

RIGHTS BEHIND BARS

*Access to justice for victims of
violent crime suffered in pre-trial
or immigration detention*

Fair

Trials

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 transparent and reliable 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 organizations. 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>



[fairtrials.org](https://www.fairtrials.org)



@fairtrials



@fairtrials



Fair Trials

Contact:

Laure Baudrihaye-Gérard

Senior Lawyer (Europe)

+32 (0)2 894 99 55

laure.baudrihaye@fairtrials.net

Emmanuelle Debouverie

Legal and Policy Officer

+32 (0)2 429 09 13

emmanuelle.debouverie@fairtrials.net

Access to Justice for Victims of Violent Crime Suffered in Detention

This report is produced as part of the project "Access to Justice for Victims of Violent Crime Suffered in Detention" co-financed by the EU Justice Programme and coordinated by Fair Trials, with partners REDRESS (The Netherlands),

Centre for Peace Studies (Croatia), Antigone (Italy), Hungarian Helsinki Committee (Hungary) and Civil Rights Defenders (Sweden). We would like to thank our partners for their contributions to this report.



Published in 2019



This document is possible thanks to the financial support of the Justice Programme of the European Union. The contents of this document are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

Contents

Acronyms	5
Definitions	5
Executive summary	6
Introduction	12
Methodology	15
Context of detention	16
Conceptual dichotomy between victims and detainees	17
Normalisation of violence as part of detention conditions	17
Isolation and vulnerability of detained people	18
Institutional barriers - conflicts of interests and self-protection	19
Legal and financial limitations	20
Scope of EU minimum standards on Victims' Rights	22
The right to information	24
Definition of the right	25
Specific challenges with respect to accessing the right to information	26
Difficulty in accessing public information on Victims' Rights	26
Detention Staff do not identify victims of violence and fail to inform them of their rights	26
Information on detainees' rights is not accessible and not efficiently provided	27
Recommendations	27
Public Authorities	27
Bar associations / lawyers / legal aid boards	28
Victim Support Services	28
Law Enforcement and Judicial Authorities	28
Monitoring bodies including NPMs	28
Access to justice	30
Definition of the right	31
Challenges with respect to the right to participate in criminal proceedings	32
Barriers to filing criminal complaint	32
Difficulties in accessing evidence of violence	34
Difficulty in proving that violence by Detention Staff is illegitimate	34
Difficulties in accessing to lawyers and legal aid	35
Violence in closed institutions is dealt with internally	36
Impunity resulting from the lack of political will to investigate and prosecute	36
Recommendations	37
Public Authorities	37
Bar associations / lawyers / legal aid boards	38
Law enforcement and judicial authorities	38
Monitoring bodies including NPMs	39

The right to protection from further victimisation	40
Definition of the right	41
Challenges with respect to the right to protection	42
Lack of available protection measures in detention	43
No appropriate needs assessment is conducted	43
Recommendations	44
Public Authorities	44
Law Enforcement and Judicial Authorities	44
The right to Victim Support Services	66
Definition of the right	47
Challenges with respect to the right to support services	47
Victim Support Services do not generally provide services in detention	48
Lack of training or protocol for Detention Administration to contact Victim Support Services	48
Detainees do not contact Victim Support Services	48
Recommendations	49
Public Authorities	49
Victim Support Services	49
Law Enforcement Authorities	49
The right to adequate compensation	50
Definition of the right	51
Challenges with respect to the right to adequate compensation	51
Obtaining compensation from the offender is long and ineffective	51
State compensation limits the possibility of awarding compensation to detained victims	52
Complaint mechanisms available to detainees do not generally award compensation	52
Recommendations	53
Public Authorities	53
Victim Support Services	53
Bar Associations	53
Recommendations for the European Union	54

Acronyms

CAT	Committee against Torture
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EPR	European Prison Rules
EU	European Union
FRA	EU Fundamental Rights Agency
HRC	UN Human Rights Council
NGO	Non-Governmental Organisation
NPM	National Preventive Mechanism under OPCAT
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
SPT	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
WHO	World Health Organisation

Definitions

“2012 Directive”: Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

“2004 Directive”: Directive 2004/80/EC relating to compensation to crime victims.

“Charter”: Charter of Fundamental Rights of the European Union.

“Detention”: Pre-trial and immigration detention.

“Detention Administration”: Immigration and pre-trial detention administration at the level of the individual detention centre.

“Detention Practitioners”: Practitioners working in the field of detention, including the Detention Staff itself (medical, psycho-social and security), lawyers, monitoring bodies, detainees support services, civil society, etc.

“Detention Centres”: Pre-trial and immigration detention centres.

“Detention Staff”: Staff employed by Detention Administration and other Public Authorities working in Detention Centres (medical, psycho-social and security).

“Prison”: May also be used to refer to pre-trial detention centre.

“Law Enforcement Authorities”: Authorities leading criminal justice investigations and prosecutions (e.g. police, prosecutors and investigating judges).

“Member States”: Member States of the EU.

“Public Authorities”: Ministry of Justice or Ministry of the Interior or any public authority in charge of Detention Centres.

“Victims’ Rights”: Victims’ rights as defined under the 2012 Directive and 2004 Directive.

“Victim Support Services”: Support services referred to in the 2012 Directive (whether, NGOs or public entities).

Executive summary

Deprivation of liberty is amongst the harshest of measures that states can take against individuals and should only be imposed in limited circumstances as a measure of last resort. In addition to the loss of liberty (and the life-changing impact this can have) detaining a person exposes them to the heightened risk of violent crime: according to the World Health Organisation, a shocking 25% of prisoners are victimized by violence each year. Violence in places of detention is much more common than amongst the general population. It can take various forms: it may occur between detainees or be inflicted by officials working in Detention Centres.

Putting a person in detention not only places them in a violent setting, it also makes them vulnerable. Detained people are isolated, stigmatized, and lack access to information and to means of communication with the outside world. Detention is not transparent – there is a lack of accountability and oversight. Procedural safeguards of people held in detention are not guaranteed. Places of detention can and often do operate as a kind of legal black hole.

States which decide to detain people are legally and morally responsible for their safety, including because of the vulnerability of detainees and the high risk of violence in detention. Over the past two years, Fair Trials has worked with five partners to examine the barriers to access to justice for detained people who suffer physical violence, whether by Detention Staff or co-detainees, in six Member States (Belgium, Croatia, Hungary, Italy, the Netherlands, and Sweden). We focused on immigration detention and pre-trial detention in the context of criminal proceedings.

Overview of findings:

The specific context of detention creates systemic challenges for victims of violent crime:

- Where detainees suffer violent crime, they are victims with rights under EU law, even if they are also suspected perpetrators of crime or undocumented migrants. There is, however, a common failure to recognise that people can be both detainees and victims at the same time, that detainees' procedural rights and their rights as victims can co-exist. This conceptual dichotomy has serious implications for the ability of detained victims of violence to access and exercise Victims' Rights.
- Acts of violence in detention are frequently normalised – seen as inevitable features of life in detention, whether that is harsh treatment by Detention Staff or by co-detainees. For this reason, violence tends to be under-reported and not to be addressed as seriously as it would be in the outside world.
- By isolating people, detention places them in a situation of vulnerability and dependency on Detention Staff and co-detainees. Their livelihood and safety depend on how they are treated by staff and fear of reprisals is a predominant barrier to reporting. This makes it especially hard for detained victims to report crimes and to seek to

exercise their other rights as victims. This vulnerability is exacerbated for people who are non-nationals, do not speak the national language and/or have no local support networks.

- Given the challenges that detainees face in reporting crimes, it is crucial that Detention Administrations play a pro-active role in identifying and addressing violent crime and in protecting the rights of victims. At various levels there are, however, embedded conflicts of interest and self-protection reflexes by those working within places of detention that can foster a rule of silence. These cultures deter whistle-blowing, investigations and accountability, all of which make violent crime hard to expose and to address.

As well as these broader contextual challenges, we identified serious barriers to victims of violent crime in detention accessing key rights as victims:

- **Information on rights:** Without information about their rights, a victim cannot exercise them. In practice, however, detainees are not usually informed of their rights as victims at any stage of their detention, including due to their inability to access information that exists in the outside world and due to the failure to recognise violence in detention as a criminal offence. Detention Staff are not trained to identify victims or to inform them of their rights, and Victim Support Services are rarely available in detention.
- **Access to justice:** Despite violence being known to occur in detention, adequate reporting systems rarely exist, and few reports ever reach the criminal justice system. Detained victims who seek access to justice face considerable barriers: limits on communication make it hard to report crimes to law enforcement; detained victims are often expected to produce evidence of violence but face difficulties in securing this; and it is particularly difficult for detainees to establish that the use of force is unjustified and amounts to a criminal offence (something which should not be but often is required). The role of lawyers in helping detainees access criminal complaint mechanisms and evidence is key, but in detention, access to legal advice and representation is difficult to secure.
- **Protection from further victimisation:** The risk of repeat victimisation, intimidation or reprisals is high in detention. The range of retaliation measures that staff may use against detainees is wide and may impact their physical or mental integrity. Similar risks of re-victimisation apply in the context of violent crimes committed by other detainees. In a closed setting, similar to a close relationship, it can be impossible for a victim to escape their aggressor. There is a lack of available protection measures in detention and Detention Staff do not generally conduct appropriate needs assessments.
- **Victim Support Services:** Victims who are not detained are usually referred to Victim Support Services when they file a criminal complaint but, as detained victims rarely

access these mechanisms, they rarely, if ever, get referred. The existing framework for support services is simply not adapted to victims in detention. Organisations that provide services (police services to file complaints, Victim Support Services, NGOs who work with victims and lawyers specialised in Victims' Rights) do not normally enter detention facilities.

- **Compensation:** The right to compensation is largely unavailable for victims of violent crime in detention. Many of the challenges are the same as those encountered by victims generally: length of legal proceedings, link between state compensation and criminal proceedings, quantum of compensation, and the difficulty in accessing remedies across-borders. Victims in detention, however, face additional challenges as a result of their inability to access the justice system. Furthermore, complaint mechanisms available to detainees do not generally include the award of compensation.

The ineffective implementation of the rights of victims in detention results in a lack of adequate investigations into, and accountability for, violence. This contributes to a climate of impunity, leading to the recurrence of acts of violence, arbitrariness and, ultimately, threatens the rule of law itself in places of detention. It leaves detainees in an unbearable position of vulnerability, contributing to high levels of mental ill-health, self-harm and suicide.

Overview of recommendations

Overcoming these obstacles to justice for victims of violent crime suffered in detention poses serious challenges. There are, however, measures that can be taken to address these challenges.

Public Authorities

- Because detainees will rarely, if ever, come into contact with law enforcement authorities (typically designated as the "competent authorities" for supporting victims in exercising their rights under EU law) Detention Staff should also be treated as "competent authorities" for these purposes. Detention Staff are often the first and the only contact with authorities that a victim of violent crime suffered in detention may have.
- A clear framework should be adopted setting out the responsibilities of Detention Staff and detention administrations in securing the rights of victims of violent crime. This should, for example, include: the timely provision of accessible information on rights; preserving and sharing evidence of alleged crimes; reporting of possible offences to law enforcement; facilitating detainees' communication with law enforcement, lawyers, medics and Victim Support Services; and the obligation to protect detained victims against secondary victimisation, intimidation or retaliation.

- Detainees should be recognised and highlighted as an "at risk" group for violent crime, repeat victimisation and intimidation, and awareness-raising campaigns and education programmes should be undertaken and aimed, in particular, at Detention Staff and victims' support services.
- Data should be collected and published to allow for oversight and research, including on: (i) the number of complaints, investigations, prosecutions and convictions of violent crime against detained victims; (ii) the use of force by Detention Staff, and associated disciplinary procedures against Detention Staff or against detainees; (iii) detainees supported by Victim Support Services; (iv) protection measures implemented in detention; and (v) compensation awarded.
- In violation of EU law, some Member States limit access to some Victims' Rights based on a victim's nationality or residence. These laws should be reformed to ensure that all Victims' Rights are protected.

Detention Administration and Staff

- Because of the key role of Detention Staff in ensuring Victims' Rights are respected, training on Victims' Rights (including on how to identify victims) should be made a formal part of the education of Detention Staff, and workshops should be organised in cooperation with Victim Support Services to strengthen cooperation.
- Taking into account the prevalence of violence in detention, and the reluctance of detainees to report violent crime, information on Victims' Rights must be provided before situations of victimisation arise. Detention Staff should, therefore, provide accessible information on Victims' Rights when people enter detention and as soon as there is any indication that a detainee may have been a victim. They should also ensure that information is provided in plain language and in a language the detainee understands.
- A clear protocol should be adopted on the steps Detention Staff must take when there is an allegation of violence or when they become aware of such situations, including systematically to: preserve evidence of crime (including audio-visual recordings); report alleged violent crime to law enforcement; and undertake an individual needs assessment to implement protective measures.
- Detention Administrations should work with Victim Support Services, lawyers, law enforcement and other agencies and should actively facilitate their access to places of detention. This would increase the likelihood of detained victims being able to access the services that are available to victims of violence in the outside world. It would also increase transparency and oversight of places of detention.

- Many detainees are afraid to report abuse by Detention Staff or co-detainees, so it is crucial to try to overcome these barriers. One mechanism would be to ensure detainees have secure, confidential and fast-track channels of communication to report crime to law enforcement, lawyers and Victim Support Services. It is also crucial to ensure effective access to confidential and independent medical assistance and assessment.
- Steps must be taken to increase oversight of Detention Staff in order to deter cases of abuse and address the culture of silence. This should, for example, include clear and detailed records of decisions to apply disciplinary measures (in particular, every use of force); an obligation to report allegations of ill-treatment and violence to law enforcement authorities; and oversight of compliance with laws and procedures to protect victims of violent crime, with appropriate sanctions where these are violated.

Victim Support Services

- Because of the conceptual dichotomy between victims and detainees, Victim Support Services are not set-up to recognise and support detainees as an “at-risk” group. To try to overcome this challenge, and increase recognition of the needs of this vulnerable group, Victim Support Services should provide specialist training to their staff.
- Victim support services should be adapted so that they more effectively support detained victims of violent crime in detention, including to access justice, obtain compensation and protect against re-victimisation. Victim Support Services should also consider creating specialised teams for detained victims.
- To increase their access to places of detention, Victim Support Services should work with Detention Administrations (in coordination with lawyers, detention monitoring bodies and NGOs) to provide accessible information on Victims’ Rights to detainees and to organise “desks” in places of detention, regular visits and hotlines for detainees.

Bar associations, lawyers, legal aid boards

- Lawyers could play a key role in detecting victimisation situations, informing their clients of their rights as victims and helping them to gather evidence and file complaints. They should work with Detention Administrations and other agencies to facilitate access to legal advice in Detention Centres, for example by creating legal clinics or hotlines.
- Most lawyers working with detainees are not specialists in Victims’ Rights, focusing instead on defending the detainee in criminal or immigration proceedings. These

lawyers should receive training on Victims’ Rights, identifying victimisation, and supporting criminal complaints and compensation claims.

- Because most detainees do not have the means to pay for the legal services they need to exercise their Victims’ Rights, legal aid should be available, including (where necessary) to cover the costs of translation and interpretation.

Law Enforcement and Judicial Authorities

- To address the serious under-reporting of violent crimes in detention, law enforcement authorities should adapt their procedures and work with Detention Administrations and other agencies to make it as easy as possible for detainees to report crimes.
- Given the reluctance of detainees to report crimes to law enforcement (and the lack of perceived and actual priority given to investigating crimes in detention), clear policies should be put in place requiring law enforcement authorities to investigate and prosecute allegations of violence (whether by Detention Staff or co-detainees) and to ensure that allegations do not negatively impact ongoing criminal or immigration proceedings relating to the detainee.
- Specialist teams should be created in law enforcement authorities to deal with criminality in places of detention, including ill-treatment by Detention Staff. This would allow for specialist training to be provided as well as a focal point for Detention Staff and Administration, lawyers and Victim Support Services.
- Specific protocols should be put in place to support effective investigations and prosecutions, including to: require the Detention Administration to explain and justify the use of force (rather than requiring the victim to prove that it was unjustified); ensure that evidence is secured from places of detention; and protect detained victims and witnesses in ongoing proceedings.

Detention monitoring bodies

- As a mechanism for independent oversight of places of detention, detention monitoring bodies (such as National Preventive Mechanisms) should review and report on whether effective steps are being taken to ensure that victims of violent crime in detention are informed of, and able to exercise, their rights as victims.
- Monitoring bodies should facilitate investigations of violent crime in detention, by referring systemic concerns and, where appropriate, individual allegations to law enforcement authorities and by assisting criminal investigations.

European Union

- Legislation at a regional level could help to reduce the incidence of violent crime in detention. In particular:
 - EU-wide legal standards to improve decision-making on pre-trial detention could reduce the unjustified use of detention, keeping more people out of detention and away from the heightened risk that they will become victims of violence.
 - EU legislation setting out minimum standards on detention conditions could make prison conditions more humane. This would in turn reduce the likelihood of violence and improve the capacity of Detention Administrations to effectively address incidences of violence.
- Recognising the high rates of violence in detention, the vulnerability of detainees and the barriers to access to justice, the EU should produce guidance on the implementation of the EU law with respect to victims in detention. This should, in particular:
 - Clarify that detainees who are victims of violence are vulnerable, within the meaning of EU law;
 - Require that “competent authorities” include Detention Staff, to address the fact that these are the only authorities that most detainees are able to access; and
- Outline minimum requirements for national protocols setting out the responsibilities of Detention Staff and detention administrations in securing the rights of detained victims of violent crime, including: the timely provision of accessible information on rights; preserving and sharing evidence of alleged crimes; reporting of possible offences to law enforcement; facilitating detainees’ communication with law enforcement, lawyers, medics and Victim Support Services; and the obligation to protect against secondary victimisation.
- The EU should offer technical and financial support to assist in the implementation of the recommendations outlined above. For example, specialist training should be funded for professionals working with detainees, such as Detention Staff and Victim Support Services.
- The European Commission should monitor the effective implementation of EU law on Victims’ Rights by Member States with respect to this vulnerable group. This could, for example, include a requirement to provide copies of national protocols for the protection of victims of violent crime in detention; and a requirement to provide data on how victims in detention have accessed their rights under EU law, such as the number of complaints, investigations, prosecution and convictions of violent crime against detained victims.



