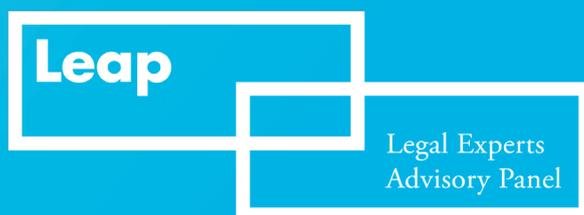
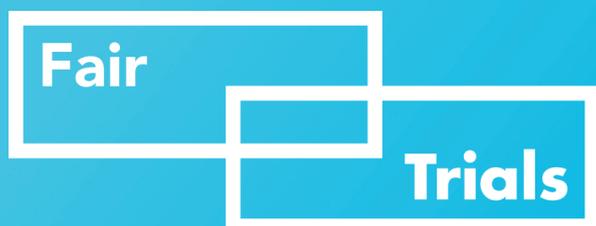


**BEYOND THE EMERGENCY OF THE  
COVID-19 PANDEMIC:  
*LESSONS FOR DEFENCE RIGHTS  
IN EUROPE***

**JUNE 2020**



# About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to fair and effective justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including

NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel- the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organisations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>.

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We would like to thank all our partners and LEAP members for their support and for the invaluable information that they have shared with us. LEAP normally publishes an annual report at the end of each year, outlining the key trends in European criminal justice and its main activities. Given the incredible levels of change to criminal justice systems across Europe in the first half of 2020 caused by Covid-19 (and the level of activity by LEAP in response to this) it was decided that we should accelerate the production of the LEAP report to draw together the key trends that LEAP members have observed and draw together practical recommendations to inform longer-term reforms.



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# Executive Summary

In order to control the spread of the COVID-19 pandemic, EU Member States introduced sweeping measures which dramatically disrupted the functioning of criminal justice systems, and which will have a long-lasting impact. With the help of international partners, Fair Trials launched the [COVID-19 Justice project](#) to track how justice systems and fair trial rights are being affected by these measures. As the pandemic is seemingly contained in Europe, countries are re-opening courts and returning to past practices. However, in many cases, emergency measures are being extended into long-term reform, or may be reintroduced in the event of a new wave of the pandemic.

## Overview of findings

- **The impact of the COVID-19 crisis on the functioning of courts:** During the pandemic, countries closed courts, and/or delayed some hearings, to protect people's health and safety by reducing the possibility of COVID-19 transmission at in-person court hearings. Many countries turned to remote hearings — using online video or audio-conferencing technology and other similar tools — as an alternative to in-person hearings in the context of both pre-trial and trial proceedings. Courts are gradually re-opening but, as a result of the measures adopted during the pandemic, they are now facing massive case backlogs and remote hearings are being proposed as a solution to promote time and cost efficiency in court functioning. However, we have identified specific concerns in relation to the impact of remote justice on the right to a fair trial, including on the effective exercise of defence rights.
- **Impact of COVID-19 on the ability to exercise defence rights:** As a result of the COVID-19 pandemic, lawyers' ability to consult with their clients was severely restricted. Remote access to a lawyer – in police stations, prisons or courts – has made it challenging for lawyers and their clients to interact with each other and to have confidential and effective communication. Remote communication can undermine the quality of legal assistance and the role of the lawyer in the prevention of coercion

and ill-treatment during custody. Court closures and limited access to police stations also caused delays in gaining access to case files, where kept on paper. Countries in Europe were uneven in whether they adjusted practices to allow for electronic access. This inevitably influences the time and facilities that the defence has available for preparing their case and risks putting the defence in an even more unequal position against the prosecution. Finally, we have seen restrictions on access to interpretation services, which are fundamental to enable persons who do not speak to language of the proceedings to exercise their defence rights.

- **Policing of COVID-19 related offences:** European governments rushed through new laws criminalising non-compliance with pandemic-related measures. States enacted new criminal offences and extended police powers, often in haste under a state of emergency, with little parliamentary oversight, raising serious rule of law concerns. Police in many countries actively enforced new (and old) rules on lockdowns and other health-related measures, and courts followed through on this policing by prosecuting an unprecedented number of criminal cases and punishing people with high fines. Such criminalisation raises serious concerns of abuse of power, unnecessary punitiveness, and the discriminatory application of laws against minorities and vulnerable people. Prosecutions, sanctions and fines imposed during the pandemic may subject people to insurmountable debts; they may also be left with a criminal record that impedes their ability to find a job or housing. In parallel, many governments pushed for ever more access to electronic information, including movements and contacts from mobile phones. While schemes (such as contact-tracing apps) may have a legitimate primary function, they often collect large amounts of sensitive data. The extensive surveillance and monitoring schemes which have been rapidly implemented pose a real and continuing danger to privacy, the rule of law and the fairness of criminal proceedings.

- **The impact of COVID-19 policies on people in detention:** Incarceration poses a deadly risk to people who are detained and who work in prisons during the pandemic. Incarcerated people are vulnerable to infectious disease because detention facilities often provide limited access to sanitation and health facilities, have unsanitary conditions, and are overcrowded, making physical distance and isolation impossible. The EU is facing a long-standing crisis in prison overcrowding, which is driven in part by the excessive use of pre-trial detention. States adopted measures to reduce prison populations, but sometimes only on a temporary basis (e.g. by delaying the implementation of prison sentences until the pandemic is contained). We reported some positive judicial and prosecutorial practices. The increased use of alternatives to pre-trial detention brought to light creative solutions. There have also been reports of fewer arrests by the police. As a result, prison populations reduced in many European countries. However, despite the urgent need to speed up and sustain the release of incarcerated people, we did not see any generalised measures to reduce the number of persons held in pre-trial detention. Instead, this group was more often overlooked in release efforts, despite being legally innocent.
- **Adequate facilities for the review of evidence:** Where remote hearings involve the review of evidence, the defence must be given access to adequate facilities and technical support to inspect evidence and submit their own evidence before and during the hearing.
- **Protection of the presumption of innocence:** Adequate measures must be in place to protect the presumption of innocence of the person appearing remotely and ensure that they are not presented in a way that makes them appear guilty, e.g. by appearing in prison clothing.
- **Cross-border cooperation:** When possible, the arrest and surrender of suspects and accused persons in cross-border procedures should be replaced by less-intrusive cross-border cooperation mechanisms such as the European Investigation Order which allows for suspects or accused people to be interviewed remotely.

## Overview of recommendations

### Remote hearings:

- **Remote hearings should remain an exception:** Remote participation in criminal proceedings cannot be treated as equivalent to physical participation. Courts should only order remote hearings so that proceedings can be held without the physical presence of the suspect or accused person in court in exceptional circumstances.
- **Adequate technology:** Detailed guarantees must be in place to ensure the good functioning and availability of appropriate technology such that suspects or accused persons are able to effectively participate in the proceedings.

## Exercise of defence rights

- **Access to a lawyer:** States should grant timely physical access to a lawyer, including to persons held in police custody or prison, by ensuring effective mechanisms for persons to communicate with their lawyer. Remote legal assistance should be used in exceptional circumstances and it requires specific safeguards, including facilities that enable free and confidential exchanges.
- **Access to case files:** The defence should have full and unrestricted access to electronic case files in advance of hearings. They should be provided such access with sufficient time to prepare in advance of the hearing. National law should also promote access to justice by providing for the possibility of filing written submissions to the courts electronically.
- **Access to interpretation services:** In deciding whether to allow for interpretation services to be provided remotely, courts should carry out a careful assessment of the person's individual circumstances and the effect of remote interpretation on the fairness of the hearing.

## Policing of COVID-19 related offences

- **Protecting the rule of law:** Parliaments should reconsider the necessity of resorting to criminalisation for public health goals. Legislatures should also consider proportionality and review new laws for clarity and quality, and conformity with fair trial and other human rights.
- **Review all prosecutions and fines:** Judicial authorities must review and scrutinise the charges, convictions and fines applied during the crisis. They should lift any disproportionate, illegal or abusive sanctions and offer effective remedies accordingly.
- **Discriminatory policing:** States must implement effective independent oversight mechanisms to collate, review and investigate complaints from people about abusive or discriminatory policing. Such cases must be investigated, prosecuted and sanctioned and people must be able to obtain an effective judicial remedy.

- **Protection of privacy rights:** Any new or extended contact-tracing or surveillance powers must be strictly necessary and proportionate in light of public health goals. Data collected must be clearly and strictly purpose-limited, accessible only to public health authorities for such purposes, and should not be used for criminal proceedings. This should also be subject to independent oversight and review. States must be transparent about such surveillance and data collection measures, and notify people whose data has been monitored, collected or intercepted; and provide individuals with access to an effective legal remedy.

## COVID-19 and detention

- **Alternatives to arrest:** Police should not arrest and detain people for minor offences. Police should consider issuing citations instead of arrest.
- **Restrict prosecutions and motions for pre-trial detention:** Prosecutors should not prosecute minor offences, and refrain from requesting pre-trial detention except in exceptional cases. Prosecutors should be required to consider information about the accused person's health and vulnerability before deciding whether to apply for pre-trial detention.
- **Extended use of alternatives to pre-trial detention:** The increased use of alternatives to pre-trial detention and creative solutions should be generalised and extended.
- **Judicial review of pre-trial detention orders:** Courts should refuse to extend pre-trial detention orders without ensuring that this is strictly necessary and that no alternatives are possible. Courts should also examine current rosters of persons in pre-trial detention and pro-actively release as many as possible.
- **Access to defence rights in prisons:** Access to lawyers should be guaranteed by prison administrations and police authorities to ensure the adequate preparation of pre-trial release motions and hearings.

# **General introduction**

## General introduction

The COVID-19 pandemic created a global health emergency. In response, states introduced sweeping measures to control the spread of the disease, including many policies which dramatically altered the functioning of criminal justice systems. Across Europe, access to courts, prisons and police stations was severely restricted, and many court hearings were postponed or moved online. States introduced new offences, and increased punishment and surveillance, in the name of containing COVID-19. These measures have serious implications for the ability of persons arrested, prosecuted, or detained to exercise their fair trial rights.

Countries are starting to reopen courts and otherwise return to past practices. However, in many cases, emergency measures are being extended into long-term reform, or may be reintroduced in the event of a new wave of the pandemic. Moreover, restrictions during the pandemic will have repercussions on the effectiveness of defence rights once court proceedings resume, and courts grapple with the newly created backlog, on top of the pre-existing backlog of cases that many European courts face. Criminal sanctions imposed on people during the crisis will also have life-long implications.

With the help of our international partners, and LEAP members in particular, Fair Trials has been tracking how justice systems and fair trial rights are being affected in our [COVID-19 Justice project](#). Fair Trials has monitored and commented on these developments. Overall, we are concerned that measures adopted hastily in the context of the global public health crisis, and without full assessment of their impact on defence rights, may become the norm, particularly where the measures appear to offer cost and/or time savings to governments.

In this document, we identify the threats and potential benefits of some of the most common measures adopted in the context of the public health crisis, for defence rights in criminal proceedings in Europe. The aim of the document is also to offer guidance to civil society and policy-makers in countries where long-term changes are being considered.

1. In this guide, we use the term “persons” to refer to “suspects or accused persons” as used in European Union law.

The European Union and the Council of Europe have set amongst the highest standards for defence rights, data protection and privacy. These are the standards against which we analyse the recent measures adopted during the pandemic. In this guide, we refer to the relevant European Union (EU) standards as well as the jurisprudence of the Court of Justice of the European Union (CJEU). We also consider the jurisprudence of the European Court of Human Rights (ECtHR), the judicial body in charge of the interpretation of the European Convention of Human Rights (ECHR). The ECtHR's rulings on the right to a fair trial and defence rights have had a significant impact on the development of the following EU directives on criminal procedure rights:

- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (Access to a Lawyer Directive);<sup>2</sup>
- Directive 2012/13/EU on the right to information in criminal proceedings (Information Directive);<sup>3</sup>
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (Interpretation Directive);<sup>4</sup> and
- Directive 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings (Presumption of Innocence Directive).<sup>5</sup>

This guide is structured around four themes. The first theme (Part 1) discusses the impact of the COVID-19 crisis on the functioning of courts, with a focus on defence rights in remote hearings. The second theme (Part 2) considers other limitations on the exercise of defence rights, in particular, access to lawyer, access to case files and access to interpretation services. The third theme (Part 3) evaluates issues with policing, surveillance and the rule of law. The last theme (Part 4) looks at the impact of COVID-19 policies on people in detention.

