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Impact on child justice in a world of digital courts: Perspectives from the bench

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Abstract

The Covid-19 pandemic brought so much tragedy across the world, but as with so much necessity also became the mother of invention. The notion of a virtual trial or other court proceedings came to life during the pandemic to help courts continue to function. In this context, virtual court proceedings and trials became the norm. And, as the world grapples with emerging from this health crisis different courts are taking different paths. In order to guarantee the child's right to justice during the pandemic and as it waned, some jurisdictions have opted to continue holding hearings in-person, while maintaining physical protection from viruses; others have decided to digitise court proceedings using technological tools. To explore this development, volunteer attorneys from Baker McKenzie and the legal department of Google came together to assist the Global Initiative on Justice With Children, by interviewing judiciary professionals around the world.

Using a single questioning tool, volunteers conducted interviews with individual judges to understand their perspectives on the use of digital hearings and the effect of their use on justice for children. We opted for the term 'digital justice' to describe this use of virtual technology to conduct hearings and trials in youth justice proceedings rather than conducting them in-person. This paper aims to highlight how digital justice had a significant impact on justice systems for children and youth during the pandemic, determine whether digital justice could or should become a new normal in children's justice systems, and identify what should be the protective measures for children in a modified justice system.

This paper analyses the advantages and disadvantages of virtual hearings and the impact of them on children's ability to effectively participate in and adequately understand the judicial processes and the seriousness of the justice outcomes. It also discusses the different jurisdictions' approaches to requiring the presence of the child's lawyer during the proceedings and the obstacles to children's access to legal aid in a digital context. The interviews conducted by volunteers highlighted difficulties in ensuring a safe space for children and young people's data and privacy, difficulties in communicating with counsel and receiving useful advice from lawyers and other participants in the proceedings, and difficulties for children to feel that they can speak up in their own proceedings.

Keywords: children's rights; digital justice; digital hearing; access to justice; legal aid

1 Introduction

The Covid-19 pandemic had a profound impact on the world, resulting in unprecedented economic and societal crises, a staggering loss of human lives, and the fundamental transformation of daily routines of individuals everywhere. The Covid-19 pandemic transformed our work, life and travel patterns, our food systems (WHO, 2022) and, of course, the way we communicate.

When Covid-19 really took root in our lives, the justice sector immediately revealed overcrowded and unsanitary places of detention. Children and youth were put in high-risk places where the virus could easily spread and potentially cause disastrous results for inmates. Health experts worldwide warned that children deprived of their liberty were the most vulnerable and likely to be most severely affected (Justice With Children, 2020).

The need to keep the wheels of child justice turning forced courts to find creative ways to remain open and, in some cases, re-open after shutting down in so many parts of the world due to the impact of the first wave of Covid-19. For many courts, this meant conducting proceedings and trials through virtual platforms so that parents, children, court workers, judges, lawyers, and anyone involved in the system could participate in court proceedings in the safety of their own spaces without travelling to a live courtroom. Although these virtual proceedings took varying forms and degrees, they all relied on virtual communications in one way or another. We opted for the term ‘digital justice’ to describe the use of digital technologies to conduct remote hearings and trials in child justice proceedings, also referred to as ‘virtual courts’, rather than conducting them in-person.

This paper seeks to shed light on the profound impact of digital justice on justice systems for children and youth during the pandemic. The analysis primarily centres on individuals aged 14 to 18, that is minors. However, when we mention ‘young people’, we are referring to young adults within the age range of 18 to 24. Specifically, it investigates whether digital justice is becoming the prevailing norm in child justice systems and explores the possibility of further advancement and growth of the hybrid approach. Furthermore, the paper delves into the critical question of what protective measures should be implemented within a modified justice system to safeguard the rights of children, and it analyses the advantages and disadvantages of virtual hearings. Beyond that, it examines their impact on the ability of children and youth to actively participate in and fully comprehend the judicial processes that affect them, emphasizing the gravity of the justice outcomes.

2 Child justice in time of crises and systemic changes

Worldwide, children are victims of different forms of violence as a result of multiple forms of crises (O’Brien, 2019). Whether it is economic disparity, discrimination, geopolitical differences or, more recently, a global health emergency, the emerging pattern is that children face and endure violence. In the wake of these crises comes an increased vulnerability of children as well as the systems that were initially designed and intended to support them (UN Committee on the Rights of the Child, 2020, para. 7). These justice systems have to adapt in order to continue delivering services in the best interests of children in adverse

circumstances, preventing and responding to serious forms of violence perpetrated against children (Justice With Children, 2021). These circumstances have a significant impact on the rights of children accused of serious crimes, who are often hindered from accessing the protections of the juvenile justice system (Lynch & Liefwaard, 2020). During the Covid-19 pandemic, the procedures, processes, and timeframes of the judicial system were compromised to ensure public health. While there is little international guidance on how to balance these rights, the Committee on the Rights of the Child has considered that, while international human rights law permits measures that may restrict the enjoyment of certain human rights to protect public health, such restrictions must be imposed on an extraordinary basis, proportionate, and kept to an absolute minimum (UN Committee on the Rights of the Child, 2020, para. 1). What does that mean for child justice? Interviews were conducted in order to determine the answer. We strove to understand the parameters of what qualifies as an extraordinary basis and what it means to be kept to a minimum that is appropriately proportionate.

Article 40 of the UNCRC recognises children's right to fair trial, including the right to legal counsel and effective participation in the criminal process (Committee on the Rights of the Child, 2019). While all defendants, including youth, have the right to be present at their own trial, this does not necessarily mean attending court in person. During the first waves of the pandemic, legal professionals such as judges, magistrates, lawyers and other authorities, were not able to contact children. Courts in many countries were closed to prevent the spread of the virus and no court hearings were allowed. In addition, strains were placed on other institutions such as places of detention where children were held. Many institutions have also had limited resources and staff shortages (U.S. Department of Labor, 2023).