Introduction

Deprivation of liberty is amongst the harshest measures the state can take against an individual. In addition to the loss of liberty, detained individuals experience serious and sometimes irreversible impacts to their livelihood, family, and health. According to international and regional human rights standards, such a severe state action against an individual can therefore only be imposed in strictly limited circumstances.¹ This report focuses on two circumstances where detention may be justified but only in exceptional cases, and as a measure of last resort: (a) pre-trial detention, which removes the right to liberty from a person who has not yet been (and may not be) convicted of any crime;² and (b) immigration detention which is based exclusively on a person's migration situation.³ Unfortunately, in the EU as around the world, strict limitations on the use of these forms of detention ("**Detention**") are frequently not respected.⁴

Pre-trial detention has recently come under particular scrutiny from European regional bodies for its connection to overcrowding and inhuman detention conditions. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the "**CPT**"): ⁵

[T]he persistent problem of overcrowding in prisons, with all its related challenges, has to be ascribed to a large extent to the high proportion among the total prison population of remand prisoners (i.e. prisoners who are detained by court order and are still awaiting their trial or have not been convicted by a final judgment).

Pre-trial detainees usually face much worse detention conditions than convicted detainees. They are "all too often held in dilapidated and overcrowded cells and are frequently subjected to an impoverished regime. (...) [F]requently subjected to various types of restrictions (in particular as regards contacts with the outside world)."⁶ This specifically harsh regime is often justified by the theoretically short

periods of pre-trial detention, but in reality, pre-trial detention can last for years. This has a negative impact on mutual trust between Member States of the EU ("**Member States**"). As expressed by the European Commission in a green paper published in 2011 "[e]xcessively long periods of pre-trial detention are detrimental to the individual, can prejudice judicial cooperation and do not represent the values for which the EU stands."⁷ Flagship cooperation instruments needed to fight crime in Europe, like the European Arrest Warrant, are at risk, because poor detention conditions can lead to refusal of extradition.⁸ The lack of EU legislation harmonising minimum standards in the area of detention was recently highlighted by the Court of Justice of the European Union ("**CJEU**").⁹

Similarly, immigration detention is at the heart of International and European institutions' preoccupation, and they have made efforts to address the growing use of immigration detention in response to large movements of asylum-seekers and refugees in different parts of the world. Contrary to pre-trial detention, the EU has legislated some aspects relating to detention conditions of detained migrants.¹⁰ In 2014, the United Nations High Commissioner for Refugees launched the "Global Strategy – Beyond Detention 2014-2019" with the aim of supporting governments to end the detention of asylum-seekers and refugees.¹¹ The strategy requires states to put in place and implement alternatives to detention, as well as better detention conditions where detention is deemed necessary and unavoidable.¹² However, it appears very clearly that the detention of migrants is frequently used systematically, and is often arbitrary and unlawful.¹³

Places of detention are dangerous. Violence is prevalent. The Secretary General of the United Nations ("**UN**") recently identified "[t]he issue of violence, death and serious injury (...) as one of the most important challenges pertaining to

1 European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights*, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

2 European Convention of Human Rights, Article 5(1)(c).

3 European Convention of Human Rights, Article 5(1)(f). This is also specifically enshrined in EU law in respect of immigration detention. See Article 15 of Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country Nationals.

4 Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, available at: <https://www.fairtrials.org/publication/measure-last-resort> and Asylum Information Database, *The detention of asylum seekers in Europe: Constructed on shaky ground?* Published in 2017, available at: <https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief-Detention-1.pdf>.

5 CPT, *Remand detention*, Extract from the 26th General Report of the CPT, published in 2017, p. 1, available at: <https://rm.coe.int/168070d0c8>.

6 *Ibid.*

7 European Commission, Green Paper, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 2011 (COM(2011) 327 final), available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0327>.

8 Joined Cases C-659/15 PPU and C-404/15, *Caldararu and Aranyosi*, judgment of 5 April 2016, and EuroJust, *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*, published in October 2018, available at: <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Pages/Case-law-analysis.aspx>.

9 CJEU, Case C 128/18, *Dorobantu*, judgment of 15 October 2019 which concluded that: "[a]s regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell" (paragraph 86).

10 Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Articles 15, 16 and 17; Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Articles 9, 10 and 11.

11 UNHCR, *Global Strategy - Beyond Detention 2014-2019 to support governments to end detention of asylum-seekers and refugees: Progress Report 2018*, February 2019, available at: <https://www.unhcr.org/protection/detention/5c934bbd7/unhcr-global-strategy-beyond-detention-progress-report-2018.html>. See also, Parliamentary Assembly of the Council of Europe, Resolution 1707 (2010) on Detention of asylum-seekers and irregular migrants in Europe, §9, available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17813&lang=en>; CPT, *Factsheet on Immigration Detention*, published in March 2017, p. 1, available at: <https://rm.coe.int/16806bf12>.

12 *Ibid.*, pp. 4-5.

13 PICUM, available at: <https://picum.org/focus-area/borders-and-detention/>.

the protection of persons deprived of their liberty.”¹⁴ A 2019 report by the UN Human Rights Council (“HRC”) underlines that “[b]y depriving persons of their liberty, States assume the responsibility to protect the life and bodily integrity of such persons. States are thus obligated to prevent the ill-treatment of, and violence against such persons and to ensure that the conditions of a dignified life are met.”¹⁵

Violence in places of detention can take various forms. Violence regularly occurs between detainees:¹⁶

[I]nter-prisoner violence constitutes an important cause of death and serious injury of persons deprived of their liberty, representing in some contexts over 17 per cent of deaths in custody. This type of violence is widespread, with some surveys indicating that over half of the prisoners interviewed had been exposed to violence originating from fellow inmates.

Despite the challenges (discussed below) in identifying and addressing cases of violence in detention, high-profile cases have emerged in the European Union of detention staff also committing violent crimes against detainees.¹⁷

Putting a person in detention not only places them in a violent setting, it also makes them vulnerable in other ways. Detained people are isolated, stigmatized, and lack access to information and to means of communication with the outside world. Detention is not transparent - there is a lack of accountability and oversight. Procedural safeguards of people held in detention are not guaranteed. Places of detention often operate in the shadows and outside the scope of the relevant legal frameworks. Pre-trial and immigration detainees’ vulnerability is often exacerbated by the fact that, unlike convicted detainees, they do not know how long they are going to remain in detention.¹⁸

The vulnerability of detainees, combined with high levels of violence in detention, is why detainees’ rights as victims need specific scrutiny. Over the past two years, Fair Trials worked with five partners¹⁹ to examine the barriers to access to justice for detained people who suffer violence, whether inflicted by detention staff or co-detainees, in six Member States (Belgium, Croatia, Hungary, Italy, the Netherlands, and Sweden).²⁰ More specifically, we considered whether the rights of these people under EU law as victims of crime (“Victims’ Rights”)²¹ are accessible in pre-trial and immigration detention.

This report provides a regional overview of that work. The first part of the report identifies the systemic challenges that arise in the specific context of detention. The second part of the report analyses the specific challenges that arise in relation to the exercise of five key areas of Victims’ Rights and proposes recommendations to overcome them: (i) the right to information; (ii) the procedural rights of victims in criminal proceedings; (iii) the right to protection measures (including against repeat victimisation); (iv) the right to specialised support services; and (v) the right to compensation. The final section of the report outlines recommendations addressed to the EU institutions.

14 Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Human rights in the administration of justice*, 2019, A/HRC/42/20, p. 6 (references omitted), available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx.

15 *Ibid.*

16 Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Human rights in the administration of justice*, 2019, A/HRC/42/20, p. 6 (references omitted), available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx.

17 See e.g. the case study at page 37 below in Belgium regarding the sentencing of a group of prison guards from the Forest prison in Brussels in March 2019.

18 Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, available at: <https://www.fairtrials.org/publication/measure-last-resort>; Jesuit Refugee Service-Europe, *Becoming vulnerable in detention*, p. 121, available at: https://jrseurope.org/assets/Publications/File/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_PUBLIC.pdf.

19 REDRESS (Netherlands), Centre for Peace Studies (Croatia), Antigone (Italy), Hungarian Helsinki Committee (Hungary) and Civil Rights Defenders (Sweden).

20 The many other forms of violence that exist in detention, including harassment and other forms of psychological violence which may fuel physical violence, are beyond the scope of this report. For other forms of violence in prison, see e.g. World Health Organisation, *Prison and Health* (2014), pp. 19-21, available at: http://www.euro.who.int/_data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.

21 Provided by Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (“2012 Directive”) and Directive 2004/80/EC relating to compensation to crime victims (“2004 Directive”).

22 Discussed more extensively below in the context of under-reporting.

Methodology

Fair Trials and its partners conducted local desk-based research on the legal and institutional framework available for victims in general, and for victims in immigration and pre-trial detention specifically, in six jurisdictions: Belgium, Croatia, Hungary, Italy, the Netherlands and Sweden. This drew on legislation, administrative guidelines, internal rules, secondary law and case law; as well as on news items and academic research. In each Member State, partners also conducted interviews with key stakeholders, including (where possible) victims themselves, lawyers, Detention Staff, professionals working in detention (e.g. probation services, social services, health care professionals) and NGO staff. These interviews helped partners compare their desk research with the reality and practice of detention.

Collecting data was challenging. First, there is very limited quantitative data available with respect to occurrences of violent crime in detention and its treatment by national authorities (criminal or administrative investigations into allegations of violence and the outcomes of prosecution or administrative proceedings). Secondly,

in some Member States, civil society organisations' and lawyers' access to Detention Centres (see defined terms) is systematically obstructed, which inevitably limited the accessibility of information. Finally, stakeholders working in Detention Centres, who may witness or hold information about violence in detention, were not always willing to talk about their experiences for fear of retaliation from colleagues or of the impact on their employment by the administration of pre-trial²² or immigration the administration of Detention Centres ("**Detention Administration**").

In each of the six Member States, roundtable meetings were organised in early 2019, bringing together key local stakeholders to discuss the challenges that victims of violent crime in detention face in accessing and enforcing Victims' Rights, and possible solutions. Participants included representatives from the national authorities in charge of pre-trial and immigration detention, prison and probation authorities, prison directors, detention monitoring bodies, civil society organisations working with migrants and pre-trial detainees, victims

support organisations and criminal defence and immigration lawyers.

Following the roundtables, each partner organisation produced a short national guidance note, summarising the challenges they identified together with recommendations to improve detainees' ability to exercise Victims' Rights.²³

In September 2019, two regional policy meetings were organised in The Hague with participants from 15 Member States, and various international organisations, on pre-trial detention and immigration detention respectively. Participants included representatives from Ombudsperson offices, National Preventive Mechanisms ("**NPMs**"), governments, criminal defence and immigration lawyers, academics, victims' organisations and other EU and international experts. The aim of the meetings was to discuss implementation issues surrounding access to Victims' Rights in detention and to compare the findings in respect of the six Member States examined to that in other Member States, in order to identify possible recommendations.



This report draws on all the work described above as well as from additional international and comparative publications and reports in the field. If you are interested in learning more about the project or have any comments on the contents of this report, please do not hesitate to contact us.

23 For further information about the national research and guidance notes, please contact the relevant national partners.

Context of detention

Before analysing the effectiveness of Victims' Rights for persons who suffer violence in detention, this section identifies the challenges arising from the context of detention. Five underlying issues were identified which pervade the accessibility of Victims' Rights for people who suffer violent crime while in pre-trial and immigration detention: (i) the conceptual dichotomy between victims and detainees; (ii) the normalisation of violence; (iii) the isolation and vulnerability of detainees; (iv) institutional barriers - conflicts of interests and self-protection; and (v) legal and financial limitations. Each factor is outlined briefly below to provide context to the subsequent sections of this report.

Conceptual dichotomy between victims and detainees

When seeking to engage many stakeholders, it was clear that they found it conceptually challenging to think of people in detention, whether in pre-trial or immigration facilities,²⁴ as potential victims of crime. In the same way as the criminal justice system distinguishes between suspects/accused persons, on the one hand, and victims, on the other, a binary attitude seems to exist amongst stakeholders. Detainees' procedural rights and Victims' Rights are often not recognised as co-existing and overlapping; rather they are seen as separate or even opposite, through polarized lenses.

This conceptual dichotomy has serious implications for the ability of detained victims of violence to access and exercise Victims' Rights, including:

- A general lack of awareness of Victims' Rights amongst the numerous practitioners working in detention – including Detention Staff (medical, psycho-social and security), lawyers, monitoring bodies, support services for detainees, civil society, etc. (together, "**Detention Practitioners**"). In all Member States researched, Detention Practitioners have no training on Victims' Rights.
- If it is not recognised that a person could be a "victim", the relevance of Victims' Rights will simply not be identified. Stakeholders who come into contact with detainees, even those supposed to protect their rights in detention, may not see detainees as potential victims. Moreover, detainees themselves may not perceive themselves as victims or, more generally, as people with rights.
- Services dedicated to victims, including NGOs, professional support services (public or independent) for victims ("**Victim Support Services**") and lawyers

specialised in the rights of victims do not generally work in detention facilities, in particular in prisons and jails.

Normalisation of violence as part of detention conditions

Statistics show that many forms of violence are prevalent in detention. The World Health Organisation's 2014 "Health and Prisons" report highlighted that: "[a]bout 25% of prisoners are victimized by violence each year, while 4–5% experience sexual violence and 1–2% are raped".²⁵ US Government statistics show that men in detention are 18 times more likely to be assaulted than men in the general population; for women in detention, the rates are more than 27 times higher.²⁶

Although the scale of violence in places of detention is under-studied in Europe and statistics are scarce, in the six Member States we focused on, violence was perceived to be an intrinsic part of both pre-trial and immigration detention. Acts of violence are seen, or lived, as a normal or inevitable element of detention. Under-reporting is discussed further below, but one reason detainees who suffer violence, or witness violence against others, do not report it, is because violence is considered to be "normal" (to a certain extent) and linked to prison conditions more generally. Given the fact detainees are particularly at risk of being victims of violence, the lack of public policy addressing this is shocking and a reflection of the normalisation of violence in closed institutions. Despite public knowledge that violence occurs in detention, our research shows that limited or no action is taken to prevent violent criminal conduct and to sanction it appropriately.

Violence in detention could also be normalised because it is wrongly perceived as part of how places of detention operate:

- In the context of violence perpetrated by Detention Staff, in strictly limited circumstances the use of force can sometimes be legitimate.²⁷ In practice, this can make it harder to distinguish between legitimate (and lawful) use of force or restraint and abusive (criminal) violence.
- Violence between detainees, which is common,²⁸ is often treated by Detention Staff as a private dispute that is either left to detainees to deal with, or that should be sanctioned without assessing whether there is an aggressor and a victim. In Hungary, for example, several cases were reported of detainees in pre-trial detention

24 This vision of migrants echoes the clear trend towards the criminalisation of migration in Europe. See e.g., FRA, *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-1_en.pdf; Council of Europe: Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, 2010, available at: <https://www.refworld.org/docid/4b6a9fef2.html>.

25 World Health Organisation, *Prison and Health* (2014), pp. 19-21 for definitions of violence in prison. Report available at: http://www.euro.who.int/_data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.

26 Wolff N, Blitz CL, Shi J., *Rates of Sexual Victimization in Prison for Inmates With and Without Mental Disorders*, *Psychiatric Services*, 2007, 58(8):1087 – 1094.

27 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), General Assembly A/RES/70/175, 2015, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3.

28 In the prison context, it has been reported that "[i]nter-prisoner violence constitutes an important cause of death and serious injury of persons deprived of their liberty, representing in some contexts over 17 per cent of deaths in custody. This type of violence is widespread, with some surveys indicating that over half of the prisoners interviewed had been exposed to violence originating from fellow inmates." Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Human rights in the administration of justice*, 2019, A/HRC/42/20, p. 6 (references omitted), available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx.

who were ill-treated, raped or even killed by other detainees in their cells in the total absence of a reaction from Detention Authorities.²⁹ Tolerance of inter-detainee violence is generally highlighted as a major contributing factor to violence.³⁰

Isolation and vulnerability of detained people

It is self-evident that detainees have limited contact with the outside world. They usually have restricted access to computers, the internet, mail or telephones. As discussed above, pre-trial detainees, in particular, may face worse detention conditions than convicted detainees and in some countries (like Sweden) their access to the outside world is frequently severely restricted to protect the integrity of evidence at trial.³¹ According to the CPT:³²

In a number of visit reports, the CPT has taken the view that the conditions of detention of remand prisoners in the establishments visited were totally unacceptable and could easily be considered to be inhuman and degrading. Moreover, remand prisoners are frequently subjected to various types of restrictions (in particular as regards contacts with the outside world), and, in a number of countries, certain remand prisoners are held in solitary confinement by court order (sometimes for prolonged periods).

People in immigration detention are also particularly vulnerable. As was noted in a recent report by the Platform for International Cooperation on Undocumented Migrants ("PICUM"):³³

[C]onditions of extreme social segregation, access to a legal representative may be the only link to the outside world, and provide the only safe opportunity to report complaints of abuse or sexual assault inside detention facilities. Migrants who do not have legal representation face significant hurdles in advocating effectively for their own rights and safety while in custody.

