Welcome to the first LEAP quarterly bulletin of 2018, which will update you on Fair Trials’ and LEAP’s work over the past months and other issues of interest.

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**FAIR TRIALS AND LEAP NEWS**

**2018 LEAP Annual Conference**

Fair trial defenders from across Europe met in Sofia, Bulgaria, on 9 and 10 March for the LEAP Annual Conference. Over 80 LEAP members gathered to discuss a host of critical challenges in the fight to ensure that fundamental human rights are respected in European criminal justice systems and to plan...
how to overcome them. Critical issues discussed at the conference include threats to the fundamental rights to access a lawyer and to a trial, and the way in which criminal justice is increasingly being viewed solely through the lens of public security at the expense of human rights.

To find out more about what was discussed at each session, read our Annual Report here (also below).

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**2018 “Justice in Europe” Annual Report**

The 2018 “Justice in Europe” Annual Report is out and you can read it here. The report highlights the main trends in criminal justice and human rights in Europe over the last year and showcases activities and achievements of LEAP members in defending the right to a fair trial. This year’s report includes chapters on cross-border justice, access to justice and defence rights, trial waiver systems, and presumption of innocence and pre-trial detention.

You can read the full report here.

Send your comments and questions on the report to Gianluca on gianluca.cesaro@fairtrials.net

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**Fair Trials Americas is here!**

We are very excited to announce the official birth of our Fair Trials Americas offices in Washington D.C. earlier this year. The new hub, which is led by our Rebecca Shaeffer, has been granted official charity status under Section 501(c)(3) of the US Internal Revenue Code. Thanks to this crucial step, Fair Trials Americas has not an established presence under US law which will enable us to spearhead and advance our work sustainably across the Atlantic.

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**Meet the new Fair Trials website**

We are also excited about our brand-new website, which we have launched recently and you can still find at www.fairtrials.org as usual. Go play around with it: it’s modern, it’s user-friendly, and it’s full of resources.

Most importantly, we have created a fresh new LEAP portal, where you can find information on what the network is, its Advisory Board members, our regional and national initiatives, including our Working Groups on Judicial Remedies, the European Court of Human Rights, the Court of Justice of the European Union, and civil society coalition JUSTICIA. You can also search for LEAP-related publications here, and find and fill our surveys here.
We are confident that this new portal will increase the visibility of the LEAP network to the outside world and will help you stay on top of and advertise our joint work and achievements.

If you have comments or questions about the LEAP portal, email Gianluca on gianluca.cesaro@fairtrials.net.

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**CROSS-BORDER JUSTICE**

**European Arrest Warrant**

*Fair Trials makes application to intervene in landmark Irish extradition case*

In the case of *Minister for Justice and Equality v. Artur Celmer*, Justice Aileen Donnelly set a new precedent, when it refused to surrender a Polish national back to Poland under a European Arrest Warrant citing threats to the independence of the judiciary and consequently to Celmer’s fair trial rights. The judge instead decided to refer the case to the Court of Justice of the European Union (CJEU) for further guidance on whether the extradition of Mr. Celmer would violate his fair trial rights.

At Fair Trials, we made an application to intervene before the Luxembourg Court as we believe that this case offers a unique opportunity to ask the CJEU to develop a brand-new test for national courts on fair trial rights. In our view, local courts could apply this test where they believe that there are risks to the right to a fair trial as established in EU law, such as threats to the independence of the judiciary, in the receiving country.

Read more about the case and about our intervention [here](#).

*The European Arrest Warrant in the headlines: the case of Carles Puigdemont*

The case of Carles Puigdemont, former Prime Minister of Catalonia, who has been fighting against two European Arrest Warrants issued by Spain, has received widespread media attention across the European continent.

In this context, at Fair Trials, we have provided an insight into the dynamics of the European Arrest Warrant and raised awareness about its potential for abuse on several European media outlets. Our Regional Director for Europe Ralph Bunche was [interviewed by online media outlet Catalan News](#) on the abuse of the European Arrest Warrant, and later authored an *op-ed on the EU-Observer*, where he exposed threats to freedom of movement in case misuse of the EU’s fast-track surrender mechanism continues.
Our expertise and comments have also been quoted by Deutsche Welle and earlier by Politico.

