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CHALLENGES IN THE PROCESSES OF CRIMINAL TRIALS AND DETENTION CAUSED BY THE COVID-19

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Abstract

This paper discusses the causes of delays in all criminal cases, challenging the assertion that COVID-19 caused the backlog. The paper questions whether post-COVID recovery plans are realistic, particularly in relation to any increase in remote hearings. It concludes that a more fundamental shift should take place in dealing with criminal cases to enable faster and more effective access to justice for victims of all crimes. This article gives reports on the impact of court delays through analysis of the Macedonian law on the criminal procedure through the provisions and the process of pre-trial detention and detention on remand as well as the main hearing.

If the physical presence of a lawyer in proximity to the detained person is not possible, there should be a confidential and unobserved line of communication between them, to enable detainees to have effective, frequent, and confidential access to their lawyers. The current Law on Criminal Procedure does not contain a basis for conducting a remote trial, i.e., a trial through a two-way communication platform without physical presence. There is a possibility for interrogation through video conference and telephone conference, but only for a witness and an expert, and not for a defendant.

This paper suggests that a more fundamental shift needs to take place in dealing with criminal cases, which both reduces the number of cases going to court and deals more effectively with those that do. The COVID pandemic only emphasized the need to support the process of digitalization of the judiciary in the direction of greater efficiency, transparency, and access to justice. The digitalization process in the judiciary needs to be multifaceted, starting with the establishment of the legislative framework as a basis for taking procedural actions, tools for remote trials, or presenting only some evidence in that way, through timely and appropriate equipping the courts with ICT equipment.

Keywords: *COVID, main hearing, pre-trial detention, digitalization, criminal cases.*

1. INTRODUCTION

The court system is crucial to the proper functioning of any state. Independent courts can ensure that other branches of power guarantee human rights and fundamental freedoms. The COVID-19 pandemic created significant challenges to the functioning of the court system, and the right to a fair trial has been under severe pressure across regions due to various restrictive measures imposed during the pandemic. (OSCE/ODIHR, 2021)

These policy recommendations provide guidance to policymakers, representatives of the judiciary, legal professionals, civil society and other stakeholders on how to develop, implement and follow legislation and rules in line with the right to a fair trial and other relevant rights during public health emergencies, with attention to equality and diversity.

A pandemic, such as COVID-19, is a public health emergency and these recommendations reflect its special nature. They may be less relevant in other types of emergencies, such as military emergencies or natural disasters. Public health emergencies pose significant and specific challenges to the normal functioning of the judiciary, but it is essential that courts operations are maintained during such emergencies as safe and possible. In order to prevent a disease from spreading, states may be forced to adopt emergency rules and regulations related to the functioning of the judiciary. However, these emergency rules and regulations should not fundamentally undermine the delivery of justice in a human rights-compliant manner.

These policy recommendations draw inspiration from international standards related to the operation of the judiciary during public health emergencies, relevant human rights standards developed by the European Court of Human Rights, and international human rights institutions. Furthermore, they should not be used to justify the limitation of rights. In fact, national standards that go beyond those outlined here to ensure the effective functioning of the judiciary during public health emergencies can be introduced if states deem them appropriate and possible.

Online trials are just one aspect of digitalization that encompasses a range of other electronic possibilities, such as e-submission, digital hearing registration, electronic record creation, the exchange of digital information and evidence, etc., some of which fall within the scope of interoperability.

The protection of human rights, in general, with particular emphasis on the many guarantees that make up the right to a public, fair trial within a reasonable time with respect for the presumption of innocence and the protection of privacy, remains the main focus of interest.

International standards and comparative experiences are particularly important in choosing the model and trajectory along which the digitalization and inclusion of artificial intelligence in the judiciary will be achieved. Standards must be appropriately embedded, present, and secured, and comparative experiences used to avoid perceived weaknesses, at the expense of exploiting strengths and benefits. The data presented in this analysis show that the courts have neither staff nor equipment; there are frequent problems with the speed and consistency of the Internet connection; electronic delivery and electronic bulletin boards are not used. However, despite this situation, the analysis showed that there is a willingness of the courts to contribute to the development of legal solutions, specifying the technical performance that must be met and improving personal literacy skills such as necessary prerequisites for holding trials or presenting evidence through digital platforms and enjoying the benefits of interoperability.

