

THE COURT DURING THE PANDEMIC

SPECIAL COURT MONITORING REPORT

Monitoring period: March 2020 - June 2020



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Georgian Young Lawyers' Association

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The background of the page features several stylized virus particles in shades of blue and purple, scattered across the left and center. On the right side, there is a magnifying glass icon with a blue handle and a yellow lens, set against a background of diagonal blue and white stripes. The overall design is clean and modern, with a color palette of blues, purples, and yellows.

INTRODUCTION

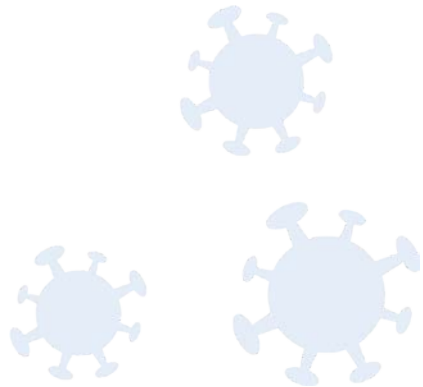
The world, including Georgia, is experiencing unforeseen challenges caused by the new Coronavirus (COVID 19). The pandemic hampered the usual lifestyle; the invisible threat instilled in people a fear of free movement, communication and professional activity. Seeking new solutions has become the number one task in almost all areas to ensure the adequate functioning of state institutions.

Given the large-scale spread of Coronavirus and persistently growing challenges facing the country, new regulations have been introduced for ensuring a relevant response to the pandemic announced by the World Health Organization and for guaranteeing that the state fulfills its constitutional commitment - to reduce life-endangering threats and manage the situation in a democratic society. In this regard, the judicial system is no exception.

Proceeding with judicial activities in a pre-pandemic manner in the court would have definitely increased the risks of the virus spread. Therefore, the judiciary not only had to prevent the spread of the virus in the court but also ensure that procedural timeframes were not breached.

The solution was soon found, and the court, as a result of coordinated work with law enforcement agencies, was able to conduct court proceedings bound with procedural timeframes remotely, using technical means.

This was not the novelty for criminal procedure legislation, although the large-scale implementation of the practice has led to a number of technical or other issues. Proper functioning of the remote court proceedings requires further refinement and full compliance with criminal law.





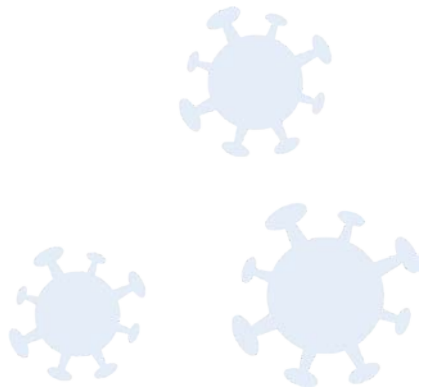
METHODOLOGY

The Georgian Young Lawyers' Association has been monitoring criminal trials since 2011. The reports are prepared based on information obtained as a result of attending and observing criminal court hearings. Currently, the organization is monitoring criminal trials in six courts: Tbilisi, Kutaisi, Batumi, Rustavi City Courts, and Telavi and Zugdidi District Courts.

Just like the monitoring of court trials in the courtroom, GYLA observers use the questionnaire developed for monitoring of criminal proceedings during remote court hearings as well. The information obtained by the monitors and the compliance of the court's activities with the international standards, the Constitution of Georgia, and applicable national legislation have been analyzed by GYLA analysts. The questionnaire contains "close-ended" questions requiring "yes" or "no" answers as well as "open-ended" questions that allowed monitors to interpret the results of their observations in detail.

GYLA attended 141 remotely conducted court hearings from 4 May to 10 June.

- First appearance court hearings - 6
- Plea agreement court hearings - 17
- Pre-trial court hearings - 54
- Merits hearings - 64





KEY FINDINGS

- Within the conditions dictated by the pandemic, the judicial system managed to switch to remote litigations in a timely manner;
- Initially, from March to May, the publicity and transparency of court sessions were completely restricted, and stakeholders were deprived of the possibility to attend remote court hearings in progress using the technology means;
- Regarding monitoring, the judiciary did not have a uniform approach. GYLA has been monitoring online court proceedings at Tbilisi City Court since May and at Zugdidi District Court since June. Other courts (Batumi, Kutaisi, Telavi, and Rustavi) refused to allow the monitors to remotely held court trials, holding that the participation of the monitors might have caused technical issues;
- One of the major challenges in conducting remote court hearings is technical obstacles, which often result in delayed opening or postponement of court trials;
- The examination of evidence at remote court hearings is problematic as well. There were cases where witnesses questioned during the court hearing were physically present in a police unit. In such cases, witnesses are not protected against the risks of psychological pressure by law enforcement officers who might be trying to ensure that the witnesses provide the court with information that the prosecution wants for;