In response to the pandemic, most countries across the world have invested in health safety measures. The measures generally are something akin to the application of physical distancing rules, the regular use of hand sanitisers and handwashing, and mandatory facial mask wearing in public spaces (WHO, 2020). In particular, safety measures were applied in the child justice sector.

During legal proceedings, some countries decided to add additional protection against the virus for children in a way that considers the unique need for children to participate and understand proceedings in a different way than adults. In the Netherlands, for instance, to safeguard the right to a fair trial, children accused or suspected of a crime were summoned to the court, and physical protection such as transparent plastic walls between the child and professionals were set up to prevent the possible transmission of the virus (Voert et al., 2022, p. 72). So, some countries interpreted the right of a child to a fair trial by ensuring presence of the child during court hearings while maintaining physical protection against the virus.

Other countries like Bangladesh, the United Kingdom, and Mexico, used digital technologies as a way to keep the wheels of child justice turning without making any special accommodations for the ages of the children (Boyes Turner LLP, 2020). Instead of organising hearings in the presence of a child, it was decided to digitalise the judicial proceedings through technological tools such as video conferencing platforms, virtual meetings, and telephones (Murshed, 2020). Digital technologies allow the judges to remotely communicate with children in conflict with the law.

The opportunity to appear in court in person has a significant impact on the rights of children, especially their participation rights (Children's Court of Victoria, 2015). Even when children attend their hearings in person, they encounter difficulties in understanding the proceedings and the seriousness of their situation (Forde, 2018). Child advocates have long argued for more inclusive and didactic opportunities for children to engage in legal proceedings that affect their human rights. This includes extended time in proceedings to have rights, procedures and facts explained to them in a way that helps them understand and know their rights. Remote participation may exacerbate these difficulties (Lynch & Kilkelly, 2021).

In Ireland, the defence manager at Oberstown Juvenile Detention Centre carried out a consultation with children about their experiences regarding remote hearings (Ombudsman for Children, Direct Division, 2020). Eleven children from Oberstown were interviewed about their experience of court appearances via video conferencing. All but one child said they had no idea what was going on in court and explained that they felt like they were sitting 'looking at TV'. The children interviewed said they were unhappy with the virtual hearings. Three of them expressed that they were content that they did not have to make the trip to court, which is often a long journey that disrupts their classes and regular activities (Lynch & Kilkelly, 2021).

It is not a surprise that, when asked, children themselves reveal how disengaged and disconnected they feel from proceedings which have only the focused purpose of identifying and preserving their own rights.

3 Techno solutionism and the new era digital justice

3.1 Research question, study and its methods

This paper represents a culmination of extensive work undertaken as part of a broad project led by the Global Initiative on Justice With Children, in collaboration with the international law firm Baker McKenzie and volunteers from Google's legal department.¹ The project encompasses a series of interconnected phases, beginning with comprehensive desk research that aims to understand the initial responses of justice systems to the unprecedented challenges posed by the COVID-19 pandemic, with particular emphasis on children in conflict with the law. The culmination of this research resulted in the development of a comprehensive policy brief entitled 'Accelerate Release of Children From Detention; Protect Children From COVID-19'. Based on this document, subsequent phases of the project included qualitative semi-structured interviews (N = 10) with judges and magistrates in the initial phase, followed by interviews with attorneys, social workers, and academics in the second phase (N = 20).

¹ The project started with collaboration between the Global Initiative on Justice With Children, Terre des hommes, Baker McKenzie, Google, Gault Center, Brennan Center, International Institute of Children Rights, Juvenile Justice Initiative of IL, and IL Collaboration on Youth. It grew to other branches of collaboration with the pathfinders, Strathclyde University, and UNODC.

The authors of this study took responsibility for developing the methodology and creating a comprehensive questionnaire. To carry out the interviews, Baker McKenzie and Google pro bono programmes were able to identify volunteers who were willing to help. In order to ensure that the volunteers were well-informed about children's rights and child justice, the authors organised an online training session on child justice and children's rights. The authors, with the support of the International Association of Youth and Family Judges and Magistrates (IAYFJM), carefully selected the experts to be interviewed based on certain criteria, such as international representation, north-south balance, and gender equality. Once the pro bono volunteers had received the necessary training, the authors coordinated the scheduling of the interviews between the volunteers and the experts. During the interviews, the pro bono volunteers recorded the conversations and produced transcripts. Afterward, the authors, along with a selected group of volunteers, analysed the transcripts. They classified the answers according to the questions asked, using an elaborated results table for their analysis.

The first phase of the project entailed conducting a series of semi-structured interviews with judges and magistrates handling criminal cases involving children. The selection criteria required a balanced geographical representation, ensuring the inclusion of at least one judge per continent who had prior experience in conducting virtual hearings with children before or during the pandemic. Consequently, the final cohort consisted of judges from Argentina, Bangladesh, Canada, Mexico, the Netherlands, Thailand, the United Kingdom, Kenya, and the United States. The interviews aimed to gather information regarding their pre-pandemic practices concerning the utilisation of online video platforms for hearings involving children in conflict with the law. Moreover, the judges and magistrates were prompted to reflect upon the implementation of this practice during the pandemic, along with its subsequent effects on their professional responsibilities, and its influence on safeguarding children's access to justice. Furthermore, the interviews served the purpose of gathering detailed and nuanced information on changes in child justice proceedings, the impact of remote and hybrid-remote hearings on judges and children, and confidentiality considerations in virtual hearings.

In the first section of the interviews, judges were asked about their experiences with child justice during the pandemic, changes in court schedules, frequency of hearings, and appearances of children and lawyers as well as technology utilised, delays in proceedings, activities that were hindered, and the operational status of the courts. Additionally, they investigated the physical modifications made to courtrooms and the mechanisms employed for the appearance of lawyers, witnesses, and parties.