Good practice – Sweden

In Sweden, migrants may use the immigration detention centre's telephone free of charge and there is approximately one computer for two detainees in the Detention Centres. Detainees also have a right to have a mobile phone without camera.

This vulnerability is exacerbated by the limited (sometimes prohibited) access to Detention Centres for independent experts, NGOs and lawyers. Access to detention facilities is typically determined by the Detention Administration which is given a wide margin of discretion in deciding who has access to detention facilities and when. There are frequently no objective criteria to allow access for monitoring purposes and, although refusals of access can in some cases be brought before the national Ombudsperson's office, it is unclear whether the Ombudsperson can compel Detention Centres to provide access.

In addition, detainees may face other vulnerabilities which add to their isolation. For example, immigration detainees, and many pre-trial detainees³⁴ are foreigners, which can make it harder for them to understand and exercise their rights (and to communicate with people who could help them) due to language barriers.³⁵ There often are no translation or interpreter services and limited ways to inform detainees about the functioning of the detention facility (i.e. who to go to in the case of violence) and about detainees' rights. In addition, many people in pre-trial detention, in particular, suffer from learning disabilities and mental illness³⁶ and many people in immigration detention have suffered trauma.³⁷ Even if they speak local languages, they may therefore be less able to understand their rights and to speak up for themselves.

In Hungary, the penitentiary institutions must make sure that the mental state of vulnerable detainees is continuously monitored by professionals. They must ensure that foreign detainees are placed in cells with detainees who speak the same language. In practice, however, this does not happen.

- 29 CPT, Extract from the 7th General Report, available at: <https://www.refworld.org/pdfid/4d7882092.pdf>. See also, CAT/C/MDA/CO/3; Office of the Commissioner for Fundamental Rights of Hungary, submission referred to in Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human rights in the administration of justice, 2019, A/HRC/42/20, p. 6 (references omitted).
- 30 Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human rights in the administration of justice, 2019, A/HRC/42/20, p. 6 (references omitted), available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_20.docx.
- 31 CPT, Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 28 May 2015, published in 2016, available at: <https://rm.coe.int/1680697f60>.
- 32 CPT, Remand detention, Extract from the 26th General Report of the CPT, published in 2017, p. 1.
- 33 PICUM, *Guide to the EU Victims' Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants*, 2015, p. 15, available at: http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf.
- 34 See Fair Trials, *Where's my lawyer? Making legal assistance in pre-trial detention effective*, published in 2019, available at: <https://fairtrials.org/publication/wheres-my-lawyer>. See also European Parliament, *Procedural Rights and Detention Conditions Cost of Non-Europe Report*, published in 2017, p.80, at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU\(2017\)611008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf). "According to 2015 SPACE statistics, 3 per cent of all inmate populations in the EU (including pre-trial detainees) 250 were citizens of another EU Member State. The unweighted average share of foreign EU citizens as a proportion of total prison population in each EU Member State was 6.8 per cent (median 4.6 per cent), although there was notable variation among Member States. The highest share was recorded in Luxembourg (42.2 per cent), followed by Austria (22.3 per cent) and Cyprus (18.8 per cent). By contrast, Hungary and Slovakia did not report any inmates holding the citizenship of other EU Member States."
- 35 See e.g., European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, p. 38 et seq, available at: <https://www.prisonlitigation.org/livre-blanc-sur-l'accès-au-droit-et-au-juge-en-detention-provisoire/?lang=en>.
- 36 See N. Singleton et al, *Psychiatric morbidity among prisoners in England and Wales*, (ONS, 1998) and NICE, *Mental health of adults in contact with the criminal justice system*, NICE Guideline 66, March 2017, available at: <https://www.nice.org.uk/guidance/ng66/evidence/full-guideline-pdf-4419120205>.
- 37 Fundamental Rights Agency, *Current migration situation in the EU: Torture, trauma and its possible impact on drug use*, 2017, available at: <https://fra.europa.eu/en/publication/2017/february-monthly-migration-focus-torture>.
- 38 PICUM, *Guide to the EU Victims' Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants*, 2015, available at: http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf.

It was reported that a Chinese national was held alone in a cell, unable to communicate with anyone. PICUM notes generally: “[a] host of practical obstacles also impede undocumented migrants’ access to protection and legal remedy through the justice system, including language barriers, poverty, social isolation, ignorance of their rights, and the absence of legal representation.”³⁸

Institutional barriers – conflicts of interests and self-protection

There are multiple institutional factors affecting the Detention Administration and other stakeholders which prevent effective responses to violent crime committed in detention.

At various levels there are embedded conflicts of interest and self-protection reflexes by those working within places of detention that can foster a rule of silence (“*esprit de corps*” or “*omerta*”). As noted by the CPT, “[t]oo often the *esprit de corps* leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues”.³⁹ The lack of adequate investigations and accountability into instances of violence “is an important contributing factor as it creates a climate of impunity which results in the recurrence of this type of violence.”⁴⁰ Such factors can operate at various levels:

- Directors of Detention Centres rely on their staff for the functioning of the institution. Recruiting and retaining staff can be challenging and Detention Centres are often understaffed. This places directors in a situation of dependency on their staff and the trade unions representing them. This may have an impact on the ability of directors to discipline staff, recognise victimisation situations and report criminal conduct to Law Enforcement Authorities (even where this is a legal obligation).⁴¹
- If they witness violence against detainees (particularly when attributable to other members of staff), Detention Staff may fear that reporting this would prejudice the security of their employment. Similarly, directors may fail to report criminal conduct committed by their staff to Law Enforcement Authorities as they are ultimately responsible for detainees’ security. More broadly, directors may be too remote from the reality on the ground.⁴²

- Loyalty between staff members is a “golden rule” in detention. Members of the Detention Staff depend on each other for their own security. Reporting wrongful conduct on the part of a colleague may have dire consequences. As reported in France:⁴³

Those who disassociate themselves from supervisors who commit violence and denounce their behaviour are quickly sidelined from the group. As a result, they can be subjected to all kinds of bullying and intimidation. Faced with this risk, some will therefore be reluctant to report the facts. (...) [W]histleblowers are reluctant to come forward, because of a lack of a clear statement of their role and a general definition of the protective measures that can be applied to them.

The absence of reporting is exacerbated by the lack of safe channels of communication for witnesses to report crime and abuse committed by members of the Detention Staff.

- This is also the case for non-security staff members, such as the medical staff,⁴⁴ who also need to maintain a “social peace” with their colleagues.⁴⁵ Doctors and nurses are often best placed to identify ill-treatment and report it but, in some Member States, are employed by the Detention Administration and are therefore conflicted. More broadly, hiring policies favour hiring security agents over staff who are trained to work with people such as educators, and social workers.

Similar self-protection reflexes apply to detainees. Whether violence is committed by another detainee or a member of the Detention Staff, the close proximity and dependency that detained victims have with their aggressors have consequences on their ability to act. Detainees’ extreme dependence on the Detention Administration and Detention Staff may dissuade them from reporting crime and filing complaints, increasing their vulnerability. Their livelihood and safety depend on how they are treated. Making a complaint may often require them to report violence to the organisation which is – or who employs the person who is – ultimately responsible for it.

Institutional conflicts of interest may also affect the work of monitoring bodies, complaint mechanisms and NGOs. For example, the same institution is sometimes tasked with both handling complaints and monitoring detention facilities, which raises questions about transparency and

39 CPT, *Combating impunity*, Extract from the 14th General Report of the CPT, published in 2004, p. 1, available at: <https://rm.coe.int/16806ccd08c>; Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 46 (free translation), available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

40 Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General*, Human rights in the administration of justice, 2019, A/HRC/42/20, p. 6, available at: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Pages/ListReports.aspx>.

41 See e.g., Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 81, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

42 Observatoire International des Prisons (France), *ibid.*

43 *Ibid* (free translation).

44 Although they are sometimes employed by a different administration, the Ministry of Health (in Italy and France for example), medical staff are reluctant to report criminal conduct by colleagues or attributable to the institution, not out of fear of losing their employment, but to maintain social peace.

45 See e.g., Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 39 et seq, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

independence from government institutions. Furthermore, as discussed above, the ability for NGOs and monitoring bodies to access places of detention often depends on the Detention Administration's good will.⁴⁶ This can create a conflict: do they prioritise reporting all forms of abuse that are suffered by detainees or focus on maintaining a right of access by not rocking the boat too much? This situation can further isolate detainees and disincentivise reporting.

Legal and financial limitations

Clearly, the ability of victims of violent crime in detention to exercise their Victims' Rights requires them to be legally recognised as holders of those rights. Croatia, for example, limits the ability of non-EU nationals to access Victims' Rights (including the right to state compensation and the availability of legal aid). In the Netherlands, victims of crime that happened in another EU country may only file a complaint in the Netherlands if: (a) they are 'habitual residents' in the Netherlands; and (b) they either (i) did not have the opportunity to file a complaint in the country where the offence took place; or (ii) in the case of serious offences, they did not wish to file a complaint there.⁴⁷ In practice, the criterion of "habitual residence" leaves undocumented migrants who are victims of violent crime with no right to file

a complaint. This seems to contradict the Directive's provision that: "[t]he rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status".⁴⁸

Even where the law does, in theory, protect a person's Victims' Rights, in practice this will often require sufficient resources to be dedicated to the realisation of those rights. This issue is discussed further in the following section of the report, however, one systemic issue which emerged in several Member States was the impact of insufficient investment in Detention Staff and the implications of this for Victims' Rights. Numbers of Detention Staff were generally considered insufficient, with insufficient training provided and difficult working conditions. This in turn causes a high turnover among the staff, which impacts the quality of their training and the professional experience.

Understaffing, like overcrowding, has a direct impact on the occurrence of violence in detention, in particular on inter-detainee violence:⁴⁹

An insufficient ratio of staff to detainees can make it difficult for staff to supervise inmates effectively and results in a lack of security for themselves, making it difficult to protect detainees from inter-prisoner violence.

46 European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, pp. 61-62, available at: <https://www.prisonlitigation.org/livre-blanc-sur-l'accès-au-droit-et-au-juge-en-detention-provisoire/?lang=en>.

47 REDRESS, *The Rights of Victims of Violent Crimes in Pre-Trial and Immigration Detention: Report on The Netherlands*, March 2019, p. 44, Section 4.5, available at: <https://redress.org/news/new-report-on-the-rights-of-victims-of-violent-crimes-in-pre-trial-and-immigration-detention-in-the-netherlands/>.

48 Article 1 of the 2012 Directive.

49 Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights* and reports of the Office of the High Commissioner and the Secretary-General, Human rights in the administration of justice, 2019, A/HRC/42/20, p. 6, available at: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Pages/ListReports.aspx>.



Scope of EU minimum standards on Victims' Rights

This report focuses, in particular, on the following rights: (i) the right to information; (ii) access to justice; (iii) the right to protection measures – including measures against repeat victimisation; (iv) the right to Victim Support Services; and (v) the right to compensation. The two EU instruments on Victims' Rights referred to in this report are Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ("**2012 Directive**") and Directive 2004/80/EC relating to compensation to crime victims ("**2004 Directive**").⁵⁰

The 2012 Directive provides for the rights of *all* victims of *all* crimes, and for corresponding obligations on the part of Member States. A victim is defined as, among other things, "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence".⁵¹ These rights therefore only apply to victims of crime, as defined under national legislation and do not apply to detainees who suffer from poor detention conditions that do not amount to criminal offences.

This does not, however, mean that these rights only apply to victims who have filed criminal complaints.⁵² The 2012 Directive specifies that "[a] person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted."⁵³ Victims' Rights are not therefore attached to a finding of guilt or even to the identification of the offender.

Article 1 of the 2012 Directive explicitly provides that "[t]he rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status". This is particularly relevant to assessing the status of people in migration detention and the high proportion of non-nationals in pre-trial detention. It is not compliant with EU law to deny these people their Victims' Rights on the basis of their residence or nationality.⁵⁴

Member States should ensure that rights set out in this Directive are not made conditional on the victim having legal residence status on their territory or on the victim's citizenship or nationality (see also Recital 10). Thus, third country nationals and stateless persons who have been victims of crime on EU territory should benefit from these rights.

50 Other instruments on Victims' Rights include Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims but are not relevant to this research.

51 Article 2(1)(a)(i) of the 2012 Directive. By contrast, the 2004 Directive only applies to victims of violent intentional crime. The directive does not contain a definition of victim or "violent intentional crime."

52 See e.g. Article 8(5) of the 2012 Directive and the European Commission's guide on implementation of 2012 Directive, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf, p. 16.

53 Recital 19 of the 2012 Directive. See the European Commission's guide on implementation of 2012 Directive available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf, p. 10.

54 *Ibid.*, p. 8.

The right to information

Definition of the right

The 2012 Directive provides for the right of victims to receive information in order for them to exercise the rights it enshrines. More specifically, the 2012 Directive provides the right for victims to receive the following information “from the first contact with a competent authority” and “without unnecessary delay (...) in order to enable them to access the rights set out in this Directive”:⁵⁵

- (a) *the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;*
- (b) *the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;*
- (c) *how and under what conditions they can obtain protection, including protection measures;*
- (d) *how and under what conditions they can access legal advice, legal aid and any other sort of advice;*
- (e) *how and under what conditions they can access compensation;*
- (f) *how and under what conditions they are entitled to interpretation and translation;*
- (g) *if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made;*
- (h) *the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;*
- (i) *the contact details for communications about their case;*
- (j) *the available restorative justice services;*
- (k) *how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.*

The 2012 Directive does not define the concept of a “competent authority”. It is not necessarily associated with the police or other Law Enforcement Authorities. The expression includes any national authority or state official that is identified as a “competent authority” in national law, for the purpose of the implementation of the 2012 Directive.

They are distinct from Victim Support Services and restorative justice authorities, although these other services and authorities may also give information to victims under the 2012 Directive.⁵⁶

Competent authorities are required to provide information about “the procedures for making complaints with regard to a criminal offence”,⁵⁷ which seems to indicate that competent authorities may intervene prior to the criminal complaint. This is also supported by the recitals in Directive 2012 which specify that: “[s]upport should be available from the moment the competent authorities are aware of the victim and throughout criminal proceedings and for an appropriate time after such proceedings in accordance with the needs of the victim and the rights set out in this Directive.”⁵⁸ Thus, if authorities are aware of a victimisation situation, despite the victim not having filed a complaint, they are under an obligation to provide the support required under the 2012 Directive, irrespective of criminal proceedings.

The 2012 Directive specifies that information “should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim (...) [and] should be provided in simple and accessible language.”⁵⁹ In all contacts with a competent authority or with “any service coming into contact with victims (...) the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account (...)”.⁶⁰ The right to understand and to be understood therefore goes beyond mere translation but requires adaptation to the specific needs of the victim.

Member States are also explicitly required to raise awareness of Victims’ Rights in order to reduce the risk of victimisation and minimise the risks of secondary and repeat victimisation, intimidation and retaliation “in particular by targeting groups at risk such as children, victims of gender-based violence and violence in close relationships. Such action may include information and awareness raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders.”⁶¹ Although the 2012 Directive refers to a non-exhaustive list of “at risk” groups, it makes no distinction among victims, whether they are nationals, EU citizens or nationals from third countries, in police custody, in detention or undocumented.⁶²

Finally, the 2012 Directive provides that officials likely to come into contact with victims should “receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an

55 Article 4 of the 2012 Directive.

56 Recital 21 of the 2012 Directive.

57 Article 4(1)(b) of the 2012 Directive.

58 Recital 37 of the 2012 Directive.

59 Recital 21 of the 2012 Directive.

60 Recital 9 of the 2012 Directive.

61 Article 26(2) of the 2012 Directive.

62 Article 1 of the 2012 Directive.

impartial, respectful and professional manner.”⁶³ This training “should include training on the specific support services to which victims should be referred or specialist training where their work focuses on victims with specific needs and specific psychological training, as appropriate.(...) Moreover, persons who are likely to be involved in the individual assessment to identify victims’ specific protection needs and to determine their need for special protection measures should receive specific training on how to carry out such an assessment.”⁶⁴

Specific challenges with respect to accessing the right to information

Many of the challenges in informing detainees of their rights as victims flow directly from the detention context described above. The difficulty in seeing violence in detention as a criminal offence, and the detainee who suffers from it as a victim, means that the Victims’ Rights apparatus under the 2012 Directive is rarely, if ever, triggered.

Detainees are rarely, if ever, informed of their rights as victims at any stage of their detention. Three key reasons for this were identified:

- (i) Publicly-available information is not available in places of detention;
- (ii) Detention Staff are not trained to identify victims or inform them of their rights; and
- (iii) When information is provided, it is in a language that is not sufficiently accessible.

Difficulty in accessing public information on Victims’ Rights

In a non-detention context, various public services and private organisations are trained to identify victimisation situations and to provide information to victims on their rights. These are usually Law Enforcement Authorities and Victim Support Services. NGOs, health care institutions and lawyers specialised in Victims’ Rights may also refer victims to Victim Support Services who will in turn inform them of their rights. These organisations, professionals and services do not usually go to Detention Centres and victims in detention have limited or no means of contacting them, in particular if they are not aware of their right to do so. Defence or immigration lawyers could also provide information on Victims’ Rights but (as discussed below) access to lawyers is sometimes difficult, in particular access to legal aid lawyers as victims of crime rather than as defendants in a criminal case or the subject of an immigration case.

Good practice – Austria

Prison authorities in Austria have the obligation to inform victimised detainees of the possibility to be put in touch with Victim Support Services. If the detainee consents (for data protection reasons), Prison authorities have the obligation to inform Victim Support Services by phone and in writing.

In some Member States, there is often a lot of information on Victims’ Rights available online, provided by Victim Support Services, lawyers and NGOs. For instance, victims can generally find information about support services from an internet search. Detainees, however, often have limited access to computers, the internet or even telephones, in particular in pre-trial detention, preventing them from accessing these resources. This was confirmed in all of the six countries in which research was conducted.