2. OVERALL OBSERVATIONS AND CHALLENGES

2.1. Differences across countries and courts

Courts have faced a myriad of challenges during the pandemic. Some courthouses and buildings closed fully, others partially, dealing with only “urgent” cases. The extent to which judges and court staff have been able to operate in person and virtually during this time has depended on the particular State’s response to the pandemic, the regulations

imposed by the authorities, and the type of court and cases they deal with. (Fundamental Rights Agency, Bulletin No. 2, April 2020)

Not all courthouses, staff members, or members of the judiciary have been available, impacting how cases were prioritized and allocated. In some countries, it was necessary for courts to share facilities and staff among different courts (family, criminal, civil, and administrative courts, where they are separated), and these courts may have considered different criteria to determine priorities.

This situation, and the immediate aftermath, has had a number of consequences. (Susskind, 2020). There has been a speedy shift to online working in order to deal with the lockdown and rules on physical distancing. Emergency legislation has been adopted, sometimes with limited parliamentary oversight. In addition, the speed of amendments to laws and regulations has made it difficult for legal challenges to be brought to the courts. There have been numerous laws, regulations and policies directed towards the judiciary, amended frequently, and not always consistent in their approach. Moreover, judicial self-governing bodies and judges' associations have not always been consulted on measures and their possible impacts on the judicial system. In addition, tensions have arisen between the judiciary and lawyers or between state authorities (such as the executive versus the judicial branch) with each having its own priorities and demands.

Overall, one can see in many jurisdictions a lack of a unified approach to justice during a state of emergency. Not all courts in all states have experienced the same issues. There was a significant variation in how countries approached the management of courts, and there have also been disparities within those countries. Similarly, common law and civil law jurisdictions may have experienced different challenges in adapting to the pandemic. Furthermore, the various courts and tribunals, whether they are criminal, administrative, civil, immigration, or family – first instance or appellate – have not all facing the same challenges in continuing to operate during this time. (OSCE, October 2020)

2.2. Need for constant revision and adaptation

The environment has been changing rapidly during the pandemic. What was considered urgent at one point in time changed as countries went through different stages in the pandemic, in particular after the end of lockdowns. In addition, there can be different or competing pressures on what are considered to be priorities, including from the point of view of judges and lawyers.

As countries started to emerge from lockdowns, courts initiated the development of “exit strategies”. (OSCE, 16 May 2020).

In Denmark, for example, a “Plan for Reopening Courts” set out the cases that can proceed without physical presence, those that should be carried out at home and those that demand particular attention. The plan included criteria for prioritizing cases, managing health and safety in court buildings, dealing with those who are infected, those who have symptoms of COVID-19 or individuals at risk, and approaching cases flexibly. (Marianne Gram Nybroe, 2020)

Another example is Finland, where the National Courts Administration published a “recovery plan” on 29 May 2020, drafted in cooperation with occupational health professionals. (CEPEJ, 2020)

2.3. Backdrop of existing challenges for judicial systems

The responses to the COVID-19 pandemic have taken place against a backdrop of challenges that courts have been facing for many years in a number of States. Financial

constraints, ineffective procedures and the inability to deliver speedy justice, remained. In addition, rule of law concerns observed in some countries has been exacerbated by the crisis. Some participating States have seen a power shift during the pandemic away from the judiciary towards the executive, with a concern that this may become “normalized” and permanent. Further, in some jurisdictions, the absence of a functioning Constitutional and Supreme Court impeded effective oversight of emergency legislation. (ODIHR, 2020, example, Belgium)

On the positive side, the pandemic has created an incentive for countries to review and reform justice systems. This has reignited discussions, for example, on virtual justice and remote delivery, as well as debates on how to reduce over-criminalization and over-incarceration by enhancing the use of non-custodial sentences and community-based approaches to offender treatment (e.g., refraining from responding to minor, non-violent offenses with imprisonment). (Global Prison Trends, 2020)

2.4. Cooperation between legal professions and the importance of communication

The judicial system is based on the interaction between many actors, including various professions (e.g., lawyers, paralegals, probation officers), as well as members of the public. Policymakers and practitioners should, therefore, consult with relevant legal professionals when adopting measures during and in the aftermath of the pandemic.

