



OCTOBER 2020

# The functioning of courts in the Covid-19 pandemic

PRIMER

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## **THE FUNCTIONING OF COURTS IN THE COVID-19 PANDEMIC**

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### **Acronyms/ abbreviations**

CEPEJ	European Commission for the Efficiency of Justice
ENCJ	European Network of Councils for the Judiciary
ICJ	International Commission of Jurists
OHCHR	United Nations Office of the High Commissioner for Human Rights
WHO	World Health Organization

## A. INTRODUCTION

### 1. Introduction & objective

The COVID-19 pandemic has created considerable challenges for the rule of law in a number of States, including for the functioning of courts during states of emergency, curfews and lockdowns.

Yet, courts have a vital function during and after the pandemic, in particular to ensure judicial scrutiny of emergency legislation and to provide an effective remedy against excessive emergency measures in individual cases. Uninterrupted access to courts is also required in other urgent legal matters, and to uphold access to justice in general. Courts have attempted to address this in various ways, some closing their buildings entirely, others remaining partially open, and all having to move swiftly to delivery of justice remotely and through online platforms.

In light of the unprecedented situation, guidance for policymakers, lawmakers, courts, judges' associations, judicial councils and other self-governing bodies, lawyers and representatives of other legal professions is urgently needed. Yet, the environment is changing rapidly. What is urgent, necessary and proportionate at one time may change quickly, and even repeatedly, depending on where countries are in terms of phases in the COVID-19 pandemic – and indeed different regions within countries.

This publication, in the form of a Primer, therefore seeks to provide timely guidance while recognizing that, in light of the complexities of the issues and the "experimental" nature of measures taken during this emergency, their impact cannot yet be fully assessed.

Following up on the chapter on "Justice institutions" in the ODIHR report *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*,<sup>1</sup> the focus of this primer is to provide an overview of challenges faced by courts during and in the aftermath of the pandemic, to reflect on emergency measures imposed during March and July 2020 and to offer some preliminary guidance.

In its work on the functioning of courts during and in the aftermath of the pandemic, particularly generous cooperation was received from the European Association of Judges (EAJ), whose members faced the COVID-pandemic earlier than in other OSCE regions and who, therefore, were able to provide experiences of interest to countries that were further behind the "curve".

ODIHR would like to thank very warmly all the many judges, representatives of judicial councils and judges' associations, civil society and academia for participating in consultations, for sharing their experiences, for providing documents and for their comments and remarks throughout the consultations. Their commitment and diligence were essential to producing this report.

### 2. Methodology

This publication draws upon comprehensive desk-based research, the review of a multitude of documents and country-related examples received from within ODIHR's network, numerous conversations and much correspondence, participation in a number of relevant webinars organized by other organizations, and a series of online consultations organized by ODIHR with

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<sup>1</sup> See also "[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)", ODIHR, July 2020, II.1.C.

members of the judiciary and judicial organizations, the legal profession and civil society. These consultations also provided examples of how different courts across the OSCE participating States were responding to the pandemic.<sup>2</sup>

It also draws on ODIHR's comprehensive report *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*,<sup>3</sup> published in July 2020.

#### **Online consultations organized by ODIHR between April and June 2020:**

- 9 April 2020: Webinar on “The functioning of courts in the Covid-19 pandemic”<sup>4</sup>;
- 7 May 2020: Webinar on “Courts in the aftermath of the COVID-19 pandemic”<sup>5</sup>;
- 4 June 2020: Online consultation on health and safety measures in the context of reopening courts<sup>6</sup>;
- 9 June 2020: Online consultation on “How to 'triage' cases, i.e., prioritization of cases and court facilities during lock-down and once courts are re-opening”<sup>7</sup>;
- 18 June 2020: Online consultation “New types of cases as a consequence of the pandemic”<sup>8</sup>;
- 16 June 2020: The Central and Eastern European Law Initiative (CEELI) organized a joint webinar with ODIHR on “Exit Strategies & Court Management post COVID-19”<sup>9</sup>;
- 17 August 2020: Online consultation on the draft primer on the functioning of courts during the COVID-19 pandemic.<sup>10</sup>

The publication sought to include a variety of examples from different countries and regions; however, it did not aim at referencing all 57 OSCE participating States. While a geographically representative approach was the aim, it may not have always been possible to achieve. The examples are illustrative rather than exhaustive, and their use intends to share information about challenges, measures and practices rather than single out any countries or courts. Nevertheless, recommendations are provided at the end of each chapter, consolidated in a checklist at the end of the Primer (Annex I), to assist courts in managing future pandemics and emergency situations.

We are grateful to the cooperation of the European Judges Association (EAJ), the Association of European Administrative Judges (AEAJ), the CEELI Institute, the Council of Europe Consultative Council of European Judges (CCJE), the International Commission of Jurists (ICJ), Fair Trials and the Bingham Centre for the Rule of Law, among many other organizations who generously shared their expertise and experiences.

### **3. OSCE commitments and international law**

The Helsinki Final Act 1975, considered to be the founding document of the OSCE, commits OSCE participating States to “respect human rights and fundamental freedoms” and to “promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights

<sup>2</sup> Examples throughout the document which are drawn from these webinar consultations are referred to in this Primer as “Consultations from webinars held June 2020”.

<sup>3</sup> See also ODIHR, “[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)”, July 2020, II.1.C.

<sup>4</sup> “[The functioning of the courts in the COVID-19 pandemic](#)”, ODIHR, 9 April 2020.

<sup>5</sup> “[The functioning of the courts in the COVID-19 pandemic](#)”, ODIHR, 7 May 2020; see also the “[Functioning of courts in the aftermath of the COVID-19 pandemic](#)”, Consultative Council of European Judges website, online meeting, 7 May 2020.

<sup>6</sup> “Exit Strategies and Court Management post COVID-19”, ODIHR, 4, 9 and 18 June 2020.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> “[Access to Justice during and after the Pandemic](#)”, CEELI Institute website, CEELI/ODIHR joint seminar, accessed 16 October 2020.

<sup>10</sup> The purpose of producing this as a “Primer” is to acknowledge the need for timely guidance but at the same time enabling this to be updated and revised in light of the swiftly changing circumstances.

and freedoms all of which derive from the inherent dignity of the human person". Participating States are required to "fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound" (Article VII).

The observance of the rule of law, "based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention",<sup>11</sup> may never be more relevant than in times of crisis and emergency. Judicial independence has repeatedly been recognized as a prerequisite to the rule of law and as a fundamental guarantee of a fair trial.<sup>12</sup>

Moreover, OSCE participating States have stressed unequivocally that the rule of law is not merely about formal legality but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.<sup>13</sup> In order to ensure the rule of law and access to justice more broadly, participating States committed to pay due attention to the efficient administration of justice and proper management of the court system.<sup>14</sup>

Even in times of emergency, overall respect for rule of law principles should be ensured.<sup>15</sup> In particular, recourse to states of emergency "may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms",<sup>16</sup> and "de facto imposition or continuation of a state of public emergency not in accordance with provisions laid down by law is not permissible".<sup>17</sup>

The Moscow Document 1991 also affirms that participating States will "endeavour to ensure that the legal guarantees necessary to uphold the rule of law will remain in force during a state of emergency".<sup>18</sup> OSCE participating States also specifically committed to provide for, in law, control over the decision to impose a state of public emergency, as well as over the regulations related to the state of public emergency and the implementation of such regulations.<sup>19</sup>

Under international law instruments, States can temporarily derogate from certain rights during states of emergency (Article 4 ICCPR, Article 15 ECHR). However, certain rights are non-derogable, even in states of emergency.<sup>20</sup> These include the right to be protected from torture

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<sup>11</sup> OSCE Ministerial Council, Decision No. 12/05, "[Upholding Human Rights and the Rule of Law in Criminal Justice Systems](#)", Ljubljana, 6 December 2005.

<sup>12</sup> OSCE Ministerial Council, Decision No. 4/06, "[Brussels Declaration on Criminal Justice Systems](#)", Brussels, 5 December 2006.

<sup>13</sup> OSCE Ministerial Council, Decision No. 12/05, "[Upholding Human Rights and the Rule of Law in Criminal Justice Systems](#)", Ljubljana, 6 December 2005.

<sup>14</sup> OSCE Ministerial Council, Decision No. 5/06, "[Organized Crime](#)", Brussels, 5 December 2006, para. 4.

<sup>15</sup> See e.g., Human Rights Commission, CCPR/C/21/Rev.1/Add.11, "[General Comment no. 29, States of Emergency \(Article 4\)](#)", 31 August 2001, para. 2.

<sup>16</sup> Conference on Security and Co-operation in Europe (CSCE), [Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE](#), Moscow, 3 October 1991, para. 28.1.

<sup>17</sup> *Ibid.*, para. 28.4.

<sup>18</sup> *Ibid.*, para. 28.8.

<sup>19</sup> *Ibid.*; For derogations and related OSCE commitments, see "[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)", ODIHR, July 2020, p. 21 et seq.

<sup>20</sup> Non-derogable rights include the prohibition of torture and ill-treatment, prohibition of slavery and servitude, the right to life, and the prohibition of retrospective criminal law (Article 4.2 of the ICCPR and Article 15.2 of the ECHR). In addition, other rights have been recognized as not being subject to derogation, including the right to an effective remedy since it is inherent to the exercise of other non-derogable rights (Human Rights Committee, [General Comment 29](#), para. 14); the fundamental principles of a fair trial (General Comment no. 29, para. 16; and [General Comment 32](#), para. 6), which include the right to be tried by an independent and impartial tribunal (General Comment 32, para. 19), the presumption of innocence (General Comment 32, para. 6) and the right to access to a lawyer; and the right of arrested or detained persons to be brought promptly before an (independent and impartial) judicial authority to decide without delay on the lawfulness of detention and order release if unlawful/right to habeas corpus (General Comment 29, para. 16; and [General Comment 35](#), para. 67).

and ill-treatment, as well as elements of the right to a fair trial, such as the presumption of innocence, and rights that are required to ensure the protection of expressly non-derogable rights, including the right to an effective remedy.

Even when no derogation is sought, emergency measures which restrict human rights and fundamental freedoms must comply with the requirements provided in the international human rights instruments. Such limitations must be provided for by law, be necessary and proportionate and non-discriminatory. Limitations must not be applied in such a way or to such an extent that the very essence of the right to a fair trial is impaired.<sup>21</sup> During a state of emergency, participating States committed “to ensure that the legal guarantees necessary to uphold the rule of law will remain in force” and “to provide in their law for control over the regulations related to the state of public emergency, as well as the implementation of such regulations”.<sup>22</sup> As the Office of the High Commissioner for Human Rights (OHCHR) notes, there should also be “meaningful judicial oversight of exceptional measures or a state of emergency to ensure that they comply with the limitations” under international law.<sup>23</sup> Furthermore, “emergency measures, including derogation or suspension of certain rights, should be subject to periodic and independent review by the legislature”.<sup>24</sup>

The *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)* emphasize that, “the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights.”<sup>25</sup>

The **Siracusa Principles** state that restrictions should, at a minimum, be:

- provided for and carried out in accordance with the law;
- directed toward a legitimate objective of general interest;
- strictly necessary in a democratic society to achieve the objective;
- the least intrusive and restrictive available to reach the objective;
- based on scientific evidence and neither arbitrary nor discriminatory in application; and
- of limited duration, respectful of human dignity, and subject to review.

For more information about OSCE commitments and international law in the context of states of emergency, see ODIHR's report *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*.<sup>26</sup>

#### 4. Safeguards at particular risk during an emergency

As a recent Declaration of the European Commission for the Efficiency of Justice (CEPEJ) noted, the key standards underpinning the operationalization of the courts must continue even during times of emergency.<sup>27</sup>

<sup>21</sup> See, for instance, [Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights](#), (1985) (Siracusa Principles), Art. I. Limitation Clauses.

<sup>22</sup> Moscow Document (1990), para. 28(8).

<sup>23</sup> “[Emergency Measures and COVID-19: Guidance](#)”, OHCHR, 27 April 2020, p. 3.

<sup>24</sup> Ibid.

<sup>25</sup> [Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights](#), (1985) (Siracusa Principles), para 70.

<sup>26</sup> OSCE commitments and relevant international law are summarized in Chapter I.1.A, Summary of Related International Standards and OSCE Commitments, and at the beginning of each thematic chapter.

<sup>27</sup> “[CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic](#)”, CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

Most crucially, the right to a fair trial, applicable to both civil and criminal proceedings, as set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR) are at particular jeopardy. This right encompasses the principles of the presumption of innocence; the rights to a public hearing and to defence; equality of arms; the right to legal representation; and to examine evidence and witnesses from the other parties; as well as to an interpreter as appropriate.<sup>28</sup>

A functional court system and fair trial rights are also fundamental in order to prevent the arbitrary deprivation of liberty. For example, Article 9 of the ICCPR and Article 5 of the ECHR require a trial within a reasonable time and various safeguards including review of the legality of the detention by a competent court.<sup>29</sup> Importantly, Article 9(3) of the ICCPR provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”, with the Human Rights Committee stating that this should be “in person”.<sup>30</sup>

It has also been apparent that there have been difficulties for trial monitors and those monitoring places of detention to access hearings and detention facilities, thereby jeopardizing their role in the identification and prevention of violations.<sup>31</sup> Independent monitoring of places of detention is a recognized safeguard against torture and ill-treatment, the protection of which constitutes a non-derogable right.