Limited access to information on Victims’ Rights is in part explained by the fact that Victim Support Services and public authorities do not identify detainees as an “at risk” group requiring deliberate and positive action to ensure they can access their rights.

Detention Staff do not identify victims of violence and fail to inform them of their rights

Detention Staff are often the only authority with which detained victims will come into contact. As discussed below, detainees will only rarely take the risk of reporting a crime. The requirement to provide information does not, however, have to be triggered by the victim. The Detention Administration and its staff should identify a victim and inform them of their rights. Yet, when Detention Administration or staff become aware of a possible victimisation situation, they do not provide the information required under 2012 Directive as they are unaware of these rights, and do not consider themselves to be under any obligation to provide information.

Typically in pre-trial detention, the Detention Administration must inform detainees of their rights and duties as detainees when they are admitted to the Detention Centre, in line with various international and European standards.⁶⁵ They are usually provided with this information through a copy of the Detention Centre’s internal regulations. Information on their rights usually includes the Detention Centre’s internal regulations, the right to file internal (usually with the director of the Detention Centre) or external complaints to monitoring bodies (such as NPMs and Ombudspersons) on

63 Articles 25(1) of the 2012 Directive.

64 Recital 61 of the 2012 Directive.

65 See e.g., United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Rule 54, General Assembly A/RES/70/175, 2015, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN general Assembly Resolution no. 43/173, 9 December 1988 (UN Body of Principles), Principle 13, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>; EPR, Rule 30.1 et seq, available at: <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>; UNHCR, Compilation of International Human Rights Law and Standards on Immigration Detention, February 2018, available at: <https://www.unhcr.org/protection/detention/5afc1b927/compilation-international-human-rights-law-standards-immigration-detention.html>

issues relating to detention conditions, the right to legal advice in some circumstances, and the right to access medical assistance. They are not informed of their rights to file a criminal complaint to Law Enforcement Authorities if they become victims of crime.

Contrary to pre-trial detainees, migrants in detention do not always have access to any information on their rights and duties as detainees. Where information is provided, it is not done systematically or does not cover all the aspects that pre-trial detainees receive. As with pre-trial detention, none of the Member States researched include information on Victims' Rights.

Information on detainees' rights is not accessible and not efficiently provided

Even though information is not being provided to detainees on Victims' Rights (including the right to file a criminal complaint), some of the rights that are being notified to detainees would be relevant to a detainee who becomes a victim of violence during detention. In particular, the right to contact a lawyer, the right to legal aid in certain circumstances and the right to file complaints through specific internal or external administrative mechanisms.

When information on rights (and duties) of detainees is provided, it is usually provided once, upon their admission to the detention facility. This information is rarely provided at any other time throughout detention by the Detention Administration. Detainees are often incapable of absorbing the information provided at that time in a meaningful way upon their admittance to Detention Centres, which can happen hours after the start of their detention and typically in a situation of significant stress. In Belgium for instance, the information pack is about 50 pages long, and includes the internal rules and regulations as well as forms such as requests for televisions, medical appointments etc.

There are other sources of information available after admittance. For instance, information is provided by social services, on billboards and in Detention Centre libraries; but it is often out-dated and not particularly helpful. Information could be provided by external stakeholders including lawyers, NGOs and other services available inside Detention Centres. However, as discussed above, NGOs and even lawyers often face difficulties in accessing Detention Centres.

Language barriers and illiteracy also obstruct effective access to information about rights for some detainees. As discussed above, in many Member States, the detained population in prisons includes a high percentage of foreigners and this is by definition the case in immigration detention. Effectively providing information to detainees requires the use of interpreters and translations. These are rarely available or accessible. For example, in Croatia and the Netherlands, the forms and brochures that contain rights such as the right to

complain to internal and external mechanisms in pre-trial detention are only available in a limited number of languages. In Croatia, migrants are informed of their obligations and rights on bulletin boards in multiple languages and, in Belgium, they are given brochures translated into 25 languages.⁶⁶ When the relevant translation is not available, Detention Staff tend to ask for assistance from other detainees who may speak two languages. In Belgium, it is not unusual for Detention Staff to use tools such as "Google Translate" to try to communicate with detainees. Information is sometimes provided only in writing (including translations when available). This means that illiterate detainees do not have access to information. Detainees who are illiterate or do not speak one of the languages used in this written material may be left without any information on their rights. There is no protocol or guidance on how to inform detainees who do not speak one of the selected languages.

When the information is provided (including translations), it is often drafted or explained in technical jargon that is not sufficiently accessible for most detainees (or non-lawyers generally). For example, where copies of prisons' internal regulations are provided to detainees, they are not drafted in a language sufficiently accessible to be understood and used by detainees. In Hungary, the rights and obligations of pre-trial detainees are provided to them in writing. Brochures are translated into 24 languages, but research shows that the language used in the brochures remains unclear and too complex to understand for most detainees. The same problem was identified in Belgium in both pre-trial and immigration detention.

Recommendations

Public Authorities

- **Detention Staff must be expressly designated as "competent authorities" under the 2012 Directive.** Because detainees will rarely, if ever, come into contact with Law Enforcement Authorities (typically designated as "competent authorities"), public authorities should clearly identify Detention Staff as a "competent authority" for the purposes of the 2012 Directive. Detention Staff are often the first and the only contact with authorities that a victim of violent crime suffered in detention may have.
- **Adopt a code of ethics for Detention Staff.** In order to prevent the risk of conflicts of interest, clear guidelines on the role and obligations of "competent authorities" with respect to victims should be established at a national level.
- **Train Detention Staff on Victims' Rights and on identifying victims of crime in detention.** Such training should be made a formal part of the education of Detention Staff and workshops should be organised in

66 MYRIA, Myriadocs 5, *Détention, retour et éloignement des étrangers en Belgique*, 2017, p. 58, available at: https://www.myria.be/files/Myriadoc_5_D%C3%A9tention_retour_et_%C3%A9loignement.pdf.

cooperation with specialist services and civil society. This could also strengthen cooperation between relevant stakeholders in ensuring the implementation of Victims' Rights in detention.

- **Understanding and knowledge of rights.** Adopt clear guidelines addressed to competent authorities:
 - **Provide information on Victims' Rights upon admission to the Detention Centre.** Information should be provided orally as well as in writing upon admission, and detainees should be allowed to keep a copy of the written information on their rights throughout their detention. Taking into account the prevalence of violence in detention, and the reluctance of detainees to report violent crime that they suffer, information on Victims' Rights must be provided before situations of victimisation arise.
 - **Offer access to information on Victims' Rights as soon as there is an indication that the detainee may have been the victim of a criminal offence.** When a situation of victimisation is identified, information on Victims' Rights should immediately be given in writing and orally by Detention Staff.
 - **Ensure information is provided in plain language and in a language the detainee understands.** Translation and interpretation services should be made available for all detainees who do not speak national languages. Special care should be taken in respect of vulnerable detainees, such as illiterate or mentally disabled detainees. The content of information should be drafted in partnership with plain language experts to ensure that it is accessible and easy to use.
- **Improve access and transparency by diversifying sources of information.** Encourage Detention Administration to collaborate with outside services supporting victims of crime – including NGOs, legal clinics, monitoring bodies, Victim Support Services, detainee support services, etc.
- **Awareness raising campaigns.** Recognise detainees as a vulnerable group or group at risk of victimisation and implement awareness raising campaigns and education programmes on Victims' Rights aimed at competent authorities including **Detention Staff** as well as Victim Support Services.

Bar associations / lawyers / legal aid boards

- **Facilitate access to legal advice in Detention Centres.** Put in place legal aid desks in Detention Centres to ensure access to legal advice and information to detainees. Create a (free) hotline for detainees to receive first line legal advice.
- **Train lawyers on Victims' Rights.** Criminal and immigration lawyers attending clients during detention should attend training on Victims' Rights, and be given tools to help them identify situations of victimisation and inform detained victims of their rights.

Victim Support Services

- **Recognise detainees as an "at-risk" group and be more proactive in Detention Centres.** Overcome the organic separation between Victim Support Services and other services, organisations and Detention Staff working with detainees.
- **Train personnel on the specificities of detained victims** and have a specialised team or person (focal point) dedicated to them.
- **Coordinate with bar associations and civil society** to organise an information desk on Victims' Rights.
- **Offer information pamphlets/posters on Victims' Rights within Detention Centres.**
- **Create a (free) hotline for detainees who suffer violence during detention.**

Law Enforcement and Judicial Authorities

- **When receiving complaints from persons in detention, ensure that the information on Victims' Rights is offered.**

Monitoring bodies including NPMs

- **Include a protocol during monitoring of Detention Centres,** so that when receiving complaints from persons in detention about violence, NPMs and other monitoring bodies ensure that information on Victims' Rights and access to Victim Support Services has duly been provided.
- **Include information on the implementation of Victims' Rights in Detention Centres in reports following inspection visits.**



Access to justice

Definition of the right

The recitals to the 2012 Directive state “[v]ictims of crime should (...) be provided with sufficient access to justice.”⁶⁷ The important role of access to justice for victims of violent crime is illustrated below.

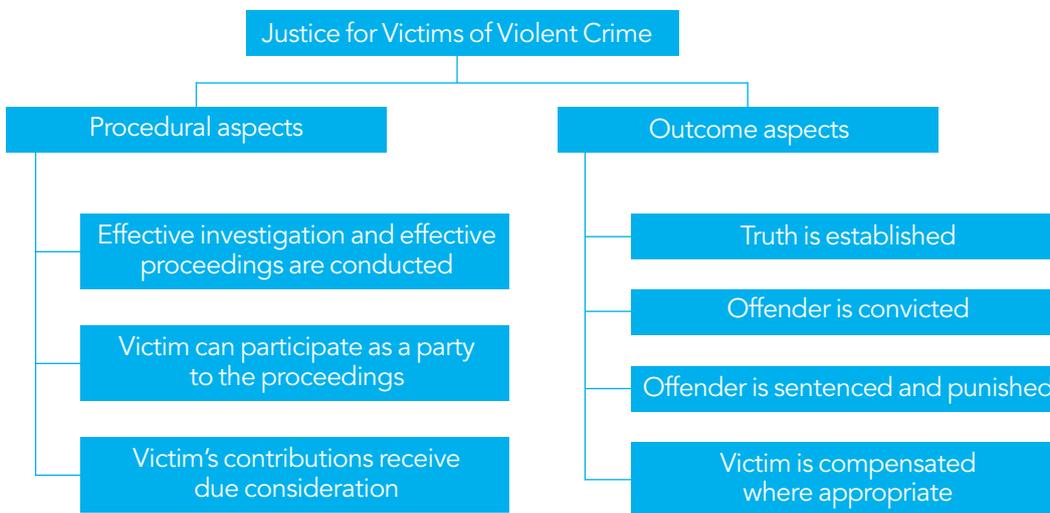
The 2012 Directive must also be read in light of the obligations of Member States under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and Charter of Fundamental Rights of the EU (“Charter”) to protect human rights, which includes an obligation to criminalise, investigate and prosecute violent crime,⁶⁸ whether by a state actor or private actor.⁶⁹ As such, impunity for those responsible for violent crime is a violation of a state’s legal obligation to protect human rights.⁷⁰ The European Court of Human Rights (“ECtHR”) has emphasised that in the “area of unlawful use of force by State agents”, criminal justice is the only possible response to violent crime, as opposed to administrative or civil proceedings.⁷¹

One objective of the 2012 Directive is “to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.”⁷² The 2012 Directive provides a broad range of procedural rights once criminal proceedings have been initiated.⁷³ It sets out rights in the context of filing a complaint.⁷⁴ These important rights, however, presuppose that a victim has made a complaint. They are, therefore, less relevant in the context of detained victims of violent crime, for whom recognising victimisation and initiating mechanisms for access to justice are key challenges.

The 2012 Directive recognises the risk that a range of factors can deter victims from coming forward to file complaints, for example:⁷⁵

In order to encourage and facilitate reporting of crimes and to allow victims to break the cycle of repeat victimisation, it is essential that reliable support services are available to victims and that competent authorities are prepared to respond to victims’ reports in a

Figure 1: Justice for Victims of Violent Crime



Source: FRA, 2019

67 Recital 9 of the 2012 Directive.

68 Fundamental Rights Agency of the EU, Victims’ rights as standards of criminal justice (Part I), 2019, p. 26, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-1-standards_en.pdf.

69 See e.g., ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 159.

70 See e.g., ECtHR, *Menson and Others v. the United Kingdom* (decision), No. 47916/99, 6 May 2003.

71 ECtHR, *Lopes de Sousa Fernandes v. Portugal*, No. 56080/13, 19 December 2017 [GC], § 135: “civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention.”

72 Article 1 of the 2012 Directive.

73 These include: the right to be heard (Article 10), the right to a review in the event of a decision not to prosecute (Article 11), the right to safeguards in the context of restorative justice services (Article 12); the right to legal aid (Article 13); the right to reimbursement of expenses (Article 14); and the right to receive information about their case (Article 6); and the right to translation and interpretation (Article 7).

74 When filing a complaint, victims “who do not understand or speak the language of the competent authority” should be “enabled to make the complaint in a language that they understand” or should receive “the necessary linguistic assistance” (Article 5(2)) and Member States must “ensure that victims who do not understand or speak the language of the competent authority, receive translation, free of charge, of the written acknowledgement of their complaint (...), if they so request, in a language that they understand” (Article 5(3)).

respectful, sensitive, professional and non-discriminatory manner. This could increase victims' confidence in the criminal justice systems of Member States and reduce the number of unreported crimes.

This does not, however, effectively address the specific vulnerability of victims of violent crime in detention. Access to justice for this group of victims, requires a more active role for the state. Indeed, the ECtHR has consistently held that the burden of proof must shift to the state:⁷⁶

[W]here the events in issue lie wholly, or to a large extent, within the exclusive knowledge of the authorities – as in the case of persons in custody under those authorities' control – strong presumptions of fact will arise in respect of injuries and deaths occurring during such detention. Thus, it has found that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue will arise under Article 3 of the Convention. Indeed, in such situations the burden of proof may be regarded as resting on the authorities.

In addition, procedural rights under the 2012 Directive must be read in light of the Charter which provides for the right to an effective remedy for violations of human rights.⁷⁷ The rights of victims of violent crime therefore include the right to an effective remedy and the right to a fair trial.⁷⁸

The notion of an 'effective remedy' entails (...) a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

A state's obligation to investigate violent crime (and provide access to justice) does not therefore depend on a victim filing a criminal complaint.⁷⁹

Challenges with respect to the right to participate in criminal proceedings

This section does not seek to cover the general right to complain about detention conditions, available to anyone in detention pursuant to international and European standards;⁸⁰ it focuses on the specific right to access criminal justice mechanisms as a victim of violent crime.⁸¹

Despite indications that violent crime is prevalent in detention, there are very few criminal investigations, prosecutions and convictions in respect of violent crimes committed in detention.⁸² Very few crimes are reported to Law Enforcement Authorities by victims themselves or by third parties – including the Detention Administration and Detention Staff.⁸³ When criminal complaints are filed, they are often dismissed for lack of evidence.⁸⁴

Many of the challenges in accessing justice as a victim of crime in detention flow directly from the general context of detention, described above. The reality of detention is that detainees are rarely able to file criminal complaints to Law Enforcement Authorities. The research highlights a number of reasons for this, discussed below:

- (i) Barriers to filing criminal complaints;
- (ii) Difficulties in accessing evidence of violent crimes in detention;
- (iii) Challenges in proving that the use of force is illegitimate;
- (iv) Limited access to legal advice and support;
- (v) Violence is dealt with through internal complaint mechanisms, rather than referred to Law Enforcement Authorities; and
- (vi) Lack of political or institutional will to investigate and prosecute lead to the impunity of perpetrators.

Barriers to filing criminal complaint

Member States have not developed services to implement Victims' Rights which are effective for detained victims, perhaps because detainees are not readily recognised as a group at risk of being victimised. Detainees who become victims must rely on the general framework available for victims, which assumes that victims are able to freely access various services including Law Enforcement Authorities, civil society organisations and Victim Support Services. In practice, these services are rarely accessible to detainees.

Communication difficulties

Criminal complaints are usually filed in person, and as a detainee is (by definition) not free to travel to a police station, they must rely on third parties to file complaints for them,

75 Recital 63 of the 2012 Directive (emphasis added).

76 See e.g., ECtHR, *Akkum and others v. Turkey*, No. 21894/93, 24 June 2005, §210 (references omitted).

77 Article 47 paragraph 1 of the Charter. Pursuant to Article 52 of the Charter, it must be interpreted as providing at least as much as the same rights provided under the ECHR and the ECtHR case law. Article 47 paragraph 1 therefore must be read as granting at least as much protection as Article 13 of the ECHR.

78 ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, § 98; ECtHR, *Tagayeva and Others v. Russia*, No. 26562/07, 13 April 2017, § 618; ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60.

79 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60.

80 See e.g., EPR, Rule 70.1 et seq; UNCAT, Article 13; Mandela Rules, Rule 56; European Measures of Detention of Asylum Seekers, Recommendation 19.

81 The difficulty for prisoners to access judges and courts generally were recently researched and highlighted in the European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, available at: <https://www.prisonlitigation.org/livre-blanc-sur-lacces-au-droit-et-au-juge-en-detention-provisoire/?lang=en>.

82 See, PICUM, *Guide to the EU Victims' Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants*, 2015, p. 15, citing Migreurop, *The Hidden Face of Immigration Detention Camps in Europe*, published in 2014 ("[e]ven when cases of abuse have been exposed, there is a lack of accountability and prosecution"), available at: http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf.

