings should be held with the physical presence of the accused without recourse to on-line hearings.

### HEARINGS RELATING TO JUDICIAL CONTROL OF DETENTION UPON ARREST OR DETENTION.

Once a person is arrested or detained, he or she must be brought promptly to appear “*physically*” before a judge. This is a right without exception. It must be automatic and does not depend on the choice of the person in question.

The purpose of bringing the person before a judge is so the judge may decide whether the person’s detention is lawful and necessary. The physical presence of the person gives the judge the opportunity to find out how they have been treated in custody. It also facilitates immediate transfer to a remand detention centre if continued detention is ordered by the judge. Detention on remand should not involve a return to police custody.

The physical appearance of the person safeguards their right to security and the prohibition against torture and ill-treatment. Signs of torture and ill-treatment cannot be properly observed in an on-line hearing and the person’s ability to complain of ill-treatment may be compromised if they are heard on-line from a place of detention.

### HEARINGS TO ASSESS THE LAWFULNESS OF DETENTION (PRINCIPLE OF HABEAS CORPUS)

Once a person has been detained, they have the right to appear “*in person*” before the court to challenge the legality of the detention. The presence of the person is important, as it gives the judge the opportunity to assess the lawfulness of detention and to hear any complaints of ill-treatment by the detainee.

These types of hearings differ from those in the hearings above. Here, the *authorities are not automatically required* to initiate a review of the legality of detention. However, the *individual must have the opportunity to challenge* the legality of detention if he or she decides to do so.

<sup>2</sup> These challenges were expressed by OHCHR colleagues in the field as well as a variety of different sources.

<sup>3</sup> This guidance is based on an interpretation of current international human rights law. Bearing in mind that there is limited jurisprudence specifically on on-line hearings, the briefer also draws from the recommendations of the International Commission of Jurists of November 2020 (Video Conferencing, Courts and COVID 19). Any legal developments in this regard will be reflected in future versions of this briefer.

The court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear. Signs of torture and ill-treatment cannot be properly observed in an on-line hearing and the person's ability to complain of ill-treatment may be compromised if they are heard on-line from a place of detention.

### **ALL HEARINGS THAT RELATE TO THE IMPOSITION OF THE DEATH PENALTY**

Hearings that might result in the death penalty should be held in the physical presence of the accused. This is because it is particularly crucial in death penalty cases to respect fair trial guarantees considering the irreversible nature of the death penalty. The increased potential for procedural and technical errors in on-line hearings renders on-line hearings inappropriate in death penalty cases.

**At the same time, some hearings could be held on-line, so long as there is the explicit free and informed consent of the accused and subject to the conditions and safeguards set out below**

- **Hearings of a criminal nature with the explicit free and informed consent of the accused**

When a person is charged with a crime, they have the right to be tried in their "presence". Trials must be conducted orally and publicly. Thus, trials of criminal cases should only be held on-line with the explicit free and informed consent of the accused and subject to the conditions and safeguards set out below. In assessing whether consent is free and informed, particular attention should be paid to 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.

**Some other hearings could be held on-line subject to the conditions and safeguards set out below (without requiring consent)**

- **Hearings and appeals of a civil/administrative nature**

Hearings relating to civil/administrative matters must in principle be conducted orally and publicly. Unlike hearings of a criminal nature, there is no specific right for the "presence" of the parties. Thus, such hearings could be held on-line subject to the conditions and safeguards set out below.

- **Hearings of appeals of certain criminal cases not relating to the death penalty**

Appeals of certain criminal cases do not require the physical presence of the accused. For example, proceedings on leave-to-appeal or involving only questions of law are often heard in the presence of accused's counsel only. In addition, the requirement of a public hearing does not necessarily apply to all appellate proceedings. Sometimes they take place on the basis of written presentations. For these reasons, certain criminal appeals may be held on-line subject to the conditions and safeguards set out below.

Appeals involving a full assessment of the issue of guilt or innocence that cannot be determined without a direct assessment of the evidence given in person by the accused should not be held on-line. For such hearings, the court should require the explicit free and informed consent of the accused for an on-line hearing subject to the conditions and safeguards set out below.



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Maria Oswald

## CONDITIONS AND SAFEGUARDS FOR ON-LINE HEARINGS

If a hearing may be held on-line, the following conditions and safeguards should apply.



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- There should be a legislative or regulatory basis for on-line hearings in the State concerned.
- Human rights impact assessments should be undertaken when developing online hearing systems and ensuring privacy by design.
- The decision to hear a case on-line should serve a legitimate aim and be based on a judicial assessment of the appropriateness of remote participation considering the characteristics of the case and the interests of the parties. This includes identification of any issues that affect the persons' ability to participate effectively and should include procedural adjustments if necessary.
- Some categories of persons may require particular consideration or accommodation and if so, should be provided with additional support, such as victims of gender-based violence, women, children, older persons, indigenous peoples, minorities, migrants, refugees, persons with disabilities, and persons accused of drug related offences.
- On-line hearings must include appropriate safeguards necessary to ensure the fairness and integrity of the proceedings. This includes respecting the due process guarantees, contained in article 14, and the right to privacy, contained in article 17, of the ICCPR. These include:
  - Making information regarding the time and venue of the hearings available to the public and media, when required.
  - Providing for adequate facilities, notably the technological means, to ensure the attendance of interested members of the public to the on-line hearing.
  - Ensuring effective access to legal counsel before, during and after the hearings, including a secure and confidential means of communication between

legal counsel and client. This could include legal counsel appearing from the same location as their client.

- Ensuring access to free interpretation when required.
- Ensuring that defendants and their legal counsel have the technological means necessary and are not technically impeded from: fully participating; following the proceedings; seeing the persons present and hearing what is being said; being seen and heard by the other parties, the judge and witnesses and; cross-examining witnesses and responding to them.
- Ensuring that the accused or their legal counsel can inspect and submit evidence during proceedings.
- Ensuring that proceedings are suspended when interruptions in on-line communications occur and until they are resolved; and that the accused is entitled to extra time for any interruption that limits his/her ability to take an active part in the proceedings; that technical support is available at all times.
- Ensuring that detained persons appearing via on-line hearings must never be required to wear prison clothes, handcuffs or have prison infrastructure displayed in the background.
- Ensuring adequate security safeguards, including encrypted channels of communication, to protect against intrusion of third parties to the hearing.
- Ensuring the protection of the right to privacy and personal data, including through enacting robust data protection legislation that protects the hearing records from unlawful or unauthorized access.