The need to react quickly to a rapidly changing situation of an unprecedented nature is bound to create a risk in terms of the principles of legality and legal certainty. The constraints of national parliaments in times of lockdown and the temptation of different levels of policymakers to adopt a myriad of laws and regulations without consultation added to this problem. Overall, there is a considerable risk of an erosion of the rule of law in responses to this pandemic and states of emergency overall.

In times of emergency, power tends to shift towards the executive, upending the separation of powers and the independence of the judiciary. This danger may be even more pronounced in an emergency like the COVID-19 pandemic given the lock-down measures and the resulting reduced functionality of parliaments and courts. There is a risk that the imbalance between the three state powers will persist after the end of the emergency and is thereby “normalized”.

It is, therefore, crucial to constantly review and re-assess emergency measures against necessity, proportionality and non-discrimination requirements. As the European Commission for the Efficiency of Justice (CEPEJ) has noted, it is worth keeping in mind principles of “flexibility, dialogue, innovation and concern for the needs and situation of vulnerable groups”.<sup>32</sup>

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<sup>28</sup> See also [“OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic”](#), ODIHR, July 2020, Chapter 1.

<sup>29</sup> Human Rights Committee, [General Comment No. 35, Article 9 \(Liberty and Security of Person\)](#), CCPR/C/GC/35, 16 December 2014.

<sup>30</sup> *Ibid.*, Section IV.

<sup>31</sup> UN Subcommittee for Prevention of Torture (SPT), “Advice of the Subcommittee to States Parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic”, CAT/OP/10, 7 April 2020; European Committee for the Prevention of Torture, “Statement of Principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic”, CPT/Inf(2020)13; OSCE Office for Democratic Institutions and Human Rights (ODIHR) and Association for the Prevention of Torture, Guidance. “Monitoring Places of Detention through the COVID-19 Pandemic”, Warsaw, OSCE/ODIHR and APT 2020.

<sup>32</sup> [“Concluding Remarks by Hanne Juncker, Justice and Legal Co-operation Department, Directorate General of Human Rights and Rule of Law”](#), CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

## B. OVERALL OBSERVATIONS AND CHALLENGES

### 1. Differences across countries and across courts

Courts have faced a myriad of challenges during the pandemic. Some courthouses and buildings closed fully, others partially, dealing with only “urgent” cases.<sup>33</sup> The extent to which judges and court staff have been able to operate in person and virtually during this time has depended on the particular State’s response to the pandemic, the regulations imposed by the authorities and the type of court and cases they deal with.

Not all courthouses, staff members or members of the judiciary have been available, impacting how cases were prioritized and allocated. In some countries, it was necessary for courts to share facilities and staff among different courts (family, criminal, civil and administrative courts, where they are separated), and these courts may have considered different criteria to determine priorities.

This situation, and the immediate aftermath, has had a number of consequences.<sup>34</sup> There has been a speedy shift to online working in order to deal with the lockdown and rules on physical distancing. Emergency legislation has been adopted, sometimes with limited parliamentary oversight. In addition, the speed of amendments to laws and regulations has made it difficult for legal challenges to be brought to the courts. There have been numerous laws, regulations and policies directed towards the judiciary, amended frequently, and not always consistent in their approach. Moreover, judicial self-governing bodies and judges’ associations have not always been consulted on measures and their possible impacts on the judicial system. In addition, tensions have arisen between the judiciary and lawyers or between state authorities (such as the executive versus the judicial branch) with each having their own priorities and demands. Overall, one can see in many jurisdictions a lack of unified approach to justice during the state of emergency.

Not all courts in all States have experienced the same issues. There was significant variation in how countries have approached the management of courts, and there have also been disparities within those countries. Similarly, common law and civil law jurisdictions may have experienced different challenges in adapting to the pandemic. Furthermore, the various courts and tribunals, whether they be criminal, administrative, civil, immigration or family – first instance or appellate – have not all faced the same challenges in continuing to operate during this time.

### 2. Need for constant revision and adaptation

The environment has been changing rapidly during the pandemic. What was considered urgent at one point in time changed as countries went through different stages in the pandemic, in particular after the end of lockdowns. In addition, there can be different or competing pressures on what are considered to be priorities, including from the point of view of judges and lawyers.

As countries started to emerge from lockdowns, courts initiated the development of “exit strategies”.<sup>35</sup> In Denmark, for example, a “Plan for Reopening Courts” set out the cases that can proceed without physical presence, those that should be carried out at home and those that demand particular attention. The plan included criteria for prioritizing cases, managing health and safety in court buildings, dealing with those who are infected, those who have symptoms of

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<sup>33</sup> For example, in Croatia, Cyprus and Denmark; see [“Coronavirus Pandemic In The EU –Fundamental Rights Implications: With A Focus On Contact-Tracing Apps”](#), Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

<sup>34</sup> See Richard Susskind, [“The Future of Courts”](#), *The Practice*, Vol. 6, Issue 5, 2020.

<sup>35</sup> For example, Belgium. See e.g., [“Exit-strategie de la crise COVID-19 dans les cours et tribunaux”](#), 16 May 2020.

COVID-19 or individuals at risk, and approaching cases flexibly.<sup>36</sup> Another example is Finland, where the National Courts Administration published a “recovery plan” on 29 May 2020, drafted in cooperation with occupational health professionals.<sup>37</sup>

### 3. Backdrop of existing challenges for judicial systems

The responses to the COVID-19 pandemic have taken place against a backdrop of challenges that courts have been facing for many years in a number of States. Financial constraints, ineffective procedures and the inability to deliver speedy justice remained. In addition, rule of law concerns observed in some countries have been exacerbated by the crisis. In addition, some participating States have seen a power shift during the pandemic away from the judiciary towards the executive, with a concern that this may become “normalized” and permanent. Further, in some jurisdictions, the absence of a functioning Constitutional and Supreme Court impeded effective oversight of emergency legislation.<sup>38</sup>

On the positive side, the pandemic has created an incentive for countries to review and reform justice systems. This has reignited discussions, for example, on virtual justice and remote delivery, as well as debates on how to reduce over-criminalization and over-incarceration by enhancing the use of non-custodial sentences and community-based approaches to offender treatment (e.g., refraining from responding to minor, non-violent offences with imprisonment).<sup>39</sup>

### 4. Cooperation between legal professions and the importance of communication

The judicial system is based on interaction between many actors, including various professions (e.g., lawyers, paralegals, probation officers), as well as members of the public. Policymakers and practitioners should, therefore, consult with relevant legal professions when adopting measures during and in the aftermath of the pandemic.

This is crucial in order to take into account all possible effects and impacts of measures adopted, to ensure the earliest possible dissemination of information to all parties potentially affected and to avoid conflict within the judicial sector at a time of crisis. For example, lawyers in Greece went on strike after the reopening of some courts was announced, arguing that they had not been consulted on the plans and neither had the health authorities approved the reopening.<sup>40</sup> In Spain, on 1 April, three of the four main judges' associations sent an urgent letter to the Permanent Commission of the General Council of the Judiciary, warning that they would refuse to work if not provided with real means of health protection.<sup>41</sup>

Therefore, as the European Commission for the Efficiency of Justice (CEPEJ) noted, “Greater consultation and coordination with all justice professionals (including lawyers, enforcement agents, mediators and social services) will help to ensure a good level of access to justice.”<sup>42</sup> Sharing of experiences is also crucial in order to incorporate lessons learnt in any future

<sup>36</sup> Marianne Gram Nybroe, “[Plan for re-opening the courts of Denmark](#)”, 14 May 2020.

<sup>37</sup> “[Management of the judiciary – compilation of comments and comments by country, Finland](#)”, CEPEJ, accessed 16 October 2020; “[Tuomioistuinviraston palautumissuunnitelmassa suositellaan, että keskeytettyjä toimintoja käynnistettäisiin harkiten uudelleen](#)”, Tuomioistuinvirasto Domstolsverket website, 29 May 2020.

<sup>38</sup> In Albania, for example, according to ODIHR Consultations held in June 2020.

<sup>39</sup> See “[Global Prison Trends 2020. Alternatives to Imprisonment](#)”, Penal Reform International, May 2020.

<sup>40</sup> “[Coronavirus Pandemic In The EU –Fundamental Rights Implications: With A Focus On Contact-Tracing Apps](#)”, Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

<sup>41</sup> Daniel Amelang, “[Coronavirus in Spain: Police Going Too Far and Judicial Protections Being Eroded](#)”, liberties.eu, 1 April 2020; “[Los jueces amenazan a Lesmes: o en 24 horas les dota de autoprotección o cerrarán juzgados de guardia](#)”, Europapress.en, 18 March 2020.

<sup>42</sup> “[CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic](#)”, CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

responses to the pandemic.

#### **Judicial cooperation in the establishment of emergency measures (Albania)**

On 16 April, the Albanian Judicial Council (KLGJ) established a Temporary Committee mandated to analyse the legal framework, identify problems relating to the infrastructure of courts. It was also tasked to draft, propose and oversee measures for judicial services during the COVID pandemic in collaboration with the court councils and chief judges. Based on this mandate, the Committee drafted a guiding instruction for the courts on the measures to be taken during the pandemic on the judicial services. It included preventive measures for the spread of the infection, provisions on planning and administrative measures for conduct of proceedings and administrative measures for court services.<sup>43</sup>

Furthermore, measures and protocols adopted in relation to courts need to be communicated to all relevant persons including lawyers and their associations and their views sought.<sup>44</sup> Due to the nature of the pandemic and the rapid adjustments it necessitates, effective communication is required within a particularly short period of time on, for example, how to visit courts in person, in which cases hearings will be held remotely, which criteria are used to determine urgent cases and how cases will be prioritized in managing the backlog.

A number of courts have provided detailed information on their websites to this end. For example, the Courts Service of Ireland published updates on the operation and conduct of various court business including on e-filing and remote hearings.<sup>45</sup> A “courts and tribunals tracker list” by the Government of the United Kingdom provides information on which courts are open, staffed or suspended.<sup>46</sup>

Different forms of communication may be needed to reach other audiences. Those who have to attend court in person, for example, may need to know whether this is feasible and if so, what procedures will be in place when they arrive. In Slovenia, for example, when individuals were invited to attend court they were provided with detailed protocols explaining how the processes will be managed.<sup>47</sup> In States outside the OSCE, some courts have used the application WhatsApp to keep in touch with lawyers and provide them with information. This practice reduced the number of people who needed to enter court buildings.<sup>48</sup>

## **5. Who decides?**

The question of decision-making powers and responsibilities, i.e., who has the authority for deciding how the judicial system should respond to the pandemic at various stages, has been a recurring and crucial matter, with different approaches adopted depending on the issue and the jurisdiction.

In some jurisdictions, decisions on how to manage courts during and post-pandemic have been taken by the executive authorities, with or without consultation from the judiciary. In some States and contexts, measures have been set out in legislation and procedural laws, while others have been determined by the judicial authorities such as judicial councils or by judges themselves. For some matters, it was a combination of these actors. In Poland, Court Presidents

<sup>43</sup> [“PËR PËRCAKTIMIN E MASAVE PËR KUFIZIMIN E PËRHAPIES SË COVID-19 GJATË USHTRIMIT TË VEPRIMTARISË GIYQËSORE DHE ADMINISTRATIVE NË GIYKATA](#)”, Supreme Judicial Council of the Republic of Albania, Instruction No. 146, 27 April 2020.

<sup>44</sup> [“CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic”](#), CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

<sup>45</sup> [“The Courts Service of Ireland”](#), The Courts Service of Ireland website, accessed 18 October 2020.

<sup>46</sup> [“Courts and tribunals tracker list during coronavirus outbreak”](#), UK Government, updated 2 October 2020.

<sup>47</sup> Consultations from webinars held in June 2020.

<sup>48</sup> See e.g., in Paraguay, [“Información General”](#), Corte Suprema de Justicia website, accessed 18 October 2020.

made the decisions, although recommendations were prepared by the Ministry of Justice.<sup>49</sup> Similarly, the Judicial Councils of Lithuania and Albania<sup>50</sup> provided guidance to the judiciary on how to organize their court activities and measures that should be adopted during the pandemic.