In each Part, we report on practices we learned about through our monitoring, detail the relevant law, and assess the risks and benefits of COVID-19-driven emergency changes to the fairness of criminal proceedings. Based on this information and analysis, in each Part, we make practical recommendations to support a rights-based approach for states considering a shift from crisis-responses to long-term changes in their criminal justice systems.

The guide builds on the legal and practical developments that have been reported to Fair Trials throughout the COVID-19 crisis in Europe. The report does not constitute a comprehensive overview of criminal justice issues and trends in Europe during the pandemic. Our recommendations are aimed exclusively at responding to the changes we have observed and the available information to date. We welcome your input and comments.

2. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, accessible [here](#).

3. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, accessible [here](#).

4. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, accessible [here](#).

5. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, accessible [here](#).

# **COVID-19 impact on the functioning of courts**

## Introduction

During the pandemic, countries closed courts, and/or delayed some hearings, arguably to protect people's health and safety by reducing the possibility of COVID-19 transmission at in-person court hearings. Courts are now gradually re-opening but, as a result of the measures adopted during the pandemic, many are now facing massive case backlogs.<sup>6</sup>

Because of a reluctance to have in-person hearings, many states across the EU turned to remote hearings—hearings held with the use of online video or audio-conferencing technology and other similar tools—as an alternative to in-person hearings. Remote hearings are taking place in the context of pre-trial proceedings and trial proceedings. Countries turned to online proceedings even when such proceedings were previously considered unlawful and some states are proposing continuing the use of remote hearings after the pandemic.

In this Part, we analyse the practice that developed during the pandemic and highlight the risks that remote justice presents to fair trial rights. We provide an overview of the relevant standards and set out our recommendations. The use of online technologies in criminal proceedings is relatively new, and the observations and recommendations in this Part are based on our preliminary understanding. On this issue, it is especially important that we continue the research and dialogue to better understand the implications of online tools for people's fair trial rights.

6. Fair Trials, [Short Update: Court caseload expected to increase by 4 million new cases after pandemic in Spain](#), 25 May 2020.

## Practice seen

### Right to be (physically) present in the hearing

Our monitoring revealed that during the pandemic, states restricted the right to be (physically) present at hearings in several ways. Most states increased the use of remote hearings, thereby infringing on the rights to be present at the proceedings against them. The extent to which states relied on remote hearings varied. There were two ways in which states defined whether proceedings that could be done remotely:

- **Consent of the person:** in the Netherlands, the suspect or accused person's opinion in the decision to conduct remote proceedings has an informative rather than decisive weight.<sup>7</sup> In Romania, the authorities required a signed consent from the suspect or accused person to participate in a remote hearing.<sup>8</sup> Germany and Belgium proposed to give the power to decide on remote hearing to judges without the person's consent in a wide range of circumstances (including e.g. in Belgium, security and public order).<sup>9</sup>
- **Type of cases:** the Netherlands had initially put categorical limits on remote hearings exempting hearings involving minors or persons with mental disabilities from remote hearings. These restrictions were subsequently withdrawn, giving judges the discretion to decide on whether to conduct the hearing remotely.<sup>10</sup> In Spain, remote proceedings were, in principle, allowed in all criminal cases, except for cases of serious crime.<sup>11</sup> In Latvia, videoconferencing was used for persons in custody. Lawyers and prosecutors were required to attend in person in order to verify their identity.<sup>12</sup>

Some states are now proposing to extend and generalise the use of remote hearings after the pandemic. In Belgium, for example, a draft law extending the use of remote hearings is being proposed,<sup>13</sup> despite a previous Constitutional Court judgement which declared them unconstitutional because of an inability to exercise defence rights effectively.<sup>14</sup> In Spain, judges and lawyers strongly condemned a law imposing remote hearings as the new default procedure for acts punishable by up to five years in prison, for at least three months after the end of the State of emergency.<sup>15</sup> In Hungary, remote hearings will continue to be preferred even if convening in-person would not violate public health regulations.<sup>16</sup>

The full impact of remote justice on the right to a fair trial, including on the effective exercise of defence rights and justice outcomes, needs to be assessed. Any decision on the extent of reliance and types of remote justice tools beyond the emergency period must be taken cautiously and after full assessment of their impact on the right to a fair trial. A retrospective analysis of any infringements on defence rights because of the use of remote justice during the pandemic period may also be necessary.

7. Fair Trials, [Short Update: The Netherlands expands use of video conferencing to all types of criminal defence proceedings](#), 15 April 2020.

8. Fair Trials, [Short Update: Romanian courts are turning to videoconferencing facilities for hearings](#), 15 April 2020.

9. Fair Trials, [Short Update: Draft law on remote criminal proceedings in Germany draws criticism from judges](#), 11 May 2020 and Fair Trials, [Short Update: Magistrates across Belgium reject post-COVID remote justice reform measures](#), 17 June 2020.

10. Fair Trials, [Short Update: The Netherlands expands use of video conferencing to all types of criminal defence proceedings](#), 15 April 2020.

11. Boletín Oficial del Estado, [Núm. 119](#), 29 abril 2020, I Disposiciones Generales, Jefatura del Estado, Artículo 19.

12. Fair Trials, [Short Update: Latvia postpones non-essential hearings and moves towards increasing use of videoconferencing](#), 14 April 2020.

13. Fair Trials, [Short Update: Magistrates across Belgium reject post-COVID remote justice reform measures](#), 17 June 2020.

14. Belgian Constitutional Court, ruling 76/2018 of 21 juin 2018 available [here](#).

15. Mar Jimeno- Bulnes, [Commentary: iProcess – Judicial emergency in Spain during the COVID-19 crisis](#), 16 June 2020.

16. Hungarian Helsinki Committee, [Main changes in the Hungarian criminal procedure due to COVID-19](#), 31 May 2020.

## Effective participation in trial

Even at their best, remote hearings are a restriction on people's rights to effective participation at trial. As discussed in Part 2, barriers to persons consulting with their attorneys in remote proceedings are particularly problematic. What's worse is that our research suggests that remote technologies rarely work properly, raising additional issues for the persons' rights to participate.

This was reported as problematic in the Netherlands and France, for example, where lawyers reported concerns that most courts did not have videoconferencing equipment and had to conduct pleadings by phone.<sup>17</sup> Technical difficulties also did not allow for meaningful participation in the trial.<sup>18</sup> In one remote hearing, attending journalists reported that the person being sentenced clearly did not understand what had happened in their case.<sup>19</sup> Persistent technical difficulties were also reported as making it very difficult, even impossible to follow the hearings also in the United Kingdom.<sup>20</sup> At one sentencing hearing, the judge noted that he did not hear what the person to be sentenced had read.<sup>21</sup> This was also reported to be an issue in Spain, where judges could not always hear and understand the person appearing remotely.<sup>22</sup>

## Right to examine evidence and witnesses

With the focus on video and audioconferencing technology to ensure the remote presence of all parties, there was little information about the courts' preparedness to examine evidence and witnesses remotely. Judges and lawyers reported difficulties examining evidence without appropriate equipment, giving examples of evidence being sent during the trial by email<sup>23</sup> and WhatsApp which made simultaneous review of evidence challenging. Judges also cited challenges in ensuring that each party was on the same page of their respective bundles of documentary evidence if paper bundles were used. Difficulties in connecting the defence with witnesses, where both appeared remotely from different locations was also cited as problematic by some judges.<sup>24</sup>

Our partners also observed that remote testimonies and statements could have possible benefits in cross-border cooperation. Remote hearings and the possibility of issuing a European Investigation Order to question the person, rather than a European Arrest Warrant, made more sense given the extreme measure of arresting and transporting a person across state lines during the pandemic.<sup>25</sup> However, lawyers reported that European Arrest Warrants were still preferred by many courts in Spain and Italy, rather than alternatives that did not require arrest and surrender.

17. Fair Trials, [Short Update: Concerns over effectiveness of remote justice in France](#), 17 April 2020; NJCM, [NJCM brief over zorgen om corona-maatregelen in de strafrechtspleging](#), 4 May 2020.  
 18. Fair Trials, [Short Update: Concerns over effectiveness of remote justice in France](#), 17 April 2020; NJCM, [NJCM brief over zorgen om corona-maatregelen in de strafrechtspleging](#), 4 May 2020.  
 19. Tristan Kirk, [Tweet](#), 31 March 2020. In an earlier study in Australia, some persons appearing in a video hearing reported feeling disorientated, unable to hear or understand the proceedings and lacking confidence in the fairness of the hearing. Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court Appearance and the Justice Matrix*, Routledge, June 2018.  
 20. Penelope Gibbs, [Is closed justice a price worth paying to keep courts running?](#), Transform Justice, 3 April 2020.  
 21. Tristan Kirk, [Tweet](#), 31 March 2020.  
 22. Mar Jimeno- Bulnes, [Commentary: iProcess – Judicial emergency in Spain during the COVID-19 crisis](#), 16 June 2020.  
 23. See, for example, European Prison Observatory, [COVID-19: What is happening in European prisons?](#), Update #3, 17 April 2020, p. 6.  
 24. An earlier report in the United Kingdom observed that lawyers frequently needed to show their client documents that are either printed or available online. As showing them was nearly impossible on video link, especially with electronic evidence, lawyers often tried to put their own tablet or computer screen up to their client's video screen in a booth which resulted in the defendant being unable to read them. Transform Justice, [Defendants on video – conveyor belt justice or a revolution in access?](#), October 2017, p. 12.  
 25. Jaime Campaner, [Commentary: The impact of Spain's COVID-19 measures on the criminal justice system](#), Fair Trials, 30 March 2020.

# Relevant standards

## Right to be (physically) present in the hearing

The right to be present at trial is recognised in EU, European, and international standards as a fundamental guarantee of the right to a fair trial,<sup>26</sup> and is closely connected to the right to a hearing. Article 8 of the Presumption of Innocence Directive guarantees the right to be present at the trial and to participate effectively. The right to a public hearing with the presence of the suspect or accused person is of fundamental importance not only to the defence, but also to the public. This right allows the defence to present its case, in person, to a judge, and allows the public to exercise its scrutiny and therefore maintain trust in the justice system.

Where an accused person is entitled to an oral hearing in criminal proceedings, they are also entitled to be physically present. This right includes at least all proceedings in which the court will examine a case as to the facts and/or the law in order to make an assessment of guilt or innocence. This is because the court cannot determine these issues without direct assessment, in person, of the evidence given by the accused in their defence.<sup>27</sup> Physical presence at the hearing is a necessary precondition for the effective exercise of the right to defend oneself in person, to examine or have witnesses examined and, where relevant, to have the free assistance of the interpreter.<sup>28</sup>

The ECtHR has found that suspects or accused persons' participation in proceedings by videoconference is not per se contrary to the ECHR, but resorting to a video hearing is a restriction of the right to be present. Therefore, in any given case, the use of remote proceedings must serve a legitimate aim, and the arrangements for giving evidence must comply with requirements for due process.<sup>29</sup>

The right to be physically present at court hearings can be waived by the person. Exceptional external circumstances may arise which require court closures, such as the COVID-19 pandemic which required social distancing to prevent the spread of the virus,

or the recent earthquake in Croatia that caused damage to court buildings, making them unsafe.<sup>30</sup> In such exceptional circumstances, courts may either delay hearings, or instead order remote hearings so that proceedings can be held without the physical presence of the suspect or accused person in court.

In any event, remote participation in criminal proceedings cannot be treated as equivalent to physical participation and must therefore remain an exception. Remote proceedings pose significant risks to the fairness of trials. Courts must exercise caution when resorting to remote hearings because virtual participation significantly impacts how effectively persons are able to exercise their defence rights, including the right to counsel and the right to examine evidence and witnesses. Past studies have shown that videoconference hearings can result in a substantial increase in the amount of bail,<sup>31</sup> or lead to increased sentences.<sup>32</sup>

Time and cost efficiency are frequently cited as benefits of remote hearings. It may be that remote hearings can reduce the travel and wait time in courts for lawyers and suspects or accused persons, as well as cut the transfer costs for detained persons from prisons to courthouses. Time and cost efficiency may be legitimate public interests that may sometimes justify limitations of procedural restrictions (for example when the state sets time limits for appeals), but on its own, efficiency cannot justify limiting the most fundamental fair trial guarantees.