**New LEAP Working Group on the EU Court of Justice**

Following the breakout session on the CJEU jurisprudence at the LEAP Annual Conference in Sofia, we are delighted to launch a LEAP Working Group which to support the development and try to influence the jurisprudence of the EU Court on EU cross-border judicial cooperation mechanisms and on the rights of suspects and defendants in criminal proceedings. Our aim is to promote higher standards through the CJEU than those applied by the European Court of Human Rights.

We would like to thank LEAP members Alex Tinsley and Anna Oehmichen who have kindly agreed to co-chair this Working Group.

If you wish to have more information about this Working Group, get in touch with Laure on laure.baudrihaye@fairtrials.net and Silvia on silvia.lorenzoperez@fairtrials.net.

You can read updates about the Working Group [here](#).

**Evidence-sharing and security cooperation**

**Fair trial rights when sharing electronic evidence: the EU Production Order**

Earlier in April, the European Commission issued draft legislation on access to and transfer of electronic evidence. Such proposals introduce two new tools to gather and share electronic evidence, called the European Production Order and the European Presentation Order, which would replace the European Investigation Order in criminal cases where the prosecution is seeking electronic evidence located in another EU Member State, without any judicial filter in the country where the data is held.

As the impact of the draft Directives on defence rights is potentially heavy, our Senior Lawyer Laure Baudrihaye-Gérard has analysed its shortfalls in a panel organised by the Vrije Universiteit Brussel (VUB) in May, with the participation of judges, prosecutors, academics and representative of high-tech companies.

According to our analysis, current draft legislation risks undermining defence rights in 5 main ways:

1. There is no threshold requiring the issuance of the Orders only when there is reasonable suspicion or probable cause;
2. Prosecutors can issue Preservation Orders whenever they want, and are allowed to issue Production Orders for everything except the content of electronic evidence (i.e. most all metadata) without judicial oversight;
3. The protection of fundamental rights is delegated to profit-seeking companies, which are meant to disclose data only when the information is necessary and proportionate. In addition, the regulation does not create the conditions under which this control should happen;
4. The only remedy guaranteed for the defendant is a right to complain and seek review. But at the same time, the Directive allows the issuer to require confidentiality of the request whenever they see fit;
EU cooperation with Latin America on security issues

In the EU, cross-border justice cooperation not only means cooperation among Member States, but also with third countries. At Fair Trials, we are currently starting to explore such cooperation with Latin American countries, which have a history of extradition agreements with EU states. Because of its largely bilateral nature, much of this cooperation is happening below the radar of civil society.

With a view to mapping existing mechanisms and checking for risks to defence rights, our Brussels and Washington offices have started to engage with the Euro-Latin American Parliamentary Assembly (EuroLat), a trans-national body of 150 parliamentarians from Europe and Latin America, which is tasked with fostering wide-ranging cooperation between the two regions.

In April, our Rebecca Shaeffer participated in the Panama meeting of the EuroLat assembly, where she firstly introduced the topic of criminal justice cooperation to the audience. Following up on that meeting, Fair Trials is now looking to produce two policy papers, respectively on the strengthening of defence rights as a way to prevent criminalisation of human rights defenders and silencing of civil society, and on criminal justice cooperation mechanisms between the EU and Latin America.

The Brussels offices are now taking up the relay on the European side of the Atlantic, ahead of the next EuroLat meeting in Vienna in September.

PRESUMPTION OF INNOCENCE

Leading European criminal justice players discussed pre-trial detention reform

On April 25th, Fair Trials and LEAP convened a meeting at the European Parliament of leading European criminal justice organisations and networks to discuss how to address the overuse of pre-trial detention in Europe.

Earlier this year pre-trial detention reform was quietly dropped from the Commission’s agenda, in spite of increasing awareness of need for such reform. Numerous studies, including our 2016 regional report A Measure of Last Resort? The practice of pre-trial detention decision making in the EU have by now confirmed that pre-trial detention is being overused in Europe.

In addition, the EU Court of Justice has also placed pre-trial detention issues at the centre of the European Arrest Warrant (EAW), ruling that persons may only be held in detention pending decision to surrender in accordance with the European Convention on Human Rights (ECHR) standards; it also stated that extradition should not happen if there is a risk to cruel and inhuman treatment, such as overcrowding in the detention facilities in the country requesting the extradition.
During the roundtable, a general consensus to introduce EU-wide minimum common standards on pre-trial detention emerged from leading European professional networks, including those representing lawyers (European Criminal Bar Association, Defence Extradition Lawyers Forum), bars and law societies (the Council of Bars and Law Societies of Europe), probation services (Confederation of European Probation), prison services (European Organisation of Prison and Correctional Services) and academics (European Criminal Law Academic Network).