83 See Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 68, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

84 *Ibid.*

Good practice – Belgium

In a Brussels prison, a team of police officers established a police desk in the prison, allowing detainees to complain directly to them about criminality in detention, including ill-treatment and violence by Detention Staff. Their regular presence within the prison enabled the officers to investigate alleged violence from within the prison. The police also installed a locked mailbox in the prison for detainees to directly address messages to them (rather than go through staff). The prison director welcomed this initiative. This police presence facilitated the prosecution and conviction of over 20 Detention Staff for ill-treatment and violence against detainees in March 2019 (see case study below).

including family, their lawyer or another intermediary. To contact them, detainees need to rely on Detention Staff to access mail, phone or the internet (often they need to ask for permission), and even to see their lawyer. This creates risk or fear that staff will intercept communications, or know why they are made, which has a chilling effect on detainees' willingness to file a complaint. In addition, Detention Staff may arbitrarily limit or delay the detainee's access to communication means with the outside.

There are also practical barriers to communication, including the cost of using phones or of postage or limits imposed by the Detention Administration on the use of these means of communication. For example, in Sweden, detainees in pre-trial detention need to pay for postage and the mail is collected only once a week. In addition, they are not allowed to call a lawyer who is not appointed by the court which is a problem when the detainee is a victim, as the appointed lawyer is not paid under the legal aid scheme to represent his client in proceedings other than the criminal proceedings against them.

Fear of reprisals

Detainees who suffer from violence during their detention do not report it because they fear reprisals being made against them, or against their family members,⁸⁵ by the offender and/or the Detention Staff. Reprisals from Detention Staff can take various forms, not necessarily violence, which affect the daily life of detainees. They may include loss of "privileges" like work, activities, visitation rights, food, health and hygiene products, and disciplinary sanctions (such as searches of cells, confiscation of personal items, body searches, and solitary confinement).

Detainees also fear that reporting abuse may adversely impact their sentence (i.e. whether they will benefit from early release) and their immigration status. In some Member

Special Advisor to the President of the European Commission

Strengthening Victims' Rights: From Compensation to Reparation⁸⁶

"It is widely recognised that undocumented migrants, and those awaiting a decision regarding their residence status, are discouraged to report a crime due to beliefs that their information will be shared with immigration authorities, or due to negative experience with law enforcement agencies in the past."

States, violence by Detention Staff is often "hidden" under the guise of disciplinary sanctions against the detainee and as "legitimate" use of force (discussed below). Reprisals from Detention Staff may therefore not only lead to additional violence, they may also result in potential disciplinary sanctions being added to the detainee's record (discussed below). Such a record may weigh against the detainee when relevant authorities decide on the outcome of the procedure for which they are detained – still pending for those in pre-trial and immigration detention – or on the continuation of their detention.

Detainees often do not see the point in reporting abuse

Given these risks, a victim of violence in detention will have to see that they have something significant to gain from reporting an incident. Frequently, they do not. There is a general lack of trust in the system and its fairness, and in Law Enforcement Authorities who may have been involved in the victim being placed in detention in the first place. Procedurally, they also know their chances of having their complaints dismissed are high. In addition, a criminal investigation and trial against their offender may often take years and, for the reasons set out below, the chances of losing at trial are high. Finally, the chances of obtaining compensation are, as discussed below, almost nil. There is virtually no gain in pursuing criminal proceedings, and a lot to lose.

Good practice – Sweden

In immigration detention, the Swedish Migration Agency provides ready-made templates within women's departments in order to be able to file complaints to the police.

During the national roundtable organised in the context of this project, the police representative agreed that they should provide similar templates for all detainees.

⁸⁵ In Hungary for example, reprisals may affect detainees' families outside detention. The 2012 Directive specifically includes this possibility by providing for protection measures not only for the victim but also for their families, discussed below.

⁸⁶ Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims' Rights: From Compensation to Reparation*, 2019, p. 56, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

Difficulties in accessing evidence of violence

Although victims are not required to prove a crime in order to file a complaint, they still need to put together sufficient evidence to be believed and to allow Law Enforcement Authorities to investigate efficiently. This is particularly the case for detainees who are not trusted; they are often perceived as having a vested interest in making a complaint, for example to be released sooner. It is therefore essential for them to have access to relevant evidence to support their complaint, including medical records, recordings from audio-visual cameras (where available), witness statements and the identity of the offender.

Difficult access to quality and effective medical care

A medical record is often the best piece of evidence to prove that the victim's account of illegitimate violence is consistent with physical signs. Unlike victims in the outside world, detained victims' access to medical care depends on the willingness of the Detention Administration to ensure access to medical staff for a consultation, on the availability of doctors, their professionalism and independence.

In practice, access to medical assistance may be delayed or obstructed when requests for medical assistance goes through non-medical Detention Staff. Generally, Detention Staff are not sufficiently proactive in referring injured detainees to their medical colleagues. In the Netherlands for instance, although doctors generally are made available upon request by a detainee, in some Detention Centres, staff act as a filter and may delay access to medical care.⁸⁷ In Sweden and in Belgium, a detainee may sometimes wait for days to see a nurse or doctor.

Even when a medical examination takes place, this is not necessarily sufficient to provide evidence of violence:

- Medical examinations are often too short to allow the detainee to fully explain the facts and for the examiner to conduct a sufficiently detailed examination.
- Detainees' injuries are not properly documented in medical records (no photographs, lack of detailed description) which makes the records insufficient for the purposes of evidence in a criminal investigation.⁸⁸
- Interpreters are rarely present to facilitate communication between the doctor or nurse and the detained victim.
- Medical examinations are often not conducted confidentially. Detention Staff (or police) may be present or sufficiently close to hear the detainees' account, which may have a chilling effect on their willingness to report abuse. In Hungary, for instance, police officers accompany victims to medical visits in all cases of

immigration detention. This practice intimidates the victims and seriously hinders their ability to freely explain how they were ill-treated.

Limited access to audio-visual recordings (if any)

In many Detention Centres, audio-visual cameras, when they are used, are placed in corridors and common areas.⁸⁹ Audio-visual recordings may provide a useful source of evidence of abuse, violence and ill-treatment. In practice, however, there are numerous obstacles preventing victims from relying on recordings:

- Recordings are automatically erased after a set period of time (often a few days) and recorded over. Even when the Detention Administration is aware of a victimisation situation (through a complaint or other means), it is rarely proactive in systematically preserving images.⁹⁰
- Lawyers and detainees are not systematically provided with the recordings when they ask for them. The Detention Administration sometimes relies on privacy arguments to oppose disclosing images. It may also delay or refuse to give access to the images to investigators.⁹¹
- Cameras only cover certain places and cannot capture, for instance, what occurs in a cell.⁹² Perpetrators of violence, particularly Detention Staff, know where cameras are installed and therefore may be able to avoid their actions from being caught on camera.

Difficulties in identifying Detention Staff responsible for violence or ill-treatment or witnesses

Typically, when a complaint is made, detainees are asked to identify when and where the alleged violence occurred, and who committed it. In detention, such factual identification is not easy. In Belgium and France for instance, in the context of pre-trial detention, Detention Staff often do not wear or hide the badges identifying them. It makes the identification of offenders more complicated for victims of crime. In addition, the Detention Administration does not always keep a detailed record of the whereabouts of staff throughout the day and night, and of the Detention Staff involved in disciplinary sanctions or security measures against detainees (such as body or cell searches) when violence may occur. It is therefore difficult to identify, after the facts, who was involved in a violent episode against a detainee.

Difficulty in proving that violence by Detention Staff is illegitimate

Contrary to ECHR standards on the reversal of the burden of proof discussed above, in practice there is often an assumption that violence by Detention Staff against

87 See also, Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, pp. 59-60, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenues/>.

88 *Ibid.*

89 *Ibid.*, p. 61.

90 *Ibid.*

91 *Ibid.*, p. 62.

92 *Ibid.*, p. 61.

detainees is lawful and part of lawful restraint measures.⁹³ This often results in the detainee having to prove that the violence was illegitimate.

But monitoring the use of force is a complicated task that falls upon the Detention Administration to confront a complaint by a detainee against the version of the Detention Staff involved. In Belgium and France, allegations were made by various stakeholders that Detention Staff (and police officers) may file false reports alleging that the detainee was resisting orders or threatening to use force, in order to justify the use of force against the detainee.⁹⁴ While this may sometimes be legitimate, it can also be an attempt to protect themselves or their colleagues, and a way to intimidate or deter victims from filing complaints.⁹⁵

If and when a criminal complaint is lodged, there are often a large number of witnesses in favour of the alleged perpetrator, when they are a member of Detention Staff. As discussed above, loyalty among Detention Staff means they will rarely inform on each other, even in the context of a criminal investigation. The lack of witnesses for the detainee victim is a consequence of the fear of reprisals, but also the likely secretive setting in which violence takes place – often when the detainee is in solitary confinement, for example in a body search room.⁹⁶

Another difficulty stems from the fact that, in some Member States, reports or statements by Detention Staff are treated by Law Enforcement Authorities and courts as having a higher probative value and credibility than statements provided by detainees,⁹⁷ even when they do not have this added value in law.

Difficulties in accessing lawyers and legal aid

Lawyers have a key role in providing independent information, advice and assistance to people in detention. For the reasons discussed above, detainees rarely speak about or report the violence they have suffered to the Detention Administration. Because they are often able to access detainees (and are not part of Detention Administration) lawyers could therefore play a valuable role in identifying victimisation situations through regular visits to their detained clients and by asking them the right questions.

Access to a lawyer or to legal advice or information is often, however, impeded as:

Good practice – Belgium

Some bar associations have established first line “legal aid desks” (permanences juridiques) in some immigration Detention Centres to facilitate migrants’ access to free legal advice.

As such, migrants are efficiently advised on their rights by independent lawyers, but may also report abuse or ill-treatment, including violence, and ask for the appointment of a legal aid lawyer to help them file a complaint, provide advice and represent them in legal proceedings.

- The context of detention detailed above limits detainees’ ability to obtain information and communicate with outside services, including lawyers;
- It is difficult and time consuming for lawyers to access their clients in detention, in particular when they are subject to disciplinary measures (e.g. solitary confinement) and legal aid rarely compensates for this;⁹⁸ and
- Access to a lawyer is heavily dependent on the good will of the Detention Administration and Detention Staff.⁹⁹

Finally, criminal defence lawyers or immigration lawyers are not usually trained in Victims’ Rights and the necessary steps to preserve evidence of abuse and file complaints. In pre-trial detention, lawyers have limited knowledge of prison law and remedies available to their clients. There is a general lack of willingness on the part of lawyers to getting involved in issues relating to prison conditions.¹⁰⁰ They often do not inquire about the well-being of their client in custody and instead focus on the ongoing criminal or immigration proceedings.

This attitude may be explained by the fact that legal aid often does not cover regular work such as visits to Detention Centres, assistance in filing a criminal complaint and gathering evidence.¹⁰¹ In Sweden, for example, a criminal defence lawyer is not paid to represent a client in detention in different proceedings such as when their client becomes a victim of crime. In addition, immigration lawyers are appointed and paid by the state, which may affect their independence when deciding to file a complaint. In Croatia and Hungary, legal aid is simply not available for migrants in detention.

⁹³ It may be sometimes necessary to “neutralise” a detainee in extreme circumstances where the physical integrity of the detainee, other detainees or prison staff is at risk.

⁹⁴ See also, Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 40, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

⁹⁵ *Ibid*; CPT, *Belgium national report*, 2018, available at: <https://rm.coe.int/16807913b1>.

⁹⁶ European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, p. 36 et seq, available at: <https://www.prisonlitigation.org/livre-blanc-sur-laces-au-droit-et-au-juge-en-detention-provisoire/?lang=en>; Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 62, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

⁹⁷ See also, Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 72, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

⁹⁸ European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, p. 54, available at: <https://www.prisonlitigation.org/livre-blanc-sur-laces-au-droit-et-au-juge-en-detention-provisoire/?lang=en>.

⁹⁹ Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 57, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.

¹⁰⁰ *Ibid*.

¹⁰¹ See, European Prison Litigation Network white paper on access to justice for pre-trial detainees, *Bringing Justice into Prison: For a common European Approach*, 2019, pp. 41-42, available at: <https://www.prisonlitigation.org/livre-blanc-sur-laces-au-droit-et-au-juge-en-detention-provisoire/?lang=en>.

Violence in closed institutions is dealt with internally

Violence is generally not reported by victims or third parties. When violence is reported, and when there is an institutional response, it is often limited to disciplinary proceedings against the offender or to administrative proceedings, for example through a complaint to an external monitoring body or Ombudsperson. However, these mechanisms are not aimed at identifying and punishing the offender and fail to meet the obligations of Member States under the 2012 Directive, the ECHR and the Charter.

States are required under European and International standards to put in place complaint mechanisms and monitoring bodies to control detention conditions. These mechanisms, which are a necessity, are however often regarded as self-sufficient, even in cases of violence. They operate in parallel to rights and procedures that would be available to all victims of crimes.

As a result, Detention Administration, monitoring bodies and complaint mechanisms do not necessarily refer cases of violence or ill-treatment to Law Enforcement Authorities, even when there is a legal obligation to do so. The lack of communication between the complaint mechanisms and the police and prosecution authorities in relation to acts that may constitute criminal offences in detention has been highlighted in several Member States. In the Netherlands, referrals between the prison complaint mechanisms and the national prosecution services are rare. In Belgium, the monitoring bodies of prisons (*Commissions de Surveillance*) act as moderators between the Detention Administration (in pre-trial detention only) but are not entrusted to report cases to Law Enforcement Authorities. The same phenomenon was also identified with medical staff.

The multiplication of internal or external bodies or authorities who are entrusted to receive complaints from detainees about detention conditions generally results in a dilution of stakeholders' responsibility to report criminal offences to Law Enforcement Authorities in a timely manner, as was the case in the Forest trial in Belgium (see box below). Internal and administrative investigations also delay the intervention of Law Enforcement Authorities which negatively impact the preservation of evidence that may only be collected by Law Enforcement Authorities.

Impunity resulting from the lack of political will to investigate and prosecute

Despite evidence that violent crime does occur in detention, there are very few criminal investigations, prosecutions and

Good practice – Austria

Prison authorities in Austria have the obligation to inform the Public Prosecutor's office if a detainee has been a victim of violence, a dangerous threat or whose sexual integrity has been compromised. They also have the obligation to inform Victim Support Services by phone and in writing after obtaining the victim's consent to do so (for data protection reasons).

Prison authorities must grant facilitated access to the prison and to the prisoner to Victim Support Services, as they do for lawyers, social institutions, the police etc. Consultations between Victim Support Services and the prisoner are to be held where confidentiality can be respected.

convictions. In the immigration setting, it has been reported that "[e]ven when cases of abuse have been exposed, there is a lack of accountability and prosecution."¹⁰² Complaints filed against Detention Staff (or the police) are often dismissed before investigations start. This is explained by several factors identified above, but also by a lack of political will to follow up on allegations of violence in detention.

If the victim is not proactive, Law Enforcement Authorities rarely investigate *ex officio*. This attitude can, in part, be explained by the detention context described above, including the deeply ingrained conceptual dichotomy between offenders and victims, and the normalisation of violence in detention. In Sweden, research indicated that detainees who are victims of crime are a very low priority, both those in immigration detention and in pre-trial detention. According to police authorities in Sweden, it is difficult to investigate crimes if the victim does not want to participate, which is often the case in detention.

In immigration detention, where (as in Hungary) the police may be in charge of security within the Detention Centre, conflicts of interest may prevent them from investigating abuse committed by them or colleagues. When victims are deported and no longer in the territory, Law Enforcement Authorities tend to close the case or dismiss complaints, as in several cases of allegations of violence in Belgium.¹⁰³

Finally, there is a generalised lack of data available to allow for sufficient oversight of investigations, prosecution and dismissal of cases when the victim is a detainee. In the Netherlands, the Committee Against Torture ("CAT") expressed concern at the lack of disaggregated data available regarding the number of complaints, investigations, prosecutions, convictions and sanctions in cases of torture and ill-treatment.¹⁰⁴

102 PICUM, *Guide to the EU Victims' Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants*, 2015, p. 15, citing Migreurop, *The Hidden Face of Immigration Detention Camps in Europe*, published in 2014 ("[e]ven when cases of abuse have been exposed, there is a lack of accountability and prosecution"), available at: http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf.

103 Contrary to the ECtHR decision in *Csonka v. Hungary* (2019) ("The fact that the applicant signed a waiver before his release carries little weight, since this happened while the applicant was still at the police station, in all likelihood under the influence of the preceding situation and in the presence of the officers who had allegedly ill-treated him").

104 CAT, *Concluding observations on the seventh periodic report of the Netherlands*, CAT/C/NLD/7, 18 December 2018, para. 56, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NLD/CAT_C_NLD_CO_7_33166_E.pdf.

Case study – Belgium

The Forest prison guards trial (2019)

The Forest prison case involved 22 prison guards who had allegedly used undue violence, and inhuman and degrading treatment against detainees in the Forest prison between 2014 and 2015. One former prison director was also accused of criminal negligence, having allegedly authorised the solitary confinement of a person with psychiatric issues. The trial was the first of its kind in Belgium, given the number of prison guards involved in the proceedings.

Detainees were beaten because they refused to undress in front of a guard; following an exchange of insults; during the transfer from cells to solitary confinement and in other instances. Detention Staff reportedly considered it a game to insult, humiliate and provoke prisoners, and organised bets on the number of prisoners they could send to solitary confinement in a single day. The accused guards also reportedly regularly cut electricity in a cell to cause incidents between the detainees, sent them to the toilet without toilet paper, left them in solitary confinement after the maximum time limit or cut off the water in the shower while they were washing.

The victims were all vulnerable detainees, some suffering from psychological problems. Many were not able to speak French.