The second section examined scenarios where only in-person hearings were allowed and investigated the rationale for the decision not to adopt virtual hearings. It also explored how the best interests of the child were defined and which elements were taken into account more in face-to-face hearings versus in remote hearings.

The third section investigated the utilisation of virtual court hearings and their impact on children and families. It explored how the understanding of court proceedings was ensured, including whether more time was dedicated to hearings, the provision of additional staff or representatives to support children and their families, the possibility of waiving the appearance in court of children due to COVID, methods to foster child partic-

ipation, strategies for facilitating the child's comprehension of the judicial process, and measures taken to explain court decisions to children and ensure effective communication with their families.

The final section of the interviews focused on communication considerations in virtual hearings. It addressed active representation and communication between lawyers and children, affirmation or confirmation requirements of lawyers or legal representatives in relation to the child's legal adviser, certifications or training requirements for children's lawyers, communication between the child and social worker (if assigned), reinforcing communication with the child to ensure fairness, managing outcomes such as custody or detention in virtual court proceedings, ensuring procedural understanding and concentration of child offenders during virtual hearings, providing visual and oral information, legal professionals' and citizens' perceptions of remote hearings, and evaluating remote hearings as progress or setbacks in the implementation of child-friendly justice.

The second phase of the project aimed to provide a comprehensive understanding of the diverse perspectives and views of those involved in the legal and social aspects of juvenile justice, shedding light on the nuances and potential implications for children of digital justice practices. The final cohort consisted of child justice professionals from Scotland, Belgium, Cameroon, Australia, Bangladesh, Senegal and Switzerland.

For this phase, the project team conducted interviews with a range of key stakeholders, including child legal representatives, social workers, and child justice experts. The questions in this phase were tailored to elicit their views as legal advisors, focusing specifically on how they believed virtual courts ensure or fail to ensure the best interests of the child.

In order to comprehensively analyse the wealth of information collected from these interviews, we formed three cohorts of experts (N = 30) who actively collaborated in dedicated working sessions.² This collaborative effort strived to foster comprehensive analysis and the development of practical recommendations.

3.2 Experts' perspectives on remote hearings

Child justice systems are bound to respect key principles set forth by international law, standards and norms, including non-discrimination, best interests of the child, proportionality, primacy of alternative measures to judicial proceedings, participation, proceedings without delay, presumption of innocence and detention as a measure of last resort (UNODC, 2013). These principles must be respected in all circumstances and may not be subject to any exceptions or derogations, including during times of crisis or change, as well as when adopting new modalities or using technology. While recognizing that general principles for child justice have to apply in video proceedings is a certainty, other questions we need to ask ourselves with regard to the use of technology are more challenging to answer. First, does replacing certain in-person proceedings with remote hearings have

² These working sessions took place within the 2021 World Congress on Justice With Children, the Children's Rights in a World of Virtual Justice webinar, and the first annual seminar 'A 360° View on Child Friendly Justice'.

an impact on substantive outcomes in child justice proceedings? Second, what is the impact of the use of technology on factors that will affect these substantive outcomes? To better understand the challenges and impact of technology on child justice systems, it is essential to look at how it affects judges, prosecutors, witnesses, jurors, and ultimately, children.

Certainly, there are some advantages to using remote hearings in criminal proceedings involving children. But whom do they benefit? One obvious advantage is linked to health concerns during the pandemic. Research has revealed other advantages including the fact that video proceedings have shown to enable legal aid organisations to serve previously underserved geographical areas and have also opened greater opportunities for pro bono representation (Brennan Center for Justice, 2020). In certain cases, children may find that online proceedings can reduce anxiety normally associated with attending court in person and there may be positive effects of the use of video links associated with reducing the risk of re-victimisation by avoiding direct contact with the offender for child victims and witnesses (Lynch & Kilkelly, 2021).

While these positive elements are encouraging, the concerns and risks of remote hearings must be taken seriously. Research suggests that remote hearings have exacerbated issues related to children's effective participation in the justice process. It can make lawyer-client relations more difficult (Brennan Center for Justice, 2020), undermining communication and the relationship of trust between the lawyer and the child as well as the lawyer's capacity to provide adequate support and assistance (Lynch & Kilkelly, 2021). The digital divide causing inequality in access to services and rights during the use of remote hearings has also been highlighted as a challenge, further disadvantaging underserved communities and children (National Juvenile Defender Center, 2021). Finally, children themselves have expressed their frustrations and anxiety in relation to a lack of understanding, privacy and access to lawyers and support persons associated with video proceedings (Juvenile Justice Initiative, 2021).

These concrete challenges significantly impede the ability of child justice systems to uphold the fundamental principles outlined in international law. The right to privacy and data protection, as well as the right to non-discrimination, may be compromised when children from marginalised communities face unequal access to technology, hindering their participation in video proceedings. Furthermore, the right to participation is at risk when children are not adequately informed or supported in a child-sensitive manner as they struggle with understanding video proceedings and expressing their views within an unfamiliar and stressful environment. Proportionality may be at stake when judges, prosecutors and jurors cannot look children in the eye, read their body language and better assess the human impact a sentence may have on a child (Martins, 2021). Absent this in-person experience, decision makers may resort to decision making based on written requirements of legal frameworks and convention rather than humanitarian evaluation on an individualised basis as international human rights law recommends.

As we emerge from the pandemic, and people are able to interact more in-person, there will be less debate about whether or not hearings should be digital and instead the focus will be on how to manage the different types of interaction on site and online. These decisions should be made with children at the centre, just as all decisions in the courts should be made in a child-centred manner.