Following this meeting, we are currently looking to bring these networks together to draft a joint position paper outlining our key recommendations on the substance of such minimum common standards.

2018 update report on pre-trial detention

To continue highlighting the critical importance of EU-level reform of pre-trial detention, we are currently in the process of updating our 2016 report.

The update report will include developments about pre-trial detention which have happened over the past couple of years and which were kindly shared with us by those LEAP members whom we had worked with on the 2016 research. We also address the impact of the CJEU's decision in Aranyosi and Caldararu on the way EU courts are assessing human rights in EAW cases, including in relation to pre-trial detention.

You can read the full update report here.

Draft report for “Suspects in Restraint” project is underway

Thanks to those of you who provided answers to the survey we circulated in the framework of our “Suspects in Restraint” (SIR) project on the way defendants are presented in courtrooms and in the media. Your precious input has been included in the draft report which is being currently finalised.

For questions and comments about this project, contact Laure at laure.baudrihaye@fairtrials.net.

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ACCESS TO JUSTICE

New toolkit on legal aid

Fair Trials produced a Toolkit on the Legal Aid Directive to help readers identify areas where current or proposed national law fails to meet the requirements of the Directive so that these can be addressed in the pre-transposition period, which ends on 25 May 2019, leaving fewer problems for the courts to deal with subsequently.

The Toolkit provides an overview of the Directive’s key provisions, as well as relevant international standards, and jurisprudence from regional courts.

Fair Trials will be working with LEAP members and other criminal justice experts to ensure that the Directive is both transposed and implemented effectively. This is an exciting opportunity for practitioners, civil society organisations and any other stakeholders to get involved and actively participate in the
The process of transposing the Directive via legislative reform and domestic litigation.

**New toolkit on children’s rights in criminal proceedings**

We have now finalised a toolkit to provide guidance for practitioners using the Children’s Directive (2016/800) in their day-to-day work with child suspects. The toolkit provides a detailed overview of the strong protections it provides to the right of children to legal assistance, and to have their best interests treated as paramount. There is also detailed information about the ways in which the Directive can be used to assert and defend the rights of children in conflict with the law at different stages of criminal proceedings, from arrest and interview up to a full trial hearing.

We were incredibly grateful for the suggestions made by LEAP members at our regional training event in Leiden in January, and many of these have been incorporated into the final version of the toolkit, as well as the Advancing the Defence Rights of Children training programme currently being replicated in Romania and Hungary.

**Draft report on audio-visual recording of police interrogations is underway**

Thanks to those of you who provided answers to the survey we circulated in the framework of our project on the audio-visual recording of police interrogations (ProCam). Your precious input has been included in the draft report which is being currently finalised.

For questions and comments about this project, contact Laure at laure.baudrihaye@fairtrials.net.

**New project to build a plain language movement for defence rights**

Earlier this year, we’ve been notified that we will be getting EU funding to promote plain language in the criminal justice system as an essential way to make people properly understand and exercise their rights. The project ACCESS-JUST builds on previous work on accessible letters of rights in the EU, which highlighted how criminal justice authorities regularly use language that is unclear and inaccessible to arrested persons, and that Letters of Rights are typically worded in ways that make it difficult for lay persons to understand and, therefore, exercise their rights.

Through ACCESS-JUST, project partners led by the Hungarian Helsinki Committee will train government officials tasked with drafting Letters of Rights to ensure that plain language principles are reflected in the domestic Letters of Rights.

We are very much excited to start off this new project in September this year and once again work together with LEAP members Antigone, APADOR, and the Hungarian Helsinki Committee.

For questions and remarks, contact Gianluca on gianluca.cesaro@fairtrials.net.

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**JUSTICE OUT OF COURT**

Thanks to all for a great Annual Conference session on plea-bargaining and other trial waiver systems. The discussions convinced us that there is a need to further investigate issues connected to such
mechanisms in terms of fair trial rights. We are therefore eager to continue such a conversation with the network, which will inform our thinking around potential future projects on the issue.