Given these considerations, remote hearings may be appropriate in some limited circumstances. For example, in some cases where hearings are conducted on organisational matters and are generally short and technical, a videoconference hearing could save the time and costs of travelling to the courthouse without the risk of compromising defence rights. As discussed in our recommendations, even then, the defence should have the right to choose between in-person and remote proceedings.

26. Article 14(3)(d) ICCPR, Article 6(3)(c) ECHR, Article 8 of the Presumption of Innocence Directive.  
 27. ECtHR, [Hokkeling v. the Netherlands](#), App. No. 30749/12, Judgment of 14 February 2017, para. 58.  
 28. ECtHR, [Marcello Viola v. Italy \(No.2\)](#), App. No. 45106/04, Judgment of 5 October 2006, para. 52.  
 29. *Ibid.*, para. 67.  
 30. See Fair Trials, [JUSTICIA meeting on the responses to the COVID-19 pandemic and their impact on criminal justice](#), 19 May 2020, page 2.  
 31. Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology 869 (2010).  
 32. Mathew Terry, Steve Johnson and Peter Thompson, "Virtual Court pilot Outcome evaluation", Ministry of Justice Research Series 21/10, December 2010, pp. 25-26.

## Effective participation in trial

The right to a fair trial guarantees the right of a person to participate effectively in their criminal trial. This right has been defined to include the right to hear and follow the proceedings. The ECtHR has found in that regard that people appearing in the hearing through video-link “must be able to follow the proceedings and to be heard without technical impediments.”<sup>33</sup>

The ECtHR has also stressed that an accused’s right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; other wise legal assistance would lose much of its usefulness.<sup>34</sup> Meaningful participation in a remote hearing setting must allow for effective and confidential communication with a lawyer.<sup>35</sup>

Where remote hearings are held, malfunctioning equipment is an obvious obstacle for effective participation. Even with properly functioning video and audio equipment, remote hearings limit suspect or accused person’s ability to effectively participate in the proceedings. For example, in a video-link setting, a judge’s ability to read a person’s non-verbal cues is severely limited, making it more difficult to ascertain whether suspects or accused persons can follow their trial and/or wants to say something or intervene.<sup>36</sup>

Remote hearings may be more complex for suspects or accused persons to navigate than in-person ones, especially if they are unrepresented or their lawyer is not with them in the same room. Understanding what is happening in the trial and being able to make interjections either him/herself or through the defence lawyer is vital for effective participation.

The University of Surrey published a report in April 2020 citing observations of suspects or accused persons appearing less engaged during video hearings, with their demeanour suggesting increased passivity and lack of expression. The person’s engagement through communication with their lawyers was also shown to decrease in remote hearings.<sup>37</sup> Suspects or accused persons in remote hearings appeared to be more disengaged, uncomfortable or unable to bring a matter to the court’s attention during the hearing.<sup>38</sup>

The impacts of remote justice, such as isolation and confusion, can be even more severe on vulnerable persons such as minors, people with cognitive impairments,<sup>39</sup> persons who require technical assistance, and people in need of interpretation assistance.

33. ECtHR, [Sakniovskiy v. Russia](#), App. No. 21272/03, Judgment of 2 November 2010, para. 98.

34. ECtHR, [Mariya Alekhina and others v. Russia](#), App. No. 3804/12, Judgment of 17 July 2018, para. 168; see also Fair Trials, [Innocent until proven guilty](#), Report, June 2019, p. 33.

35. ECtHR, [Sakniovskiy v. Russia](#), App. No. 21272/03, Judgment of 2 November 2010, para. 98.

36. Transform Justice, [Defendants on video – conveyor belt justice or a revolution in access?](#), October 2017, p. 18.

37. Nigel Fielding, Sabine Braun and Graham Hieke, [Video Enabled Justice Evaluation](#) Final Report Version 11, March 2020, Sections 8.2. and 8.3.

38. *Ibid.* pp. 70-71.

39. Equality and Human Rights Commission, [Inclusive Justice: a system designed for all](#), Findings and Recommendations, June 2020.

## Right to examine evidence and witnesses

Meaningful participation also includes the right to examine evidence and witnesses. This right requires that a person know the identity of their accusers so that they are in a position to challenge their probity and credibility, and also that the person is given an adequate and proper opportunity to challenge and question the witnesses against them.<sup>40</sup> The right to a fair trial under the ECHR requires that before the accused can be convicted, in order to facilitate adversarial argument, all evidence against the accused must be produced in their presence at a public hearing. This is a precondition for the effective exercise of the defence's right to challenge evidence produced by the prosecution. Exceptions to this principle are possible but must not infringe upon the rights of the defence.

The UN Human Rights Committee has also stressed that a person have a right to examine the witnesses against them, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. This is an application of the principle of "equality of arms", which provides that the defence and prosecution in criminal proceedings be similarly situated and able to present their cases. This guarantee is important for ensuring an effective defence because it guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining witnesses as are available to the prosecution.<sup>41</sup>

The remote submission and examination of evidence can be very difficult because of a lack of appropriate equipment. An inability to orientate in bundles of evidence, or to share the evidence currently being examined on the screen can undermine the ability to put forward effective challenges to its use. Even with a lawyer, a lack of proper equipment for sharing evidence can result in the person being unable to see or read the evidence, and therefore consult with their lawyer about the evidence. Unless there are adequate facilities for suspects or accused persons to file and inspect evidence during court proceedings, they will be deprived of their ability to defend themselves.

In addition to issues with examining evidence, remote hearings present challenges for the ability of the defence to examine witnesses. The inability of the suspect or accused person and their lawyer to see and hear a witness directly undermines their ability to cross-examine them as effectively as in a traditional courtroom setting, where it is possible to react to the witness' verbal and non-verbal communication, to consult with the suspect or accused person, and to quickly react to the answers given by the witness. This risks violating the defence's right to examine or have the witness examined. Moreover, judges cannot ensure that witnesses appearing remotely are not subject to any behind-the-camera pressure.

40. ECtHR, [Hümmer v. Germany](#), App. No. 26171/07, Judgment of 19 July 2012, para. 38.

41. UN Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32, 23 August 2017, para. 39.

## Presumption of innocence

EU law sets out specific measures to preserve the presumption of innocence. For example, Article 5 of the Presumption of Innocence Directive requires that Member States “take appropriate measures to ensure that suspects and accused persons are not presented as being guilty through the use of measures of physical restraint” in court or in public. This means that the use of physical restraint should be avoided.

As further explained in Article 6(2) and Recital 20 of the Presumption of Innocence Directive, measures such as handcuffs, glass boxes, cages and leg irons should only be used on a case-specific basis. Physical restraints may only be used after an individual assessment has revealed that there are strong reasons to believe that preventive measures are necessary to prevent a specific suspect or accused person from harming themselves or others, from damaging any property, from absconding, or from having contact with third persons or witnesses.<sup>42</sup>

The way in which suspects and accused persons are presented in courtrooms can cause irreversible damage to a suspect’s reputation and can also affect judgments about a person’s guilt or innocence. It should be easier to protect the presumption of innocence in the more controlled setting of the courtroom; to ensure that the suspect is not presented in a way that makes them appear guilty. In practice, however, many courts are simply set up in a way that makes all suspects look as though they are dangerous. The use of secure docks is common, despite research that shows the impact that the use of docks has on whether a person is convicted.<sup>43</sup> As applied to persons detained appearing via remote proceedings, the person must not be required to wear prison clothes, put in cages or glass boxes, or have bars or other prison infrastructure displayed in the background.

42. Recital 20 of the of the Presumption of Innocence Directive.

43. See Fair Trials, [Innocent until proven guilty? The presentation of suspects in criminal proceedings](#), 2019.

# Recommendations

## Right to be (physically) present in the hearing

- Where the suspect or the accused person is entitled to an oral hearing under the relevant law, they have a right to be physically present in that hearing. The use of remote hearings must remain an exception.
- Remote hearings require an intelligent, informed and unequivocal waiver from the suspect or accused person of their right to be physically present at trial, i.e., with the person's informed and explicit consent. This consent should be given after a consultation with a lawyer so that the suspect or accused person can understand the consequences of such waiver.
- In specific and limited exceptional circumstances, courts may temporarily derogate from the right to be physically present at trial where court closures are ordered on a temporary basis. In such circumstances, courts may order remote hearings, over a limited period in time, without the consent of the suspect or accused person. In such exceptional cases, however, extra diligence must be applied to ensure compliance with fair trial rights which continue to apply.
- Where remote hearings are ordered, courts must ensure that all the safeguards and equipment necessary to ensure the effective exercise of defence rights are in place (see further in section below):
  - Courts should take into account factors such as complexity of the case and the potential sentence; whether or not the person is represented by a lawyer; the urgency of the case, including whether the person is in detention; the vulnerability of the person, including language needs; and other factors.
  - An appropriate equipment must be in place to allow for the effective exercise of defence rights in remote proceedings.
- The impact of remote hearings on suspects or accused persons, effective exercise of defence rights and judicial outcomes must be monitored on an ongoing basis. Legislation and policies regarding the use of remote hearings should be regularly reviewed based on that assessment.

## Meaningful participation in remote hearings

Where remote hearings are held, the following guarantees must be in place:

- Technology used should enable free and confidential exchanges between the suspect or accused person and their lawyer during the hearing (see Part 2 for more information).
- Technology used should enable the effective assistance of an interpreter in cases in which interpretation is required (see Part 2 for more information).
- Video-link equipment should imitate courtroom participation as much as possible. The suspect or accused person should be able to get a full view of the courtroom and to observe all participants.
- Hearings should be halted where a connection is interrupted (and this must be continually monitored) and should only continue once the problem has been fixed.
- Technical support should be readily available at courts and detention facilities to fix technical problems that impact the quality and reliability of audio and visual communications.
- Court procedures should be explained in simple terms to the suspect or accused person before and during each stage of the hearing.
- Documents such as user manuals and guidelines for the remote hearing technology should be provided to the suspect or accused person and their lawyer in advance. The use of technology and equipment should also be explained in a clear and simple manner before the hearing.

## Right to examine evidence and witnesses

- Where remote hearings involve the filing or review of evidence, the suspect or accused person should be given access to facilities that enable them to inspect evidence and submit their own evidence before and during the hearing. Such facilities require specialised technical support to be put in place.
- Witnesses should not be questioned remotely except when necessary for the protection of their identity or other valid interests.
- When witnesses appear in a hearing remotely, courts should offer neutral and safe facilities. Before allowing the witness to give evidence remotely, the judge should make sure that no behind-the-camera pressure can be exerted on the witness and that the confidentiality of the proceedings is appropriately ensured.

## Presentation of the suspect or accused person and presumption of innocence in remote hearings

- Suspects or accused persons in detention should be able to wear clothing of their choice for court hearings that does not prejudice the case against them, for example, they should not be presented in detention uniforms. Suspects or accused persons should be given the opportunity and time to prepare their appearance before the hearing.
- Suspects or accused persons should be presented during video-link hearings against a neutral backdrop, that does not suggest that they have been deprived of their liberty.
- No handcuffs, restraints or other similar security measures should be used and visible on camera, except in limited circumstances after an individualized assessment of their necessity in a specific case.

## Use of remote justice tools in cross-border cooperation

- When possible, arrest and surrender of suspects and accused persons in cross-border procedures should be replaced by less-intrusive cross-border cooperation mechanisms such as the European Investigation Order.
- Use of video links to carry out a suspect or accused person's interview in their state of residence should also be considered where the execution of the European Arrest Warrant cannot be completed, i.e., the person cannot be surrendered.
- All remote cross-border procedures should be accompanied by appropriate safeguards, as detailed throughout this guide. In particular, the suspects or accused persons must have access to a lawyer and, if necessary, legal aid.

# **COVID-19 and defence rights**

## Introduction

As a result of the COVID-19 pandemic, physical access to police stations, courts and prisons was severely restricted, non-urgent court hearings postponed and states increased the use of video-link and telephone hearings. In practice, resorting to remote justice and additional changes in policy during the COVID-19 pandemic seriously limited access to justice and defence rights, including people's ability to exercise their right to legal assistance, to obtain access to the materials in the criminal case file and interpretation services.

In this Part, we discuss the challenges to the effective exercise of defence rights, before highlighting the legal relevant standards and setting out our recommendations.

## Practice seen

### Access to a lawyer

Our monitoring shows that access to lawyers was significantly limited during the pandemic. In Spain the Asociación Libre de Abogados y Abogadas criticised measures that prevented detained persons from attending court hearings. Because of these restrictions, people were unable to communicate with their lawyer before and after their appearances.<sup>44</sup> In Paris, the Bar Council stopped appointing state-paid lawyers because of a lack of personal protective equipment in courts.<sup>45</sup> Persons requiring such legal assistance risked being left without access to counsel.