#### **Approach of courts in a federal state (Germany)**

In Germany, each judge was to decide independently within the provisions of existing statutory law whether it was appropriate to carry out a hearing or to postpone. General guidance was developed, e.g., by making available an overview of existing statutory provisions that provide legal grounds for procedural alternatives to a face-to-face hearing. A potential problem for ongoing criminal proceedings was resolved by a temporary legislative change. In order to avoid the need to restart criminal trials as a result of the effects of the COVID-19 pandemic, the German Bundestag passed a new regulation under which the courts were able to interrupt a main hearing for a maximum time period of three months and ten days, for example, in the event of restricted court operations or the involvement of persons belonging to at-risk groups. In addition, recommendations and binding regulations were also published by some of the federal states.<sup>51</sup> Whether or not court proceedings were to be postponed under these circumstances, however, was decided by the judges within their judicial discretion. Yet, during the height of the pandemic, most courts (including the Federal Court of Justice, the Federal Administrative Court and the Federal Constitutional Court) decided to keep visitor traffic at courthouses to a minimum.<sup>52</sup>

Experience indicates that a balance should be found between the requirement of clarity and predictability of solutions and decisions on the one hand and flexibility to decide on a case-to-case basis on the other. The former is invaluable to prevent arbitrary decisions and unpredictable outcomes for court users, in line with the principle of legal certainty. The latter maintains judicial discretion and allows taking into account the specificities of the case as well as the location, type and size of the court.

### **6. Disproportionate impact on certain groups**

It is apparent that in many jurisdictions there has been a disproportionate impact on certain groups, in particular those already marginalized and vulnerable in society.<sup>53</sup> For more on the impact of emergency measures on marginalized and minority groups, see ODIHR's comprehensive report *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*,<sup>54</sup> published in July 2020.

The right to access justice of marginalized and vulnerable groups should be taken into consideration in determining what is urgent, and in the delivery of technological solutions. Support for these individuals should continue throughout the pandemic and will need to adapt as courts emerge from the pandemic.

<sup>49</sup> Consultations from webinars held in June 2020.

<sup>50</sup> "[Management of the judiciary – compilation of comments and comments by country](#)", CEPEJ, accessed 15 October 2020.

<sup>51</sup> "[CCBE Survey: exchange of experiences and best practices between bars](#)", Council of Bars and Law Societies of Europe website, 2020.

<sup>52</sup> "[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)", ODIHR, July 2020, p. 75.

<sup>53</sup> See e.g., "[COVID is 'a colossal test of leadership' requiring coordinated action, High Commissioner tells Human Rights Council](#)", COVID-19 pandemic – Informal briefing to the Human Rights Council, Statement by Michelle Bachelet, UN High Commissioner for Human Rights, 9 April 2020; "[CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic](#)", CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

<sup>54</sup> See also "[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)", ODIHR, July 2020, II.1.C.

For example, marginalized communities are unlikely to have access to videoconferencing technology and risk being disadvantaged in terms of access to justice.<sup>55</sup> If individuals are visually impaired or have an intellectual disability, this may impact their ability to participate fully in any remote hearing.<sup>56</sup> Impairments may not be immediately apparent but may still make effective participation of parties with cognitive impairment, mental health condition and/or neuro-diverse condition more difficult.<sup>57</sup>

Particular considerations are required where parties or witnesses require confidentiality, privacy and safety, for example in domestic violence cases, where abusive partners would be able to intimidate victims during videoconferences.

### **Victims of trafficking during the COVID-19 pandemic**

Control, violence and isolation by their exploiters increased the exposure of victims of trafficking as a result of the COVID-19 pandemic, aggravated by less access to assistance, including medical services, psychological services and legal assistance. Changes in procedure, delays and postponements in administrative, criminal and civil cases as a result of emergency measures negatively impacted victims' and survivors' access to protection, justice and redress.<sup>58</sup> According to a global survey of survivors of trafficking and frontline stakeholders conducted by ODIHR and UN Women (between 27 April and 18 May 2020), about half of the survivors experienced delays in receiving the statutory status of victim of trafficking or in other types of legal procedures. Respondents also indicated that they are not receiving information about the status of their cases.<sup>59</sup>

## **7. Legality, data protection and privacy**

Even though IT solutions may have been required at the first wave of the pandemic, their use in addition to or as an alternative to existing procedural requirements necessitates a clear basis in law, and must comply with international standards on data protection and privacy.<sup>60</sup> Confidential information being shared accidentally (e.g., for failure to mute microphones), respecting privilege, challenges ensuring private hearings are not recorded – all are issues that courts have faced.<sup>61</sup>

As considered in section D below, when accessing and sharing files in electronic interactions between individuals and using videoconferencing, data must be transmitted securely and confidentially. In Lithuania, for example, the judiciary and court staff working remotely must comply with the government's Resolution no. 716 of 24 July 2013 on the General Description of Electronic Information Security.<sup>62</sup> The exponential and rapid increase in the use of different technologies, alongside constant changes to the platforms being used, indeed raises concerns

<sup>55</sup> See e.g., ["Reaching equal justice report: an invitation to envision and act"](#), Canadian Bar Association, November 2013.

<sup>56</sup> Nigel Fielding et al., ["Video Enabled Justice Evaluation"](#), Sussex Police and Crime Commissioner and University of Surrey, Final Report Version 11, March 2020. With respect to a refusal to extend custody time limits, Judge Raynor held that "the lack of money provided by Parliament to provide sufficient space for trials to be conducted does not amount to a good nor a sufficient cause to extend the custody time limit in this case." (*R v Richard Graham*, 22 July 2020, Woolwich Crown Court, para 34(b)).

<sup>57</sup> ["Inclusive justice: a system designed for all"](#), Equality and Human Rights Commission, United Kingdom, June 2020, pp.17-20.

<sup>58</sup> ["Guidance: Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic"](#), ODIHR and UN Women, July 2020, pp. 8, 11.

<sup>59</sup> *Ibid.* pp. 18, 99.

<sup>60</sup> ["CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic"](#), CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

<sup>61</sup> See e.g., Rebecca Halpin, ["L and RS Note, Remote Court Hearings"](#), Oireachtas Library and Research Service, 28 July 2020, pp.19-20.

<sup>62</sup> ["Management of the judiciary – compilation of comments and comments by country"](#), CEPEJ, accessed 15 October 2020.

over the protection of such data. In addition, there may be lack of clarity about who owns the data – the provider or the court – in particular when stored in cloud-based solutions. Consequently, considerations about where the data centre is hosted, whether there is end-to-end encryption and requirements that court users certify confidentiality are all tools that could be used to ensure greater protection.<sup>63</sup>

## 8. Recommendations

- Flexible exit strategies for emerging from restrictions imposed by the pandemic should be considered by courts.
- States should avoid “hyper-production” of laws, decrees, regulations and instructions on emergency measures for the judiciary from different levels of power (legislative, executive, judicial). Such laws, decrees, regulations and instructions should not be contradictory or vaguely formulated and should be clear on the time when the measures start and end. Laws and regulations adopted as a response to the emergency should include sunset clauses, be temporary in nature and preferably be kept separate from regular, non-emergency legislation.
- Courts should ensure that the right to a fair trial is respected during states of emergency and that nobody is ever subject to measures that would circumvent non-derogable rights.
- Judicial oversight should be available to review both the constitutionality and legality of any declaration of state of emergency, and any implementing measures, to evaluate the proportionality of the restrictions, as well as procedural fairness of application of emergency legislation.
- Higher judicial authorities and court presidents should issue guidance to assist individual judges in determining how to manage their responses to the pandemic. Feedback should be sought, and guidance should be amended accordingly.
- Courts, when determining measures, should consider how to maintain a balance between clarity and predictability and judicial discretion and flexibility.
- Courts could consider the establishment of committees to propose and oversee measures to manage the pandemic.
- The judiciary should identify ways to share practices on their responses to the pandemic, among and across different courts, different regions of the country and different jurisdictions.
- Dialogue should be established with a wide range of professions, in particular with lawyers and bar associations, in order to ensure that considerations of access to justice and safety measures are adequately taken into account.
- When designing their protocols and responses to the pandemic, courts should consider the needs of vulnerable persons and the particular impact on their rights to fair trial and access to justice.
- Any measures and protocols should be communicated to all users, rapidly and regularly, and in ways which are accessible and which take account of vulnerabilities. Those attending court should be provided with detailed guidance.
- Alternative means of communicating with court users should be considered in order to reduce the numbers of persons attending court in person.
- The secure and confidential transmission of data needs to be ensured in the provision of any technology used by the courts.

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<sup>63</sup> [“Delivering justice during the COVID-19 pandemic and the future use of technology”](#), The Standing International Forum of Commercial Courts, Memorandum, 29 May 2020, para 5.

## C. COURTS DURING THE PANDEMIC

Courts used different methods and tools during lockdowns to determine what matters were urgent and could not be postponed. In addition, technological solutions were employed, often very quickly, to manage cases. The impact of the pandemic on other professionals who engage with the court, including lawyers, probation officers and translators, among others, has also required consideration.

### 1. Defining urgent cases

In light of the partial or full closure of courts in many countries during the height of the pandemic, the capacity of courts to process cases was reduced, prompting the question of which cases to suspend, which ones to continue and which ones to prioritize as urgent, sometimes referred to as the “triaging of cases”. Defining what is urgent varied from State to State and across different types of courts<sup>64</sup>; however, certain commonalities could also be found.

As noted above, some general guidance on the determination of urgency in the form of laws, regulations or recommendations is beneficial to avoid arbitrariness and ensure fairness, transparency and consistency, if at the same time balanced with flexibility to decide on a case-by-case basis. The International Commission of Jurists (ICJ) and some other organizations have provided helpful principles to assist in the determination of urgency.<sup>65</sup>

Key criteria should include, first and foremost, the requirements of international law and the need to prevent irreparable harm. Accordingly, urgent cases should include matters related to the violation of rights, to which remedial action would likely be ineffective upon delay. This is probable where individuals with specific vulnerabilities are at risk of physical or mental harm or neglect. It has been widely reported, for example, that women found themselves at an elevated risk of domestic violence during lockdown situations.<sup>66</sup> Children, older persons and persons with disabilities were also more vulnerable to violence and neglect at times of emergency.<sup>67</sup>

Any criteria for the suspension versus continuation of procedures, and for their prioritization should be subject to prior consultation with all legal professions, including judges and lawyers and their respective associations. They should be objective, fair, clear and transparent and should not undermine judicial independence or be discriminatory.

In light of human rights obligations, the consideration of cases of individuals deprived of their liberty also needs to feature on the list of priority cases, in particular persons after arrest and in pre-trial detention due to their fundamental right to be brought before a judge.<sup>68</sup> Those who have been held on remand longer than they would have been without the pandemic should also be considered as urgent, bearing in mind the obligation of States and authorities to keep pre-trial detention as short as possible and the need to reduce (or at least not add to) the numbers

<sup>64</sup> [“Coronavirus Pandemic In The EU – Fundamental Rights Implications: With A Focus On Contact-Tracing Apps”](#), Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

<sup>65</sup> [“The Courts and COVID-19”](#), International Commission of Jurists (ICJ), 5 May 2020.

<sup>66</sup> See [Coronavirus emergency: challenges for the justice system](#), OHCHR, accessed 16 October 2020; [“Covid-19 and ending violence against women and girls”](#), UN Women, Brief, 2020.

<sup>67</sup> See [“OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic”](#), ODIHR, July 2020, p. 20 and p. 127; [“Agenda for Action”](#), Inter-Agency Working Group on Violence against Children, April 2020; [“Human rights of older persons in the age of Covid-19”](#), Statement by the United Nations High Commissioner for Human Rights, Michelle Bachelet, 12 May 2020; [“Covid-19 and the Rights of Persons with Disabilities: Guidance”](#), OHCHR, 29 April 2020.

<sup>68</sup> Article 9(3) of the International Covenant on Civil and Political Rights provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”.

in detention. Indeed the UN Subcommittee on Prevention of Torture (SPT) has called on States in the context of the pandemic to “review all cases of pretrial detention in order to determine whether it is strictly necessary in the light of the prevailing public health emergency and to extend the use of bail for all but the most serious of cases”.<sup>69</sup>

**Examples of prioritization:**

- In Ontario, Canada, various matters were identified as urgent, such as those relating to public health and safety, child protection, etc. The courts also relied on criteria such as the immediacy of the matter; seriousness (e.g., it would significantly affect health or safety or economic well-being of one of the parties); that the concern is definite and material, rather than speculative or theoretical; and that there is evidence to support the claim of urgency (e.g., medical evidence that the health issue was serious, etc.).<sup>70</sup>
- Laws adopted during the height of the pandemic in Italy, Portugal and Slovenia provided that urgent acts in which fundamental rights were at stake be carried out despite situations of lockdown, such as proceedings where minors are at risk, in urgent guardianship and domestic violence proceedings.<sup>71</sup>
- In some jurisdictions, such as in Serbia, criminal offences committed during or related to the state of emergency were among the trials that continued to be held during lockdown.
- In administrative courts in Austria, the need for interim relief and the legality of emergency measures (speedy provision of legal security) were among the main considerations for the urgency of cases.
- The Dutch judiciary adopted a general regulation on handling cases which included among the urgent cases some criminal hearings, insolvency and family cases such as child protection.<sup>72</sup>
- In North Macedonia, Judicial Council Decision No. 02-606/1,<sup>73</sup> enacted on 17 March 2020, included a recommended list of urgent cases for common courts:
  - Criminal cases where the defendant or some of the defendants are in detention, under house arrest or subject to other measures for securing presence of defendant during the criminal procedure;
  - Criminal cases related to domestic violence;
  - Criminal cases in which defendants do not have regular or temporary households in North Macedonia but the crimes were committed in the country;
  - Criminal cases that risk reaching the statute of limitations;
  - Criminal cases for specific criminal offences;<sup>74</sup>
  - Misdemeanour cases of an urgent nature;
  - Cases related to the application of temporary measures;
  - Cases that are in the phase of enacting a decision;
  - Cases in which there is a danger of violation of the principle of speedy trial;
  - Cases that are urgent as defined by law;
  - Receipt of writs and other matters related to preclusive deadlines.