This is crucial in order to take into account all possible effects and impacts of measures adopted, to ensure the earliest possible dissemination of information to all parties potentially affected and to avoid conflict within the judicial sector at a time of crisis. For example, lawyers in Greece went on strike after the reopening of some courts was announced, arguing that they had not been consulted on the plans and neither had the health authorities approved the reopening. In Spain, on 1 April, three of the four main judges' associations sent an urgent letter to the Permanent Commission of the General Council of the Judiciary, warning that they would refuse to work if not provided with real means of health protection. (Amelang, 2020)

Therefore, as the European Commission for the Efficiency of Justice (CEPEJ) noted, “Greater consultation and coordination with all justice professionals (including lawyers, enforcement agents, mediators and social services) will help to ensure a good level of access to justice.” (CEPEJ Declaration, Strasbourg, 10 June 2020)

Sharing of experiences is also crucial in order to incorporate lessons learned in any future responses to the pandemic.

Judicial cooperation in the establishment of emergency measures (Albania): On 16 April, the Albanian Judicial Council (KLGJ) established a Temporary Committee mandated to analyze the legal framework, and identify problems relating to the infrastructure of courts. It was also tasked to draft, propose and oversee measures for judicial services during the COVID pandemic in collaboration with the court councils and chief judges. Based on this mandate, the Committee drafted a guiding instruction for the courts on the measures to be taken during the pandemic on the judicial services. It included preventive measures for the spread of the infection, provisions on planning and administrative measures for the conduct of proceedings and administrative measures for court services. (Supreme Judicial Council of the Republic of Albania, Instruction No. 146, 27 April 2020.)

Furthermore, measures and protocols adopted in relation to courts shall be communicated to all relevant persons including lawyers and their associations and their views sought. (CEPEJ Declaration. Lessons learned and challenges faced by the judiciary

during and after the COVID-19 pandemic”, CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.)

Due to the nature of the pandemic and the rapid adjustments it necessitates, effective communication is required within a particularly short period of time on, for example, how to visit courts in person, in which cases hearings will be held remotely, which criteria are used to determine urgent cases and how cases will be prioritized in managing the backlog.

A number of courts have provided detailed information on their websites to this end. For example, the Courts Service of Ireland published updates on the operation and conduct of various court businesses including e-filing and remote hearings. (The Courts Service of Ireland, 2020) A “courts and tribunals tracker list” by the Government of the United Kingdom provides information on which courts are open, staffed or suspended. (UK Government, 2 October 2020)

Different forms of communication may be needed to reach other audiences. Those who have to attend court in person, for example, may need to know whether this is feasible and if so, what procedures will be in place when they arrive. In Slovenia, for example, when individuals were invited to attend court, they were provided with detailed protocols explaining how the processes will be managed. (Consultations from webinars held in June 2020)

In States outside the OSCE, some courts have used the application WhatsApp to keep in touch with lawyers and provide them with information. This practice reduced the number of people who needed to enter court buildings. (International Criminal Court, 2020, e.g., Paraguay)

3. ANALYSIS OF THE MACEDONIAN LAW ON CRIMINAL PROCEDURE THROUGH THE PROVISIONS OF REMOTE TRIAL

The current Law on Criminal Procedure does not contain a basis for conducting a remote trial, i.e., a trial through a two-way communication platform without physical presence. There is a possibility for interrogation through video conference and telephone conference, but only for a witness and an expert, and not for a defendant. (Official Gazette of Republic of North Macedonia, 150/2010, 100/2012, 142/2016 and 198/2018)

Regarding electronic communication, the following provisions are contained:

Submitting letters to the court:

- Private lawsuits, indictments, motions, remedies and other statements and announcements (submissions) can be submitted electronically to the receiving department of the competent authority (court or public prosecutor's office);
- The submissions submitted by lawyers, state administration bodies, legal entities and persons exercising public authorizations should also contain data for an electronic mailbox for delivery of the written registration registered in accordance with the law.