International rules on child friendly justice recall that child justice systems should adapt to the child's specificity and needs. A best interest of the child or as conceptualised by the US Supreme Court in *JDB v North Carolina* a 'reasonable child standard' (2011) must be used to evaluate whether digital proceedings are effective in protecting child rights, and whether better interests were achieved through a digital justice system (Vigil, 2021). However, there is very limited information about how effective court systems are in the youth justice settings, as regards the impact and actual effectiveness in distributing justice, which is something very hard to measure. For instance, only ten years ago in 2012, the US Supreme Court examined whether the age of a child detained by police should be a relevant consideration in determining whether he understood that they were free to leave (*JDB v North Carolina*, 2011). The court wisely determined that examining an understanding of rights of a child should be examined under a 'reasonable child standard'. This standard is to be taken into account when examining whether the child is participating and understands what others are saying in the courtroom as well as what opportunities they have and what choices they can make. This consideration should perhaps rightly apply in all considerations of legal rights of children (Juvenile Law Center, 2017). We should evaluate if digital systems allow for a reasonable child standard to be considered. If under this standard, the impact of digital procedures denies children a full understanding of their rights and their ability to participate meaningfully in all aspects of the system, then the system fails. It fails to meet the expectations of a just system for children. Even the advancements of a digital platform cannot justify a system that denies children these guarantees of meaningful participation in a system of justice.

Three areas of extreme concern for child justice emerged as digital justice systems evolved and were applied to child court proceedings. First, there is a diminished ability of the judiciary to communicate and engage with children. Second, lawyers are less able to communicate and work with their child clients. Third, the confidentiality owed to any young person in a system of human rights and the rule of law is challenged or altogether absent (Vigil, 2021).

Regarding the opportunity for communication and ability of the judiciary to work with children, many judges around the world implemented international rules of child friendly justice, and changed their practice from their ordinary courtrooms, spending more time asking children questions to try to assure they understood the actions of the court, the rules of the proceedings and the options and opportunities they had. But that is a challenging task in even the most open communication circumstances where communication can flow both ways freely and unencumbered by technology or the limitations it presents. For example, asking a child if they understand what is happening in the court and them answering 'yes' is no guarantee that they understood the rights at stake, the options they had, or the possible outcomes in the alternative to proceedings that they did not take. However, judges have also reported that delays have emerged as a significant challenge during the pandemic, imposing extreme difficulties on their part due to the additional time required. Currently, there is limited information available regarding discussions focused on children's understanding, with a greater emphasis on queries directed towards judicial actors and fewer opportunities for children to express themselves directly.

In terms of the lawyers' ability to work with children confidentially, a US study on child advocates and how digital platforms have affected their capacity found that it was

almost universally critical about whether or not they had the same opportunity to establish a relationship with their client, to spend time with them to discern their gaps in understanding the system and, of course, to be able to discover the facts before them (Brennan Center for Justice, 2020). In addition, one of the biggest concerns raised from a fundamental rights and due process perspective is whether or not there is room for confidential conversations between a child's advocate or lawyer and their client on digital platforms. Some judges reported providing breakout rooms for the child and his or her lawyer intermittently during the proceedings, but that was scarce. In most cases, communications between lawyers and their advocates had to be conducted surreptitiously between proceedings or avoided in order to maintain confidentiality.

Children should be able to exercise their right to fully understand the proceedings by easily halting legal proceedings when they do not understand things being said, concepts at work or options they have to consider. Children should have space, physical and temporal, in order to have confidential communications and the ability to share information with their advocate so that the child's rights are best represented and realised.

The children's rights world is always trying to be creative in addressing these gaps. Acute challenges in the youth justice system existed before this move to digital technology. There was not enough time for lawyers to engage with children, there was not a great understanding of the confidentiality of different actors in a setting, and there was not enough time to help assure children are truly engaged and meaningfully informed about their options and opportunities. This understanding of confidentiality is especially critical when detention is a potential outcome of a legal proceeding.

When assessing the effectiveness of systems, measurement often only focuses on data and statistics, and not necessarily the humanity of the children involved. What such analysis misses is an assessment and understanding of whether all the child's circumstances have been considered and the wisdom of employing the extreme response of detaining or removing a child from their family environment. A fair system of justice should never put these considerations in opposition that requires a choice. Rather, they must ensure that both things happen. During the pandemic, Judges became familiar and dependent on the online functioning of a court system. Still, none reported an increase in reasonable actions by the courts to ensure confidential conversations and good interactions with lawyers and children. This challenge, already a dire need before the pandemic, has become a greater burden with the disruption of the pandemic bringing a new routine and habit of the digital platform (Vigil, 2021).

4 Findings

4.1 Diverse results

The global survey conducted by the Global Initiative on Justice With Children and its partners showed no consensus in the surveyed courts response on whether to maintain face-to-face hearings or shift to virtual platforms to tackle the delay or disruption of court proceedings due to the pandemic (Justice With Children, 2021).

One perspective was to maintain entirely virtual proceedings. In Argentina, Mexico, and the United States, judges have decided to digitalise judicial proceedings by using technological tools, such as video conferencing platforms, virtual meeting technologies, and telephone or audio only communications (Justice With Children, 2021). In Mexico, a vast majority of proceedings were transformed to be completely virtual (Pantin, 2020). There, all parties, including the child, were required to remotely participate in their justice proceedings. The focus of the Mexican courts has been for proceedings to continue to be handled expeditiously to meet the demands of a speedy resolution and trial inherent in rule of law and due process. In less than three weeks after the force of Covid hit the community, the Mexican courts established rules to conduct virtual proceedings while maintaining their obligations under the United Nations Convention on the Rights of the Child (Altamirano, 2021). The Mexican courts made arrangements for lawyers to visit their child clients and to ensure that the lawyers had access to the proper equipment such as software and hardware, cameras and audio headsets, and a zoom license, in order to participate in the virtual proceedings. (Consejo de la Judicatura del Estado de Baja California, 2020). According to our interviewee in Mexico, children were very infrequently taken into custody during the virtual proceedings because there was a reliance on the child voluntarily coming in if an order was issued. At the time of the interviews, the judges in Mexico had the discretion to reopen courts in-person but had not yet moved to do so as vaccination levels were low, and the country continued to prioritise public health (Consejo de la Judicatura Federal, 2020).