The Decision also included separate paragraphs for cases within the jurisdiction of appellate courts, the State Supreme Court, Administrative Court and Higher Administrative Court.

<sup>69</sup> Subcommittee on Prevention of Torture (SPT), CAT/OP/40/2, “[Advice of the Subcommittee to States parties and national preventive mechanisms relating to the coronavirus disease \(COVID-19\) pandemic](#)”, 2 April 2020, section II.9.

<sup>70</sup> Criteria defined by Justice Kurz in *Thomas v. Wohleber*, [2020 ONSC 1965 \(CanLII\)](#), 30 March 2020, para. 38.

<sup>71</sup> “[Coronavirus pandemic in the EU – Fundamental Rights Implications](#)”, Fundamental Rights Agency website, Bulletin 1, 1 February – 20 March 2020.

<sup>72</sup> “[Tijdelijke algemene regeling zaaksbehandeling Rechtspraak](#)”, Rechtspraak.nl, 28 August 2020.

<sup>73</sup> Judicial Council Decision No. 02-606/1 was supplemented by two Decisions. No. 02-606/2, enacted 7 May 2020 (adding cases of domestic violence as urgent), and No. 02-606/4, enacted 29 May 2020 (adding a provision referring to operation of second and third instance courts and administrative courts).

<sup>74</sup> The offence of “Transmission of contagious disease” (Article 205 of the Criminal Code), “Failure to comply with health regulations during an epidemic” (Article 206), “Failure to provide medical care” (Article 208), “Prevention of an official person in the performance of official action” (Article 382), “Attack on an official person in the performance of official, police or security work” (Article 383), “Organizing resistance” (Article 387).

Other procedures dealing with potentially unjustified detention should also be considered a priority, not least in light of the risk of infection in usually cramped conditions in prison. OHCHR and WHO have emphasized that persons deprived of their liberty face greater vulnerabilities as the spread of the virus can expand rapidly due to the usually high concentration of persons deprived of their liberty in confined spaces and to the restricted access to hygiene and health care in some contexts.<sup>75</sup> Indeed, the UN Working Group on Arbitrary Detention has called on states to review “existing cases of deprivation of liberty in all detention settings to determine whether the detention is still justified as necessary and proportionate in the prevailing context of the COVID-19 pandemic.”<sup>76</sup>

#### **“Urgent matters” defined by law (Slovenia)**

In Slovenia “urgent matters” are defined in Article 83 of the Courts Act (as amended in July 2020), and include matters that can be adjudicated during the summer recess from 15 July to 15 August, and in case of natural and other serious disasters, epidemics or similar extraordinary events based on a decree of the President of the Supreme Court of the Republic of Slovenia, the following matters are considered urgent:

1. Investigations and adjudication in criminal cases in which the defendant is deprived of liberty or the defendant’s liberty is restricted, and in criminal cases concerning aliens who are not residents of the Republic of Slovenia,
2. Non-litigious matters concerning the detention of persons in psychiatric wards or health organizations,
3. Non-litigious matters under the law governing prevention of domestic violence,
4. Enforcement matters relating to procedures for the protection of the interests of children,
5. The issue of an interim decision,
6. Disputes over the publication of a correction of published information,
7. Inventory of a decedent’s property,
8. Insolvency and winding-up proceedings,
9. Other matters for which the law so provides.

Furthermore, national courts must remain competent and capable to evaluate and, if necessary, nullify any unlawful imposition or unjustified extension of emergency measures, as the UN Special Rapporteur on the Independence of Judges and Lawyers has emphasized.<sup>77</sup>

## **2. Who determines urgency?**

Who decides which cases are urgent varied from jurisdiction to jurisdiction. In some States, individual judges have determined what is urgent on a case-by-case basis, such as in Albania, with very general or no guidance from, for example, judicial councils. In Slovenia, on the other hand, a list of urgent cases was defined by law (see above).<sup>78</sup> In Greece, “urgent cases” to be handled by courts throughout the COVID-19 pandemic were explicitly defined by law.<sup>79</sup>

A two-pronged approach, with decisions taken on a case-by-case basis by individual judges but based on general guidance and/or recommendations from judicial councils seems to be a sensible compromise. Regulation or recommendations regarding criteria to be considered are beneficial to avoid arbitrariness and ensure fairness, transparency and consistency. At the same

<sup>75</sup> [“Interim Guidance, COVID-19: Focus on Persons Deprived of their Liberty”](#), Inter-Agency Standing Committee (IASC), March 2020, p. 2.

<sup>76</sup> Working Group on Arbitrary Detention, Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies, 8 May 2020.

<sup>77</sup> [“Report of the Special Rapporteur on the Independence of Judges and Lawyers”](#), A/63/271, 12 August 2008, paras. 16-19, 66.

<sup>78</sup> Article 83 Courts Act, Republic of Slovenia.

<sup>79</sup> Consecutive Acts of Legislative Content and Joint Ministerial Decisions, as referred to in ODIHR consultation.

time, a case-by-case approach is in keeping with judicial independence and is required to assess the criteria in any given case. Courts also need to retain considerable flexibility to adapt to the (often swift) changing nature of the pandemic and responses to it. In addition, the “organ” that takes decisions on urgency needs to be determined in advance, to prevent any tampering and inconsistency.

#### **Triaging of cases (Ontario, Canada)**

In Ontario, Canada, the Chief Justice set out broad parameters for what was to be dealt with as urgent. One judge in each court was assigned to decide on triaging and urgency of cases. The same judge also determined any adjournment request, thereby enabling an overview of all cases and ensuring consistency in approach. The solution ties in with the institution of an “on-call judge” that existed before the pandemic. These are individual judges who are on-call to deal with emergencies. In this mechanism, decisions on urgency constitute judicial decisions in the same way as any decision on scheduling and assignment of cases.<sup>80</sup> It constitutes an administrative decision without prejudice to the merits of the case<sup>81</sup> and is made simply and quickly. Ontario’s triage judges are encouraged to limit their reasoning in such decisions to 2-3 pages. In addition, case summaries of COVID-19 cases are prepared on a regular basis and circulated to all judges by e-mail.

### **3. Knock-on impact of external pressures on the courts**

Of course, courts do not operate in isolation. Consequently, the impact of the pandemic on other actors outside of the judiciary has also influenced the operation of courts.

Probation services and community sentences have been suspended or significantly limited in most States during lockdown and when emerging from the pandemic. As the Confederation of European Probation noted, the pandemic resulted in, for example, reduced availability of staff, reduction or suspension of in-person meetings, and suspension or alternative delivery of community service sentences and treatment programmes.<sup>82</sup> This has likely impacted, and may continue to impact, the courts’ imposition of community orders.<sup>83</sup> There is also some concern that reduction in the availability of probation services may ultimately result in lengthier sentences where offenders will need more time to complete required activities.<sup>84</sup>

Furloughing, closure of offices and redundancies have been experienced by various professions, including translators, interpreters and notaries. The organization Fair Trials noted that, as a result of severe restrictions of solicitors’ access to their clients, suspects in police custody were receiving poor quality advice.<sup>85</sup> Lawyers’ offices have also been affected by closures or reduction in staff numbers,<sup>86</sup> impacting access to legal assistance and advice. Some lawyers have attempted to address these challenges in innovative ways. In Kyrgyzstan, free legal aid was provided by phone, social media and email.<sup>87</sup>

<sup>80</sup> *Wang v. 2426483 Ontario Ltd.*, [2020 ONSC 2040](#).

<sup>81</sup> See, *Grant v. Grant*, [2020 ONSC 2455](#).

<sup>82</sup> For information on how probation has been affected in different jurisdictions see: “[COVID-19: measures and protocols in probation](#)”, Confederation of European Probation website, accessed 16 October 2020; see also England, House of Commons Justice Committee, HC 461, “[Coronavirus \(COVID-19\): The impact on probation systems](#)”, 20 July 2020.

<sup>83</sup> Lizzie Dearden, “[Coronavirus sends justice system into 'meltdown' as criminal court case backlog passes 37.000](#)”, Independent.co.uk, 29 March 2020.

<sup>84</sup> See “[Coronavirus. Preventing harm and human rights violations in criminal justice systems](#)”, Penal Reform International, 14 July 2020, pp. 32-33.

<sup>85</sup> “[Coronavirus \(COVID-19\): The impact on prison, probation and court systems](#)”, FairTrials.org, July 2020, paras 2.3-2.19.

<sup>86</sup> Jake Richards, “[How will the justice system withstand the coronavirus pandemic?](#)” Prospectmagazine.co.uk, 18 March 2020.

<sup>87</sup> [The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan](#), International Commission of Jurists, Briefing Paper, 2020, para 20.

### **Initiatives to provide legal aid during lockdown**

The Macedonian Young Lawyer Association<sup>88</sup> and the Kosovo<sup>89</sup> Law Institute's Free Legal Aid Center<sup>90</sup> offered legal aid during the lockdown, establishing special hotlines for detainees and asylum seekers. Through television and social media awareness campaigns and toll-free phone numbers, the organizations informed people about their rights and ways to access legal support during the COVID-19 lockdown.

Little information is available to date about the accessibility of legal aid during the pandemic and whether it has been available, for example, in countering excessive emergency measures. In some countries, such as Portugal, social services are involved in the assessment of eligibility of legal aid (on financial grounds), which likely resulted in delays in decisions given the impact of the pandemic on staffing and workload of social services, and restrictions in accessing such services during lockdown. Such conditions may have led to delays in decisions on eligibility for legal aid and the expiry of appeal deadlines, resulting in increased self-representation or omission of the appeal altogether. A review of the accessibility and effectiveness of legal aid during and in the aftermath of the pandemic by States and courts is advisable.<sup>91</sup>

## **4. Recommendations**

- Clear criteria should be established, preferably by law, with a margin of discretion for judges, for the determination of an “urgent case”.
- The criteria should be objective, fair and clear and should not undermine judicial independence or be discriminatory.
- Criteria should be transparent and available to others for consultation, including members of the legal profession and their associations.
- Courts should retain flexibility to adapt to the pandemic. A case-by-case approach in determining what is urgent may be appropriate as a way of ensuring judicial discretion and independence.
- Guidance by law, regulation or recommendations can avoid arbitrariness and ensure fairness, transparency and consistency.
- The body taking decisions on urgency needs to be determined in advance, to prevent any tampering or inconsistency.
- Determining what is urgent should take into consideration those cases where defendants are in (pre-trial) detention, cases where immediate protection is required by women or other vulnerable groups from (domestic) violence (in particular during confinement in quarantine), other urgent family disputes and cases relating to violation of measures concerning COVID-19 that imply irreparable harm. The availability of certain remedies is required by international human rights obligations and cannot be suspended.
- Those who have been held on remand longer than they would have been without the pandemic should also be considered as urgent.
- Other procedures dealing with potentially unjustified detention should also be considered a priority, particularly consider the risk of infection in usually cramped conditions in prison.
- Determining what is urgent should be a judicial decision, taken without prejudice to the

<sup>88</sup> “[COVID – 19 Emergency. Free legal aid for asylum seekers in \[the\] Republic of North Macedonia](#)”, Macedonian Young Lawyers Association website, accessed 16 October 2020.

<sup>89</sup> Any reference to Kosovo, whether to the territory, its institutions, or population, is to be understood in full compliance with United Nations Security Council Resolution 1244.

<sup>90</sup> Kosovo Law Institute's Free Legal Aid Center, accessed 16 October 2020, <<https://kli-ks.org/en/>>.

<sup>91</sup> The next report (2018 data) of the CEPEJ, which regularly collects data on legal aid, is expected in October 2020. For information from before the COVID-19 pandemic, see “[European Judicial Systems | Data Tables](#)”, CEPEJ, Public.tableau.com, accessed 16 October 2020.

merits of the case, and made simply and quickly. Any decisions should be communicated promptly to all stakeholders.

- Courts need to consider the impact of the pandemic on other actors outside of the judiciary, including the legal profession, probation, notaries, interpreters, etc.
- The accessibility and effectiveness of legal aid during and in the aftermath of the pandemic by States and courts should be provided. There should be the possibility of submitting and reviewing applications for legal aid online.

## D. VIDECONFERENCING AND OTHER IT SOLUTIONS

The most discussed aspect of the impact of COVID-19 on courts may be the rapid increase in the use of technology to manage the workload of courts and to maintain some functioning during lockdown and in its aftermath.