- During remote court trials, it is literally impossible to examine material evidence. The examination of material evidence means the opening and visual inspection of sealed evidence in front of the parties right in the courtroom so that there is no doubt about a possible replacement of evidence, a substantial alteration in its features or disappearance of significant traces left on the evidence;
- Shortcomings were revealed during several court proceedings that were reviewing video-audio recordings, in particular, the recordings were not perceivable to the parties;
- Defendants who join the court hearings from a penitentiary facility may feel hesitant to boldly and openly speak about any incidents of ill-treatment perpetrated against them, especially in cases where the violence is likely to have been committed by the staff of a penitentiary facility;
- The monitoring identified two cases where the defendants made allegations about ill-treatment;
- Online litigations may even jeopardize the confidentiality of conversations between the accused and defense lawyers. There were cases when the lawyer's consultation with the accused was audible to third parties during the remote court trial;
- In a remote court hearing, there is a risk that the personal information of the accused and other individuals involved in the case proceeding, as well as any confidential information voiced at closed sessions, might be leaked out and disseminated.



CHALLENGES FACING REMOTE LITIGATIONS

CURRENT SITUATION

Within the reality of the new Coronavirus pandemic, when the necessity to switch to remote litigations emerged, the court managed to timely provide access to remote court proceedings, yet with some hurdles in terms of publicity at the initial stage. With the view to preventing the spread of the virus, the High Council of Justice, in its recommendation of 13 March 2020, limited the number of individuals who could be present at court hearings, including representatives of media outlets.¹

On 20 March 2020, a meeting was held in the Supreme Court of Georgia,² where the heads of relevant bodies discussed the capacities to provide a full-fledged administration of justice in the country with the prevention of the spread of the new Coronavirus in mind. It was unanimously agreed that the

¹ Recommendations of the High Council of Justice of Georgia, 13 March 2020. Available at: <http://hcoj.gov.ge/ge/iustitsiis-umaghlesi-sabchos-rekomendatsiebi/3629>.

² The meeting of the heads of the bodies implementing justice was held in the Supreme Court. Available at: <http://www.supremecourt.ge/news/id/2058>

judiciary in the country would move to the remote mode of legal proceedings.

On 21 March 2020, a state of emergency was declared throughout the territory of Georgia. Article 7 of the Decree №1 of the President of Georgia issued on 21 March 2020 allowed the possibility to hold court hearings remotely under criminal procedure legislation, in particular, by using electronic means of communication.³

And since 23 May 2020, once the state of emergency was lifted in the country, the procedure of conducting remote litigations has been regulated by a new legislative amendment. Specifically, a temporary rule of holding criminal court hearings remotely until 15 July of the current year has been determined.⁴

PUBLICITY OF COURT HEARINGS

Initially, court hearings conducted remotely by the common courts deprived GYLA monitors, as well as other interested parties, of the possibility to access criminal proceedings.

On 2 April 2020, the organization filed a statement with the High Council of Justice requesting permission to participate in remote court hearings.⁵ The Council replied that given the existing situation and notwithstanding the commitment of the court to observe the principle of publicity, the judicial system was not able to allow monitors to remote court proceedings.⁶

Following that, in early May 2020, GYLA applied to five courts: Tbilisi, Kutaisi, Batumi and Rustavi City Courts and Telavi District Court and requested the authorization for conducting the monitoring remotely.⁷ It was only Tbilisi

³ The Decree N1 issued by President of Georgia. Available at: <https://matsne.gov.ge/ka/document/view/4830372?publication=0>

⁴ Please see <https://matsne.gov.ge/ka/document/view/4876514?publication=0>

⁵ 02/04/2020, Application №-01/37-20

⁶ 07/04/2020, Application N305/995-03-m

⁷ 04/05/2020, Application №-01/44-20

City Court that expressed its readiness to admit the monitors to online litigations. GYLA cannot remotely monitor the first appearance court hearings in Tbilisi City Court due to the fact that the information about the initial court sessions is not published on the court's website.⁸ We have been indicating for many years that the information related to the first appearance court hearings must be posted on the website of the court, as well as on the screens installed in the court building, just like the information about other stages of court litigations. Given the importance of issues to be reviewed at the first court hearing of the accused, leaving this stage of court proceedings completely beyond the monitoring poses a risk, as this is the stage where the issue of detention is decided and the lawfulness of arrest is examined.