Lawyers faced many difficulties in accessing police stations to attend interrogations by the police and to provide prior confidential consultations. A survey conducted in Ireland highlighted how COVID-19 impacted suspects' access to legal assistance at police stations across the country. The survey describes a lack of uniformity in compliance with social distancing guidelines at police stations, and a lack of alternative mechanisms for remote legal assistance during questioning. Solicitors therefore had to visit their clients in custody at police stations that could not ensure proper social distancing, or detained people were effectively deprived of legal assistance during interviews because their attorneys could not attend.<sup>46</sup>

In Northern Ireland, a criminal defence lawyer made the news headlines by making an emergency application to the court requiring the police to make it possible to attend police questioning remotely.<sup>47</sup> Lawyers in England & Wales reported that their participation in police interviews was facilitated via telephone call. They expressed concerns, however, that the use of the telephone was affecting the quality of their legal assistance because they had less time to give advice, and because it was much harder to establish trust and rapport. They also stressed that confidentiality was not always respected – calls were sometimes taking place in open areas and being facilitated by police officers who remained present. Lawyers noted that some police stations used video-links but that video-links still reduced the quality of legal assistance they could provide during the crucial initial stages of criminal proceedings, and that connectivity challenges sometimes hampered their ability to follow the interviews.<sup>48</sup>

44. Fair Trials, [Short Update: Association ALA requests appropriate Legal Assistance to Detainees in a letter addressed to the Superior Court of Justice in Madrid](#), 15 April 2020.

45. Fair Trials, [Short Update: Courts remain closed in France and access to a lawyer is restricted due to COVID-19](#), 15 April 2020.

46. Fair Trials, [Short Update: Survey in Ireland shows impact of COVID-19 on Garda station access to a lawyer](#), 22 May 2020.

47. Fair Trials [Short Update: Police station legal assistance given remotely in Northern Ireland](#), 27 April 2020.

48. Fair Trials, [Justice under Lockdown – A survey of the criminal justice system in England & Wales between March and May 2020](#), 25 June 2020.

Lawyers also reported difficulties in being able to provide assistance in the context of remote court hearings. In the Netherlands, lawyers said that confidential lawyer-client communication was not possible during hearings when the person was only allowed to appear via videoconference.<sup>49</sup> The same issue arose in Spain, when the person appeared through videoconference from the police station and the lawyer was present at the courthouse with the judge. In such cases of geographical distance between the lawyer and their client, confidential consultations could not take place.<sup>50</sup>

In France, lawyers complained about the inability to participate in detention hearings because of a lack of videoconferencing equipment in some courts.<sup>51</sup> In the United Kingdom, lawyers noted that some platforms used by the courts, such as the Cloud Video Platform, did not allow them to speak with their client at all once the hearing had started.<sup>52</sup> Some video platforms, such as ZOOM, allow for breakout rooms that can be used for communication between the lawyer and client. However, in platforms without that option, lawyers had to request a short recess, which can be cumbersome and relied on the goodwill of the judge to grant the recess.<sup>53</sup> Even when instant messaging services were available, those appearing from remote locations found it difficult to contact those inside the court, making it more difficult to share information or discuss details about cases.<sup>54</sup>

During the pandemic, some states also enacted bans or restrictions on access to lawyers for people in prison. Lawyers from Portugal wrote: “The simple task of preparing the proceedings is now seriously hampered, since defence lawyers cannot visit their clients in prison, unless in duly justified urgent matters and situations, and should not be conducting face-to-face meetings with clients also outside of prison”.<sup>55</sup>

Other countries such as the Czech Republic introduced technology supporting Skype calls between prisoners and their legal representatives in all prisons and detention centres. This measure was part of a long-term plan originally aimed at reducing travel costs but the government accelerated the introduction of Skype and used it to allow people in prison to connect with their legal representatives during the pandemic.<sup>56</sup> In Hamburg, Germany, 470 mobile phones were provided to prisoners for 20 euros each.<sup>57</sup>

49. NJCM, [NICM brief over zorgen om corona-maatregelen in de strafrechtspleging](#), 4 May 2020.

50. Mar Jimeno- Bulnes, [Commentary: iProcess – Judicial emergency in Spain during the COVID-19 crisis](#), 16 June 2020.

51. Shirli Sitbon, [Coronavirus en France : le système judiciaire et les prisons à l'épreuve de la pandémie](#), France 24, 10 Avril 2020.

52. Just: Transcription, [Tweet](#), 13 May 2020.

53. A 2017 study on video hearings in United Kingdom found that lawyer-client consultations on video are frequently overheard by others because the rooms in which they are held are not properly soundproofed, and because due to poor sound quality either or both sides sometimes needed to shout to be heard. Transform Justice, [Defendants on video – conveyor belt justice or a revolution in access?](#), October 2017, p. 12. See also Equality and Human Rights Commission, [Inclusive Justice: a system designed for all](#), Interim Evidence Report, April 2020, p.9.

54. Nigel Fielding, Sabine Braun and Graham Hieke, [Video Enabled Justice Evaluation](#), Final Report Version 11, March 2020, pp. 112-113.

55. Vânia Costa Ramos and Diana Silva Pereira, [Commentary: COVID-19 - What does all this mean for your ability to defend your clients' right to a fair trial? – the Portuguese case](#), Fair Trials, 7 April 2020.

56. Fair Trials, [Short Update: Prisoners in the Czech Republic given access to Skype so that they can continue to contact their lawyers during the pandemic](#), 30 April 2020.

57. European Prison Observatory, [COVID-19: What is happening in European prisons?](#), Update #9, 5 June 2020, p. 3.

## Access to case files and the ability to file submissions

Court closures and limited access to police stations caused delays in gaining access to case files. In many states, criminal case files are kept on paper. During the pandemic, states did not always maintain access to these files for lawyers and the suspects or accused persons.

In Belgium, for example, all requests deemed “non-urgent” were suspended. Attorneys in Belgium representing clients held in pre-trial detention were only provided access to the case file for 48 hours, only during limited office hours, and with no option of receiving a copy of the file. Only recently did courts allow attorneys to scan documents with their phones.<sup>58</sup> Belgian lawyers expressed their concerns about the inability to access case files remotely. In Portugal, consulting the case files in the prosecutor’s office or at the court could only be done after making a special application to the relevant authority, and after scheduling a specific time and date.<sup>59</sup>

By contrast, some Member States made electronic access more available. For example, some courts in France granted online access to specific documents.<sup>60</sup>

States in Europe were uneven in whether they adjusted practice to allow for submissions to the court by mail or electronically, rather than in person. Physical access to courts and police stations in many countries was either restricted or not possible at all. Many states accepted court submissions electronically or by post.

Some states like Austria kept some parts of court services open to accept written submissions during working hours.<sup>61</sup> In Poland the practice varied from court to court and the lack of guidelines about court submissions created confusion among practitioners.<sup>62</sup> In some courts in Poland, submissions appeared to be impossible to file, while in others it was possible to place them in a special mailbox or file them via email.<sup>63</sup> Courts in Bulgaria accepted submissions by post or

by electronic means,<sup>64</sup> whereas Belgium authorised procedural documents to be sent by email or through an online platform that was previously only used to submit legal briefs.<sup>65</sup> Latvia accepted court submissions either electronically or in a special mailbox.<sup>66</sup>

## Access to interpretation services

As a result of the increased risk of infection posed by direct contact, some states provided interpretation services via video conferencing and phone calls.

In the Netherlands, lawyers have reported difficulties in the use of telephone interpreting.<sup>67</sup> According to a recent report analysing the involvement of interpreters in remote hearings, issues with the clarity of the audio meant it was difficult to anticipate the flow of conversation and to establish when an interpreter had finished speaking. These issues caused disruptive long pauses and overlapping speech. The inability to hear the interpreter from another location could also cause confusion as it was difficult to understand when the interpreter had finished interpreting and the speaker could carry on.<sup>68</sup>

58. Open letter to the authorities, written by a collective of dozens of criminal lawyers, [La justice pénale au rabais: bienvenue chez Kafka 2.0](#), L’Echo, 6 May 2020.

59. Vânia Costa Ramos and Diana Silva Pereira, [Commentary: COVID-19 – What does all this mean for your ability to defend your clients’ right to a fair trial? – the Portuguese case](#), Fair Trials, 7 April 2020.

60. Constance Ascione le Dréau, [Commentary: Silver lining to a very dark cloud: what could we learn from the COVID-19 crisis? A French perspective](#), Fair Trials, 14 April 2020.

61. Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), [Management of the judiciary – compilation of comments and documents by country: Austria](#), 23 March 2020.

62. Fair Trials, [Short Update: Lack of guidelines for filing court submissions create uncertainty in Poland](#), 28 April 2020.

63. Helsinki Foundation for Human Rights, [Access to courts in times of a Pandemic, Analysis – part I](#), April 2020, pp. 5-6.

64. Council of Europe, CEPEJ, [Management of the judiciary – compilation of comments and documents by country: Bulgaria](#), 28 April 2020.

65. European Union Agency for Fundamental Rights, [Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications: Belgium](#), March 2020, section 1.3.9.

66. Latvian Court E-Services, [Par tiesu turpmāko darbu saistībā ar Latvija izsludināto ārkārtējo situāciju](#), 18 March 2020.

67. Fair Trials, [Short Update: Language interpretation now being performed remotely in the Netherlands](#), 30 March 2020.

68. Nigel Fielding, Sabine Braun and Graham Hieke [Video Enabled Justice Evaluation](#), Final Report Version 11, March 2020, p. 69.

# Relevant standards

## Right to a lawyer

The right to a lawyer in criminal proceedings is a key component of the right to a fair trial. It is enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union (the Charter), in Article 6(3)(c) of the ECHR, and in Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR).

The ECtHR has widely recognised the importance of a lawyer’s physical presence at the initial stages of the criminal process, particularly in police custody.<sup>69</sup> That is because lawyers serve as a “gateway” to other fair trials rights. Lawyers can, at these early stages when the person is questioned or evidence is taken, help prevent prejudice to the person’s defence by ensuring proper safeguards are applied. More generally, a lawyer’s presence at the early stages of criminal proceedings helps a person understand their legal situation and the consequences of their choices.<sup>70</sup>

Direct physical presence of a lawyer is also crucial for the prevention of ill-treatment or coercion by the police.<sup>71</sup>

The ECtHR established that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings.<sup>72</sup> Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract, and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced.<sup>73</sup>

Article 6(3) of the ECHR also guarantees the right to have adequate time and facilities for the preparation of the defence. According to case law, the “facilities” provided to a person to enable them to prepare their defence include consultation with their lawyer.<sup>74</sup> The opportunity for an accused to

confer with their defence counsel is key to ensuring the effective exercise of the rights of the defence,<sup>75</sup> and fundamental to the preparation of the defence.<sup>76</sup>

As codified in EU law, the right to access to a lawyer remains crucial throughout the case.<sup>77</sup> Article 3(1) of the Access to a Lawyer Directive requires Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow them to exercise their rights of defence practically and effectively.<sup>78</sup>

The right of access to a lawyer must entail the following:

- The right to consult with a lawyer prior to questioning by the police or another law enforcement or judicial authority;<sup>79</sup>
- The right for the lawyer to be present and participate effectively when questioned;<sup>80</sup> and
- The right for the lawyer to attend certain investigative or evidence-gathering acts.<sup>81</sup>

69. See notably: ECtHR, *Salduz v. Turkey*, App. No. 36391/02, Judgment of 27 November 2008, para. 55; ECtHR, *Beuze v. Belgium*, App. No. 71409, Judgment of 9 November 2018, paras. 133-134.

70. ECtHR, *A.T. v. Luxembourg*, App. No. 30460/13, Judgment of 9 April 2015, para. 64: “[A]n accused often finds himself in a particularly vulnerable position at the investigation stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.”

71. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, *21st General Report*, 2011, p.18.

72. ECtHR, *Beuze v. Belgium*, App. No. 71409, Judgment of 9 November 2018, para. 134.

73. ECtHR, *Beuze v. Belgium*, App. No. 71409, Judgment of 9 November 2018, para. 134.

74. ECtHR, *Campbell and Fell v. the United Kingdom*, App. Nos. 7819/77 7878/77, Judgment of 18 June 1984, para. 99.

75. Recital 33 of the Access to a Lawyer Directive.

76. ECtHR, *Bonzi v. Switzerland*, App. No. 7854/77, Commission Decision of 12 July 1978.

77. The COVID-19 pandemic does not in itself provide sufficient reasons to introduce blanket policies that restrict or even deny access to a lawyer. See our analysis: Fair Trials, [Templates to request effective \(remote\) lawyer-client communication before and during police questioning](#), 28 May 2020.