The evidence presented in court included medical reports certifying traces of violence and transcripts of text message conversations between the guards, whose phones were seized in house searches during the investigation. In some of the exchanges, some of the guards explicitly bragged about using violence against detainees. The nature of the evidence used to convict showed the necessity of having crimes investigated by independent Law Enforcement Authorities with police powers to investigate. An internal or disciplinary investigation would not have uncovered phone records which were key to prove that the violence was illegitimate.

Detainees filed several complaints to the prison's director and the external monitoring bodies. An investigation finally started after years of knowing what was going on, as detainees were not initially trusted. A specific police unit investigated, and charges were finally brought against 22 Detention Staff including one of the prison's directors. On 23 March 2019, many were convicted and sentenced for inhuman and degrading treatment and violence.

Recommendations

Public Authorities

- **Establish a clear and detailed protocol for Detention Staff and the Detention Administration** on what steps to take when there is an allegation of violence/ill-treatment or when Detention Staff /Detention Administration become aware of such situations, in the absence of a complaint. The protocol should include the following steps:
 - 1) **Preserve evidence of crime immediately:**
 - (i) Immediately refer the detainee to effective medical assistance;¹⁰⁵ (ii) guarantee the timely preservation of audio-visual recordings as soon as an allegation of violence is made or that Detention Staff or the Detention Centre director becomes aware of the possibility of a violent episode. Recordings should be kept for a sufficiently long period of time to allow an investigation.
 - 2) **Systematically report potential violent crime to Law Enforcement Authorities.** Reporting should not be conditional upon a determination by Detention Staff and Detention Administration of whether the use of force is legitimate, to prevent the risk of bias against reporting.
 - 3) **Clarify or adopt rules on access to evidence for the detainee and his lawyer.** Systematically and immediately grant access to evidence when there are disciplinary proceedings against the detainee and when detainees file a criminal complaint.
 - 4) **Protection of victim and witnesses against reprisals.**¹⁰⁶ Ensure that protection measures are made available to the victim and any witnesses supporting the allegation of violence (see further below).
- **Publish the protocol for oversight purposes.** Monitoring bodies, public authorities, judicial authorities and other oversight mechanisms should oversee the response given by Detention Administration to violent crime in detention. The protocol can also be used as part of internal evaluation of Detention Staff and oversight of Detention Administration. It may form clear grounds to report breaches to supervisors. In extreme cases, it may engage the responsibility of a prison director/staff for failing to report allegations to Law Enforcement Authorities.
- **Collect and publish data to allow for oversight and research** on: (i) complaints, investigations, prosecution/dismissals and convictions of violent crime against detained victims; (ii) disciplinary procedures filed against Detention Staff for excessive use of force; (iii) legitimate use of force and disciplinary proceedings against detainees.

¹⁰⁵ CPT, *Documenting and reporting medical evidence of ill-treatment*, Extract from the 23rd General Report of the CPT, 2013, available at: <https://www.coe.int/en/web/cpt/medical-evidence-ill-treatment>.

¹⁰⁶ See below our recommendations on the right to protection.

- **Provide effective legal aid to victims of violent crime suffered in detention**, covering legal advice and representation, as well as translation and interpretation costs, as required by the 2012 Directive. Legal aid must be made available to all victims irrespective of their nationality and residence status.
 - **Adapt legal aid fees** to legal assistance in detention to reflect the fact that it is more time consuming for lawyers to go into places of detention to meet with their clients, than it is to represent victims outside detention. It is also important to ensure that the costs associated with interpretation and translation are covered by legal aid.
 - **Adopt strict rules on access to a lawyer** with clear timeframes. Access cannot be left to the discretion of the Detention Administration/Detention Staff.
 - **Ensure secure, confidential and fast track channels of communication for victims** to (i) report crime to Law Enforcement Authorities; and (ii) request a medical examination directly to the medical staff. These safe channels could include secure mailboxes, private phone booths or online tools. The key is that the communication channels break the dependence of victims on Detention Staff.
 - **Ensure effective access to medical assistance and medical evidence.**¹⁰⁷
 - All detainees should have access to medical assistance from the start of their detention.
 - Prompt medical examination should be conducted on detainees who have been injured and detailed reports should be kept.
 - Prompt medical examination should be conducted for detainees who are placed in solitary confinement.
 - Medical examination should be confidential, conducted in person and away from non-medical Detention Staff (unless exceptionally at the request of medical staff).
 - Medical records established following the medical examination of a detainee presenting signs of violence should include: (i) a summary of the detainee's statement regarding relevant facts, including the detainee's description of his medical state and any allegation of ill-treatment; and (ii) a summary of medical observations following a medical examination.¹⁰⁸
 - Ensure medical staff in Detention Centres are not employed by the Detention Administration and are independent.
 - **Adopt clear policies to guarantee easy identification of Detention Staff.** Implement an obligation to wear visible name badges, and for the director to be able to track the whereabouts of Detention Staff in the detention centre.
 - **Hold Detention Staff accountable.** Adequately investigate and sanction cases of abuse, ill-treatment and violence by Detention Staff against detainees, including cases where Detention Staff produce disciplinary reports as a means of justifying the use of force. Sanction the obstruction of detainees' communications by Detention Staff.
 - **Increase oversight of Detention Staff.** Create clear and detailed records of decisions to apply disciplinary measures against detainees – in particular every use of force – and security measures, for oversight purposes.
 - **Facilitate access to Detention Centres for lawyers (including law clinics), civil society, and other outside services including Victim Support Services.**
- ### Bar associations / lawyers / legal aid boards
- **Work with the Detention Administration to establish lawyers' desks in prisons.** Lawyers should be accessible to all detainees to advise them of their rights – including Victims' Rights – and to facilitate the appointment of legal aid lawyers when necessary to file criminal complaints.
 - **Research solutions to facilitate access to a lawyer in detention**, including through the use of digital technologies.
 - **Acknowledge the crucial role of lawyers in detention.** Lawyers are key witnesses to detect victimisation situations, inform their clients on Victims' Rights and help them gather evidence and file complaints.
 - **Train lawyers on their role in detention**, including on: (i) identifying a detainee who has been victimised, by asking the right questions; (ii) how to preserve and obtain evidence in Detention Centres; (iii) the available remedies (including training on ECHR case law and EU law when Law Enforcement Authorities fail to properly investigate); and (iv) how to obtain protection measures.
 - **Establish quality standards or guidelines for lawyers working in a detention context.** They should for example include lawyers' participation in disciplinary proceedings against their client, regular visits to clients in detention, and inquiring about detention conditions, etc.
- ### Law enforcement and judicial authorities
- **Facilitate filing complaints for detainees.** Where it is not yet the case, criminal complaints could be filed in various ways including: (i) through intermediaries by allowing family or a lawyer to file a complaint in the detainee's name; (ii) via mail, online/email or phone; or (iii) at police desks or the secretariat in Detention Centres. Ready-made templates can be used to make it easier to fill out the police report.

107 CPT, *Documenting and reporting medical evidence of ill-treatment*, Extract from the 23rd General Report of the CPT, 2013, available at: <https://www.coe.int/en/web/cpt/medical-evidence-ill-treatment>.

108 See e.g., CPT, *Belgium national report*, published in 2018, para. 82, available at: <https://rm.coe.int/16807913b1>.

- **A firewall** should be established between the administrative process related to the person's immigration status and access to justice. Equally, a complaint of violence should not impact the ongoing criminal investigation against a detainee.
- **Adopt clear policies on the obligation of Law Enforcement Authorities to investigate and prosecute allegations of violence by Detention Staff or co-detainees.**
- **Implement ECHR case law on burden of proof** requiring the Detention Administration to explain and justify the use of force, rather than requiring the victim to prove that it was unjustified.
- **Create special units within Law Enforcement Authorities.** Designate a public prosecutor, an investigating judge and police unit in charge of criminality

in places of detention, including ill-treatment by Detention Staff, to encourage a proactive role in investigations and for lawyers/other stakeholders to have an identifiable interlocutor for complaints and urgent communications. A dedicated unit would minimise risk that other cases are prioritised.

Monitoring bodies including NPMs

- **Adopt a protocol for the automatic referral of individual allegations of violence to Law Enforcement Authorities.**
- **Increase communication between NPMs and Law Enforcement Authorities.** The findings of NPMs through their monitoring activities can help support investigations by Law Enforcement Authorities.

**The right to
protection
from further
victimisation**

Definition of the right

The 2012 Directive provides for a right to protection for victims of crime. More precisely, Member States must put in place measures to “protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm and to protect the dignity of victims during questioning and when testifying.”¹⁰⁹ The 2012 Directive recitals refer, by way of examples, to “interim injunctions or protection or restraining orders.”¹¹⁰ The measures include “when necessary (...), procedures (...) for the physical protection of victims and their family members.”¹¹¹

According to the European Commission Guidance Document related to the transposition and implementation of the 2012 Directive, protection against repeat victimisation “applies to all victims, but may be of particular importance in situations of gender-based violence and violence in close relationships, such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion. Physical protection from intimidation and retaliation includes measures to improve the victim’s feeling of safety and security at police and court premises, at the victim’s residence and in public.”¹¹² The same guidance provides that protection measures, including interim injunctions or protection/restraining orders, must be issued by Member States to protect a victim “when there are serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk.”¹¹³

In the context of criminal proceedings, Member States are required to “establish the necessary conditions to enable avoidance of contact between victims (...) and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact”.¹¹⁴ The measures must be based upon an individual assessment conducted in respect of each victim aimed at identifying their specific protection needs and whether and to what extent they would benefit from special measures in the course of criminal proceedings, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.¹¹⁵

The specific protection needs assessment must take into account:

- a) the personal characteristics of the victim;
- b) the type or nature of the crime; and
- c) the circumstances of the crime.¹¹⁶

Moreover, particular attention must be paid to “(...) victims whose relationship to and dependence on the offender make them particularly vulnerable (...).”¹¹⁷ The victims’ “concerns and fears in relation to proceedings should be a key factor in determining whether they need any particular measure.”¹¹⁸

Though not specifically targeted as a vulnerable group under the 2012 Directive, detainees are a group “whose relationship to and dependence on the offender make them particularly vulnerable” to repeat victimisation, intimidation and retaliation, whether the offender is a member of the Detention Staff or another detainee.¹¹⁹ As explained in the previous sections, the occurrence of repeat victimisation, intimidation and retaliation against detainees is also well documented in practice.

The 2012 Directive interpreted in the light of the Charter and the ECHR

Beyond the scope of the 2012 Directive, states have a general obligation to protect human rights including by adopting concrete protection measures under the Charter and the ECHR.¹²⁰ In the context of violations of the right to life,¹²¹ the ECtHR held that if they “knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers,” they “might have been expected to avoid that risk.”¹²²

Therefore, once alerted of the commission of a violent crime, the state also has the obligation to protect against further victimisation. In order to do so, states must thoroughly assess whether the risk that led to the victimisation continues. If so, national authorities must “take all reasonable measures to prevent the recurrence of violent attacks against the applicant’s physical integrity.”¹²³

109 Article 18 of the 2012 Directive.

110 Recital 52 of the 2012 Directive.

111 Article 18 of the 2012 Directive.

112 European Commission guidance document related to the transposition and implementation of the 2012 Directive, p. 39, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_en.pdf.

113 *Ibid.*

114 Article 19 of the 2012 Directive. See also, Fundamental Rights Agency of the EU, *Proceedings that do justice, Justice for victims of violent crime (part II)*, 2019, p. 91, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-2-proceedings_en.pdf.

115 Article 22 of the 2012 Directive.

116 Article 22 of the 2012 Directive.

117 Article 22 of the 2012 Directive.

118 Recital 58 of the 2012 Directive.

119 Article 22 of the 2012 Directive.

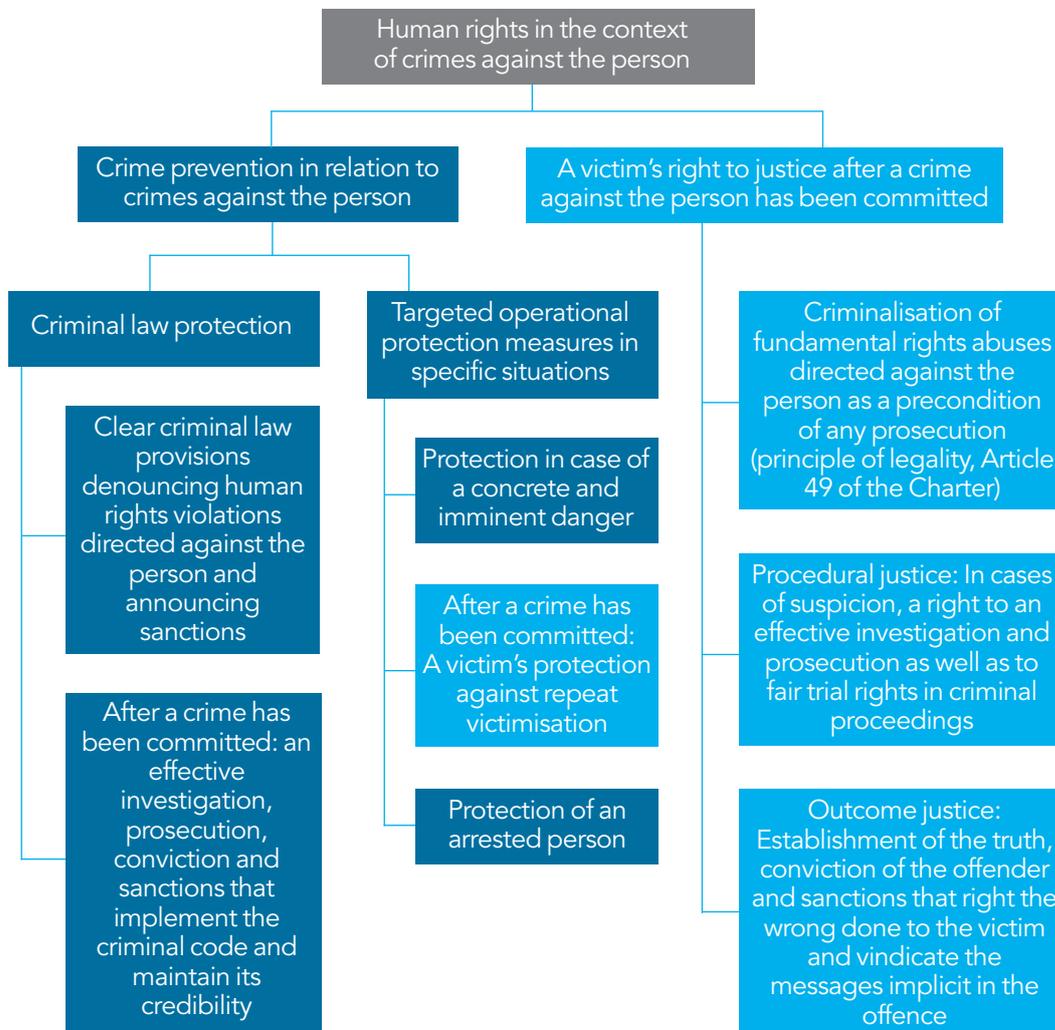
120 See e.g., ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 159.

121 Article 2 of the ECHR.

122 ECtHR, *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998, § 116.

123 ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 162.

Figure 2: Human rights in the context of crimes against the person



Source: FRA, 2019

Challenges with respect to the right to protection

The risk of repeat victimisation, intimidation or reprisals in detention is high. A detainee who decides to file a complaint exposes themselves to multiple risks of retaliation. The range of retaliation measures that Detention Staff may use against detainees is extremely wide and may impact their physical or mental integrity in various ways. Aside from repeat violence, they may also be measures that affect the quality of detainees' daily life in detention, including their sleep, activities, security, food, transfers, etc.¹²⁴ In France, a former

detainee explained that when they decide to file a complaint, detainees must prepare themselves for "war":¹²⁵

We have to tell ourselves that we're going to win. And then we have to hold on. Some detainees weigh the difficulties they will face against the lack of assurance that the complaint succeeds, and finally abstain.

Retaliation measures may even extend to the families of detainees. In Hungary, research has shown that not only victims of crime in detention can face problems while trying to access their right to protection, but also their families if they are in detention.

124 See e.g., Observatoire International des Prisons (France), *Omerta, Opacité, Impunité, Enquête sur les violences commises par des agents pénitentiaires sur les personnes détenues*, 2019, p. 44, available at: <https://oip.org/publication/rapport-denquete-sur-les-violences-commises-par-des-agents-penitentiaires-sur-les-personnes-detenees/>.
 125 *Ibid* (free translation).

Similar risks of retaliation and re-victimisation apply in the context of violent crimes committed by other detainees. In a closed setting, it is impossible for a person to get away from the perpetrator. Furthermore, as discussed above, the normalisation of violence in places of detention, makes it unlikely that Detention Staff will take all necessary steps to prevent future occurrences of violence.

Many of the challenges for detained victims in obtaining protection measures directly flow from the context of detention described above. Our research further identifies the following specific challenges in accessing protection measures, which we consider below:

- a) The lack of availability of protection measures in detention; and
- b) The lack of appropriate needs assessment.

Lack of available protection measures in detention

It is particularly difficult to implement protection measures, such as physical protection, in Detention Centres.

Where detainees are subjected to violence by other detainees, the Detention Administration may take measures to ensure the detainees are separated from each other. In Croatia, for example, penitentiary legislation provides for certain measures to be taken to ensure detainees' safety when incidences of violence occur between detainees. These include holding detainees in individual cells, intensive monitoring of detainees and medical visits. It is also possible to transfer one detainee, for example to another wing or another Detention Centre. If the victim is transferred, protection measures may imply readapting to a new environment, which is not always easy.