In contrast, another perspective was to return immediately to in-person proceedings. Some countries, like the United Kingdom, have interpreted the right of a child to a fair trial by ensuring the presence of the child during court hearings while maintaining physical protection against the virus (Ministry of Justice & HM Courts & Tribunals Service, 2020). For Youth Court proceedings – criminal proceedings for children between the ages of 10 and 17 – children were required to be physically present in court, though defence and prosecution lawyers would participate through a video-conferencing platform (Logan, 2021). The system employs teams of professionals called ‘youth offending teams’ which work with young people that get into trouble with the law, are arrested, or are taken to court, and help them stay away from crime. These teams continued to work remotely (United Kingdom Government, 2020). Explaining why the UK chose not to adopt virtual hearings, a Magistrate of the United Kingdom remarked:

The aim has been to protect youths by getting them into court and not using remote work as far as possible [...]. It is nationally accepted that remote hearings do not work and are unsuitable for children. (Logan, 2021)

Another reason the United Kingdom maintained in-person proceedings was an extremely high rate of disability of children in the justice system (Young et al., 2014). It is estimated that 70 per cent of youths called in the courts of England and Wales have some type of vulnerability including many on the autism spectrum (Kent et al., 2023).

A third perspective suggested an approach that depended on the circumstances and the digital platform used. For instance, in the Netherlands, the nature of the proceedings determined whether child justice proceedings could be conducted virtually using digital

platforms like Zoom, or whether an in-person format was necessary (Justice With Children, 2021). Factors such as the complexity of the case, the age of the child, and the availability of suitable technological infrastructure influenced the decision.

In Bangladesh, juvenile bail hearings were the only type of proceeding that could be conducted virtually, with all other hearings, including trials, required to be conducted in-person (Justice With Children, 2021). According to our interviewee from the Hague Court of the Netherlands, divorce and child custody proceedings were permitted to be held virtually, whereas criminal juvenile cases and child protection cases were required to be held in-person (Dam, 2021).

Finally, another perspective was to leave the format of the proceedings to the individual judges to determine. In countries where the discretion of whether to hold in-person or virtual proceedings was left to the judiciary, these decisions turned on a variety of factors and were determined on a case-by-case basis. For example, for one judge in Canada, the decision whether to conduct a virtual or in-person proceeding was based in part on whether the parties had adequate resources, like technology and Wi-Fi access to participate virtually (Gagnon, 2021). If not, the judge would require an in-person proceeding. Criminal and/or contentious cases would generally be in-person proceedings. Similarly, in the United States, one judge considered the child's preference and comfort level in determining the most appropriate platform on which to conduct the proceeding (Pattison, 2021). When asked what has been done about children appearing in court, the judge remarked:

Some children have asked to be in court, and others have requested to participate by phone (without video) and others are okay with video. My job is to listen to what participation feels good to [the child] and do that. If I do that, then the children at least feel heard. I try to be creative in problem solving. (Pattison, 2021)

The frequency of virtual hearings has varied across countries. During our interviews, it was noted that in Canada, a considerable number of hearings were conducted virtually. In the United States, courts had a higher ratio of virtual hearings compared to in-person hearings. In the Netherlands, virtual and in-person hearings were evenly split. Despite these variations, interviewed judges from Canada, the United States, the Netherlands, Thailand and Bangladesh generally agreed that remote hearings could and, in some cases should remain an option for specific proceedings in the post-pandemic era. However, interviewed judges from Argentina, Mexico and the United Kingdom emphasised that virtual hearings should never completely replace in-person hearings.

Defenders of remote hearings point to their enhanced efficiency, greater flexibility, and, often, a more relaxed environment for children participating in the court proceeding (Ali, 2021; Gagnon, 2021). Nevertheless, it is possible the challenges outweigh the benefits. Disruptions and sometimes full access to technology lead to unequal access to justice when justice is delivered only virtually. The gaps in personal interaction between the judge and the child is an irreplaceable challenge presented by virtual court that may have important impacts both on the child's ability to effectively participate in their court proceedings and on justice outcomes (McKay, 2018; Rossner et al., 2021). Similarly, lack of access to confidential and privileged communication with legal counsel during proceedings may be a critical violation of a child's right to due process and the rule of law that virtual hearings cement in our systems.

The perspectives of judges, magistrates, and child professionals analysed in subsections 4.2, 4.3 and 4.4 were derived from interviews conducted as an integral part of this study.

4.2 Impact of remote or hybrid remote hearings on the judge

4.2.1 Advantages of remote or hybrid hearings

Based on our research findings, interviewees noted that remote hearings had positive effects on the efficient operation of the courts. (Justice With Children, 2021) Technology has allowed judges and judicial officers to work more quickly and efficiently. One judge noted that virtual courts provided him relief from backlogs in the legal process (Ali, 2021). Another judge observed that virtual hearings allowed social service workers to quickly connect with the judge on non-urgent matters, which freed up the social workers' schedule to spend more time with their assigned children rather than waiting in court (Gagnon, 2021). In Argentina, court personnel were able to use WhatsApp messaging to set up meetings faster and communicate more efficiently (Pascual, 2021). And while this may streamline communications between parties, there is no record of WhatsApp for preservation of record and procedures. Moreover, there is no clear guidance on the protection of data and privacy of the parties.

Remote hearings have reduced the time required of parties travelling to and waiting in courts, which is of greatest benefit to low income and financially disadvantaged persons. As one judge noted, many families involved in child judicial proceedings lack the financial flexibility to accommodate the cost and inconvenience of travel to courts, missing work and losing income (Altamirano, 2021). In these cases, virtual hearings have proven to be particularly useful in ensuring these families' access to justice.