78. See also CJEU, *Kolev and Others*, Case No. 612/15, Judgment of 5 June 2018, para.103.

79. Article 3(3)(a) of the Access to a Lawyer Directive.

80. Article 3(3)(b) of the Access to a Lawyer Directive.

81. Article 3(3)(c) of the Access to a Lawyer Directive.

The ability of Member States to restrict the right to a lawyer is strictly limited in time and to a specified set of circumstances, that the Court of Justice of the EU has determined to be exhaustive.<sup>82</sup> The derogations envisaged in EU law do not include a public health emergency. Further, Article 8(2) of the Access to a Lawyer Directive requires that such derogations may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority or by another competent authority on condition that the decision can be submitted to judicial review.

Article 4 of the Directive 2016/1919 on legal aid<sup>83</sup> specifies that suspects or accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require. The right to prompt access to counsel is also guaranteed by the ICCPR, which specifies that counsel should be able to meet their clients in private and to communicate with them in conditions that fully respect the confidentiality of their communications.<sup>84</sup>

The right of access to a lawyer also requires that people are able to communicate confidentially with their lawyer. This right of communication also applies to people who are detained. Article 4 of the Access to a Lawyer Directive confers a right of confidentiality on lawyer-client communications “in the exercise of the right of access to a lawyer provided for under this Directive”. The communication covered by this provision includes “meetings, correspondence, telephone conversations and other forms of communication permitted under national law”.

Restrictions and bans on in-person access to a lawyer are making people increasingly reliant on telephones and other forms of remote communication to maintain contact with their lawyers. Remote access to lawyer – be it in a police station, prison or court – can make it very challenging for lawyers and suspects or accused persons to interact with each other and have confidential and effective communication.

There is a risk that reliance on remote communications will undermine the quality of legal assistance and the role of the lawyer in prevention of ill-treatment. Video-calls deprive persons of the opportunity to meet their lawyers in person, in secure, private environments where confidential discussions are possible. Restrictions on the frequency and length of calls, for example, could affect the ability to provide and obtain legal advice, and the lack of in-person meetings might make it harder for lawyers to establish rapport and a strong working relationship with their clients.

The ECtHR has previously expressed major concerns about a person’s ability to talk to their lawyer only by means of video communications because these connections may provide insufficient confidentiality to lawyer-client communications.<sup>85</sup>

Courtroom settings in remote hearings also affect the person’s ability to consult their lawyer in the same way as physical barriers in traditional hearings. In most remote hearings, the lawyer was not in the same room as the suspect or accused person. It was therefore either not possible for them to consult each other during the hearing, or the lawyer needed to request a recess to do so. This hinders effective communication between the person and their lawyer, which can in turn negatively affect the effectiveness of legal assistance.

Appearing in remote proceedings from the same location could facilitate communication between the person and their lawyers. Having the lawyer next to them could also improve the person’s ability to navigate the proceedings and, where necessary, to actively participate in the hearing, either by intervening themselves or through the lawyer.

82. Article 3 of the Access to a Lawyer Directive provides that a temporary derogation from the right of access to a lawyer is possible in three sets of circumstances, referred to, respectively, in Article 3(5), Article 3(6)(a) and Article 3(6)(b). This list of permissible derogations is exhaustive as established by the CJEU stating that “it is apparent from the scheme and objectives of Directive 2013/48 that the temporary derogations from the right of access to a lawyer which Member States may provide for are set out exhaustively in Article 3(5) and (6)”, judgment of the Court (Second Chamber) of 12 March 2020, [Criminal proceedings against VW](#), Case C-659/18, paragraph 42.

83. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, accessible [here](#).

84. UN Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32, 23 August 2017, para. 34.

85. ECtHR, [Sakniovskiy v. Russia](#), App. No. 21272/03, Judgment of 2 November 2010, para. 104.

## Access to case files and the ability to file submissions

Gaining access to case files and the ability to file submissions to the court are closely connected with many aspects of the right to a fair trial. The Information Directive gives suspects and accused persons the right to access all documents in possession of the competent authorities that are essential for the effective challenge of arrest or detention. Timely access to all material evidence must also be ensured in order to prepare the defence for a trial on merits.<sup>86</sup> The ECtHR has found that the right to an adversarial hearing means that the defence must be given the opportunity to have knowledge of, and comment on, the observations filed and the evidence adduced by the prosecution.<sup>87</sup>

The right to have “adequate facilities” to prepare a defence must also include access to documents and other evidence, and this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.<sup>88</sup> In order to facilitate the conduct of the defence, the accused must also be able to get copies of relevant documents from the case file and compile and use any notes taken.<sup>89</sup>

Concerns over timely access to the case file often arise in advance of detention hearings, which are usually urgent and held with short notice. Keeping criminal case files in paper copy requires the defence to physically access the file, especially if the state does not provide opportunities to make copies or scan the file. When only paper copies are available, access to the case file is limited by its physical location and by the working hours of courts and police stations.

This inevitably influences the time and facilities – guaranteed by law – that the defence has available for preparing their case and risks putting the defence in an even more unequal position against the prosecution, which has uninhibited access to all case materials. Remote access to a case file or relevant parts of it, depending of the stage of proceedings, would ensure more timely and unrestricted access to the information necessary to prepare the defence. The length and costs of this procedure for both defence and judiciary can be cut significantly by granting remote access to the case file.

Access to justice also means being able to file submissions to the court. Many states still require litigants to file a paper copy of written submissions, which in turn requires travelling to the post office or to the courthouse. In some cases, litigants would also have to wait for the submission to be properly acknowledged by the receiving authority. While the option of filing a paper copy of written submissions is essential for those who may not have access to internet or an electronic signature, the alternative of filing written submissions electronically is an effective and time and cost-efficient way to ensure access to justice.

86. Articles 7(1) and (2) of the Information Directive.

87. ECtHR, [Brandstetter v. Austria](#), App. Nos. 11170/84 12876/87 13468/87, Judgment of 28 September 1991, para. 67.

88. UN Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32, 23 August 2017, para. 33.

89. ECtHR, [Rasmussen v. Poland](#), App. No. 38886/05, Judgment of 28 April 2009, paras. 48-49.

## Access to interpretation services

Fairness of proceedings demands that those persons who need them have access to interpretation services.

Access to interpretation services enables suspects or accused persons who do not speak the language of the proceedings to understand the most fundamental aspects of the proceedings. Without the assistance of interpreter, a suspect or accused person who does not understand the language of the proceedings will not be able to receive any information, including information about their rights, reasons for their arrest, or information about the charges against them.

Remote proceedings may hinder interpretation because of the quality and functionality of the available technology. Without properly functioning equipment the interpretation can get interrupted or be inaudible to all participants at the same time. This can further increase the complexity of remote proceedings to the point that interpretation loses its effectiveness and the suspect or accused person is unable to understand what is happening.

Uninterrupted and quality interpretation is equally important for a person's ability to communicate with their lawyer, especially in the early stages of proceedings, when time before interviews and detention hearings is very limited, but crucial for developing defence strategy and gaining trust. If effective communication with the lawyer is hindered by remote interpretation this will undermine the ability to prepare defence.

The ECtHR has stated that an interpreter "should be provided from the investigation stage, because initial defects in interpretation can create repercussions for other rights and may undermine the fairness of the proceedings as a whole."<sup>90</sup> The ECtHR has emphasized the importance of early verification of a person's language needs already in police custody, as absence of interpretation can prejudice the fairness of entire subsequent proceedings.<sup>91</sup>

The right to a defence encompasses the right to understand and answer questions during police questioning in custody in a manner which fully puts the accused person's version of events before the investigative authorities, so that decision-makers may consider the accused person's account prior to deciding whether to pursue proceedings or charge the person. This right is guaranteed by Article 2(1) of the Interpretation Directive, which requires that interpretation is made available without delay in all stages of criminal proceedings, including police questioning.

The right to interpretation also covers lawyer-client communications.<sup>92</sup> Where appropriate, communication technology such as videoconferencing, telephone or the internet may be used, however these options should only be used after a careful assessment as to whether physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.<sup>93</sup>

The ultimate goal of interpretation is not to enable the accused simply to partially understand the proceedings but to "actively participate" in them.<sup>94</sup>

90. ECtHR, [Baytar v. Turkey](#), App. no. 45440/04, Judgment of 14 October 2014, paras. 50, 54-55.

91. ECtHR, [Amer v. Turkey](#), Application no. 25720/02, Judgment of 13 January 2009, para. 83.

92. Article 2(2) of the Interpretation Directive.

93. Article 2(6) of the Interpretation Directive.

94. ECtHR, [Vizgirda v. Slovenia](#), App. no. 59868/08, Judgment of 28 August 2018, para. 102.

# Recommendations

## Access to a Lawyer

- States should grant at all times prompt physical access to a lawyer to all suspects or accused persons, including those in police custody or prison, and require police authorities to make the necessary arrangements to ensure that effective mechanisms are in place for persons to contact their lawyer or appoint a lawyer.
- Police authorities should make the appropriate arrangements to reduce the exposure of all persons, including suspects and lawyers, to avoidable health risks.
- In exceptional circumstances where police authorities are unable to guarantee in-person access to a lawyer, remote access may be arranged subject to specific safeguards:
  - Suspects or accused persons should be given sufficient time before the police interrogation or court hearings to consult confidentially with their lawyers. This time should be increased if the assistance of an interpreter is necessary for this communication.
  - Strict confidentiality of suspect or accused person - lawyer communications should be respected. Police stations, prisons and courts must be equipped with adequate facilities, such as secured rooms with a secure communication channel or separate video-link, to enable persons to have effective, frequent and confidential access to their lawyers.
  - Police stations, prisons and courts should be equipped with properly functioning video-conferencing facilities that enable lawyers to participate effectively during the questioning or hearing through video-link.
  - Moreover, free and confidential exchanges between suspects or accused persons and their lawyer during the hearing or procedural activity (e.g. interrogation) without having to ask for recess.

## Access to case files and the ability to file submissions

- Lawyers and suspects or accused persons should have full and unrestricted access to electronic case files (or electronic copies of the case files) in advance of hearings. They should be provided such access with sufficient time to prepare in advance of the hearing.
- National law should provide for the possibility of filing written submissions to the courts electronically. The procedure for electronic submissions should be clearly defined in procedural laws and accompanied by user guidelines or similar explanatory documents. The option to file written submissions in paper copy should be kept in order to ensure that everyone who does not have access to technology has access to court.

## Access to interpretation services

- In deciding whether to allow for interpretation services to be given remotely, courts should carry out a careful assessment of suspect or accused person's individual circumstances and the effect of remote interpretation on the fairness of the hearing. This assessment should at least include the quality and proper functioning of video or audio equipment, the complexity of proceedings and the impact of remote interpretation on its effectiveness and quality.
- Where interpretation is needed for lawyer-client communications during a hearing, courts must make the necessary practical facilities available and grant additional time for the consultation to compensate for the time needed for interpretation.

# **Policing COVID-19**

## Introduction

States responded to the COVID-19 pandemic by extending law enforcement powers and hastily creating new criminal offences through the adoption of emergency measures, which were often not clear. In Spain for instance, more than 200 exceptional rules were adopted to regulate different areas and sectors (justice included), which were not considered easy to understand.<sup>95</sup>

Police in many countries have actively enforced new and old rules on lockdowns and other health-related measures, and courts have followed through on this policing by prosecuting an unprecedented number of criminal cases and punishing people with high fines. In some cases, we received reports of abusive and discriminatory use of these new measures, with states targeting migrants or other minority and vulnerable people.

Our monitoring also exposed states in Europe, and across the globe, pushing for ever more access to electronic information, including movements and contacts from our mobile phones. The extensive surveillance and monitoring schemes which have been rapidly implemented in Member States pose a real danger to the rule of law and the fairness of criminal proceedings.

In this Part, we identify some different trends and their potential implications for the fairness of criminal proceedings. We highlight the key standards that are necessary to frame and guide any discussion around the issue, before setting out our recommendations.