Such IT solutions include video platforms to conduct remote hearings, systems to enable the filing, dissemination and sharing of documents, digital case management and e-signatures. The use of such technology requires internet connectivity and data security, and access of court users to computers, cameras/webcams, microphones, screens and Wi-Fi.

While reluctance among judges to adapt to IT solutions and online delivery has been noted as almost proverbial in the past, the pandemic catapulted the judiciary into the age of technology. Some IT tools have been absorbed by judges enthusiastically in a number of jurisdictions, sometimes overlooking its insufficiencies for parties, and related fair trial concerns.

### 1. Electronic case management

The ability of the judicial system to operate remotely requires that those involved have access to, and are able to file and share, documents electronically, and subsequently an effective digital case management system. As the Fundamental Rights Agency (FRA) noted, this has been problematic if courts are not fully adapted to using such technology.<sup>92</sup>

Judicial systems that require files or motions to be picked up or delivered in person from or to police stations or courthouses faced problems during lockdown and while public transport was not available or restrictions on movement applied.<sup>93</sup> Correspondence with the courts, which required postal services, has also been affected.

As a consequence of the pandemic, many States introduced or expanded avenues of electronic filing of court documents. For example, in Azerbaijan, the electronic filing of documents was made possible with additional support provided by telephone for each court.<sup>94</sup> In Kazakhstan, a “Judicial Cabinet” was established that provided access to the courts through a single electronic filing platform. It enables the electronic submission of documents by smartphone, tablet or computer. Statistics indicated that over 62,000 applications (93.5 per cent of all applications) were submitted in this way between March and April 2020. In Estonia, which has been building up its e-government system since the mid-1990s, digital access is provided to a range of government services, facilitating also the filing of documents at court.

<sup>92</sup> [“Coronavirus Pandemic In The EU –Fundamental Rights Implications: With A Focus On Contact-Tracing Apps”](#), Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

<sup>93</sup> [“Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings”](#), FairTrials.org, 30 March 2020.

<sup>94</sup> [“Management of the judiciary – compilation of comments and comments by country”](#), European Commission for the Efficiency of Justice, 15 October 2020.

For cases to be handled remotely, individuals need to be able to prove their identity if they are not physically present in court. To this end, several States have permitted the use of electronic signatures by amending, for example, criminal and civil procedural codes.<sup>95</sup>

Judges, too, need to be able to authenticate themselves and validate decisions if cases are handled remotely. Several States have introduced an electronic option through the use of e-signatures. In Norway, for example, legislation was amended to permit the adoption of decisions if there is a scanned copy of the presiding judge's signature and the judge's confirmation that the other judges have agreed with the decision.<sup>96</sup>

## 2. Problems faced with IT solutions

The speedy adaptation to a range of technologies inevitably generated problems, with different challenges experienced depending on the type of court and hearing. Procedures involving witnesses, children or individuals in detention required specific considerations.

Firstly, prompted by the hasty adaptation to the pandemic, technologies were introduced or expanded without adequate legal basis in some countries. In Bulgaria, for example, concerns have been raised regarding the legality of judges using videoconference technology for hearings on the basis of a governmental recommendation or decree.<sup>97</sup> In Serbia, between 27 March and 1 April, courts used Skype for trials against those charged with breaches of COVID-19 related regulations following a simple instruction sent in a letter by the Ministry of Justice. Subsequently, a decree was signed on 1 April by the President and the Prime Minister to authorize remote hearings. As it lacked clarity, on 9 April the High Judicial Council issued a conclusion stating that it considers the decree applicable only to trials against those charged with breaches of anti-COVID-19 regulations.<sup>98</sup>

Due to the speed of introduction and lack of general guidance to judges, there was also a lack of consistency in the use of IT solutions, including teleconference hearings; some judges used it, others did not, and judges used it differently. This resulted in confusion of court users and lawyers, and a considerable amount of arbitrariness.

Problems included poor internet connection, the lack of necessary equipment among court users, systems that lacked the sophistication to cope with sudden demands, inadequate data protection, lack of training in the use of the new technology and lack of IT-assistance when difficulties arose.<sup>99</sup>

## 3. Videoconferencing and remote hearings

One of the ways in which courts have adapted to lockdowns and the requirements of physical distancing is the use of videoconferencing. Consequently, analysis of the challenges and effective use of videoconferencing to conduct virtual trials and other hearings has become increasingly available,<sup>100</sup> and guidance for judges in remote hearings has been produced by various

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Consultations from webinars held in June 2020.

<sup>98</sup> See "[SASLUŠANJA ZA LICA KOJA SU PREKRŠILA MERU SAMOIZOLACIJE PUTEV VIDEO LINKA](#)", Ministarstvo Pravda, Republika Srbija, mpravde.gov.rs, 26.06.2020; Tanasije Marinković, "[Neustavna uredba o suđenju preko Skajpa](#)", danas.rs, 10 Aprila 2020; Goran Ilić, "[Virus neznanja nikad ne spavaprof](#)", Otvorena Vrata Pravosuda, 07.04.2020; <<https://vss.sud.rs/sites/default/files/attachments/ZAKLIUCAK.pdf>>.

<sup>99</sup> "[The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan](#)", International Commission of Jurists, Briefing Paper, 2020, para 34.

<sup>100</sup> See, for example, a virtual mock trial carried out by the UK-based organization Justice, <<https://justice.org.uk/our-work/justice-covid-19-response/>>.

judicial authorities.<sup>101</sup>

A variety of different platforms (such as Skype, Zoom, Microsoft Teams, Cisco's Webex, Polycom Real presence, Cloud Video Platform, BlueJeans, PEXIP, TrueConf, etc.) have been used by the courts, sometimes on an experimental basis. Cost implications of available software means that, where courts do not purchase the necessary licenses, judges may be forced to use free-of-charge applications that do not provide for unlimited length and other features necessary for a remote trial hearing. Some countries and courts have been conducting virtual hearings for some time, and others are seeking to learn lessons from their experiences (see Appendix for list of resources).

#### **Different features of videoconference technology**

- A Memorandum of the Standing International Forum of Commercial Courts provides a checklist to assist courts to determine the features and benefits of different platforms and suitability for their use. It covers issues such as the strength of the system and level of support provided, security (such as where the platform is hosted, how secure the data is and encryption), the ability to operate with poor connections and to integrate with other systems, the availability of separate links and "rooms" for judges during hearings, as well as ease of use as reported by lawyers and judges.<sup>102</sup>
- "Remote Courts Worldwide" (<https://remotecourts.org>) is a site that seeks to enable the judiciary, court staff and users to share their experiences of remote hearings. It was established by Professor Richard Susskind (Society for Computers and Law) and is supported by England and Wales' Her Majesty's Courts & Tribunals Service.

Countries where videoconferencing was used in civil and criminal procedures included, among others, Austria, Croatia, France (where hearings were also held by phone), Hungary, Ireland,<sup>103</sup> Kazakhstan (where Zoom and the application TrueConf were used), Portugal, Serbia, Slovenia, Sweden and the United Kingdom. In Ukraine, the State Judicial Administration decided to allow the use of various applications for videoconferencing rather than relying on one. Participants, however, had to pre-register with a digital signature or login and password details.<sup>104</sup> Some judges reportedly broadcasted hearings via YouTube to ensure public access.<sup>105</sup> In North Macedonia, remote hearings were enabled by Government Directive during the state of emergency; however, the decision was described by judges as very vague. As a result, remote hearings were only reported from the Basic Court Kavadarci<sup>106</sup> and ended with the termination of the state of emergency there, which ended also the legal basis for remote hearings.<sup>107</sup> In Greece, by contrast, there was no regulatory framework allowing for remote hearings; only the remote deliberation of cases among judges of, for example, three-judge panels were enabled during the partial suspension of court sessions (13 March to 6 May 2020), whereas all trials were postponed to a later date.<sup>108</sup>

While more detailed guidance on fair trial safeguards, including in the context of videoconferencing, may be added to this publication later, this section seeks to identify some of

<sup>101</sup> "Good Practice for Remote Hearings", Judicial College Equal Treatment Bench Book (ETBB) Committee, May 2020.

<sup>102</sup> "Delivering justice during the COVID-19 pandemic and the future use of technology", The Standing International Forum of Commercial Courts, Memorandum, 29 May 2020, para 5.

<sup>103</sup> See Rebecca Halpin, "L and RS Note, Remote Court Hearings", Oireachtas Library and Research Service, 28 July 2020.

<sup>104</sup> Weekly analytics of the Centre of Policy and Legal Reform (CPLR) for 21 – 27 April 2020, <<https://pravo.org.ua/en/>>.

<sup>105</sup> Information recorded at a conference call organized by ODIHR on "The Functioning of Courts in the COVID-19 pandemic" on 9 April 2020.

<sup>106</sup> See, for example, Vasko Magleshev, "COVID puts justice in North Macedonia on standby", Balkan Insight website, 14 August 2020; and "Онлајн судење за разбојништво во Основниот суд Кавадарци", akademik.mk, accessed 16 October 2020.

<sup>107</sup> ODIHR consultations.

<sup>108</sup> ODIHR consultations.

the key issues for judges and courts to consider.

#### 4. Conditions and criteria for the use of remote hearings

First of all, the ability of courts to hold hearings remotely depends on the existence of a legislative or regulatory basis. In some countries this option was available prior to the pandemic, although usually only for some types of procedures. For example, in Croatia, in civil procedures, it has been possible to hold remote hearings since September 2019, as permitted by Article 115 of the Civil Procedure Act.<sup>109</sup> Conversely, in Italy, legislation was amended in reaction to the pandemic in April 2020 to permit videoconferencing in some mediation procedures, subject to consent of all parties of the proceeding. This option has been extended to apply after the end of the emergency period.<sup>110</sup>

Secondly, substitution of hearings by videoconference or other IT solutions requires that the respective technical solutions are in place for *all* parties involved, i.e., judges, lawyers, prosecutors, parties, witnesses, interpreters (where applicable) with sufficiently reliable and continuous audio and video. Technical support should be made available for the parties in order to ensure their effective participation, and hearings need to be halted if the connection is interrupted. It can only continue once the problem is resolved. It should be noted that persons who are not tech savvy or have sensory disabilities may not be able to use or participate effectively using such technology. Having test runs of the technology as well as additional means of communicating with the participants (such as phone numbers) may alleviate some of these challenges. Some parties may not have access to a reliable internet connection, the software or knowledge to use the necessary platforms. Documents and materials also need to be shared electronically in a secure way.

A number of further considerations have been compiled over the course of the first phase of the pandemic that may assist in determining when remote hearings are appropriate<sup>111</sup>:

- The length of delay and its potential impact on the rights of defendant and parties (including increased risk of detention, encompassing increased vulnerability to COVID-19)<sup>112</sup>;
- The nature of the hearing, including its complexity, the need for witnesses and interpreters and the impact of the legal matter on the rights of defendant (e. g., whether there is an increased risk of detention);
- The equipment available to all parties and persons involved;
- The existence of impairments or other factors that could negatively affect the ability of the parties to participate in the proceeding (e. g., visual and other relevant disabilities and impairments, age and familiarity with IT systems);
- Whether the parties have or will need legal representation;
- The ability of a party and lawyer to interact with each other confidentially during the remote/ videoconference hearing;
- The need to summon witnesses; and
- The need to (physically) examine evidence.

<sup>109</sup> [“CCBE Survey: exchange of experiences and best practices between bars”](#), Council of Bars and Law Societies of Europe website, 2020.

<sup>110</sup> Article 83 of legislative decree n. 18/2020 (as amended). [“Approvato nel Cura Italia l’Emendamento che Disciplina lo Svolgimento delle Procedure di Mediazione in Videoconferenza”](#), MondoADR, 8 April 2020; see [“Virtual Civil Trials”](#), Law Library, Library of Congress website, April 2020.

<sup>111</sup> [“Safeguarding the right to a fair trial during the coronavirus pandemic”](#), FairTrials.org, 30 March 2020; ODIHR Online consultations; see also [“Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe”](#), FairTrials.org, June 2020.

<sup>112</sup> [“Interim Guidance. COVID-19: Focus on Persons Deprived of their Liberty”](#), Inter-Agency Standing Committee (IASC), March 2020, p. 5.

Decisions may ultimately need to be taken on a case-by-case basis, but they should be based on predictable, general rules and take into account the overarching principle of the right to a fair trial. In criminal cases, fair trial considerations speak in favour of a face-to-face hearing, in particular in the context of obtaining testimonial evidence.<sup>113</sup> The seriousness of the impending sanction and the preference of the defendant should be taken into account.