Rustavi, Batumi, Kutaisi City Courts and Telavi District Court rejected our request seeking access to remote court hearings, on the grounds that the involvement of GYLA's monitors remotely would cause technical delays due to a large number of attendees.⁹ This cannot be considered a valid argument since we have monitored multiple court hearings at Tbilisi City Court where the number of attendees remotely participating in the litigations was more than ten, yet no technical problems emerged because of a large number of people present.

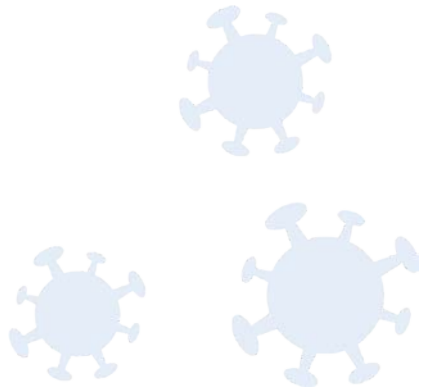
Once requested, on 2 June of this year, Zugdidi District Court provided access for GYLA monitors to all stages of the remote court hearing, including the first appearance court sessions. This renders the motivation of other courts even more obscure, breaching the principle of publicity with the aforementioned attitude to the GYLA's monitors. It is unclear why they placed defendants in a condition different from the defendants in the Tbilisi and/or Zugdidi courts in terms of publicity of the court hearing by merely referring to an abstract threat of technical issues.

⁸ GYLA monitors randomly select court hearings from the information posted on the court's website a day prior to the trial and inform thereof the heads and/or secretaries of the Tbilisi City Court Criminal Case Investigative Panel, Pre-Trial/Main Court Trial Panels, who are in charge of providing access to monitors to remote court sessions in progress.

⁹ Response of Kutaisi City Court, 11.05.2020. Application N 4212-2.
 Response of Batumi City Court, 11.05.2020. Application N 313-8 /3.
 Response of Rustavi City Court, 06.05.2020. Application N440/8.

Since 01 June 2020, GYLA has been monitoring criminal court proceedings in the following six courts: Tbilisi, Kutaisi, Batumi, Rustavi City Courts, and Telavi and Zugdidi District Courts.¹⁰

Presently, GYLA continues to monitor the court sessions in the courtroom, as well as remotely in Tbilisi and Zugdidi Courts. As of today, no delays in terms of monitoring have been reported.



¹⁰ The GYLA monitors conduct the monitoring in Tbilisi City Court both remotely and by attending court proceedings in the courtroom; In Zugdidi District Court - remotely, and in the Kutaisi, Batumi, Rustavi City Courts and Telavi District Court, GYLA monitors right in the court building observe court proceedings either remotely or partially remotely.



RESULTS OF REMOTE COURT MONITORING AND IDENTIFIED TRENDS

FIRST APPEARANCE COURT HEARING

After being deprived of the possibility to directly attend court proceedings in the courtroom based on the above-mentioned legal acts, we were practically unable to monitor first appearance court hearings. Although we were allowed to attend remotely other stages of court proceedings in Tbilisi City Court within forty days after the announcement of the state of emergency in the country, we did not have the possibility to be present at first appearance court sessions.

We would not experience the above challenges to online monitoring if the information about the initial court hearings was posted on the court's website.

We successfully monitor first appearance court hearings in Zugdidi District Court, unlike other courts. Relevant persons in Zugdidi Court publish public information about upcoming court hearings on the court's website and demonstrate the maximum openness in terms of ensuring the involvement of the civil sector in the process.

GYLA monitors attended six initial court hearings in Zugdidi City Court. In one case, the court did not apply a measure of restraint against the accused, in one case the defendant was sentenced to remand detention, and in four cases, the court used bail as a preventive measure. The arrested defendants joined the court hearings remotely from the temporary detention facilities, and in one case, the accused person, who was not a detainee, joined the court hearing from the administrative building of a police department.