Submitting writs from the court to other entities:

- In other ways, they can be delivered electronically to the recipient's mailbox address through the information system of the competent authority; thereby, by sending the written letter to the recipient of the delivery to his / her e-mail address, a notification is also sent that a written document has been sent from the information system of the competent body, which the holder of the address must take over; the e-mail from

the e-mail box must be received no later than eight days from the day of its sending, and if the e-mail from the e-mail box is not received within the determined deadline, the delivery will be considered complete;

- The recipient of the electronic mail with his / her electronic signature proves his / her identity, inspects his / her electronic mailbox and electronically signs the written letter which he / she sends to the competent body, i.e., confirms the receipt of the electronic mail.
- The legal possibilities for a witness or expert to be examined by telephone or video conference are limited only in the case when:
 - Is in the territory of another state or at the main hearing it is found out that the witness cannot appear in court or his / her arrival is significantly difficult.
 - The only provision that allows the use of a closed technical device for telecommunication (video conferencing) refers to the conduct of an evidentiary hearing.

The proposal for amendments to the LCP from 2018 contains certain provisions regarding electronic evidence and registration during the main hearing, which are insufficient to provide the legal framework for online trials and it is necessary to further elaborate them in a system of norms that will enable the realization of guarantees for fair action and in case the trial is conducted remotely.

In this context, the following proposed provisions deserve attention:

- the possibility for the state bodies and the bodies of the local self-government units to submit to the public prosecutor the requested data in electronic form with an authorized electronic signature;
- within the presentation of material and written evidence, there is a possibility for the electronic evidence and recordings to be presented by presenting them in electronic form as they were submitted to the state bodies or the bodies of the local self-government units;
- The course of the main hearing is registered in the form of a recording which is a visual-audio recording of the held hearing, and another computer program can be used to record the course of the hearing.
- the video conference is recorded, and the parties receive a copy of the recording;
- the possibility for a witness or expert to be examined by videoconference, regardless of where he or she is, is extended;
- If the defendant is in custody or serving a prison sentence, his presence at the session before the appellate court can be provided through a video conference connection. (Lazetic, Nanev, Gorgieva, Nedelkova, OSCE, 2020.)

How inevitable is the question of supplementing the provisions of the LCP regarding the possibility of online trials, the obligation to report an electronic mailbox from the parties and other participants in the procedure, provided guarantees for the right of defense, the public in the proceedings, wider use of electronic evidence, use on the recording in the case of repetition of the procedure, i.e., as soon as there was recording of the procedure, it should not start again and in case when there was a change in the composition of the court or time elapsed for holding a hearing from the main hearing, etc.

4. THE PROCESS OF PRE-TRIAL DETENTION AND DETENTION ON REMAND

Anyone detained should appear before a judge. A detainee has the right to be brought physically in front of a judge. The rule-makers must ensure that this right is given priority. If the public health emergency does not allow physical presence, an online or hybrid hearing needs to be organized using a high-definition video camera. A defense lawyer should preferably be present at the same location as the detainee during the hearing. If the physical presence of a lawyer in proximity to the detained person is not possible, there should be a confidential and unobserved line of communication between them, for example, access to secured rooms with a secure communication channel or via a separate video link, to enable detainees to have effective, frequent and confidential access to their lawyers. (OSCE/ODIHR 2021)

The right to have a confidential access to a lawyer should be guaranteed, to the extent possible during public health emergencies. Those detained on remand should have access to a lawyer. If necessary, the remand facilities need to be equipped with unsupervised video-conferencing. Necessary restrictions can be imposed to ensure the safety of lawyers and detainees but should not undermine the core of the right of access to a lawyer. The duration of the visits might be limited in time, but these restrictions need to be proportionate and justified, for example by a lack of facilities and other relevant factors. Police stations, prisons and courts should be equipped with properly functioning video-conferencing facilities that can enable lawyers to participate effectively in online or hybrid hearings. (OSCE/ODIHR 2021)

Law enforcement authorities should use bail as much as possible during public health emergencies. Where possible and appropriate, the national judicial institutions should consider the exigencies of the public health emergency and use alternative forms of restrictions such as bail or house arrest instead of pre-trial detention.

5. TRIAL MONITORING AND PUBLIC HEARINGS CHALLENGES CAUSED BY THE COVID – 19

Court hearings should be held publicly as much as possible. It is recommended that online and hybrid hearings are made public to the extent possible. Public access to hearings can be ensured by allowing the public to attend the hearing in real-time or by uploading the audio/ video recordings on the courts' website. National courts should consider the privacy of the participants, the presumption of innocence, the need to avoid disruptions to hearings, whether the case is of public interest and other relevant factors when deciding whether to allow the public to access the online hearing or to upload the recordings.