## 5. Fair trial concerns

The underlying concern is the range of fair trial issues that could be jeopardized by videoconference hearings. For individuals who were arrested or detained, Article 9(3) of the ICCPR and Article 5(3) of the ECHR include an explicit obligation that they be brought promptly before a judge or other competent legal authority. The purpose of the provision – to enable the judge to notice any ill-treatment or torture of a suspect/defendant – cannot be achieved in a remote hearing. The safeguard acknowledges that the power imbalance between detainees and those in charge is a factor rendering detainees more vulnerable to ill-treatment. This is aggravated by the almost complete dependency upon the institution where they are detained and the isolation from family.<sup>114</sup> The UN Human Rights Committee has, therefore, clarified that detainees have the right to appear in person – physically – before the court.<sup>115</sup>

A public hearing is required by Article 14(1) of the ICCPR and Article 6 of the ECHR in certain types of procedures. Failure to enable this impedes the public from participating and observing justice being done.<sup>116</sup> The UN Human Rights Committee has noted that “all trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly”, and States must provide adequate facilities for the attendance of interested members of the public, within reasonable limits.<sup>117</sup> Furthermore, “apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media”.<sup>118</sup> Some countries or courts have attempted to compensate for the lack of public trials by broadcasting or streaming online hearings. However, there are concerns about wholesale broadcasting of entire criminal proceedings, especially on third party platforms. Lack of public access also impacts the possibility of trial monitoring and observation, which is a crucial tool to identify structural and fair-trial shortcomings.

The principle of equality of arms necessitates that the defendant should not be put at a disadvantage during criminal trials, and there are respective concerns in a videoconference setting. Individuals may be less likely to be represented, and decisions may be more likely to result in prison sentences.<sup>119</sup>

Another concern regarding remote hearings refers to the effectiveness of participation and legal representation. For example, videoconferencing deprives the parties and judge from observing non-verbal cues and from observing the courtroom in its entirety, which impedes orientation and assessment of witness credibility. Effective and confidential communication between

<sup>113</sup> *Sakhnovskiy v. Russia*, 2 November 2010; *Sakhnovskiy v. Russia*, 27 November 2018; *Marcello Viola v. Italy*, 5 October 2006; *Vladimir Vasilyev v. Russia*, 10 January 2012; *Yevdokimov and Others v. Russia*, 16 February 2016; *Gorbunov and Gorbachev v. Russia*, 1 March 2016; *Repahshkin v. Russia*, 16 December 2010.

<sup>114</sup> “[Groups in situations of vulnerability](#)”, Association for the Prevention of Torture (APT) website, accessed 18 October 2020.

<sup>115</sup> Human Rights Committee, [General Comment No. 35, Article 9 \(Liberty and security of person\)](#), CCPR/C/GC/35, 16 December 2014, section IV (stating that “[i]n general, the detainee has the right to appear *in person* before the court” (para. 32)). See e.g., *Schiesser v. Switzerland*, European Court of Human Rights, 4 December 1979, para. 31.

<sup>116</sup> For discussion, see “[Public Trials. Remote Courts as Public Spaces](#)”, *The Practice*, Vol. 6, Issue 5, 2020.

<sup>117</sup> Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32, 23 August 2007, para 29.

<sup>118</sup> *Ibid.*

<sup>119</sup> See Nigel Fielding et al., “[Video Enabled Justice Evaluation](#)”, Sussex Police and Crime Commissioner and University of Surrey, Final Report Version 11, March 2020; Lizzie Dearden, “[Coronavirus: Defendants more likely to be jailed in video hearings, research warns amid rise of remote justice](#)”, *Independent.co.uk*, 5 May 2020.

parties and their lawyers during the hearing is also challenging, if at all possible. Consideration of platforms that permit break-out rooms to enable lawyer/client discussions may provide solutions in some instances; however, break-out rooms may not be relied upon as truly confidential.

Online hearings may also prompt difficulties in the use of interpreters, including for confidential communication between parties and their lawyers.

Other difficulties arise in how to verify the identity of the parties and witnesses (particularly given the possibilities of the technology being infiltrated), how to file and inspect evidence, how to prevent witnesses or parties from looking at “cheat sheets” or from being influenced or receiving signals by third parties during testimony, and how to enable appropriate cross-examination and the right (and in some jurisdictions the legal requirement) of a defendant to be present when a witness is questioned. The European Court of Human Rights has held, for example, that “it is difficult to see how” the right of an individual charged with a criminal offence “to defend himself in person”, to examine witnesses and have the assistance of an interpreter, if necessary, could be exercised without being physically present.<sup>120</sup> The Court also reiterated that use of videoconferencing must “serve a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention”.<sup>121</sup> The ability to assess the vulnerability of defendants and its impact on their ability to participate in remote justice has also been questioned.<sup>122</sup>

Certain technologies may pose challenges for vulnerable persons since disabling impairments can impede the ability to effectively follow proceedings on a laptop screen rather than in person.<sup>123</sup> In order to ensure adequate participation in the procedure, support may need to be made available, for example, from witness intermediaries, victim support and other agencies.

Considerations of suitability of the environment from which individuals are calling in is also a factor. An individual may not be able to give evidence to a virtual hearing safely from home, for example, in a case of domestic violence. Conversely, taking evidence of vulnerable witnesses or individuals (such as children) remotely, from a place where they are not directly exposed to an alleged perpetrator of violence, has already been used as a tool of protection of vulnerable witnesses before the pandemic.

The safety and security of online communication of individuals in detention is another ambiguity, since prison guards may be present, and the communication may be monitored or even recorded.

Fears have been raised with regard to the potential deliberate misuse of remote/videoconference hearings as a means of persecution. First situations have arisen where defendants and their lawyers were not able to question witnesses, or where even the identity of witnesses remained unclear in a videoconference hearing.

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<sup>120</sup> Marcelo Viola (No.2), Application no. 45106/04, Judgment 5 January 2007, para 51; See “[Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe](#)”, FairTrials.org, June 2020, p.16.

<sup>121</sup> Marcelo Viola (No.2), Application no. 45106/04, Judgment 5 January 2007, para 67. See also before the ICTR, Zigiranyirazo, ICTR R-01-73-A, 2006, para. 12, citing Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 289/1988: Panama, 8 April 1992, CCPR/0441289/1988 (Jurisprudence), para. 6.6.

<sup>122</sup> “[Inclusive justice: a system designed for all](#)”, Equality and Human Rights Commission, United Kingdom, June 2020. See also “[Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings](#)”, FairTrials.org, 3 April 2020.

<sup>123</sup> See “[Inclusive justice: a system designed for all](#)”, Equality and Human Rights Commission, United Kingdom, June 2020.

## 6. Practical issues and court etiquette

Various issues arise in managing participants in videoconference trials, and more work is required in order to identify guidelines regarding court etiquette in remote hearings.

While in a courtroom, the role of trial participants is clear due to pre-determined seating (judge, prosecution, defence, witnesses and translators), this is not the case in a videoconference hearing. Rather, most software allocates images and thumbnails randomly, or by order of joining. Moreover, the position on the screen may change if a participant drops out and re-joins or changes the setting on their screen or camera. The roles of court participants may be confusing for parties as a consequence.

Other questions arise with regard to the moderation of the hearing, in particular muting and un-muting of microphones, “raising hand” and chat functions, and their impact on the opportunity to intervene during the hearing. Conducting hearings with the necessary empathy and humanity may be difficult in a videoconference hearing, as was noted for family proceedings in a report of the Nuffield Family Justice Observatory.<sup>124</sup> Finally, remote hearings may be experienced as more tiring than in-person hearings.

Court etiquette may need to be re-evaluated accordingly for remote hearings, including appropriate dress codes and screen backgrounds for judges and other participants in order to ensure the seriousness of proceedings is upheld. Policies on how to require someone to “leave” the courtroom if necessary, may be needed, as well as how to engage individuals who are not participating sufficiently, including by picking up on non-verbal cues. Protections to ensure that participants are not excluded from hearings also need to be evaluated.<sup>125</sup> There are also concerns with the illegitimate recording of hearings.

### **Remote hearings based on consent of the parties (Austria)**

In Austria, the usually very limited use of videoconference hearings was expanded by law and regulations due to the pandemic, allowing their use until 31 December 2020. According to the new regulations, in civil law cases, remote hearings are possible if the parties agree, with a few exceptions. If witnesses or parties belong to a risk group, they have the right to use videoconferencing so they do not have to come to the court. Secondly, hearings at hospitals, nursing homes, etc. (because of the higher risk of individuals living there) can be replaced by remote hearings, so that judges and parties do not have to enter these facilities.<sup>126</sup> In criminal cases, the court can decide to hear defendants who are detained via videoconference. The rationale of the provision is to avoid the risk of the COVID-19 virus being carried into the penitentiary as a result of a transfer to the court.<sup>127</sup>

In sum, there is a need to ensure that “the use of IT provides “real hearings” online. Such hearings should not be characterized as virtual or remote. A true sense of reality is of high importance to trust and confidence”.<sup>128</sup> It should be noted that the use of IT may be perceived as easy and convenient for work meetings and private chats; however, it is far more delicate when individuals depend on effective participation in a hearing that impacts their freedom or livelihood.

<sup>124</sup> [“Remote hearings in the family justice system: a rapid consultation”](#), Nuffield Family Justice Observatory, 2020.

<sup>125</sup> [“The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan”](#), International Commission of Jurists, Briefing Paper, 2020, pp.13.

<sup>126</sup> [Bundesgesetzblatt fuer die Republik Oesterreich, Teil I](#), 5. Mai 2020 (8. COVID-19-Gesetz).

<sup>127</sup> [Erlaess vom 22. April 2020 ueber die praktische Handhabung des erweiterten Anwendungsbereichs der Durchfuehrung von Videokonferenzen](#), Bundesministerium fuer Justiz, Die Republik Oesterreich, 22. April 2020.

<sup>128</sup> [“Delivering justice during the COVID-19 pandemic and the future use of technology”](#), Standing International Forum of Commercial Courts, Memorandum, 29 May 2020.

The identification of cases which are suitable for remote hearings under certain circumstances, and those that cannot be held in this way, constitutes a real challenge faced by courts and policymakers. Some courts have provided for the possibility for the parties to opt for a remote hearing. In Romania, for instance, consent of the parties is required for remote hearings, and some courts are offering a section on their website for parties to download the respective form used to express agreement with participation in a videoconference hearing.<sup>129</sup>

## 7. Considerations for future use of technology by courts

As countries come out of states of emergency, States and judicial stakeholders should conduct an evaluation of the technologies introduced during the pandemic, their advantages and downsides, and – importantly – their impact on court users and the delivery of justice in order to learn lessons and prepare in case infection rates prompt renewed restrictive measures. Equipment, including appropriate bandwidth and connectivity, may (still) not be available in (all) courthouses, thereby limiting access justice. Additional funding may be needed for courts and other judicial stakeholders to acquire or expand the use of necessary equipment.<sup>130</sup>

The need to assess the principles of necessity and proportionality, and be reviewed on a regular basis against the backdrop of the changing situation, applies to the use of technological tools, and in particular to the use of videoconference hearings (as a replacement for trials held in courtrooms). During lockdown, it is plausible that justice can only be served with the use of such technology, unless the procedure is delayed. However, as societies – and courthouses – reopen, the assessment may turn out differently. Where fair trial rights are infringed or at least curtailed by the use of videoconference hearings, delaying the face-to-face hearing may be a more proportionate solution, depending on the type of procedure.

### **Assessment of the impact of emergency measures on the rights of defendants**

A survey conducted by Fair Trials in England and Wales in May 2020 found that the “level of protections for fair trial rights varied according to the police station and court at which the proceedings took place, and according to the police officer and judge in charge of the proceedings”.<sup>131</sup> It indicated an adverse effect on the rights of defendants to access effective legal assistance and to participate effectively at their own hearings, resulting disproportionately in custodial sentences.<sup>132</sup> The study also found that the “majority of lawyers have significant concerns about their impact on defendants’ rights”, with 60 per cent of those surveyed believing that remote hearings, through video link or telephone, “had a noticeably negative impact on the overall fairness of the hearings”.<sup>133</sup>

Yet, as judges have become accustomed to the use of videoconference technology and cost-saving pressure rises, there is a risk that remote hearings become normalized without an adequate and regular assessment of their suitability and compatibility with fair trial safeguards. At the same time, the impact on the outcomes of procedures held in remote settings has yet to be fully examined.<sup>134</sup>

<sup>129</sup> [“Short Update: Romanian courts are turning to videoconferencing facilities for hearings”](#), FairTrials.org, 15 April 2020.

<sup>130</sup> For example, challenges have been experienced to navigate complex hearings with a high number of participants on screen and with only one webcam. The use of two screens and/or additional cameras in virtual hearings has proven beneficial in managing visual and documentary material.

<sup>131</sup> [“Justice Under Lockdown. A survey of the criminal justice system in England & Wales between March and May 2020. 10 June 2020”](#), FairTrials.org, 25 June 2020. The survey was conducted with members of the legal profession, judges, magistrates, police officers, staff of the Prosecution Service, and appropriate adults.

<sup>132</sup> [“Coronavirus \(COVID-19\): The impact on prison, probation and court systems”](#), FairTrials.org, July 2020, para 4.3.

<sup>133</sup> Ibid. at para 4.15.