## Practice seen

### Adoption of new offences and extended police powers

In the wake of the COVID-19 pandemic in Europe, governments rushed through new laws criminalising non-compliance with pandemic-related measures and otherwise extended police powers.

Many states introduced new criminal offences related to the new public health guidelines such as “stay-at-home» orders, in states including Greece,<sup>96</sup> the United Kingdom,<sup>97</sup> and many others. The Hungarian Helsinki Committee documented that the Hungarian government adopted over 70 emergency decrees since the “state of danger” was declared on 11 March 2020.<sup>98</sup> In the United Kingdom, lawmakers amended or otherwise changed the regulations every few weeks, introducing new offences every time via an emergency legislative procedure, with limited democratic scrutiny.

States turned to criminalisation of breaches of public health guidelines with limited public scrutiny, and with little evidence that criminalisation of these rules increases public health.

Even where the spread of the pandemic appears to be contained, we are seeing states push through long-term reform projects without the legislative scrutiny and procedures that would normally apply. For instance, in Belgium a legislative proposal introduced on 27 May 2020, involving wide-ranging reform of criminal procedure, benefitted from the “emergency procedure” meaning that the Conseil d’Etat only had 5 days to review the proposal.<sup>99</sup>

95. Mar Jimeno- Bulnes, [Commentary: iProcess – Judicial emergency in Spain during the COVID-19 crisis](#), 16 June 2020.

96. Fair Trials, [Short Update: Greek laws impose criminal sanctions for the violation of the government’s measures against COVID-19](#), 29 April 2020.

97. Fair Trials, [Short Update: New public health regulations strengthen police powers in England to reduce the spread of coronavirus](#), 7 April 2020.

98. Fair Trials, [Short Update: Hungarian Government has adopted over 70 emergency decrees - tracker](#), 27 May 2020.

99. Fair Trials, [Short Update: Magistrates across Belgium reject post-COVID remote justice reform measures](#), 17 June 2020.

## Abusive and discriminatory policing of new offences/powers

Courts and tribunals in European countries were already stretched and facing case backlogs, before the pandemic hit. As a result of court closures, court hearings were significantly reduced. In addition to the curtailment of defence rights detailed in Parts 1 and 2 above, this also means that there has been a reduction in the courts' proper oversight of abuses of power by law enforcement authorities.

In the UK, after activists raised awareness of the issues of ticketing and punishment, the Crown Prosecution Service (CPS) decided to review all prosecutions under coronavirus lockdown laws and withdrew problematic ones. In the case of prosecutions under the UK's Coronavirus Act, which "relates to potentially infectious persons who refuse to co-operate with the police or public health officers, when they are required to be screened for COVID-19."<sup>100</sup> The CPS found that all of the charges were "incorrect".<sup>101</sup>

We also saw some cases where new offences were used to prosecute people who spoke out against measures adopted by the state. For instance, Bulgaria amended its Criminal Code to introduce severe penalties for violating the lockdown and spreading what the government described as "fake news". Those caught could face up to five years in prison and fines of 50,000 Bulgarian Lev (25,000 Euro). Based on those measures, two doctors were prosecuted for speaking out about shortages of protective clothing and masks.<sup>102</sup>

Prosecution and policing during the pandemic appear disproportionately to have targeted minorities, asylum seekers and vulnerable people.

In the UK, fines were disproportionately imposed against Black, Asian, and other minority ethnic people.<sup>103</sup> States across Europe have also targeted Roma people. In Bulgaria and Slovakia, Roma neighbourhoods were cordoned off or blockaded because of racist fears

that they would spread the virus.<sup>104</sup> Slovakian police have beaten Roma children,<sup>105</sup> and Romanian police assaulted several Roma who were forced to lie on the ground with their hands tied behind their backs.<sup>106</sup>

Belgian human rights organisations collected complaints about policing of the COVID-19 related offences. In over half of the complaints, people reported being subject to discrimination.<sup>107</sup> Over 20 rights groups signed a letter detailing how police in France have used excessive checks and force during the pandemic, and of homophobic and racist abuse during lockdown enforcement.<sup>108</sup> Similar homophobic enforcement trends were noted in Greece, where a gay couple out jogging was stopped by police.<sup>109</sup>

States also targeted homeless people and asylum seekers. People were punished for failing to comply with rules they simply could not comply with because of their circumstances. For example, people in France experiencing homelessness were fined for not "staying at home".<sup>110</sup> People experiencing homelessness in the UK were also prosecuted for not staying at home, despite an express exception from prosecution in the relevant regulations.<sup>111</sup>

We also received reports of discrimination against and arrests of migrants, under the pretext of public health measures. For example, in Cyprus, the old city of Nicosia, where the majority of migrants live, has been targeted by the police and there have been arrests and attacks on asylum seekers under the pretext of coronavirus measures.<sup>112</sup> In Greece, after the asylum office on the island of Lesbos was re-opened, 1,400 asylum seekers were told their applications had been rejected, and that they only had 10 days to appeal. When they went to seek free legal assistance for their appeals, the police fined them €150 for breaking COVID-19 movement restrictions. There have been further reports of attacks on migrants and arrests under the pretext of coronavirus measures.<sup>113</sup>

100. UK Crown Prosecution Service, [CPS announces review findings for first 200 cases under coronavirus laws](#), 15 May 2020.

101. Ibid.

102. Fair Trials, [Short Update: Bulgaria grants special powers to police to enforce lockdown and stop fake news](#), 27 March 2020.

103. Fair Trials, [Short Update: BAME people in the UK fined more than white population under coronavirus laws](#), 26 May 2020.

104. Shaun Walker, [Europe's marginalised Roma people hit hard by coronavirus](#), The Guardian, 11 May 2020.

105. Bernard Rorke, [Pandemic: Roma at receiving end of racist policing](#), EUnobserver, 4 May 2020.

106. Ibid.

107. Ligue des droits humains, [Rapport Police Watch](#), June 2020.

108. Open Society Justice Initiative, [Amid COVID-19 Lockdown, Justice Initiative Calls for End to Excessive Police Checks in France](#), 2020.

109. Fair Trials, [Justicia Update Call, Responses to COVID-19 Pandemic Impact on Criminal Justice](#), 21 April 2020.

110. Pauline Bock, [Coronavirus: France's homeless 'fined for not staying indoors' during COVID-19 lockdown](#), Euronews, 20 March 2020.

111. Fair Trials, [Short Update: A homeless man charged in the UK for violating lockdown rules](#), 11 May 2020.

112. Fair Trials, [Short Update: Asylum seekers in Cyprus detained in crowded camps, with limited access to a lawyer](#), 27 April 2020.

113. Fair Trials, [IUSTICIA calls for action against disproportionate COVID-19 criminalisation](#), 29 May 2020.

## Numerous prosecutions and fines

The figures are staggering in many countries, for instance, in Spain, over 7000 people were arrested or detained between 15 March and 15 May for allegedly breaching the “state of confinement,” or rules related to COVID-19.<sup>114</sup> In Italy, 300,000 individuals were fined for failing to comply with COVID-19 measures, and an additional 100,000 people were reported for failing to comply with “measures of the authority”.<sup>115</sup> More than 20,000 people were sanctioned for breaches of containment measures in Brussels over a two-month period.<sup>116</sup> According to a local authority representative, violations of the containment measures were not always clearly defined and not all should have been subject to a fine.<sup>117</sup>

Difficulties in challenging fines are also reported. In the UK, no remedy was foreseen to challenge fines. When people paid the fine, they were deemed to have “discharged any liability to conviction for the offence” and no criminal offence was recorded. If they refused, the Crown Prosecution Service (CPS) could charge them with committing the alleged crime, forcing them to attend a hearing where they could face both a higher fine and a criminal record, if convicted. As a result, fines that may have been disproportionate may have been left unchallenged. The same situation arose in Belgium, in respect of administrative sanctions.<sup>118</sup>

NGOs across the EU called for judicial authorities to review and scrutinise the charges, convictions and fines applied during the crisis, and for people to have effective remedies to challenge any disproportionate and/or unfair sanctions.<sup>119</sup>

## Surveillance

A common theme has been the swift implementation of various means of tracking people’s movements, ostensibly to trace the spread of known infections. Many states have turned to contact-tracing mobile phone apps to monitor people who are found positive with COVID-19, and to trace who they may have been in contact with and where, with the stated goal of being able to notify and test the infected person’s close contacts. For example in Bulgaria, emergency laws amended existing regulations to allow police and government accelerated access to mobile phone data, without prior notification or judicial authorisation.<sup>120</sup>

While these tools may have a legitimate primary function, by their nature they generally collect huge amounts of sensitive and personal location data on people’s movements. They may also be used to monitor whether people are complying with movement restrictions or “lockdowns” imposed to slow the spread of the virus. There is, therefore, the potential that this location data collection may be used for other purposes, such as the prosecution of new criminal offences related to the pandemic, or in other criminal proceedings.

There are also very real concerns that the current crisis may be used as a cover to implement invasive digital surveillance regimes. Many of these apps can and are being implemented in ways that extend far beyond the immediate emergency. In Poland, the “Home Quarantine” app, which is mandatory for people who are required to quarantine after being abroad, collects GPS data and facial biometrics and stores it for 6 years.<sup>121</sup> People have to register a photo of themselves with the app, are periodically prompted to take a picture of themselves, and this picture is geo-located to confirm that they are at home. This information is disclosed to the National Centre for Healthcare, as well as state governors – and the police.<sup>122</sup> If they don’t respond to a request from the app within 20 minutes, the police are notified.<sup>123</sup>

114. Fair Trials, [Short Update: 7,556 arrests and 869,537 fines proposals since the start of emergency in Spain](#), 15 May 2020.

115. Fair Trials, [Short Update: Italy releases statistics on fines issued for breaching lockdown laws](#), 11 May 2020.

116. Véronique Lamquin, [Bruxelles: plus de 20.000 infractions aux mesures de confinement](#), Le Soir, 5 June 2020.

117. Ibid.

118. Lizzie Dearden, [Coronavirus: Public must risk prosecution to challenge lockdown fines, justice secretary says](#), *Independent*, 20 April 2020; Centre d’Appui aux Services de Médiation de Dettes de la Région de Bruxelles-Capitale, [Coronavirus - quid des amendes pour non-respect du confinement?](#), 7 May 2020.

119. Fair Trials, [Short Update: IUSTICIA calls for action against disproportionate COVID-19 criminalisation](#), 1 June 2020.

120. Fair Trials, [Short Update: Bulgaria grants wide-ranging new powers to police](#), 27 March 2020.

121. Ministry of Digitalisation of Poland, [Home Quarantine](#), released on 19 March 2020.

122. New Zealand Office of the Privacy Commissioner, [Overview of COVID-19 Contact Tracing Apps](#), 12 May 2020.

123. Isobel Asher Hamilton, [Poland made an app that forces coronavirus patients to take regular selfies to prove they’re indoors or face a police visit](#), *Business Insider*, 23 March 2020.

## Relevant standards

In this section, we set out the relevant standards that need to frame and underpin any reform and highlight their relationship with the right to a fair trial.

### Principle of legality

The principle of legality is a fundamental principle in all criminal proceedings and its purpose is to provide effective safeguards against arbitrary prosecution, conviction and punishment. It is found in Article 46 of the Charter, Article 7 of the ECHR and Article 15 of the ICCPR.

The principle of legality states that no one can be found guilty of any criminal offence for an act or omission that did not constitute a criminal offence under national or international law at the time it was committed. The concept of 'law' as used in Article 7 ECHR covers both domestic legislation and case-law, which not only has to be passed in appropriate procedure, but also must be accessible and foreseeable.<sup>124</sup>

Foreseeability of criminal law is a key guarantee which requires that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it or after taking appropriate legal advice, what acts or omissions will make them criminally liable and what penalty will be imposed for the act committed or omission.<sup>125</sup> Whether law is sufficiently foreseeable is always assessed from the point of view of the person charged at the time when the offence charged was committed.<sup>126</sup>

It is unavoidable that criminal law will be, to some extent, general, in order to be applicable in a variety of situations, however the ECtHR has stated that "the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."<sup>127</sup> Therefore, legislation which applies to everyone, is applied immediately after its passing and criminalises otherwise legitimate everyday behaviour should be particularly clear and precise.

In the context of the COVID-19 pandemic, there was a lot of uncertainty over permissible and banned behaviour. Where prosecutions are brought on the basis of legislation that does not meet the principle of legality, they may lead to unjust and unfair outcomes.