A blanket ban on public hearings during public health emergencies is likely to be disproportionate. A blanket rule preventing the general public and trial monitors from attending online, hybrid or regular hearings is likely to be disproportionate and the authorities should find ways to allow some access to hearings. Certain temporary prohibition might be acceptable at particular stages of an emergency, but these restrictions should be justified and then gradually lifted as circumstances change. All emergency rules should be practical, accessible and proportionate.

Judicial self-governing bodies need to develop a communication strategy during public health emergencies. In the circumstances of public health emergencies when trial monitoring may be restricted, the national judiciary needs to effectively communicate with its stakeholders and the general public, for example by regularly producing press releases on particular cases and informing about the proceedings. Press officers should be available to provide information about cases of major importance. Judicial self-governing bodies should also find alternative routes to accommodate the access of trial to monitors to cases of interest. If hearings have to be conducted in camera due to a public health emergency, courts can use other means to accommodate some degree of trial monitoring, for example by providing access to some court documents and to video/audio recordings.

These bodies should also apply uniform rules to facilitate access of monitors across the state. The applicable rules in relation to trial monitoring should be unified across the state, but there might be fluctuations due to the building capacity, health situation and other relevant factors. These differences must be taken into account by the emergency rules. For instance, the emergency rules can provide some restrictions on the number of monitors and other attendees allowed in the courtroom of a particular size.

Access to trials should be practical and effective, not formal and declaratory. When the emergency rules allow fast and easy access of monitors to trials, such access cannot be curtailed by complex rules of admission that effectively prevent monitors from attending hearings. For instance, a lengthy waiting time for permission might prevent a monitor from accessing a particular trial of interest. Health-related limitations should be reasonable and explicitly stated.

6. CONCLUSIONS AND RECOMMENDATION

Flexible exit strategies for emerging from restrictions imposed by the pandemic should be considered by courts.

States should avoid “hyper-production” of laws, decrees, regulations, and instructions on emergency measures for the judiciary from different levels of power (legislative, executive or judicial). Such laws, decrees, regulations, and instructions should not be contradictory or vaguely formulated and should be clear on the time when the measures start and end. Laws and regulations adopted as a response to the emergency should include sunset clauses, be temporary in nature, and preferably be kept separate from regular, non-emergency legislation.

Courts should ensure that the right to a fair trial is respected during states of emergency and that nobody is ever subject to measures that would circumvent non-derogable rights.

Judicial oversight should be available to review both the constitutionality and legality of any declaration of a state of emergency and any implementing measures, to evaluate the proportionality of the restrictions, as well as procedural fairness of the application of emergency legislation.

Higher judicial authorities and court presidents should issue guidance to assist individual judges in determining how to manage their responses to the pandemic. Feedback should be sought, and guidance should be amended accordingly.

Courts, when determining measures, should consider how to maintain a balance between clarity and predictability and judicial discretion and flexibility.

Courts could consider the establishment of committees to propose and oversee measures to manage the pandemic.

The judiciary should identify ways to share practices on their responses to the pandemic, among and across different courts, different regions of the country, and different jurisdictions.

Dialogue should be established with a wide range of professions, in particular with lawyers and bar associations, in order to ensure that considerations of access to justice and safety measures are adequately taken into account.

When designing their protocols and responses to the pandemic, courts should consider the needs of vulnerable persons and the particular impact on their rights to a fair trial and access to justice.

Any measures and protocols should be communicated to all users rapidly and regularly, and in ways that are accessible and which take account of vulnerabilities. Those attending court should be provided with detailed guidance.

Alternative means of communicating with court users should be considered in order to reduce the number of persons attending court in person.

The secure and confidential transmission of data should be ensured in the provision of any technology used by the courts.

Online and hybrid hearings must be compatible with human rights standards and the rule of law. Online or hybrid hearings should be used as an alternative to in-person hearings only if the latter are not safe or not possible. Online or hybrid hearings should be conducted in accordance with national legislation and in compliance with the rule of law and human rights, including rules guaranteeing data security, privacy of communications and judicial independence. The increased number of online or hybrid hearings during a public health emergency might require special laws, guidelines and protocols developed by rule-makers in collaboration with IT specialists, data protection experts and judicial self-governing bodies. These rules should be circulated among judges and other stakeholders and made publicly available.