<sup>134</sup> E.g., [“Rapid Consultation – The impact of COVID-19 measures on the civil justice system”](#), Courts and Tribunals Judiciary website, United Kingdom, 1 May 2020,

If and where the use of new technology is expanded, States should conduct a thorough assessment of its compatibility with human rights obligations, in particular in the context of judicial review of deprivation of liberty, criminal procedures and proceedings with the requirement of access of the public. As the organization Fair Trials noted, “It is essential that states do not rush to adopt these measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence”.<sup>135</sup>

## 8. Recommendations

- The right to a fair trial must not be jeopardized by any technological solutions to the pandemic.
- The needs of vulnerable persons in accessing and managing the technology must be considered.
- Courts should adopt criteria to identify those cases which are suitable for remote hearings and those which are not.
- The decision on whether to hold a remote hearing should be a matter for the court in line with the need to respect the right to a fair trial.
- The use of this new technology or expansion into other areas will need some basis in law.
- The respective technical solutions and support must be in place for all parties involved, i.e., judges, lawyers, prosecutor, parties, witnesses, interpreters (where applicable).
- Decisions may ultimately need to be taken on a case-by-case basis but should be based on predictable, general rules and take into account the overarching principle of the right to a fair trial. The seriousness of the impending sanction and the preference of the defendant should be taken into account.
- Judiciaries should consider the amendment of rules of procedure for judicial councils and general assemblies of courts in order to enable remote deliberation or decision-making in case of emergency but adhering to the principles of necessity and proportionality of such extraordinary modus operandi, and ensuring transparency of decision-making.
- The physical presence of parties in court hearings should remain the rule, and recourse to remote proceedings should constitute an exception. Judiciaries should ensure that all hearings are held in person where fair trial rights cannot otherwise be guaranteed.
- The consent of the parties, with limited exceptions, should be required for remote hearings.
- States should provide the necessary financial resources to courts to conduct remote proceedings and should cover: the necessary technical equipment, connection to the Internet, training for the staff in charge with the use of this equipment, guaranteeing access for vulnerable defendants, parties and witnesses, etc.
- Judges should respect the right to a public trial and the right to a fair hearing of defendants during the pandemic, recognizing that some aspects of the right cannot be derogated. Any restrictions need to be necessary, proportionate and based on law.
- Managing participants in virtual hearings requires a reconsideration of court etiquette, managing and engaging individuals.
- The observation of trials and trial monitoring in videoconference hearings should continue.
- States should conduct a thorough assessment of the compatibility of the use of new technology with human rights obligations, in particular in the context of judicial review of deprivation of liberty, criminal procedures and proceedings with the requirement of access of the public.

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<sup>135</sup> [“Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings”](#), FairTrials.org, 30 March 2020.

## E. HEALTH AND SAFETY OF JUDGES, COURT STAFF AND USERS OF JUDICIAL PROCEDURES

As States emerged from lockdown, “physical distancing”<sup>136</sup> was one of the tools utilized to ensure safety and reduce the risk of transmission of the virus. This had various implications for courts. Courts may face different challenges, depending on their size and location. For example, larger courts may have bigger rooms available, enabling physical distancing. One of the challenges judicial systems faced after the end of initial periods of lockdown was how to reopen courthouses physically, at least to some extent, and how to begin face-to-face hearings, in particular where the respective standards could not be met in remote hearings.

Health and safety considerations at courts are required for a range of stakeholders who use the courts, both remotely and in person. Considering how they each interact with the courts, including any particular needs or challenges, can help to provide a framework to address some of the issues listed below.

**Stakeholders who use the courts, both remotely and in person, include:**

- Judges;
- Court staff (ushers, legal advisers, security officials, cleaners, etc.);
- Defendants and respondents, some of whom may be in custody;
- Applicants and complainants;
- Lawyers and paralegals;
- Prosecutors;
- Witnesses;
- Support agencies, such as probation services, witness support agencies and interpreters;
- Journalists and media representatives;
- Trial monitors;
- Members of the public; and
- Those supporting parties attending the court.

### 1. Who decides?

In order to adopt the necessary health and safety protocols, it is necessary first to identify who has responsibility for the identification of risks, and for the determination and implementation of infrastructural adjustments and other measures. While in some countries, courthouses and other premises used by the judiciary are owned and managed by a ministry (usually the Ministry of Justice), in others they may be leased from private companies. This has ramifications for determining the responsibility for infrastructural adjustments, including for the procurement and absorption of related costs.

In some countries, regulations on health and safety in courts in response to the pandemic were governed both by measures adopted by governments as well as those designed by courts or judicial councils. In Slovenia, for example, a combination of legislation, ministerial and court policies determined health and safety procedures. General legislation applied to public buildings, while the Ministry of Justice was responsible for the maintenance of the buildings and more detailed measures were determined by the courts. The judge or president of the chamber decided on the relevant safety protocols and in which trials it was appropriate for the public to be present.<sup>137</sup> Federal courts in the United States of America, for instance, adopt orders on a

<sup>136</sup> The term has become used to describe the practice of maintaining a greater than usual physical distance from other people during the pandemic in order to reduce exposure to possible transmission of infection.

<sup>137</sup> Aleš Galič, “[Slovenian Civil Procedure in the age of COVID-19](#)”, Septentrio.uit.no, 21 April 2020.

regular basis on managing the pandemic.<sup>138</sup> In England and Wales, Her Majesty's Courts and Tribunal Service produced an "Organisational COVID-19 Risk Assessment" and an "Assessment Tool", as checklists for courts to complete.<sup>139</sup>

## 2. Managing the physical space and staffing

The availability of suitable courtrooms and buildings is a key consideration when reopening courts. They need to be large enough to permit the physical distancing required, and they need to be sufficiently equipped with the necessary technology that enables parties and the public to attend, either in the room with the required physical distancing or via live-streaming of the hearing into another room. In some jurisdictions, courts limited the use of courtrooms to those with windows in order to avoid the use of air conditioning in warm weather. Guidance is available from the European Centre for Disease Control and Prevention<sup>140</sup> and the World Health Organization (WHO), which recommends that a "well-maintained and operated system" can reduce the risk of infection but should be regularly inspected, and recirculation modes should not be used.<sup>141</sup>

It may be feasible to identify other buildings that can be used for hearings, including through local authorities. In some jurisdictions, authorities created an inventory of suitable courthouses and rooms which could be used for face-to-face hearings. Where universities conduct moot court, suitable rooms may be available for court hearings. In Germany, rooms in gyms have been rented or tents have been erected to accommodate greater numbers.<sup>142</sup> In England, it was suggested that commercial premises could be leased.

How individuals enter and leave courthouses (including security checks at entrances, etc.) and rooms, and move in and around the buildings, are further considerations. In Slovenia, for example, some courts have set one point of entry into the building to manage the sanitary requirements.<sup>143</sup>

The frequency, modus and times of cleaning and sanitizing the building and courtrooms need to be reconsidered. For example, cleaning during hearings, e.g., of the witness stand, may be necessary under certain circumstances.

Particular consideration needs to be given to a range of spaces. Firstly, with respect to public access, courts have to consider whether the number of people admitted to the building needs to be limited, while bearing in mind the need to satisfy fair trial requirements and for certain hearings to be held in public. Confidential spaces and rooms need to be provided for lawyers to speak with their clients; and for other services, such as probation services, to meet and communicate with individuals. In addition, suitable rooms need to be available for witnesses, jurors, interpreters and relatives, and these rooms must permit the necessary distancing between individuals. Adjustment of infrastructure may include ensuring waiting space for parties, members of the public and for witnesses until they are summoned. Furthermore, the management of detainees within cells and secure facilities at courthouses needs careful thought.

The usual security arrangements (such as metal detectors and pat-down checks) may need to be adjusted in light of health and safety requirements, such as the wearing of masks or gloves by security personnel, the use of hand sanitizer, the use of glass screens and taking temperatures,

<sup>138</sup> ["Court Orders and Updates During COVID-19 Pandemic"](#), United States Courts website, updated 16 October 2020.

<sup>139</sup> ["Coronavirus \(COVID-19\): courts and tribunals planning and preparation"](#), Gov.uk, updated 13 October 2020.

<sup>140</sup> ["Heating, ventilation and air-conditioning systems in the context of COVID-19"](#), European Centre for Disease Prevention and Control, 22 June 2020.

<sup>141</sup> ["Q&A: Ventilation and air conditioning and COVID-19"](#), World Health Organization website, 29 July 2020.

<sup>142</sup> ["Justice and Challenges in Times of Pandemic in Europe"](#), Magistrats Européens pour la Démocratie et les Libertés (MEDEL) website, 1 June 2020.

<sup>143</sup> Aleš Galič, ["Slovenian Civil Procedure in the age of COVID-19"](#), Septentrio.uit.no, 21 April 2020.

etc. Changes may also need to be made for fire exit routes.

#### **Communication of health and safety information (Albania)**

The Albanian Judicial Council (KLGJ) has created a weblink in their official website containing information on COVID-related measures (<http://klgj.al/covid-19/>). It included posters illustrating for the general public and court users what to expect from the court and how to address the courts under the pandemic. The posters provided answers to questions such as:

- When and how shall I physically approach the court?
- How will I be informed by the court if my case is urgent?
- For which case can I address the court?<sup>144</sup>
- On which civil cases can I address the court?
- On which criminal cases can I address the court?
- How will hearings take place?

Furthermore, the respective health and safety protocols need to be communicated to relevant individuals in a way that is easy to access, clear and comprehensible.

Finally, it needs to be clarified how such health and safety protocols are controlled in the daily routine of the courthouse, and how compliance is enforced. In a number of jurisdictions, the legal nature of health and safety protocols, and respective sanctions, were unclear.

For courts to function, judges and other judicial staff need to be present (remotely and in person). However, some may be (obliged to) self-isolate, unable to work due to other health conditions or due to restrictions, including childcare and caring responsibilities; and there may be obstacles in travelling to court on public transport.

The disproportionate impact in this regard on women judges, prosecutors and lawyers in many countries needs to be acknowledged. They have faced, and continue to face, the challenge of delivering in the workplace while bearing the primary responsibility for caring responsibilities including childcare, exacerbated where kindergartens and schools are not fully open.

Court administrations may need to assess the availability and preparedness of staff and other members of the judiciary to return to work physically, as well as their capacity to work remotely (bearing in mind the closure of schools and kindergartens). This includes what equipment is available to them and the necessary connectivity to enable remote work.

### **3. Health and safety protocols at courts**

Courts and authorities have adopted various policies to manage health and safety in buildings and remotely. This necessitated not only attention to equipment and coverage of costs incurred but also staffing, as well as the enforcement of health and safety protocols.

Courts have employed various means to manage public access to procedures, including, for example, prior registration or accreditation for attendance and designated seats for a limited number of members of the public or press. Other courts have demarcated spaces by taping seats, adding floor markings and signage and having one-way systems through buildings.

Some hearings have been streamed online, for example, by the Oslo District Court<sup>145</sup> and in Ukraine, as recommended by its High Council of Justice. Other courts have streamed the hearing

<sup>144</sup> Here the poster explains that the Court will inform the citizen in their contact number or electronic address. The poster provides examples of urgent cases such as family cases (in adoption and custody cases, measures against domestic violence; in cases of exercising the parental responsibility and alimony.

<sup>145</sup> B. Krans et al., "[Civil Justice and COVID-19](#)", *Septentrio Reports* 5, 2020, pp. 40-41.

into another room in the court buildings where the public can attend.

In Austria, an ordinance issued by the Minister of Justice in March 2020 amended the rules of procedure for the courts of first and second instance. The measures for protection of staff and users of the court included abandoning the usual time regulations for when staff have to be present in court, use of Plexiglass to avoid the spread of infection, and requiring those who wish to enter the building to arrange this in advance.<sup>146</sup> Other jurisdictions arranged a phased return of judges or alternating their presence in court, depending on the day or week.

When face-to-face jury trials resumed in England and Wales, specific measures were put in place such as sitting for fewer hours, making courtrooms available for adjournments, limiting the number of trials taking place and having another courtroom from which others can watch the trial being streamed; oaths were required to be taken without touching holy books or scriptures, or permitted individuals to bring their own with them. For jury trials, some countries have suggested reducing the number of jurors or increasing trial by members of the lay judiciary (thus providing some degree of independent judicial oversight).

A checklist was provided by Her Majesty's Courts and Tribunal Service in England and Wales (HMCTS) on how trials could be run safely. This set out what the HMCTS would provide and what court users would be asked to do.<sup>147</sup> The former included, among others, ensuring safe distancing at various locations in the court buildings; clear signage for movement around the building; indicating how refreshments would be managed and the sanitization of equipment, documents and other material; how buildings are cleaned; and the provision of witness support. In turn, court users are expected, for example, to comply with instructions regarding movement and sanitation, limit the changing of seats, maintain a safe distance from others, minimize the touching of objects, bring their own refreshments, wash hands regularly, and consider who they bring to court with them.