In virtual proceedings, some judges observed children to be more relaxed and willing to participate in the proceeding because the children felt more comfortable and/or were less stressed or nervous because they were in the familiar settings of home or community and not in the intimidating and unfamiliar setting of a formal courthouse (Dam, 2021). In the United States, one judge found better child and parent participation where, previously, child cases generally had less child presence (Pattison, 2021). Judges from the United States and Bangladesh observed that youths were more willing to participate in the remote proceedings as a result of being in a comfortable environment such as the child's own home, and that children were more adaptive and capable of using the virtual platform (Justice With Children, 2021) In the Netherlands, one judge observed that in pre-trial child detention hearings, proceedings in which the judge decides whether to detain or release children from custody, that children appeared more relaxed and open over Skype (Dam, 2021). This is partly because children did not have to unnecessarily wait around in court as was often the case when such proceedings were held in-person prior to the pandemic. This confirms that courtrooms are currently not always child friendly enough, the argument of using remote hearing for the child's wellbeing should not contradict the effort to make court setting more suitable for children.

Judges interviewed identified instances where remote hearings appeared to work well. For example, remote hearings generally worked well in proceedings involving greater sensitivity, such as child abduction or domestic violence cases, as they allowed a child to not face his or her abuser in person during the hearing (Dam, 2021). A judge in the United Kingdom noted that welfare check-ins with the child can be effective and efficient in a virtual setting post-trial.³

4.2.2 Challenges with remote or hybrid hearings

The sudden shift to remote hearings was not without its challenges. One such challenge expressed by several judges was that the lack of visual contact and in-person meeting with children and other parties to a virtual proceeding limits judges' abilities to assess body language and interferes with judges' abilities to fully assess the situation and well-being of the child and the child's family. The opportunity for live court interaction provides the ability for a judge to see how the child behaves with his family members and trusted court personnel is absent in the virtual context. In Argentina, where all in-person proceedings went completely virtual during the pandemic, a judge described the impact that the lack of in-person contact has had on child justice proceedings, stating:

It is important for the court to see people's reactions and sense their feelings as this will inform the court's decision and judgment. However, remote hearings have made this more challenging. The empathy aspect has been impacted.

Interviewed judges from Argentina, Mexico and the United Kingdom found that the lack of face-to-face meeting during virtual hearings made it extremely difficult to conduct hearings with the requisite level of empathy and humanity (Justice With Children, 2021). Particular challenges were noticed in parole hearings, which one judge equated to parenting in general, noting that just as parenting requires in-person, physical presence, when a judge tries to teach children on parole, that should also be done face-to-face. One judge noted it could be difficult to know whether children properly understood the nature and significance of remote hearings (Altamirano, 2021).

The technical problems associated with virtual hearings posed an additional challenge. Without the non-verbal cues that judges observe when they see a person in front of them, they found it difficult to talk to the parties, and often encountered situations where several parties were talking at the same time, creating delays or even chaos. Additional delays resulted from one or more parties having difficulties navigating and using online

³ Almost none of the judges interviewed has the experience of giving youth and their families the option of whether to proceed virtually or in-person so we have no conclusions about what their preferences would have been if they had choice. Also, no judges interviewed conducted formal or scientific evaluations of the comfort and anxiety level of children in remote proceedings or conducted post-proceeding surveys or evaluations. These observations were made by the judges based on their observations of children remotely and their experience in court systems.

platforms, particularly when they were not tech-savvy (Pascual, 2021). The use of a virtual platform also increased the workload for court personnel as they were required to also check parties' internet, sound, and camera connections at the beginning of a session.

A court in Thailand faced challenges when trying to admit detained children to their post-arrest and pre-trial rehabilitation programme (Disatha-Amnarj, 2021). In between arrests and trial, detained children in Thailand were only able to speak with psychologists via Line⁴ as opposed to benefiting from in-person meetings. Other proceedings which judges identified as being particularly challenging in the virtual setting were probation and social service assessments, post-arrest hearings (i.e. proceedings in which judges decide whether to release or detain a child in pre-trial facilities), and child rehabilitation programs, all of which necessitate in-person interaction with the child.

4.3 Impact of remote and hybrid remote hearings on the child

4.3.1 Impact on the child's understanding

Child advocates from Australia (Gordon, 2021) and Belgium (Dushi, 2021), judges (Pascual, 2021; Ali, 2021; Altamirano, 2021; Dam, 2021; Logan, 2021), experts and families are concerned with how complex a legal proceeding can be and how well a child, the subject of it, can truly understand its impact, procedure and long-time effects. That has existed for as long as there have been youth justice proceedings. Nevertheless, virtual proceedings exacerbate these challenges by presenting more barriers to the extra efforts that must be made to assist a child in understanding the proceedings of a legal case. Concerns were raised by the judges interviewed about how virtual hearings impacted children's understanding of and participation in their hearings. Judges observed that children often had difficulties engaging virtually, and that there had been miscommunications between courts and juveniles when hearings were conducted online.

Interviewed judges from Argentina, United Kingdom, and Mexico had concerns over whether children were able to understand the proceedings and the seriousness of their implications sufficiently and appropriately (Justice With Children, 2021). For example, judges noted instances where children would speak and gesticulate at inappropriate times during the virtual proceeding (Logan, 2021). In one such case involving a criminal proceeding conducted over Zoom, the victim began using the chat feature to voice objections during a witness's testimony (Pattison, 2021). The judge in this case proceeded to instruct the victim that this was not allowed and that the judge could not take the victim's chat messages into consideration when deciding the case. The fact that the victim was not aware that he/she could not do that and that there were facts to share that they felt were unheard, illustrates a lack of communication with citizens in the courtroom by the prosecutors as well as other court personnel to help the victim understand their own rights and their opportunities to raise issues before the court appropriately.