Online or hybrid hearings are not appropriate in all cases and flexibility should be allowed. The rule-makers should allow discretion when deciding if online or hybrid hearings are possible and desirable, prioritizing in-person hearings as much as possible. The presiding judge needs to consider the implications of a possible delay on the rights of the parties, the nature of the hearing, access and availability of the necessary equipment, the need to physically examine the evidence, as well as vulnerabilities of the parties and witnesses. Thus, online or hybrid hearings might not be possible in all cases and should be used only if appropriate. The presiding judge should consider the opinion of the parties and of the witnesses in this respect and decide in the form of a reasoned judgment.

Introduction of new technologies should be accompanied by planning, capacity and human rights-compatibility assessments. The rule-makers should conduct a thorough human rights and rule of law compatibility and technical assessment before introducing new courtroom technologies. For example, the mere application of new technologies should not undermine the equality of arms; it should not become an extra hurdle for effectuating the procedural rights of the parties. The emergency rules should explain how the hearings should be organized, what software and hardware are required, how unsupervised communication of the parties with their lawyers can be arranged, what the presiding judge should do with disruptive witnesses or other trial participants, what to do in case of bad Internet connectivity, if a participant cannot be heard and in other comparable situations.

Judicial self-governing bodies should facilitate sufficient training for all participants of online and hybrid hearings. Judges, court staff and other professional participants of online and hybrid hearings should be provided with sufficient training in IT solutions, as well as data protection and standards of human rights protection during online or hybrid hearings. The parties, defendants, witnesses and other ad hoc participants should be given instructions as to how to operate the software and hardware. It is recommended that an online meeting between the hearing participants and a person responsible for technical support is arranged prior to the hearing. This person should confirm that the participants are able to use the software and hardware and participate in the hearing.

An online case and document management system might be required for effective online or hybrid hearings. The rule-makers should introduce electronic case management systems linking all the stakeholders to facilitate social distancing before, during and after hearings. In order to facilitate online or hybrid hearings, the rule-makers might need to ensure that new simplified rules related to the circulation of documents are introduced. These rules should not compromise the authenticity of these documents. Acceptance of scanned copies of documents and e-signatures might be appropriate in some cases. Online case and document management systems must not interfere with the independence of the judiciary and the privacy rights of the participants; for instance, access to court materials should be properly protected.

Confidential communication between parties and their lawyers should always be ensured. It is recommended that the rule-makers and judicial self-governing bodies ensure that confidential communication is facilitated between the parties (defendants in criminal cases or parties in civil cases) and their legal representatives before and during online and hybrid hearings. If possible, such communication should be done in person or through a secure and confidential channel. This recommendation is especially relevant if the defendant is in pre-trial detention.

Rule-makers and presiding judges should ensure that the participants of online or hybrid hearings are able to take part without pressure, intimidation or fear. It is more challenging to ensure that the participants are not under pressure during online or hybrid hearings than during in-person hearings. For instance, victims of domestic violence should not give evidence from home in the presence of the defendant. Those complaining about ill-treatment should not give their statements in a police station. To the extent possible and necessary, the participants of online or hybrid hearings should be able to observe all other participants.

Emergency rules should clarify the legal effects on hybrid and online hearings of a failure of the system. Emergency rules should include solutions in the case of an IT system failure. This is especially pertinent when such failures can result in interference with the human right safeguards or procedural entitlements of the parties.

Technical support and high-quality equipment should be made available to all trial participants in order to ensure their effective engagement with the process. Judges, parties, court staff and all other trial participants should be able to access IT support in order to avoid delays and technical difficulties during online or hybrid hearings. The quality of Internet connections and video cameras (including vision and sound) used in hybrid or online hearings should be appropriate in order not to interfere with the trial.

If the emergency continues for an extended period of time it is recommended to develop a specific software to facilitate online or hybrid hearings. Generic video conferencing tools are appropriate as a temporary solution during a public health emergency, but more tailor-made tools are required in the longer run. The rule-makers also need to

ensure that courts, pre-trial detention centers and other relevant criminal justice institutions have appropriate equipment and software to facilitate the online or hybrid hearings. This equipment would ensure preparedness of the national judiciary for future public health emergencies.

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