You can read more about the discussions in the Justice in Europe Annual Report here.

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CROSS-CUTTING ISSUES

Vulnerable suspects

LEAP Communique on Vulnerable Suspects

At the margins of our last Advisory Board meeting in Stockholm in early December, we held a session to discuss the protection of procedural rights of vulnerable suspects across EU countries. The meeting was organised with the crucial help of Annika Akerberg of Civil Rights Defenders (CRD), who kicked off the discussions in light of their report on suspects with disabilities in Sweden. The CRD report had highlighted a need for greater attention to this issue and additional protections. Following up from the report, the Swedish Ministry of Justice and CRD were interested to learn about practices from across the EU. Unfortunately, very few good examples came out of the meeting, which rather shed light on widespread failures in many domestic criminal justice systems in addressing the specific needs of vulnerable suspects.

We have now finalised a communiqué where we map out existing standards on the protection of procedural rights for vulnerable suspects across a number of EU countries, and we address recommendations to the European Commission, building on previous advocacy efforts, to adopt binding legislation to tackle these shortcomings.

You can read the full communiqué here.

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CASELAW UPDATES

European Court of Human Rights (ECtHR)


The ECtHR found a violation of Article 6 (1) and 3 (c) of the Convention when the domestic courts relied on the witness testimonies recounting a confession made by the applicant to secure his conviction. According to the applicant the confession had been extracted in the absence of a lawyer after the two officers had beaten him. The applicant had been arrested and placed in police custody on the suspicion that he had committed an offence of murder. Whilst in police custody, the applicant had been informally questioned by two officers during which he aparently confessed to having also committed a theft. On the next day he was formally charged with other offence, whilst charges in relation to the murder and the theft at issue were only formally brought against him 6 months later.

In this case, the ECtHR build on its previous judgements in Ibrahim and Others and Simeonovi in which
the Court set up a two-stages test in order to decide whether a failure to grant access to a lawyer would amount to a violation of Article 6: whether there were compelling reasons to restrict the right and whether the fairness of the proceedings have been affected overall. First, the ECtHR found that under Bulgarian law, there had been no “compelling reasons” to restrict the right of the applicant to access a lawyer. Secondly, the ECtHR stated that in the absence of “compelling reasons” for restricting the right to legal assistance, the ECtHR must apply a very strict scrutiny to its fairness assessment. It expressly stated that ‘in cases such as the present one, where there have been no “compelling reasons” to restrict access to a lawyer at the early stages of the proceedings, it can only exceptionally find that the overall fairness of proceedings has not been prejudiced by that initial failure to observe the accused’s rights’. In *Ibrahim and Others* the ECtHR set out non-exhaustive list of factors to be taken into account in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings:

- Whether the applicant’s confession was obtained “cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion”. The ECtHR found that after he made the alleged confession during the questioning, the authorities charged him with a minor offence. It was only six months later that the applicant was charged with murder. Therefore, the ECtHR had doubts on the accuracy and reliability of the testimony of the police officers, relating the applicant’s confession.
- “The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with”. The ECtHR held that the confession had not obtained in accordance with the requirements of the law and therefore it could have been used in trial.

Whether the contested evidence formed “an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case”. The ECtHR observes that the applicant’s confession, included in the body of probative evidence through the witness testimony of the police officers, had have been one of the important elements of evidence securing his conviction. This was even more relevant in the light of the fact that the body of evidence examined at the trial also contained exonerating evidence, but on balance the national courts found that the accusations had nevertheless been proved.
he is a national, since he has made use of his freedom of movement right.

The referring court asked whether in this case Article 18 TFEU (prohibition of discrimination on grounds of nationality) should be interpreted as precluding the requested Member State from drawing a distinction between its nationals and the nationals of other Member States and from granting extradition of the latter whilst not permitting extradition of its own nationals. The CJEU responded in the negative. Members States are able to draw a distinction between its citizen and other EU citizens for the purpose of extraditing them to a third-State. However, before deciding to extradite, the executing State must inform the competent authorities of the Member State of which the citizen is a national so as to afford the latter the possibility of seeking the surrender of that citizen pursuant to an EAW in order to prosecute that person for offences committed outside its national territory. If the authorities of the State of which the requested person is a national fail to request the surrender of its own national pursuant to an EAW, may the executing State extradite to a non-EU country.

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