PLEA AGREEMENTS

The GYLA monitors attended 17 court hearings where plea agreements were signed with all 17 defendants; in one case though, the plea agreement was not approved as the judge considered that the wording of the charge needed to be further specified.

It should be noted that at the hearing where the plea agreement was not approved, the accused was not a detainee, yet he remained in the administrative building of the police department while taking part in the court hearing. Following the refusal to approve the plea agreement, the judge left the defendant without a preventive measure, despite the prosecutor's request for bail of GEL 3,000.

The plea agreement can serve as the basis for rendering a verdict without the main consideration of the case, therefore, it is important for the accused to have adequate consultation with the lawyer on any matters concerning which the agreement is reached with the prosecution. To this end, effective communication between the defense counsel and the defendant is crucial. During the 2018-2019 reporting period, GYLA identified court proceedings held in the courtroom where the lawyer met with the accused for the first time just a few minutes before the hearing started.¹¹

Plea agreement court hearings, as well as pre-trial and merits hearings, showed that the defense was unable to establish effective communication

¹¹ GYLA Criminal Court Monitoring Report N13. Published in 2019. Available at: <https://bit.ly/2CPvs17>

with defendants remanded in the penitentiary institution due to the emergency state restrictions. During the distant court hearings, several lawyers requested permission to have a conversation with the accused privately, yet the secretary of the session explained that he/she would not be able to ensure the confidentiality of the conversation with the accused. This is problematic also in the sense that even if it is technically possible to temporarily switch off the prosecution and the judge (ask them to leave the hearing), a non-stop audio/video recording which is made during the court hearing may jeopardize the confidentiality of the communication between the lawyer and the defendant.

In view of all the above, as of today, it appears that judges cannot fully discern whether the accused expresses his/her true will to sign a plea agreement during a remote court proceeding, compared with court hearings held in the courtroom.

On the other hand, provided that the defendant has proper and effective communication with the lawyer, followed by strict judicial control over the plea agreement by the court with the strict observance of the requirements of the CPC, a plea agreement court hearing handled remotely may even save time and resources for the parties.

PRE-TRIAL COURT HEARINGS

The GYLA monitors attended 54 pre-trial court hearings conducted remotely against 57 defendants. The preliminary court hearings were held in full compliance with the requirements of the criminal law. In two different cases where the defendants were not represented by defense lawyers and were joining the court trials from a penitentiary facility, it was revealed during the trial that the defendants could not properly understand the important issues voiced at the court hearing and to the judge's question regarding the indisputability of the evidence, it seemed that the defendants unknowingly consented to deem the evidence undisputed.

During two pre-trial court hearings, two defendants declared that they had been subjected to ill-treatment. In one case, the person spoke about verbal

abuse by law enforcement officials, and in the other, the defendant mentioned physical violence he had been inflicted by employees of the penitentiary institution. In comparison to other remote court sessions, in the above case, the accused¹² was joining the court hearing from his prison cell, while the screen, microphone, and speakers were outside the cell, making it difficult for the defendant to adequately understand the issues or receive information from the accused. Following the defendant's above statement, the judge called on the prosecutor to respond thereupon, as well as noted that he/she would notify the State Inspector's Office about the incident.

In contrast to a court trial where a defendant is present in the courtroom and can speak openly about the circumstances of alleged violence perpetrated against him/her, a defendant in a remote court proceeding cannot leave the penitentiary facility, and employees of this institution have to ensure that he/she is provided with access to the court trial. Although only the accused remains visible on the screen, we cannot be sure at all whether he/she is actually alone in the room or who might be having access to the information provided by the defendant to the court from the penitentiary facility. We believe this increases the likelihood that if the accused has been abused by employees of a penitentiary institution, he/she will refrain from providing information to the court for the fear of psychological or further physical violence from the same and/or other employees.

¹² He/she was charged under Article 378, paragraph 4 (b) and paragraph 5 of the Criminal Code of Georgia (interference with the activities of a penitentiary institution, committed repeatedly, by a person convicted for serious or particularly serious offence).

TRENDS REVEALED DURING MERITS HEARINGS

GYLA monitors attended 64 court hearings on the merits against 84 defendants in the court remotely with the help of technical equipment. Witnesses were interrogated in fifteen cases including the two of them were presented by the defense.

There were cases where witnesses joined the court trial from the administrative building of a police station or the office of a defense lawyer. There were also cases when a witness physically appeared in the courtroom during the remote court hearing.