### Right to liberty

The ECtHR requires "quality" also in respect of laws regulating the basis and procedures for detention under Article 5 ECHR. The ECtHR has stated that the "factors relevant to this assessment of the 'quality of law' – which are referred to in some cases as 'safeguards against arbitrariness' – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the 'lawfulness' and 'length' of his continuing detention."<sup>128</sup>

Where the enforcement of COVID-19 offences enable police authorities to detain persons, it is key that the relevant legal basis includes safeguards against arbitrariness.

### Non discrimination

Within the EU, Article 2 of the TEU specifies that the non-discrimination principle is one of the fundamental values of the EU. Moreover, the EU Charter of Fundamental Rights contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties. Under the title "Equality" (Articles 20 to 26), the EU Charter of Fundamental Rights emphasises the importance of the principle of equal treatment in the EU legal order.<sup>129</sup>

124. ECtHR, [S.W. v the United Kingdom](#), App. No. 20166/92, Judgment of 22 November 1995, para. 35.

125. ECtHR, [Del Río Prada v. Spain](#), App. No. 42750/09, Judgment of 21 October 2013, para. 79.

126. *Ibid.*, paras. 112 and 117.

127. ECtHR, [Kononov v. Latvia](#), App. No. 36376/04, Judgment of 17 May 2010, para. 235.

128. ECtHR, [J.N. v. the Netherlands](#), App. No. 37289/12, Judgment of 19 May 2016, para. 77.

129. Council of Europe, European Court of Human Rights, European Union Agency for Fundamental Rights, [Handbook on European non-discrimination law](#), 2018 Edition.

## Equality of arms: access to case materials

The EU standards on access to the criminal case file set out in the Information Directive give suspects and accused persons the right to access all documents in possession of competent authorities that are essential for effective challenge of arrest or detention.<sup>130</sup> Timely access to all material evidence must also be ensured in order to prepare the defence for trial on merits.<sup>131</sup>

A key check on the legality of evidence-gathering by law enforcement authorities occurs at trial or shortly before it through pre-trial hearings. The accused person may challenge the admissibility of any evidence on which the state is relying to secure a conviction. Under human rights principles, this opportunity to challenge the evidence is a mechanism to promote the overall fairness of the proceedings.

It also ensures that people are not tried based on unlawful policing, prosecutorial, or other governmental activity. Such checks also reduce incentives for law enforcement authorities to violate the law to obtain data. To be able to exercise the right to challenge evidence, the person must be able to obtain disclosure of the sources of the evidence. In the case of electronic information, such as data obtained via contact tracing apps, people must have information about the sources and other details about the nature of the evidence to be able to challenge the admissibility as well as the reliability of the evidence (for example where there is a risk of inaccuracy in technology locating a person).

The use of such information in criminal proceedings holds the potential for serious miscarriages of justice.<sup>132</sup> People must have the right to challenge the legality of the gathering and use of data at trial, and to legal remedies where electronic data has been obtained illegally.

## Privacy and data protection

Under EU law, most European countries should ensure certain minimum data protection requirements in relation to contact-tracing apps. The General Data Protection Regulation (GDPR)<sup>133</sup> and the ePrivacy Directive<sup>134</sup> set out rules around the use of personal data and electronic communications data. Further, in response to the adoption of contact-tracing apps by EU Member States, the European Commission issued a Recommendation on 8 April 2020 on a common European Union toolbox for the use of technology and data,<sup>135</sup> setting out key standards for data protection and privacy within the EU.<sup>136</sup>

In particular, the Commission stressed that the use of data should be strictly limited to the processing of personal data for the purposes of combating the COVID-19 crisis and that states must ensure that personal data are not used for any other purposes, such as for law enforcement. The GDPR sets out purpose limitations on what personal data may be used for. Under the GDPR, personal data should not be processed in a manner which is incompatible with the purposes for which it was originally collected.<sup>137</sup> For example, if data is collected for one purpose, e.g. public health purposes, it should not be used for other purposes, such as by law enforcement or in criminal proceedings. The European Data Protection Board has said that the purposes of any contact-tracing app must be clearly defined to exclude further processing unrelated to COVID-19, such as for law enforcement purposes.<sup>138</sup>

130. Article 7(1) of the Information Directive.

131. Articles 7(1) and (2) of the Information Directive.

132. For instance in Denmark in late 2019, over 10,000 convictions using or linked to mobile phone geolocation data were subject to review, several ongoing cases were put on hold and 32 prisoners were released after the reliability of the data and its interpretation was brought into question: Jon Henley, [Denmark frees 32 inmates over flaws in phone geolocation evidence](#), The Guardian, 12 September 2019.

133. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), accessible [here](#).

134. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive), accessible [here](#).

135. European Commission, [COMMISSION RECOMMENDATION \(EU\) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data](#), C/2020/3300, 8 April 2020.

136. Expanding on the Recommendation, the eHealth Network with the support of the Commission adopted a [Common EU Toolbox for Member States. Mobile applications to support contact tracing in the EU's fight against COVID-19](#) on 15 April 2020. On 16 April 2020, the Commission published a [Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection](#) providing further details to ensure tracing apps comply with the GDPR and the ePrivacy Directive.

137. Article 5(1)(b) of the GDPR.

138. European Data Protection Board, [Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak](#), 21 April 2020.

Under the GDPR, personal data should only be processed where it is adequate, relevant and limited to what is necessary in relation to the purpose, e.g. a contact-tracing app for public health purposes.<sup>139</sup> If a contact-tracing app is collecting additional information which is not clearly within its purpose, such as extensive personal details, then it may be in breach of the principle. De-centralised contact-tracing apps will generally be closer in line with the data minimisation principle as, by their design, they collect the minimum amount of information required for the purpose of contact-tracing.

In relation to location data, the European Commission has said that location data is "not necessary for the purpose of contact tracing functionalities".<sup>140</sup> The processing of location data in the context of contact-tracing is difficult to justify considering the principle of data minimisation, as well as security and privacy concerns. Location data collected from electronic communication providers may only be processed under Articles 6 and 9 of the ePrivacy Directive, which state that this data can only be transmitted to authorities or other third parties if it has been anonymised by the provider or, for data indicating the geographic position of user via their mobile phone (other than traffic data), with the prior consent of the user(s).

The ePrivacy Directive allows Member States to adopt laws to retain (non-anonymised) telecommunications data where this data supposedly constitutes "a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences".<sup>141</sup> For Member States to use non-anonymised location data and therefore derogate from the ePrivacy Directive, additional safeguards apply.

139. Article 5(1)(c) of the GDPR.

140. European Commission, [Communication from the Commission Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection 2020/C 124 I/01](#), C/2020/2523, 17 April 2020.

141. Article 15 of the ePrivacy Directive.

## Recommendations

### Adoption of new offences and extended police powers

- States should advance measures to support public health goals that do not rely on criminalisation and policing.
- Any legislation passed should include consideration of whether criminal punishment is necessary. Legislatures should also consider proportionality and require adequate safeguards to prevent targeting or disproportionate impact any specific groups, including minorities and vulnerable people.
- Legislatures must also review new laws for clarity and quality to ensure that people and law enforcement authorities fully understand the scope of the legislation.
- Legislators must also verify that new laws are drafted in conformity with the human rights standards set by the ECHR as well as by EU legislation, including procedural safeguards for criminal proceedings.
- Any legislation adopted during the pandemic should be reviewed by national parliaments, including a retrospective analysis of the impact of those laws on people, including any disproportionate impact on any specific groups, including minorities and vulnerable people.
- Parliaments should also re-consider any extension of emergency legislation so that it will continue to apply in future. Emergency legislation must include sunset clauses and if not, parliaments must regularly review the continued need for emergency measures.

### Abusive and discriminatory policing of new offences/powers

- States must implement effective independent oversight mechanisms to collate, review and investigate complaints from people about abusive or discriminatory policing.
- States must ensure that cases of abusive or discriminatory policing are investigated, prosecuted and sanctioned. People who have suffered from abusive or discriminatory policing must be able to obtain an effective judicial remedy.
- States must actively promote and effectively implement anti-discrimination policies in all areas, including criminal justice systems.

## Disproportionate prosecutions and fines

- States should urgently review all charges, convictions and fines imposed for alleged COVID-19 offences. Any disproportionate, illegal or abusive charges, convictions and fines should be immediately lifted and courts should ensure that an effective remedy is available.
- States should lift any charges, convictions and fines imposed based on emergency legislation that is subsequently invalidated (e.g. as a result of a constitutional challenge).
- States should develop easy procedures for people to apply for fines imposed during the emergency to be lifted, including because of financial hardship, inability to comply (e.g. stay-at-home violations against people without a home), and other circumstances.
- States should ensure that any records relating to violations of COVID-19 laws are expunged from criminal records and police databases.

## Surveillance

- Any new or extended contact-tracing or surveillance powers must be strictly necessary and proportionate on a public health basis.
- Data collected as part of public health responses to coronavirus must be clearly and strictly purpose limited, accessible only to public health authorities for such purposes, and should not be used for criminal proceedings. This should be subject to independent oversight and review.
- States must be completely transparent about surveillance and data collection measures, including notifying people whose data has been monitored, collected or intercepted. Individuals must have access to an effective legal remedy to challenge this.
- Any contact-tracing or surveillance measures brought in or used in relation to coronavirus must be subject to strict time limits, and the operation of those powers must be kept under regular review to justify their necessity and proportionality.
- Meaningful remedies in the event of a trial if data collected through these tools is used to prosecute a person, including the inadmissibility of such data as evidence. Use of surveillance tools to gather data must be disclosed to the person concerned.
- Effective and systemic oversight on the use of these measures by law enforcement authorities. If the new tools are used fairly and proportionately, they are more likely to maintain public trust in criminal justice systems and law enforcement authorities.

# **COVID-19 and detention**

## Introduction

Jurisdictions around the world woke up to the grim reality that in the COVID-19 era, incarceration poses a mortal risk to people who reside and work in prisons.

The World Health Organisation (WHO) recognises that people deprived of their liberty are more vulnerable to the coronavirus outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time: “close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons.”<sup>142</sup>

Drastic measures were introduced in prisons and detention centres to reduce the risk of infection, including restricting visits by lawyers, families, social and health services, and even prison monitoring bodies. These measures have had dramatic consequences on the lives of persons detained, in particular on their mental health.<sup>143</sup>

However the most effective way to preserve public health and safety, and protect the rights of persons detained, is to reduce the number of people in detention facilities. Across the world, prison overcrowding is a long-standing problem that criminal justice policies have failed to address. Statistics collected by the World Prison Brief suggest that some 125 countries suffer from this problem,<sup>144</sup> European prisons being no exception.<sup>145</sup>

The grip of COVID-19 across the globe made the pre-existing crisis take on a new urgency. We are now facing a backlog of cases built up during the COVID-19 lockdown which may result in inordinate delays to criminal cases and prolonged pre-trial detention for many detained people.

In this guide, we focus on the success of the different measures adopted to reduce prison populations in many EU Member States, while highlighting the failure to reduce the number of people held in pre-trial detention. After setting out the key principles that apply in relation to detention, we identify a number of recommendations.

## Practice seen

### Measures adopted to reduce prison populations

In total, it is reported that 18 EU Member States adopted measures to reduce the existing incarcerated population.<sup>146</sup> These measures took various forms.

Certain measures aimed to reduce the existing prison population through, for instance:

- Early release of prisoners coming to the end of their sentence: for instance, in Scotland, the government authorised the release of up to 450 prisoners to free up more cells for single-use occupancy. Only those sentenced to 18 months or less and have 90 days or less left to serve were eligible.<sup>147</sup>
- Release of prisoners considered to be “low risk”: in Ireland, measures were adopted for the temporary release of prisoners serving up to 12 months and considered to be low risk.<sup>148</sup>
- Alternative measures to serve sentences: prisoners were released in some countries to serve their sentences at home with electronic monitors,<sup>149</sup> or telephone monitors where electronic tracking bracelets were not available in sufficient numbers, as in Spain.<sup>150</sup>

142. WHO, [Preparedness, prevention and control of COVID-19 in prisons and other places of detention](#), 15 March 2020, p. 2.

143. There are reports of suicides, including in the UK where: “[i]n just six days, five detainees committed suicide in English and Welsh prisons, causing more fears that the restrictive regime used to avoid the spread of the Coronavirus is having a devastating impact on prisoners. Four deaths were recorded in the adult male facilities (Bure in Norfolk, Risley in Cheshire, Dartmoor in Devon, and Cardiff) while the last suicide was committed at Aylesbury young offender institution (YOI) in Buckinghamshire by a 19 years-old boy, who was found dead in his cell on 16 May. Data show that there have been 16 self-inflicted deaths in British prisons since the beginning of the lockdown on 23 March”. European Prison Observatory, [COVID-19: What is happening in European prisons?](#), Update #9, 5 June 2020, p.8.