⁴ Line is a freeware app for instant communications on electronic devices such as smartphones, tablet computers and personal computers.

In most cases the concerns regarding the child's understanding did not appear to be unique to virtual proceedings by video. Many measures that judges had in place for in-person court proceedings before the pandemic continued to be implemented in virtual hearings in largely the same fashion. Judges gave examples of such measure including:

- (1) Ensuring that a child could understand and identify who was who in a digital court included asking whether the child could see everyone on the video link at the outset of the proceeding before introducing all parties.
- (2) Taking additional time to explain to the child that this is a court and that decisions made in court affect the child's life and can be final and binding.
- (3) Providing a recap to the child at the end of the proceeding and requesting that the child repeat the information back to the judge.

Not all judges expressed concerns over interaction with the child in a virtual proceeding. One judge in Bangladesh had a positive experience with virtual child bail hearings, noting that the video conferencing platform allowed the court to see the child's demeanour and the child to visually observe the participants and follow along with the proceeding. In his opinion, the changes did not diminish the process for the child or other court personnel (Ali, 2021).

4.3.2 Building trust between the attorney and the child

Access to adequate legal advice and privileged communication with counsel is an essential component of access to justice and a fair trial. However, as a result of the pandemic, countries differed on approach for requiring the child client's lawyer to be present in the courtroom, which created a number of barriers to children's access to legal advice. In the United Kingdom Youth Courts, at the time of the interviews, children were physically required to be present in court, whereas defence attorneys had the option, with court approval, to appear by video platform. In discussing the impact that this arrangement had on the attorney-child relationship, a UK Magistrate noted:

Attorneys appearing by video could not communicate with the children as they normally would do and could not immediately check on the child's understanding. The child could be disadvantaged in circumstances where he or she could not develop relationships with others that would normally be in the courtroom such as his or her defence lawyer.

In Mexico, where both the attorney and child were required to appear virtually, courts arranged for lawyers to meet their child clients in a designated location, such as the lawyer's office, so they could physically be in the same place and appear virtually together. However, even with such procedures in place, one Mexican judge acknowledged there were issues ensuring children had access to their lawyers given the limited options for transportation. This would sometimes prevent children being in the same place as their lawyers. Other judges reflected on children with unique vulnerabilities as being particularly disadvantaged in virtual settings. In cases where child offenders had unique vulnerabilities or needed special accommodations, one judge in Bangladesh would appoint an interpreter to explain the proceedings to the child in a way that he or she understood to try to overcome the inherent gaps.

Many measures were taken by judges to promote fair access to justice in the virtual setting. These included asking the child to present his or her own view and asking the child to confirm a plea after such plea has been requested by the lawyer. Judges also noted watching for ‘red flags’ of inadequate representation such as a lack of communication between the child and lawyer and/or comments suggesting attorney’s lack of familiarity about the child situation. Judges suggested asking the child at the outset of the proceeding whether he or she had had a chance to speak with the lawyer. Many of these measures were best practices by courts which were implemented in physical proceedings prior to the pandemic.

The concerns associated with ensuring children have access to justice through adequate legal representation have existed prior to the pandemic. As one judge noted, ‘There is a broader question regarding the quality of advocacy in the youth courts.’ The challenges to child advocacy have been exacerbated by the pandemic, particularly in countries where the use of remote hearings has prevented the attorney and child from being able to effectively communicate.

4.4 Considerations of confidentiality in virtual hearings

Given the unexpected demand and heightened use of online technological platforms as a result of the pandemic, judges expressed concerns about confidentiality. The online platforms were not designed and prepared to handle the unexpected high demands for confidential communications between children and their lawyer advocates that are essential before, during and after a legal proceeding. Added to this situation is the fact that it is difficult to know where a party is calling in from when using a virtual platform. Video call participants could dial in to a public, non-private virtual room. Confidentiality could not be guaranteed.

However, given that the only alternative to the virtual proceedings was having none at all, courts used various virtual platforms to keep courts open which were publicly available. During the peak of the pandemic, in Thailand, Google Meet, Zoom, and Line were used for court proceedings, where the judge would be in the courtroom and the parties would be in another room, communicating with the judge via technology. In the United States, Go To was initially used and then transitioned to Zoom. In Mexico, Zoom was generally used, however, child proceedings were closed to the public as required by law. In Bangladesh, as a result of the Bangladeshi Evidence Act, physical presence was required for all trials, however, with flexibility for bail hearings to be temporarily conducted virtually through Microsoft Teams and Zoom. In Argentina, courts used Zoom, Google Meets, and WhatsApp to communicate throughout their fully remote court posture. In the Netherlands, Skype was generally used in the limited approved instances for virtual hearings. In Canada, courts generally used Microsoft Teams in the limited instances that virtual hearings were also permitted.

Still, given the difficulty to guarantee confidentiality, in some countries, certain cases, generally criminal cases, still required an in-person presence. In the Hague courts, for example, child victim cases were required to be in-person. However, in the instances where

the virtual platform was permitted, judges incorporated creative solutions. To manage confidentiality concerns in a virtual setting, one judge required all parties to swear under oath that they were in environments free from eavesdropping.

5 Conclusions

While there is no uniform response from justice systems around the world on how to ensure access to justice for all children during crises, it is true that complex situations may nevertheless offer a new opportunity to rethink child justice systems in order to increase their resilience. In the post-crisis world, the question is how to apply the lessons learned to the benefit of all children.

According to the majority of interviewees and participating experts, virtual trials should not replace in-person hearings, and, in general, no proceedings should be virtual if interested parties are to be examined. Similarly, virtual proceedings should not be conducted if the child's liberty or access to services is at stake. If the procedure does not affect the liberty of the child and witnesses do not have to be examined, a remote procedure may be an option.