Sometimes, the only available protection measures from further violence in detention is to restrict detainees' rights – they may require victims to stay in their cells or to be placed in solitary confinement, or to restrict their access to the prison yard or other areas. Victims are therefore not incentivised to report crime and/or ask for protection. In Hungary, protection of a person in immigration detention includes placing the victim in solitary confinement. It was reported that a migrant woman was subjected to verbal sexual abuse by other asylum seekers and the only way the staff could protect her was to isolate her.

When violence is caused by a member of Detention Staff, protection measures appear to be rarely implemented. Even when a report is made to the Detention Administration and is taken seriously, the available protection measures are extremely limited. The detainee may be transferred to another Detention Centre but, as discussed above, this can entail readapting to a new environment and potentially being further away from support networks and family outside.

Research conducted in the Netherlands, Croatia and Belgium reveals that protection measures will only rarely impact on the Detention Staff who are allegedly involved in the violence – a suspension may in theory be imposed but this requires allegations to be sufficiently serious and corroborated by other, external and independent, evidence. In Sweden, if a member of Detention Staff is under investigation for having used violence against a detainee, the Detention Administration in charge of disciplinary proceedings may decide to suspend them from work while the investigation is ongoing. However, it is more common that the Detention Administration reaches an agreement with the staff member about changing their post during the investigation period. As explained above, sanctioning Detention Staff is generally made harder by the fact that taking protection measures in favour of a detainee assaulted by Detention Staff, implies an acknowledgment of wrongdoing, and Detention Administration tends to show solidarity towards its employees.

No appropriate needs assessment is conducted

Member States typically entrust Law Enforcement Authorities to make an individual assessment and identify the specific protection needs of a victim. For example, in the Netherlands, it is the police who determine whether a person is vulnerable to repeated victimisation, intimidation and retaliation, and who inform Victim Support Services which may determine that the imposition of protective measures is necessary.¹²⁶ As discussed previously, criminal offences committed in detention, however, appear to evade the criminal justice system. These protection mechanisms, managed by Law Enforcement Authorities, are not therefore triggered and victims of violence in detention are unprotected.

If Law Enforcement Authorities are not engaged, it becomes incumbent on the Detention Administration and Detention Staff to address the protection needs of victims. However, as discussed above, they are not trained on Victims' Rights, including the right to protection measures against repeat victimisation. As a result, it is rare for a needs assessment, and a proper identification of protection measures, to be made in detention, even when a victim is clearly identified. Although, in some Member States, Detention Centres have protocols or checklists to identify suicide risk, and the steps to take to protect the detainee; equivalents do not usually exist for inter-detainee or Detention Staff on detainee violence. Internal and external complaint mechanisms do not usually have a protocol in place regarding protection measures and the needs-based assessment required under the 2012 Directive. In the Netherlands, for example, the complaint mechanism does not include any specific framework for assessing the particular vulnerabilities and protection needs of victims.

¹²⁶ NRC, Van Lonkhuyzen, *The Police Will Investigate if a Victim is Vulnerable*, 14 November 2016, available at <https://www.nrc.nl/nieuws/2016/11/14/politie-gaat-bij-aangifte-onderzoeken-of-slachtoffer-kwetsbaar-is-a1531694>; Parliament, Second Chamber, "Implementation of Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 setting minimum standards for the rights, support and protection of victims of crime", available at <https://zoek.officielebekendmakingen.nl/kst-34236-3.html>.

Good practice – the Netherlands

The Inspectorate of Security and Justice designed a framework for the assessment of the treatment of detainees and the prevention of violence against or among them.

“Detainees must be screened upon arrival for care needs, safety and health care management risks and any reasons why they should not be placed in a multi-person cell. To this end, the following steps, among others, are taken:

- Medical screening within 24 hours of arrival of the detainee. This includes identifying contraindicated drugs and an assessment of suicide risks;
- Within 24 hours of arrival, an interview takes place on personal attention points and possible contraindicated drugs or situations;
- An observation and findings form is completed on this basis within three working days of arrival;
- The detainee is screened **within ten working days of arrival on the security level, risk to fellow prisoners and risk of self-harm.**¹²⁷

Recommendations

Public Authorities

- **Conduct a needs assessment.** National law should be amended to require the protection of victims in detention against secondary victimisation, intimidation or retaliation independent of the criminal justice process.¹²⁸ Formal protocols should be adopted for systematic individual needs assessment and assessment of necessary protective measures for alleged victims of ill-treatment and violence in detention.
- **Provide training to Detention Staff** on assessing the victim’s needs for protection against secondary victimisation, intimidation or retaliation.
- **Establish clear and efficient protection measures for victims and witnesses who report crime in detention.** Protective measures should include temporarily relocating an alleged offender to a different unit or Detention Centre, ordering a suspension measure, and following-up regularly with the victim on existing threats or concerns for his/her personal safety.
- **Consult with victims before implementing protection measures.**
- **Ensure secure, confidential and fast track channels of communication for victims and witnesses to report crime to Law Enforcement Authorities.**¹²⁹

Law enforcement and judicial authorities

- **Ensure the protection of victims and witnesses.** Protection measures should include the necessity to keep the investigation secret from the alleged offender and Detention Administration.

127 REDRESS, *The Rights of Victims of Violent Crimes in Pre-Trial and Immigration Detention: Report on The Netherlands*, March 2019, available at: <https://redress.org/news/new-report-on-the-rights-of-victims-of-violent-crimes-in-pre-trial-and-immigration-detention-in-the-netherlands/>. The report indicates however that this is not done for detainees suspected of terrorism, as they are automatically placed in the terrorist wings of Detention Centres.

128 Article 22 of the 2012 Directive.

129 See recommendations above regarding access to justice.



The right to Victim Support Services

Definition of the right

The 2012 Directive provides for the right of victims to access specialised support services, free of charge.¹³⁰ These services include the provision of:

- Information, advice and support relevant to the rights of victims;
- Information about referral to relevant specialist services, emotional and psychological support; and
- Practical advice including in relation to secondary and repeat victimisation, intimidation and retaliation.

Access to Victim Support Services should be guaranteed at the earliest stage possible, that is as soon as competent authorities become aware of a situation of victimisation:¹³¹

Support should be available from the moment the competent authorities are aware of the victim and throughout criminal proceedings and for an appropriate time after such proceedings in accordance with the needs of the victim and the rights set out in this Directive.

Support should be provided “through a variety of means, without excessive formalities” and “allow all victims the opportunity to access such services.”¹³² In addition, specialised support services should be provided to “[v]ictims who have suffered considerable harm due to the severity of the crime.”¹³³

The 2019 report by the special adviser to the EU Commission’s President on victims’ rights underlines the importance of Victim Support Services as a gateway to other rights under the 2012 Directive, including compensation:¹³⁴

Many victims point out that victim support services are a key factor in their ability to recover, feel recognised and request compensation. Support through administrative assistance, psychological, post-trauma or resilience guidance, advice and information on success rates and procedures are identified as helpful to victims as an additional part of a compensation scheme and sometimes much more helpful.

The 2012 Directive requires “competent authorities and other relevant entities” to facilitate referrals to Victim Support Services.¹³⁵ In this context, “other relevant entities” include, but are not limited to, “public agencies or entities, such as

hospitals, schools, embassies, consulates, welfare or employment services who are in contact with victims and identify the need for the victim to seek the specialised services” of Victim Support Services.¹³⁶ These entities may also therefore include the Detention Administration.

Accordingly, appropriate referral systems between competent authorities and Victim Support Services should be put in place. The necessity for different stakeholders to cooperate and communicate to provide effective rights to victims of crime was also stressed by the Special Adviser to the European Commission President in a 2019 report: “[a]t national level, the care for victims requires close collaboration between public authorities and support services (health, justice, police, psychological assistance, support services and insurance, etc.).”¹³⁷ The European Commission guidance document related to the transposition and implementation of the 2012 Directive stresses that good referrals systems are key to enforcing Victims’ Rights and describes their absence as “a bottleneck for victims requiring proper support”.¹³⁸

Challenges with respect to the right to support services

In countries that have implemented this aspect of the 2012 Directive,¹³⁹ victims are usually informed of, and sometimes referred to, Victim Support Services when they file a criminal complaint to the police. Because, as discussed, detained victims of violent crime rarely access these criminal complaint mechanisms, they also rarely, if ever, obtain this help. None of the Member States researched had specific protocols or measures in place to provide Victim Support Services to victims of violent crime in detention. Instead, detainees must rely on the general legal framework available to all victims.

The research highlighted the following specific challenges for victims of violent crimes suffered in detention to access Victim Support Services:

- (i) Victim Support Services are not present and do not generally provide services in detention;
- (ii) The Detention Administration lacks the training or a relevant protocol regarding Victim Support Services; and
- (iii) Detainees do not contact Victim Support Services.

¹³⁰ Articles 8-9 of the 2012 Directive.

¹³¹ Recital 37 of the 2012 Directive.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims’ Rights: From Compensation to Reparation*, 2019, p. 57, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

¹³⁵ Article 8(2) of the 2012 Directive; European Commission guidance document related to the transposition and implementation of the 2012 Directive, p. 14, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf.

¹³⁶ *Ibid.*, p. 25.

¹³⁷ Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims’ Rights: From Compensation to Reparation*, p. 38, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

¹³⁸ European Commission guidance document related to the transposition and implementation of the 2012 Directive, pp. 24-25, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf.

¹³⁹ In Italy, the right to access a Victim Support Service is not implemented into national law (research conducted in Italy).

Victim Support Services do not generally provide services in detention

Victim Support Services, whether run as public entities or charities, are typically absent from Detention Centres and do not regularly provide services to detainees in any of the Member States studied. The conceptual dichotomy between victims and detainees means that Victim Support Services are not conceived of as being relevant to detainees. When publicly funded, the organic fragmentation of services – to victims or to detainees – may imply that serving detainees is often not understood to be part of the mandate of Victim Support Services. Indeed, as in Croatia, Victim Support Services may not be even permitted access to places of detention.

In Belgium, this dichotomy appears clearly. Victim Support Services are provided through publicly-funded NGOs which exist alongside (but separately to) other publicly-funded services for detainees. These provide moral, social, psychological, material and cultural support to detainees and their families and prepare their rehabilitation. Although these two support services are sometimes located within the same building and organisation, there is a clear dichotomy in the services offered. Their target group is either victims or detainees. As a result, Victim Support Services rarely visit Detention Centres and detainees' support services are not specially trained to inform detainees on their rights or to assist them as victims. In practice, detainee support services rarely ask questions about detention conditions, and if they learn about violence, do not always have the tools to help victims. In addition, it appears that there is no clear protocol for liaison between the two sets of services.

Lack of training or protocol for Detention Administration to contact Victim Support Services

As explained in the context of the right to information and to protection, although the Detention Administration is often the only authority which is likely to be in contact with victims in detention, they lack training and awareness on Victims' Rights, including on the availability of Victim Support Services.

Detainees do not contact Victim Support Services

For the same reasons observed with other rights under the 2012 Directive, detainees generally do not contact Victim Support Services. This is because they do not see themselves as victims, are not informed of their right to these services, have limited means of communication with the outside world, do not report crimes committed against them, or fear reprisals. In practice, like many other Victims' Rights, these services are also not accessible unless a criminal complaint is filed.

Language barriers are also a difficulty. In most Member States where the research was conducted, Victim Support Services are only accessible by phone for detainees. For foreign detainees, in particular in immigration detention, communication will simply not be possible because the operators taking phone calls rarely speak English, let alone other foreign languages. Detainees may also be reluctant to contact Victim Support Services as they may seem connected with Law Enforcement Authorities because, in some Member States, these services are located with police and therefore not seen to be independent.

Recommendations

Public Authorities

- **Recognise detainees as a group at risk of victimisation.**
- **Establish Victim Support Services** if they do not already exist, in line with the requirements of the 2012 Directive.
- **Provide Victim Support Services with sufficient means to help detainees**, in particular sufficient staff, budget and access to Detention Centres.
- **Ensure access to Victim Support Services** is available to all victims regardless of their immigration status, as required by EU law.
- **Ensure the independence of Victim Support Services** from Law Enforcement Authorities.
- **Inform detainees of their rights as victims**, including on access to Victim Support Services.
- **Ensure training to all authorities that may come into contact with victims of crime in detention**, including on the availability of Victim Support Services.¹⁴⁰

Victim Support Services

- **Recognise detainees as a group at risk of victimisation.**
- **Be proactive in Detention Centres.** Victim Support Services should overcome the organic separation between support services for victims and other services working with detainees.
- **Provide information on Victims' Rights in Detention Centres.** Coordinate with bar associations, legal aid boards and NGOs to organise the dissemination of information on Victims' Rights in detention, including the organisation of Victim Support Services' "desks" or regular visits to Detention Centres.
- **Provide training to Detention Staff and other Detention Practitioners** on the role of Victim Support Services, on identifying victimisation situations and risks of repeat victimisation, and on reacting accordingly.
- **Create a hotline for detainees** in particular where the possibility of visiting Detention Centres is restricted or limited.¹⁴¹

Law Enforcement Authorities

- **With the victim's consent, directly contact Victim Support Services**, in the case of detained victims (in addition to referring victims to Victim Support Services) to increase the possibility that this isolated group of victims will receive support.

140 European Commission guidance document related to the transposition and implementation of the 2012 Directive, p. 27, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf.

141 European Commission guidance document related to the transposition and implementation of the 2012 Directive, pp. 26-27, available at: https://ec.europa.eu/info/sites/info/files/13_12_19_3763804_guidance_victims_rights_directive_eu_en.pdf.

**The right to
adequate
compensation**

Definition of the right

The 2012 Directive provides for the right of victims to receive “adequate compensation” from the offender.¹⁴² Member States have the obligation to “promote measures to encourage offenders to provide adequate compensation to victims.”¹⁴³ Moreover, the 2004 Directive requires Member States to ensure that there is a scheme in place for state compensation to victims of violent intentional crimes committed in their territories.¹⁴⁴ The scheme must guarantee fair and appropriate compensation to victims.¹⁴⁵

Both the 2004 and 2012 Directives provide for access to compensation in cross-border situations. This includes the right to submit an application in the Member State of residence, for harm suffered as a result of a crime committed in another EU country.¹⁴⁶ The 2012 Directive specifies that “the right to a decision on compensation from the offender and the relevant applicable procedure should also apply to victims resident in a Member State other than the Member State where the criminal offence was committed.”¹⁴⁷

Access to legal aid is also relevant to the right to compensation. The 2012 Directive requires Member States to provide a right to legal aid for the purposes of advice and legal representation,¹⁴⁸ interpretation and translation expenses,¹⁴⁹ and possible reimbursement of other expenses.¹⁵⁰

Challenges with respect to the right to adequate compensation

Many of the challenges relating to access to adequate compensation for victims of violent crime in detention are challenges encountered by victims generally. The Special Adviser to the European Commission President on Victims’ Rights recently identified the key challenges faced by victims generally as including the length of criminal or civil proceedings, the dependence of state compensation awards on the conduct of criminal proceedings, the nature and amount of the compensation awarded, and the difficulty in accessing a remedy in cross-border situations.¹⁵¹

The present report does not focus on these systemic challenges faced by all victims, but on the additional challenges that are specific to detained victims, and directly flow from the context of detention, namely:

- (i) The long and ineffective process of obtaining compensation from the offender;
- (ii) The limitations on detained victims being awarded state compensation; and
- (iii) The fact that the complaint mechanisms available to detainees do not generally include the award of compensation.

Obtaining compensation from the offender is long and ineffective

In none of the Member States we considered is there specific legislation establishing a procedure by which victims of violent crime or ill-treatment in detention may claim compensation from either the individual offender or the state. As for all victims of crime, compensation may usually be obtained from the offender following a conviction in criminal proceedings or a finding of civil responsibility (tort) in civil proceedings.

However, as explained above, detainees rarely even report crime, leaving little prospect for any form of compensation.

Special Advisor to the President of the European Commission

Strengthening Victims’ Rights: From Compensation to Reparation¹⁵²

“If victims do not report crimes, they are not entitled to seek compensation. These are often the most vulnerable victims, such as children, undocumented migrants, homeless, trafficked victims to name a few. They are arguably the most in need of emergency compensation.”

Even where victims do report violence suffered in detention, they face numerous hurdles (described in this report) before obtaining compensation, including gathering evidence, time, lack of legal aid and legal costs. Moreover, criminal and civil proceedings are often long, and even when damages are awarded to the victim, it is often difficult to enforce the judgment against the offender due to the added legal costs and insolvency of the offender.¹⁵³

142 Article 16 (2) of the 2012 Directive.

143 Article 16 (2) of the 2012 Directive.

144 Article 12 of the 2004 Directive.

145 Article 12(2) of the 2004 Directive.

146 Article 1 of the 2004 Directive and Article 17 of the 2012 Directive.

147 Recital 49 of 2012 Directive.

148 Article 13 of 2012 Directive.

149 Article 7 of the 2012 Directive.

150 Article 14 of the 2012 Directive.

151 Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims’ Rights: From Compensation to Reparation*, 2019, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

152 *Ibid*, p. 56.

153 *Ibid*, pp. 24-25.

Good practices – Sweden and the Netherlands

In Sweden, a copy of the judgment awarding damages is sent to the Swedish Enforcement Authority when the judicial process has ended. Victims may receive assistance from the Enforcement Authority to collect the awarded damages. If the Enforcement Authority notices that the defendant is insolvent, it provides the victim with an investigation report evidencing it. With this report, the victim may turn to his/her insurance company or to the Crime Victim Compensation and Support Authority for compensation.