Witnesses from the prosecution mainly joined the trials from the administrative building of police stations, which we deem to be problematic, as the environment provided in the police unit may affect the witness's ability to freely render the details of a case; the witness may feel reluctant to speak openly or honestly about the circumstances contradicting the opinion of the prosecution. There is also a risk that a witness questioned in the police administrative building may not go beyond the information provided by him/her during the investigation stage due to an imaginary tension or psychological pressure from the police, and may not feel comfortable to speak about circumstances of a specific case that he or she had recalled and/or specified after the incident. This will definitely prevent the court from establishing the truth into a case.

Another challenge is interrogating police officers from the administrative building of a police unit, because the process of questioning a police officer involved in a case proceeding as a witness may be audible to other police officers present in the same building. This is problematic because witnesses may hear each other's statements.

Anywhere in a lawyer's office, a police station, or even during a remote interrogation at one's own home, there is a risk that a witness may be reading out a predesigned text or rendering the information provided to him/her by the parties in advance rather than the circumstances of the case that actually had taken place.

During the remote court trials, there were cases when the participants of the case proceedings shared the so-called screenshots of the court trials through social networks. This negatively affects the protection of the personal information of the accused and other persons involved in a court proceeding. It is also problematic that during a remote court trial a witness can record the hearing and make it available to another person or the one who is going to be questioned as a witness into a given case.

The above-mentioned factors may jeopardize the confidentiality of those court hearings that must be closed pursuant to the procedural law, as any information voiced during a court trial held remotely because of the above risks cannot be protected as effectively as information disclosed in the courtroom.

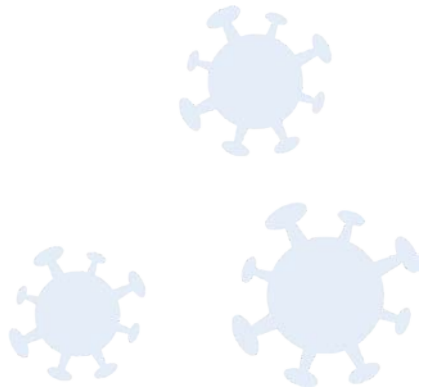
Unlike the interrogation of a witness in the courtroom, the witness in a remote court trial does not produce his/her identity document to the court, which further reduces the judicial control over the remote court trial.

The monitoring identified cases where the accused could hardly understand the information presented during the court hearing, which is particularly alarming when the accused is not represented by a lawyer. Another challenge is the examination of material evidence at a remote court session, which is virtually impossible. Problems were also identified during the video recording of several court trials, in particular, the parties were not able to view the recordings.

The court rendered final judgments in eight remote court trials, seven guilty verdicts and one acquittal. In each of the cases, including the acquittal,¹³ the parties deemed the evidence indisputable.

¹³ The accused was charged with Article 287¹, paragraph one of the Criminal Code of Georgia (violation of the registration requirements of a saw mill). The accused did not plead guilty, yet deemed the evidence indisputable. Despite the decisions of the first instance courts presented by the prosecutor, in which similar cases were qualified under Article 287¹, the judge could not find any elements of the crime in the unregistered possession of the damaged device and acquitted the accused.

Particularly problematic is a court hearing where the fate of the accused depends on the conclusion of a forensic psychiatric examination. Due to the state of emergency, taking defendants to the appropriate medical facility for the examination has been suspended, for example, in one case, all stages of the judicial proceedings have been finalized, yet the judge cannot deliver a final judgment because a report of the forensic psychiatric examination has not been provided yet.





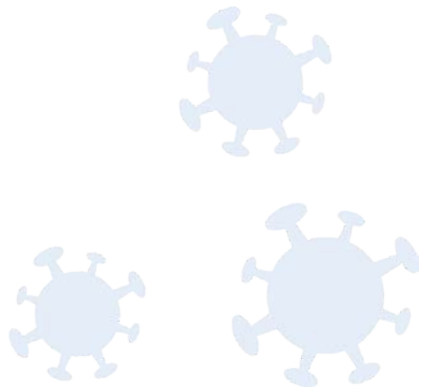
TECHNICAL AND OTHER ISSUES

Eight court hearings have been marked with technical challenges that caused the delay in the case proceedings. We could not manage to join 35 court hearings remotely because these hearings were delayed and in most cases, either the accused or the party was unable to join the court session, ultimately resulting in the cancelation of the court proceedings.