Virtual proceedings should only take place with the consent of all parties after explanation of the alternatives available for an in-person proceeding. Breaks should be taken at frequent intervals to allow counsel and the child to confer outside the hearing of any other parties or the court. In addition, it is key to encourage the child to ask for the cessation of proceedings in order to inquire about what is happening and what it means with his or her lawyer.

It is of utmost importance that counsel in any virtual proceedings receive training on how to practice law in these virtual circumstances and that live transcripts are made available on screen to all parties. The use of written and visual materials should not be discouraged, and all materials should be made available to all parties electronically prior to the proceedings and not just shared on screen.

The compliance of these good practices should include the opportunity to end the virtual proceeding at any time for their own understanding of the proceedings without penalty.

The current interpretation of children's rights and international standards should advocate that in-person court proceedings should be the norm, while a hybrid system using remote technologies could be used as a support.

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Annex I: Questionnaire Phase 1 (Judges and Magistrates)

Experience with child justice during the pandemic

General Questions	Detailed Questions
What has changed during the pandemic in terms of child justice proceedings?	What has the court schedule been? How often have you conducted hearings? How do the children and lawyers appear? What technology do you use? What proceedings were delayed and why? What activities have you been prevented from conducting?
Have your courts closed due to COVID or remained open? If open, under what conditions have the courts remained open? If they closed, for what period and when?	What are the physical changes to the court rooms? Where are lawyers, witnesses, and parties appearing from and through what mechanism? What protections are put in place for parties for COVID?
How have you maintained child justice proceedings during the pandemic?	What have you done about children appearing in court? What have you done about children being able to communicate with their lawyers and advocates? What changes have been made to probation or other social services?
Have the courts returned to opening back to normal? If so, when did that happen? How would you define it?	What protections must litigants, lawyers, and staff go through to attend court in person?
Have you used remote hearings? If so, how were the hearings similar and /or different to regular in-person hearings?	How did you accommodate Wi-Fi and connectivity problems? How did the court facilitate virtual hearings? How did the court deal with absent witnesses, lawyers/counsellors, or staff? How did you call witnesses? How did you guarantee confidentiality?
Are you still using remote hearings? If so, in what proportion? Will you keep this pattern after the pandemic?	
Have you presided over court proceedings during the pandemic? Virtually or in-person?	If in-person, how have you taken protective measures such as maintaining adequate social distancing etc...?
Have your courts adopted a hybrid model, in which some are participating remotely and others are present? If so, how is that similar and /or different to in-person court hearings / proceedings?	
Have you dealt with instances where an urgent hearing was to be had? Who was in charge of presiding over those urgent hearings?	What, if any, processes were different about these hearings than others?

What was the basis to go back in-person?

This section of the questionnaire was only posed in cases where the judge or magistrate chose to maintain exclusive reliance on face-to-face hearings.

General questions	Detailed questions
On which basis or principle was the decision made to not adopt virtual hearing? What was the basis for going back to in-person?	How has the best interest of the child been defined? Which elements are better considered with in-person hearings v. remote hearings?

Virtual court impact on child and family

General questions	Detailed questions
How do you ensure that the child understands that he has been in court?	Did you take more time in hearings? Were any additional staff or representatives provided to children or their families? <i>Amended question:</i> Did the court have to use more staff to reach out to witnesses or parties? Was the appearance of children waived due to COVID?
How do you ensure that the child does not think that what was decided was not final rather than 'just another meeting'?	
How do you ensure the child's participation during the meeting?	Any problems with children showing up during virtual meetings as opposed to in-person?
How do you ensure that the child understands and identifies who is who in a digital court?	
How do you ensure that the child understands he has been sentenced?	
How do you ensure that a child understands the sentence and its effect on an order?	Who explains the court decision to the child?
How do you ensure communication with the child's family?	
How do you ensure participation of the victims?	Were any extra staff or advice provided to the victim to explain proceedings? Were there any outside meetings?

Considerations regarding communication in virtual hearing

General questions	Detailed questions
How do you ensure that the lawyer is actively representing and communicating with the child?	Do you require any affirmation, assurance or confirmation from the attorney or any other representative that the child has been advised? Are any additional filings required?
How do you ensure that the child is being represented by a competent lawyer?	What certifications or trainings are required for child lawyers in your jurisdiction?
How do you ensure communication between the child and the social worker, if there is one assigned?	Do you require any affirmation, assurance or confirmation from the attorney or any other representative that the child has been advised? Are any additional filings required?
Communication impacts whether or not a child is charged or not charged, given diversion or not diversion, to remain in the community or to remain in detention – as such, how has the court taken to strengthen communication with the child to ensure justice?	
When a decision is made for a child to remain in custody or sentenced to custody, how have these outcomes been handled? Generally, in a physical courtroom, detention is immediate. However, what type of care and contact arrangements are made in civil, virtual court proceedings?	
Many child offenders suffer from brain trauma and have IQs under 79. During virtual courts, how do you also ensure that the child is fully understanding and concentrating during the hearing?	
How do the virtual courts provide visual and oral feedback (which is generally available in physical courts)?	
How do legal professionals and citizens consider the use of virtual/remote hearings? Do you think parties take the process more seriously if they were in-person than on the phone?	Is remote hearing considered as a progress or a step backward in the implementation of a child friendly justice?

Annex II: Questionnaire Phase 2 (Other child justice professionals)

- 5.2.1.1 What is your professional connection or role within the field of child justice?
- 5.2.1.2 Have you conducted any research or evaluation on virtual courts?
- 5.2.1.3 Are you aware of any such research in your jurisdiction?
- 5.2.1.4 How has the best interest of the child been defined in virtual courts?
- 5.2.1.5 Are there situations where the best interest of the child would be better achieved in a remote hearing setting? Can you give examples?
- 5.2.1.6 Which elements are better considered with in-person hearings vs. remote hearings?
- 5.2.1.7 Are there some types of proceedings that should always be heard in-person?