In the Netherlands, "Under Dutch law, a victim has the right to present a claim for compensation in parallel to the criminal trial and thus has the ability to join the criminal proceedings as a civil claimant or 'injured party'. (...) The compensation claim itself is a civil claim governed by tort law, but is processed by the criminal court as if it were a civil court. The main advantage of a compensation order issued in this manner is that it is enforced by the State. Other advantages include the possibility of advance payment from the State and the speed at which some claims are determined. If the offender is insolvent, the Criminal Injuries Compensation Fund pays the financial compensation."¹⁵⁴

Further, victims face a financial risk if they pursue legal action for compensation. In some Member States, without a conviction or finding of liability, the unsuccessful victim may be ordered by the court to pay the defendant's legal costs associated with the proceedings. In Hungary, a fee of 6 % of the claimed damages is to be borne by the unsuccessful victim, in addition to the costs of the procedure which may, for example, include the fee of a forensic medical expert. This risk may deter most detained victims, especially in light of the difficulties in proving violent crime in detention discussed above.

Victims must generally take an active part in the process of recovering compensation. It is reasonable to assume that it is even more difficult to undergo the process for victims who are detained, in particular those who do not speak or understand the national language. In addition, the processes for obtaining compensation are often very long and victims, particularly migrants, may have left the country before compensation is paid, if it is ever obtained.

State compensation limits the possibility of awarding compensation to detained victims

In implementing Directive 2004, some Member States created a State body responsible for awarding compensation to victims of intentional violent crime. State compensation is generally awarded only when the offender is not identified,

has fled or is insolvent. If the offender is found not guilty, state compensation may not be awarded. There is therefore a strong connection between accessing criminal complaint mechanisms and the possibility of obtaining state compensation. This connection has an adverse impact on a population which is typically without access to justice as victims of crime.

In Sweden, for instance, in order to receive state compensation, the crime must have been reported to the police, or the victim must show a legitimate reason for not doing so. The victim must have contributed to the investigation of the crime to a reasonable extent. If the offender is unknown, there must have been an inquiry, such as a preliminary investigation, which shows that the victim has indeed been subject to a criminal offence. If the suspect is identified, a conviction or summary imposition of a fine is in principle required before the victim can seek State compensation.

The eligibility to state compensation is also restricted in various ways that particularly affect detained victims.¹⁵⁵ In some Member States, state compensation is limited to the reimbursement of medical expenses only - except in the case of homicide or sexual violence; or where the damage will not be reimbursed in any other way (including by an insurance company). In some Member States, compensation is limited to EU citizens only; or available only where the crime was committed on the Member State's territory or outside the Member State's territory if the victim is a resident. These conditions particularly affect migrants and foreigners in detention.

Complaint mechanisms available to detainees do not generally award compensation

As explained above, violence in detention often remains an internal matter and is rarely reported externally to Law Enforcement Authorities. If and when a detainee complains about ill-treatment or violence, it will often be through internal complaint mechanisms and through disciplinary proceedings against the offender. Detainees may also report violent crime to external monitoring bodies or complaint mechanisms.

Keeping these offences within the detention walls or detention related administrative bodies has an impact on detainees' ability to obtain compensation. In most Member States researched, internal (disciplinary) and external complaint mechanisms (non-judicial proceedings) do not have the power to award compensation to victims. In the Netherlands, complaints mechanisms in prisons may result in the award of damages to detainees, but they are extremely low (as little as 2.5 Euros). For instance, in a case where a detainee was kicked in his face and stomach, resulting in

154 REDRESS, *The Rights of Victims of Violent Crimes in Pre-Trial and Immigration Detention: Report on The Netherlands*, March 2019, p. 54, available at: <https://redress.org/news/new-report-on-the-rights-of-victims-of-violent-crimes-in-pre-trial-and-immigration-detention-in-the-netherlands/>.

155 For restrictive eligibility criteria, see generally Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims' Rights: From Compensation to Reparation*, 2019, pp. 23-24, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

shoulder dislocation and being taken to the hospital unconscious, the detainee was awarded 50 Euros compensation. These amounts are not proportionate to the damage suffered and are considerably lower than the compensation that would be obtained through judicial proceedings.¹⁵⁶

Recommendations

Public Authorities

- **Guarantee access to State compensation for all victims of crime committed on the Member States' territory, regardless of the victim's nationality and residence status.**
- **Provide effective legal aid to victims of violent crime suffered in detention**, covering legal advice and representation, as well as translation and interpretation costs, as required by the 2012 Directive.¹⁵⁷ Legal aid must be made available to all victims irrespective of their nationality and residence status.¹⁵⁸
- **Create a State entity capable of acting on behalf of victims of violent crime to enforce a judicial award for compensation against an offender.**
- **Allow for more flexible eligibility conditions to State compensation for detainees who may not easily access criminal complaint mechanisms.** In particular, it is necessary to guarantee access to State compensation mechanisms when disciplinary sanctions are taken against a member of Detention Staff for violence or ill-treatment against a detainee, regardless of whether the victim has filed a criminal, civil or administrative complaint.
- **Increase the level of compensation awarded** to better reflect the gravity of harm suffered by victims in detention and include other forms of compensation such as the provision of free psychological and specialist services.
- **Collect and publish** data on compensation awarded to victims of violent crime suffered in detention to allow for effective monitoring.
- **When proceedings are ongoing to recover compensation and the victim is no longer in the territory, ensure communication with them and/or the relevant national authorities in the state where they reside.**

Victim Support Services

- **Actively support the detainees who suffer from violent crime in detention** to help them obtain compensation from the offender or the state.

Bar associations / lawyers / legal aid boards

- **Provide guidance to lawyers** to ensure that they offer meaningful support to detainees in legal actions for compensation from the offender or the state.

156 REDRESS, *The Rights of Victims of Violent Crimes in Pre-Trial and Immigration Detention: Report on The Netherlands*, March 2019, pp. 53-54, available at: <https://redress.org/news/new-report-on-the-rights-of-victims-of-violent-crimes-in-pre-trial-and-immigration-detention-in-the-netherlands/>.

157 See also recommendation 34 of Special Adviser, J. Milquet, to the President of the European Commission, *Strengthening Victims' Rights: From Compensation to Reparation*, 2019, pp. 23-24, available at: https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf.

158 *Ibid*, recommendation 35.

Recommendations for the European Union

By isolating people, detention (whether pre-trial in the context of criminal proceedings, or administrative in the context of immigration procedures) places people in a situation of great vulnerability and dependency on the officials in charge of Detention Centres, as well as other detainees. Vulnerability is exacerbated by the fact that people who end up in pre-trial detention tend to come from low socio-economic backgrounds and/or are foreigners; and those who end up in immigration detention are foreigners, perhaps with no knowledge of the national language or system, and no local support network.

Studies have shown that even short periods of detention can have long-term impacts on physical and mental health.¹⁵⁹ But placing someone in detention also exposes them to the risk of violence and states who decide to place people in detention have a legal and moral responsibility to safeguard their physical integrity. This responsibility appears to be diluted amongst the different stakeholders involved in monitoring detention conditions more broadly, leading to a failure to recognise that where people in detention suffer violent crime, they are victims and as such must be entitled to exercise the rights recognised in EU law of victims of crime and to make a complaint based on criminal law to the relevant law enforcement authorities.

Despite violence being known to occur in detention, there are no adequate reporting systems in place, such that few reports of violence ever reach the criminal justice system and lead to the opening of a criminal investigation. Instead, violence tends not to be reported or, when it is, is addressed through internal disciplinary measures. The failure to enable victims of violence suffered in detention to access justice leads to the impunity of those who commit violence in detention. This impunity feeds more violence and the “normalisation” of violence as part of being detained. Beyond the impunity of perpetrators, the ineffectiveness of rights in detention places detainees at the mercy of the arbitrariness of state officials, threatening the rule of law itself in places of detention.

Just because someone is detained (whether lawfully or not) it does not mean they should no longer be entitled to exercise their rights if they become a victim of violence. Member States must seek to implement effectively the rights of victims enshrined in EU law in the context of detention. This starts with changing the perspective of domestic stakeholders, to overcome the fact that many struggle to recognise that a detainee can also be a victim.

Many of the challenges in accessing Victims’ Rights in detention are linked to the incomplete implementation of the 2012 Directive and 2004 Directive by Member States, and the difficulty in recognising the relevance of Victims’ Rights and applying effective protections for them in the

context of detention. But the EU cannot let Member States “get away with murder” because it happens behind the closed doors of detention facilities, and must ensure that Member States enforce EU law obligations to protect people in detention.

In this respect, the European Commission can support Member States through further guidance on implementation and training. But beyond the implementation of the rights enshrined in existing EU law, regional legislative action is necessary: first, to tackle the overuse of pre-trial detention, which is linked to the overcrowding of European prisons, by setting minimum standards on the use of pre-trial detention; and second, to establish minimum standards on detention conditions with recognised procedural rights for people in detention. EU action will help reinforce the mutual trust between Member States that underpins the good functioning of the mutual recognition instruments, key to the EU’s common area for freedom, security and justice.

The final part of this report identifies, first, the areas in which EU action can advance Member States’ implementation of EU law on Victims’ Rights, through clearer standards, guidelines, implementation monitoring, enforcement, funding and technical assistance. Beyond implementation of existing EU standards, we also urge the EU to take legislative action to address the current conditions of detention across the EU that expose detainees to the risk of violence, without any meaningful and effective redress mechanism.

Effective implementation of existing EU standards

Recommendation 1: Guidance on implementation of the rights recognised in the 2012 Directive.

a) “Vulnerability” in Article 22 of the 2012 Directive, explicitly recognising that persons held in immigration or pre-trial detention are a particularly vulnerable group

Member States are required to make individual needs assessments and have regard to victims whose relationship to and dependence on the offender make them particularly vulnerable: “[i]n this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.”¹⁶⁰ These categories of victims are particularly vulnerable and exposed to the risk of repeat victimisation, intimidation and retaliation. In their implementation of the 2012 Directive, some Member States have taken account the particular protection that some or all of these specific groups require.

The ECtHR recognises that detainees constitute a particularly vulnerable group and the correlated duty for states to

159 PICUM, available at: <https://picum.org/focus-area/borders-and-detention/>.

160 Article 22 of the 2012 Directive.

protect them.¹⁶¹ In addition, their confinement and isolation make them entirely dependent on Detention Administration and Detention Staff, and also on their co-detainees. They are placed in a situation akin to victims of domestic violence, unable to escape the perpetrator. As the 2012 Directive itself underlines, some victims in close relationships “are disproportionately affected when they are dependent on the offender economically, socially or as regards [their] right to residence.”¹⁶²

The EU should expressly require Member States to recognise detainees as a group specifically vulnerable to victimisation, repeat victimisation, intimidation and retaliation. It should take into account the specific vulnerability of victims of crimes suffered in detention in the implementation monitoring conducted by the European Commission.

b) “Competent authorities” must include Detention Staff

Our research shows that detainees will rarely, if ever, come into contact with Law Enforcement Authorities (typically designated by Member States as “competent authorities” for the purposes of the 2012 Directive). Detention Staff are often the first and only contact with authorities that a victim of violent crime suffered in detention may have.

The European Commission should publish guidance that Detention Staff must be included in the concept of “competent authority” and, therefore, be required to participate in the implementation of the 2012 Directive.

c) Establish a framework for a complaints protocol for Detention Administration and Detention Staff

When receiving a complaint (a right of victims enshrined in Article 5 of the 2012 Directive), Detention Administration and Detention Staff should be able to refer to a clear and detailed framework on what steps to take when there is an allegation of violence/ill-treatment or when Detention Staff /administration become aware of such situations, in the absence of a complaint.

d) Guidelines on the implementation of the individual assessment of Article 22 of the 2012 Directive, including on protection measures for people who suffer violence in detention

The European Commission should produce detailed guidelines addressed to Detention Administration and Detention Staff on how to implement individual assessments when a person is held in detention, in particular in respect of specific protection needs.

Recommendation 2: Training on Victims’ Rights

There is a lack of awareness and understanding of Victims’ Rights amongst Detention Professionals, in particular Detention Staff and lawyers. Victims’ Rights should be systematically included in the training offered to Detention Staff and should be organised in cooperation with Victim Support Services to strengthen cooperation between these stakeholders.

The European Commission should support the provision of this training.

Recommendation 3: Monitoring the effective implementation of Victims’ Rights

Despite the risk of violence that may occur in detention, and the vulnerability of detainees, Victims’ Rights are not being effectively implemented in this context. It is important that the European Commission continue actively to monitor the implementation of the 2012 Directive, in particular with respect to the obligation to provide information about rights (Article 4). We urge the European Commission to require Member States to provide copies of the letters of rights for victims to ensure they are drafted in plain language, and a protocol on the distribution of the letters of rights for victims to people in detention.

Moreover, as part of the Member States’ obligation to communicate to the European Commission (in 2020) data showing how victims have accessed the rights set out in the 2012 Directive (Article 28), we urge the European Commission to require that Member States provide data on: (i) the number of complaints, investigations, prosecution and convictions of violent crime against detained victims; (ii) the use of force by Detention Staff, and associated disciplinary procedures against Detention Staff or against detainees; (iii) detainees supported by Victim Support Services; (iv) protection measures implemented in detention; and (v) compensation awarded.

EU legislative action

Recommendation 1: New legislation on pre-trial detention

The best way of protecting people from the violence that so many suffer in pre-trial detention is to keep them out of detention if they don’t need to be there. As discussed in this report, pre-trial detainees are particularly vulnerable to violence. Despite this, the overuse of pre-trial detention in EU Member States is well-known.¹⁶³

161 See e.g., ECtHR [GC], *Bouyid v. Belgium*, no. 23380/09, 28 September 2015; ECtHR [GC], *Salman v. Turkey*, No. 21986/93, 27 June 2000.

162 Recital 18 of the Directive 2012.

163 Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf.

Pre-trial detention has long been linked to overcrowding and inhuman and degrading detention conditions. According to the CPT, “the persistent problem of overcrowding in prisons, with all its related challenges, has to be ascribed to a large extent to the high proportion among the total prison population of remand prisoners.”¹⁶⁴ The European Commission has previously recognised this impact in its Green Paper of 2011: “[e]xcessively long periods of pre-trial detention are detrimental to the individual, can prejudice judicial cooperation and do not represent the values for which the EU stands.”¹⁶⁵ In turn, prison overcrowding has a direct impact on the risk of violent crime occurring in detention:¹⁶⁶ “[o]vercrowding in particular has an impact on the physical and mental health of the individual, including through violence. It also has a negative impact on rehabilitation, including anti-radicalisation efforts.”¹⁶⁷ Detention generally “may expose the individual to maltreatment and violence, with a particular impact on vulnerable groups.”¹⁶⁸

Even if existing procedural safeguards were fully implemented, they would not provide a complete answer to the overuse of pre-trial detention across the EU and would not tackle the overcrowding in Europe’s detention facilities that this creates.

The excessive use of pre-trial detention is an EU-wide problem, with EU-wide impacts. It requires an EU-wide solution. Regional action should take the form of EU legislation that is binding on Member States. This should build on existing ECtHR standards, making them clearer, more practical and more accessible to Member States. Legislation is within the EU’s competency and would help tackle a grave threat to human rights in Europe.¹⁶⁹

Legislation limiting the grounds to put someone in detention has been adopted by the EU in the context of immigration detention,¹⁷⁰ this can also be achieved in the context of pre-trial detention. The EU should tackle the overuse of pre-trial detention by setting minimum standards that seek to limit the ability for Member States to order pre-trial detention so that it is only used as a measure of last resort. Moreover, regarding both immigration and pre-trial detention, viable alternatives to detention should be promoted and adopted.

Recommendation 2: Legislation setting minimum standards on detention conditions

The absence of EU law on detention conditions was recently highlighted by the CJEU.¹⁷¹ It has negatively impacted mutual trust between judicial authorities across the EU, with severe consequences on the functioning of the cross-border judicial cooperation instruments that are key to the creation of an EU area of freedom, security and justice. We estimate that currently, only one in three European Arrest Warrants result in surrender. Risks of human rights violations, largely linked to detention conditions, are becoming a growing reason for refusal.¹⁷²

Legislation on detention conditions has been adopted by the EU in the context of immigration detention,¹⁷³ this can also be achieved in the context of pre-trial detention. The EU should legislate on minimal detention conditions applicable to all places of detention, including but not limited to immigration and pre-trial detention. Legislation should include the obligation to provide effective means to access and exercise Victims’ Rights and other EU procedural rights in detention.

164 CPT, Remand detention, *Extract from the 26th General Report of the CPT*, 2017, p. 1, available at: <https://rm.coe.int/168070d0c8>.

165 European Commission, Green Paper, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 2011, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0327&from=EN>.

166 See e.g.: Penal Reform International, *Global Prison Trends 2019*, p. 8, available at: https://cdn.penalreform.org/wp-content/uploads/2019/05/PRI-Global-prison-trends-report-2019_WEB.pdf; UNODC, *Handbook on strategies to reduce overcrowding in prisons*, p. 11, available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.

167 EPRS, *Procedural Rights and Detention Conditions, Cost of Non-Europe Report*, p. 35, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU\(2017\)611008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

168 EPRS, *Procedural Rights and Detention Conditions, Cost of Non-Europe Report*, p. 31, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU\(2017\)611008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf).

169 For detailed recommendations, please refer to Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, p.44, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf.

170 Article 15 of Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country Nationals.

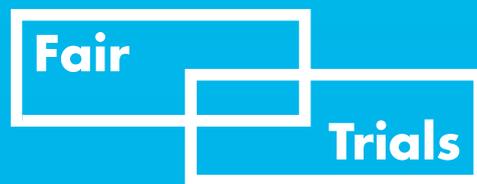
171 CJEU, Case C 128/18, *Dorobantu*, judgment of 15 October 2019.

172 Fair Trials/JUSTICIA statement available at: https://www.fairtrials.org/sites/default/files/publication_pdf/20190731_PTD_Brief_IP_V07_JUSTICIA.pdf.

173 Article 16 of Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country Nationals.

Our vision:

A world where every
person's right to a fair
trial is respected



@fairtrials



@fairtrials



Fair Trials



fairtrials.org