Almost all court hearings that we attended started late. The main reason for the lateness was in majority of the cases the delayed transportation of convicts from the penitentiary institutions, in some cases due to the absence of technical equipment in the facility, as well as the delayed involvement of defendants due to the lack of personnel in charge of technical support. The above problem not only caused discomfort of waiting but also disrupted the agenda of the court and the parties, resulting in the postponement of court hearings or even several hour delays.

There were cases where the prosecutor participating in a court hearing went off to join another court proceeding due to the lateness of the party, and a prosecutor who later joined the case proceedings in question was unaware at all of the case materials, which ultimately led to the postponement of the hearing.

There were two instances where a court official refused us to the remote court hearing using a technical means for unknown reasons.¹⁴ In one case, the defense expressed dissatisfaction concerning our participation, yet it did not affect the monitoring process as the court hearing was not closed.



¹⁴ He/she did not favour the involvement of GYLA monitors in the court proceeding, and despite the agreement, we were not allowed to attend several court hearings.



CONCLUSION AND RECOMMENDATIONS

With the onset of the pandemic, the court managed to take timely measures to prevent the threat and switch to remote proceedings for the same reason. This should be highly appreciated, yet holding court hearings with technical means is a significant challenge facing the judiciary. A number of shortcomings have been identified that jeopardize the fundamental principles of criminal law and require timely regulation to ensure that court proceedings are not hindered and that citizens receive high quality and effective justice.

The observance of the principle of publicity when conducting court trials is the requirement of the legislation, and court hearings handled based on the above principle earn greater legitimacy in the eyes of the public. Unfortunately, several courts are still refusing to admit the monitors or stakeholders to remote court proceedings, which leads to a violation of the principle of publicity and a full closure of court hearings without any reasonable grounds as stipulated in the law.

As a result of monitoring the court hearings and identifying the challenges, GYLA prepared recommendations. Although the amendments to the Criminal Procedure Code with respect to online court proceedings are

temporary,¹⁵ the necessity for holding court hearings remotely may arise in the future.

We hope that the findings and recommendations provided in the report will ensure the effectiveness of remote litigation and facilitate the administration of fair and accessible justice that will directly and proportionally be translated into the high degree of public confidence in the judiciary.

Recommendations:

- The courts should ensure the involvement of monitors and interested parties in remote court hearings.
- With the view to limiting the interested parties participating in remote court hearings with the legal framework, recommendations should be developed that will prevent any interference with the progress of the court hearing and protect the interests of the participants of court proceedings.
- The court must ensure that the information on first appearance court hearings is published on the court's website.
- For remote questioning of witnesses, the courthouse should allocate a room with appropriate technical equipment, from which witnesses will be able to join court hearings. This will ensure that the information provided by witnesses is not available to others and psychological threats or pressure usually accompanying the interrogation of witnesses in police units or a lawyer's office is minimized.
- With the help of the participants of court proceedings and the local municipality, it must be ensured that individuals who do not have the necessary technical means to participate in remote court hearings are provided with the same so that the social conditions of individuals do not cause the delay of court proceedings.

¹⁵ Article 332 (5) of the CPC. In the event of risks of spreading the epidemic and/or especially dangerous diseases for public health before 15 July 2020, court hearings falling under the scope of the Criminal Procedure Code of Georgia may be held remotely based on a decision of the court.

- The court and the parties should try their best to hold merits hearings in the courtroom.
- Relevant agencies should train the participants of the court proceeding in the use of technical equipment.
- The penitentiary institutions should be equipped with a sufficient number of technical facilities, and the required number of personnel should be provided and retrained to ensure the smooth participation of the accused in court hearings.
- The penitentiary facilities should ensure that the accused/convicts are protected against harmful influences during the remote participation in court hearings, as well as to guarantee that information provided by the accused/ convicts is protected.
- Defendants who find it difficult to present their position during the court proceedings without direct consultation with the lawyer should be given the possibility to attend the court hearings with a lawyer from the penitentiary institution. Such communication should be achieved with the due observance of the risks of the pandemic.
- The confidentiality of the communication between lawyers and defendants during remote court trials should be protected.
- Information disclosed during closed court sessions should be better protected.
- The regulations for providing audio-video and photo shooting of remote court hearings should be developed.
- The parties must adhere to ethical norms and refrain from disclosing any photographs taken of the participants of court hearings to the general public during the court proceedings.