144. See Prison Studies, [Highest to Lowest - Occupancy level \(based on official capacity\)](#), last consulted on 5 June 2020. Prison overcrowding is a problem in several EU Member States, including Belgium, Czech Republic, Denmark and Greece.

145. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment (CPT), [Remand detention, Extract from the 26th General Report of the CPT, published in 2017](#), 7 April 2017, p. 1.

146. See European Parliamentary Research Service, [Briefing: Coronavirus and prisons in the EU – Member-State measures to reduce spread of the virus](#), June 2020, p. 11.

147. Fair Trials, [Short Update: Scotland is set to release up to 450 prisoners to prevent the spread of coronavirus](#), 5 May 2020.

148. Fair Trials, [Short Update: Ireland adopts emergency measures to be taken to alleviate overcrowding in prison](#), 2 April 2020.

149. See, for instance, in Norway: Fair Trials, [Short Update: Norway releases prisoners to prevent spread of coronavirus in prisons](#), 29 April 2020.

150. Fair Trials, [Short Update: In Spain, more prisoners are granted home confinement](#), 30 March 2020.

Measures were also introduced to limit the number of new persons entering detention:

- Delaying the execution of prison sentences for the duration of the pandemic: for instance, in Germany,<sup>151</sup> the Czech Republic<sup>152</sup> and Belgium.<sup>153</sup> But concerns have been raised that the eventual enforcement of these sentences will put pressure on penitentiary services at a later stage.<sup>154</sup>
- Reduction in prosecutions for minor offences: in Greece, minor offences carrying a sentence of up to 1 year were not prosecuted.<sup>155</sup>
- Reduction in arrests: measures were also seen in relation to police practice, in particular in France where the number of arrests reduced during the pandemic.<sup>156</sup>
- Prosecutorial practice: we also reported anecdotal evidence of prosecutors not making pre-trial detention motions in relation to arrested persons with underlying health conditions, such as in the Netherlands.<sup>157</sup> In Italy, there was a decrease in the number of people held in pre-trial detention thanks in part to the decisions of judges and prosecutors.<sup>158</sup>

In parallel to efforts by authorities to reduce the prison populations, we've seen lawyers in different countries make urgent applications for the release of clients held in pre-trial detention. Criminal defence lawyers in France and Belgium developed template applications for the urgent release of persons held in pre-trial detention, based on the relevant standards set by the ECHR, which were shared amongst other practitioners.<sup>159</sup> To support similar initiatives in other countries, Fair Trials put

together an outline application for release from pre-trial detention, with the relevant human rights standards.<sup>160</sup>

These collective efforts led to a welcome reduction in European prison populations.<sup>161</sup> For instance, Belgium had reduced the number of people in prisons by 11% over April and May 2020, bringing the total prison population much closer to the actual capacity of prisons.<sup>162</sup> However, recent numbers confirm that the detained population has risen again to a number over the capacity of Belgian prisons, in part with the return of several hundred detained persons whose sentences had been suspended.

In countries where similar measures were taken, there is now a serious concern over the 'boomerang' effect after the crisis is over, potentially resulting in more severe overcrowding and the system being overwhelmed with detained persons forced to return and with increased incarceration due to the prosecution of new COVID-19 related offences.<sup>163</sup>

Certain states operate selective release based on political, rather than sanitary, reasons. For example, Spain restricted the release for people who are detained for political activities.<sup>164</sup>

151. Fair Trials, [Short Update: 268 prisoners temporarily released and more than 3,600 prison sentences postponed in Germany](#), 3 June 2020.

152. Česká justice, [Benešová podporuje odklad nástupu vězňů do výkonu trestu kvůli omezení šíření nákazy koronaviru](#), 16 April 2020.

153. See in Belgium, for instance, where the prison population was reduced by 11% as at 6 May 2020. Fair Trials, [Short Update: Belgium sends inmates home and facilitates police work](#), 10 April 2020.

154. European Prison Observatory, [COVID-19: What is happening in European prisons?](#), Update #5, 30 April 2020, p.7.

155. Fair Trials, [Short Update: Greece enacts new law to relieve congestion in the criminal courts upon the lifting of their temporary closure](#), 27 May 2020.

156. Fair Trials, [Short Update: France achieves 6,000 prisoner releases, but haltingly, and with glaring gaps in protection](#), 30 April 2020.

157. Fair Trials, [Short Update: Dutch courts suspends pre-trial detention due to health risk concerns](#), 6 April 2020.

158. European Prison Observatory, [COVID-19: What is happening in European prisons?](#), Update #9, 5 June 2020, p. 5.

159. Fair Trials, [Short Update: Paris attorneys file for release of clients](#), 30 March 2020; Fair Trials, [Short Update: Lawyers in Brussels filing for release of detained clients](#), 30 March 2020.

160. Fair Trials, [Template application for the urgent release from pre-trial detention](#), 3 April 2020.

161. Human Rights Watch, [Covid-19 Prisoner Releases Too Few, Too Slow](#), 27 May 2020.

162. Fair Trials, [Short Update: Belgium has reduced its prisoner population by 11% to prevent the spread of coronavirus, but there are fears over a 'boomerang'](#), 6 May 2020.

163. See our analysis on adoption of new COVID-19 offences in Part 3 'Policing COVID-19' of this document, on page 25.

164. Council of Europe Parliamentary Assembly, [COVID-19: Rapporteur calls on Spain and Turkey to include politicians in early prison releases prompted by Coronavirus](#), 2 April 2020.

## The blindspot: pre-trial detainees

The crisis in prison overcrowding in the EU is driven in part by the excessive use of pre-trial detention. The European Commission and Parliament have repeatedly recognised the need for improved standards of pre-trial detention.<sup>165</sup>

However, despite the urgent need to speed and sustain the release of incarcerated people, we did not see any generalised measure to reduce the number of persons held in pre-trial detention, despite them making up a third or more of the prison population in many countries.<sup>166</sup> Reducing the use of pre-trial detention would protect the health not only of detained persons, but also the many professionals who come into contact with people in detention (including detention staff and lawyers) and the families and communities to which they return.

Instead, persons held in pre-trial detention were discriminated against in release efforts.<sup>167</sup> With people in pre-trial detention making up nearly half of the jailed population, the failure to consider their release considerably undermined mass release efforts.<sup>168</sup>

Discrimination towards people in pre-trial detention is particularly perverse given that they are legally innocent, and are often held in worse conditions than sentenced people.<sup>169</sup> Often, this distinction is made because decisions on pre-trial detention are within the ambit of individual judges, rather than prison or corrections administrations that can take unilateral decisions.

We have even seen measures being adopted by governments negatively impacting the rights of people held in pre-trial detention and the length of their detention. For example, France opted to extend pre-trial detention duration, depending on the

seriousness of the offence, by 2, 3 or up to 6 months, without any hearing. It also extended (doubled) the timeframe in which judges could rule on applications for release in the context of pre-trial detention and replaced oral hearings by written submissions on this issue.<sup>170</sup>

The Netherlands considered relaxing the rules around how long accused persons can spend in pre-trial detention. If instituted, this would double the number of days that people can be detained before seeing a judge from 6 to 12, and double how long they can be detained while their cases are investigated from 12 to 24 days.<sup>171</sup>

165. European Commission, [Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM/2011/327, 14 June 2011.

166. Fair Trials, JUSTICIA, [Pre-trial detention: It's time for EU action to end excessive use](#), 31 July 2019.

167. See Jago Russell, [Covid-19 in Europe's prisons – and the response](#), EUobserver, 18 May 2020.

168. Fair Trials, [Commentary: Selective release of people in prison undermines efforts to contain COVID-19](#), 25 April 2020.

169. CPT, [Remand detention. Extract from the 26th General Report of the CPT, published in 2017](#), 7 April 2017, p. 1.

170. Fair Trials, [Short Update: Concerns over changes to pre-trial detentions rules in France](#), 3 April 2020.

171. Fair Trials, [Short Update: Netherlands reportedly considering relaxing limits on length of pre-trial detention](#), 30 March 2020.

## Relevant standards

Pre-trial detention (depriving suspects and accused people of their liberty before the conclusion of a criminal case) is intended to be an exceptional measure, only to be used as necessary and proportionate and in compliance with the presumption of innocence and the right to liberty. Its use is only acceptable as a measure of last resort, in very limited circumstances.

According to the settled case-law of the ECtHR, Article 5 ECHR requires judicial authorities to demonstrate convincingly that each period of detention, however short, is justified. To decide whether a person needs to be detained or released, judicial authorities must assess whether there are any other ways to ensure the person's appearance in court.

The ECtHR has stated that the presumption is always in favour of release. This means that until conviction, the accused person must be presumed innocent, and Article 5 of the ECHR requires provisional release once continuing detention ceases to be reasonable. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.<sup>172</sup>

The ECtHR further specified that it primarily falls to the national judicial authorities to ensure that the duration of pre-trial detention does not exceed a reasonable time. Accordingly, courts must examine all the facts militating for or against the existence of the requirement for detention and must set them out in their decisions on applications for release.<sup>173</sup>

Today more than ever, the reasonableness and legality of a decision to detain must also be assessed under Article 3 ECHR which prohibits torture, and inhuman or degrading treatment or punishment. The ECtHR has repeatedly indicated that states must ensure that people

are detained in conditions which are compatible with respect for their human dignity and that people's health and well-being are adequately secured by, among other things, providing the requisite medical assistance.<sup>174</sup>

Placing a person in detention means placing a person's life and health under the responsibility of the state. If a person is in good health when entering prison and no longer in good health while in detention, it is up to the State to provide explanations, failing which a violation of Article 3 ECHR may be established.<sup>175</sup>

The ECtHR further specified that Article 3 ECHR imposes a positive obligation on states to ensure that every prisoner is held in conditions compatible with the respect for human dignity and that the health and well-being of the prisoner are adequately ensured, in particular by the provision of the necessary medical care.<sup>176</sup> In sufficiently serious circumstances, the good administration of justice can require that measures of a humanitarian nature be adopted, including the release of the prisoner.<sup>177</sup>

172. ECtHR, [Buzadji v. Republic of Moldova](#), App. No. 23755/07, Judgment of 5 July 2016, paras. 89 and 90.

173. *Ibid.*, para. 91.

174. ECtHR, [Kudla v. Poland](#), App. No. 30210/96, Judgment of 26 October 2000, para. 94.

175. ECtHR, [Dobri v. Romania](#), App. No. 25153/04, Judgment of 14 December 2019, para. 45.

176. ECtHR, [Poghosyan v. Georgia](#), App. No. 9870/07, Judgment of 24 February 2009, para. 48.

177. *Ibid.*, para. 49.

# Recommendations

## Reduce the number of new persons entering detention

- Police should not arrest and detain people for minor offences.<sup>178</sup>
- Police should consider issuing citations instead of arrest.
- Prosecutors should not prosecute minor offences.
- Prosecutors should not request pre-trial detention except in extraordinary cases, in compliance with ECHR standards.
- Prosecutors should be required to consider information about the accused person's health before deciding whether to apply for pre-trial detention.
- Courts should not impose pre-trial detention without ensuring that this is strictly necessary and that no alternatives are possible, in compliance with ECHR standards.
- Regular review of the continued need for pre-trial detention need to be guaranteed.
- The COVID-19 pandemic has pushed the urgent need for EU standards on pre-trial detention to the fore.

## Reduce the number of persons held in detention

- Courts should refuse to extend pre-trial detention orders without ensuring that this is strictly necessary and that no alternatives are possible, in compliance with ECHR standards.
- Courts should examine current rosters of persons held in pre-trial detention and pro-actively release as many as possible, prioritising those with health concerns and old age.
- Access to lawyers should be guaranteed by prison administrations and police authorities to ensure adequate preparation of pre-trial release motions and hearings, including:
  - Bans on visitation by lawyers should be limited to specific risks and limited in time to enable in person consultation;
  - Protective gear should be provided in lieu of limiting access to lawyers; and
  - Free phone and video calls between lawyers and detained clients should be made available where in person visitations are exceptionally restricted.

<sup>178</sup> See also our recommendations relating to 'Policing COVID-19', on page 23.