#### **Examples of measures put in place by courts in OSCE participating States:**

- In Portugal, a security protocol was adopted on 3 June 2020, including a combination of measures such as the requirement of maintaining two metres' physical distance, the use of face-masks (unless giving testimony), a special cleaning protocol, and the recommended use of only those courtrooms with windows, not those with air-conditioning unless necessary and air circulation is feasible.<sup>148</sup>
  - In Greece, health and safety measures were established in two Joint Ministerial Decisions<sup>149</sup> with reference to the National Public Health Organisation, the Committee of Experts on COVID 19 and by the crisis management committee of the Ministry of Justice.<sup>150</sup> They include:
    1. All judicial staff and visitors (i.e., judges, secretaries, lawyers and litigants) wear a non-medical face mask or shield;
    2. An alcohol-based hand sanitizer should be made available in all court locations;
    3. Individuals should maintain a distance of at least 1.5 metres from each other;
    4. A maximum of 20-25 persons are allowed in regular courtrooms, while court presidents had the authority to reduce this number according to the capacity of their premises.<sup>151</sup>
    4. Placing Plexiglass protective boards in all court areas open to the public.
- Health and safety measures taken by the head of the court or the three-member Judicial

<sup>146</sup> ["Management of the judiciary – compilation of comments and comments by country"](#), CEPEJ, accessed 15 October 2020.

<sup>147</sup> ["Our commitment to running jury trials safely"](#), HM Courts and Tribunals Service, 15 May 2020.

<sup>148</sup> <https://www.csm.org.pt/2020/05/07/medidas-para-reduzir-o-risco-de-transmissao-do-virus-nos-tribunais/>

<sup>149</sup> Joint Ministerial Decisions G.G. No. B 2033 28-5-2020 and G.G No B 2865/14-7-2020.

<sup>150</sup> Letter Ref No 18044/7.5.2020.

<sup>151</sup> For example, at the Thessaloniki Court, where the usual capacity of courtrooms is 50-60 persons, the maximum number was set at 10 persons with non-medical masks inside a courtroom.

Administrative Board, were announced both at the court entrance and on the court's website where such a site exists.<sup>152</sup>

- The Norwegian court administration prepared a YouTube video on infection control measures during the pandemic (Norwegian, with English subtitles): <https://www.youtube.com/watch?v=jsndKggml7Y&t=1s>
- The Normative Act of Albania provided for a series of measures to be taken to deal with court proceedings which included: restricting entry to court buildings to only those who have to “conduct urgent activities”, requiring users to reserve access to services, publishing guidance on courts’ and councils’ websites on the movement of persons, conducting hearings behind closed doors for some hearings or conducting hearings on the basis of written documents. For the latter, the presence of the parties was not required; rather electronic-communication tools are used to submit documents and issue decisions of the court.<sup>153</sup>
- In a courthouse in Krakow, Poland, temperatures were taken before entry to the courthouse, and the court set up a tent in front of the court building for this purpose. Some courts required prior registration; some had erected glass screens.

These measures need, however, to be balanced against ensuring compliance with international standards and the right to a fair trial. The use of face masks to protect health, for example, needs to be considered alongside the ability of the judiciary, lawyers and others to “read” an individual’s demeanour and its influence in assessing credibility.<sup>154</sup>

#### 4. Compelling individuals to come to court?

As the number of physical hearings increased over the summer of 2020 with the necessary health and safety protocols being put in place, challenges were faced if individuals failed or refused to attend in person. Judges had to consider the permissibility of such refusal, weighing legitimate health and safety precautions with concerns that lack of physical attendance was being used to delay the process, as well as the impact on the delivery of justice.<sup>155</sup>

Judicial authorities should assess these issues in light of the national legal framework and the COVID-related situation in their jurisdiction and should provide guidance to assist judges.

Courts so far appear to have taken a cautious approach to the issue. For jury duty, some countries have introduced the right to defer. Others have postponed proceedings where oral evidence is required. In other countries, individuals who voice health concerns have been offered the option to appear remotely.

Different considerations apply if it is the judge who refuses to come to court due to COVID-related health risks. The question arises as to whether and under which circumstances refusal to exercise one’s duties by conducting face-to-face hearings can prompt a disciplinary proceeding.

<sup>152</sup> ODIHR consultation, August 2020

<sup>153</sup> Normative Act No. 9, “[On Special Measures In The Area Of Court Activity. During The Epidemic Caused By COVID-19](#)”, 25 March 2020, Article 3(4); see also “[Legislative measures to cope with Covid-19 outbreak](#)”, KPMG Albania Shpk website, 27 March 2020.

<sup>154</sup> Julia Simon-Kerr, “[Unmasking Demeanor](#)”, 88 Geo. Wash. L. Rev. Arguendo 158 (2020).

<sup>155</sup> See, for example, a case in Paraguay, outside the OSCE region. The defendant in a corruption case had requested a delay of trial claiming fear of infection if attending court. After deliberation, the court decided to go ahead with the hearing and compel the defendant to attend, considering that he was young and healthy, a strict health and safety protocol would be followed and the pandemic must not be used, or be perceived to be used, as a pretext to evade justice. “Sentencia Definitiva Nro 152 de fecha 26 de junio de 2020 en el juicio Camilo Ernesto Soares y Alfredo Guachire Medina s/ lesion de confianza”, Tribunal de Sentencia Penal de Asuncion, Paraguay.

### **Handling of suspected infections among suspects and arrestees (North Macedonia)**

A case arose whereby a foreign national (citizen of a neighbouring state) was arrested in North Macedonia on charges of smuggling of migrants. The prosecutor requested detention to secure his presence. Pursuant to national law, the defendant had to appear before a pre-trial judge within a time limit of 24 hours. The pre-trial judge required that the defendant be tested for COVID-19 and be brought to court in a protective suit, mask and gloves, given his risk of exposure to the virus. The defendant indeed tested positive, and the judge subsequently had to determine, within the space of a few hours, whether to impose detention as had been requested by the prosecution. No guidance was available from the Judicial Council of the Republic of North Macedonia (State Judicial Council) for these kinds of situations except the general instruction that the courts should follow the COVID-19 protective measures and recommendations provided by the government and health authorities.

While judges, prosecutors and court staff – as human beings – have the right to life and right to health, they may justifiably be asked to accept a higher degree of risk than other individuals who do not hold public office, in a similar way to medical staff, police, fire-fighters, etc. The *Bangalore Principles of Judicial Conduct* state that “a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly”.<sup>156</sup> Yet, judges may be unable or unwilling to come to court for justifiable reasons.

As noted above, parents and caretakers may face obstacles in returning to court while schools and kindergartens remain closed. In Kosovo, the Judicial Council’s Decision from 12 March 2020 and 8 May 2020 on the imposition of restrictive measures in the judiciary during the pandemic emphasized that a parent who is taking care of children, or an administrative staff member with chronic illness, may be released from work after a submission of a request to the president of the court. Judges are often older than people in other professions, and they are, therefore, at greater risk, given that the mortality rate of the COVID-19 virus appears to increase with age.

Another example is North Macedonia, where at its 15th regular session on 10 March 2020 the government obliged all state and local self-government institutions to release certain parents from working duties and to consider it a justified absence if an employee had a child under 10 years old that needed to be cared for.<sup>157</sup> The same approach was adopted for pregnant women and chronically ill employees. Non-compliance and violation of these measures was considered to violate the Criminal Code.<sup>158</sup>

## **5. Recommendations**

- Courts need to remain functional to discharge key functions while preserving the right to life and health of judges and judicial staff, as well as for all users of court services.
- Health and safety considerations at courts are required for a range of stakeholders who use the courts, both remotely and in person.
- There should be clarity on whose responsibility it is to determine health and safety protocols, identify risk and put measures in place.
- Consideration needs to be given to the suitability of courtrooms for various hearings, bearing in mind their size, accessibility, IT equipment, ventilation; the availability of

<sup>156</sup> [The Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002; see also M. Pollard, M. Laronche and V. Grande, “[COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#)”, [OpinioJuris.org](#), 3 April 2020.

<sup>157</sup> “[Measures and Recommendations for Protection and Prevention from Coronavirus COVID 19](#)”, Government of the Republic of North Macedonia website, 13 March 2020.

<sup>158</sup> [Articles 205 and 206 relating to public health in the state of an epidemic](#), Government of the Republic of North Macedonia website, accessed 18 October 2020.

waiting rooms and spaces; the availability of other suitable venues.

- Health and safety protocols for courts will need to include entry, egress and movement within buildings, as well as sanitation, management of usual security requirements and the consequent staffing implications.
- Higher judicial authorities should provide clear guidance on sanctions in the event of non-compliance and compelling individuals to attend court.

## F. PRIORITIZATION OF CASES AND DEALING WITH BACKLOG

In many jurisdictions, courts have not been functioning fully during the pandemic and had to resort to the suspension of proceedings, cancellation of hearings and a shift to a remote way of working. Added to backlogs that already existed in many jurisdictions and the limited resources under which they operated,<sup>159</sup> courts have faced a significant accumulation of cases.<sup>160</sup> For example, Bosnia and Herzegovina’s High Judicial and Prosecutorial Council (HJPC) in September 2020 reported a 17 per cent reduction of new cases, 23 per cent reduction of solved cases; and 21 per cent reduction of filed indictments in the first half of 2020 when compared with the same period in 2019.<sup>161</sup> Enforcement of judgements has also been affected.<sup>162</sup> Long delays create significant challenges for court users, and there is a risk that prioritization of cases following the end of emergency measures could undermine the protection of rights of individuals.

### 1. Managing the backlog

As courts started to reopen, they had to consider how to organize resources, in particular which cases require face-to-face hearings as compared to those that may still need to be dealt with remotely. However, the extent to which courts have already been operating through written or digitalized procedures prior to the pandemic for some types of procedures inevitably impacted their experiences during this time.<sup>163</sup>

The extension of deadlines and limitation periods in a number of countries has sought to give the courts some ability to manage the backlog.<sup>164</sup> For example, in France, ordinances provided for such extensions until the end of the pandemic, except for certain urgent matters (e.g., those before liberty and custody judges, and for proceedings before juvenile courts) where specific rules applied.<sup>165</sup> While administrative courts were suspended in Greece, deadlines for execution of procedural and other actions were similarly postponed.<sup>166</sup> However, courts will need to evaluate what is an “undue delay” and how to consider what is “within a reasonable time” in such circumstances. In Ontario, Canada, it was made clear to the legal profession and parties that procedural timelines that could continue would do so unless the parties argued that the pandemic had prevented them from taking the necessary procedural steps in time.

<sup>159</sup> M. Pollard, M. Laronche and V. Grande, “[COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#)”, OpinioJuris.org, 3 April 2020.

<sup>160</sup> Owen Bowcott, “[England and Wales face backlog of 40,000 criminal cases due to coronavirus](#)”, The Guardian website, 24 May 2020.

<sup>161</sup> Statistical report on the work of courts and prosecutor’s offices in BiH, presented at the HJPC plenary session held on 15-16 September 2020.

<sup>162</sup> ‘How can enforcement agents contribute to overcoming the economic crisis connected to the COVID-19 pandemic?’, Position Paper of the International Union of Judicial Officers, International Union of Judicial Officers (UIHJ), April 2020, <https://www.uehj.eu/wp-content/uploads/2020/04/PP-Covid-19-EN.pdf>.

<sup>163</sup> [Webinar](#) on effects of Covid-19 pandemic on the criminal process in Sweden, 11 May 2020.

<sup>164</sup> M. Pollard, M. Laronche and V. Grande, “[COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#)”, OpinioJuris.org, 3 April 2020.

<sup>165</sup> B. Krans et al., “[Civil Justice and COVID-19](#)”, *Septentrio Reports* 5, 2020, p. 25.

<sup>166</sup> Safety Measures and Court Operation Procedures in Greek Administrative Courts throughout the COVID-19 pandemic, (March 2020-June 2020).

Courts have started to explore different ways of dealing with backlogs. As a general rule, a sufficient extent of judicial discretion is needed to assess the circumstances on a case-by-case basis, and in order to satisfy judicial independence.

Firstly, which cases to prioritize have been considered in conjunction with determining what matters are urgent (as noted in section C above). The Office of the Lord Chief Justice for Northern Ireland, for example, made available lists (which are constantly revised) for the various courts of “work that we will continue to do” (such as bail applications, urgent injunctions, non-molestation orders in family work); “work that we will aim to do” (e.g., case management reviews, bad character applications, undefended divorces, etc.); and “work we cannot yet do” (e.g., at certain stages, jury trials and extraditions; contested civil bills and contested children order applications).<sup>167</sup>

Furthermore, mechanisms of diverting cases away from the courts have been encouraged, such as mediation and alternative dispute resolution.<sup>168</sup> This may be particularly appropriate in civil matters,<sup>169</sup> and in jurisdictions where the use of technology in such procedures is already well-established, including through online hearings and electronic distribution of papers, such as in Canada.<sup>170</sup> In Norway also, online mediation was used to some extent before the pandemic, and these processes have since been expanded.<sup>171</sup> Similarly, in Italy, Article 83 of legislative decree no. 18/2020 (as amended) permits online mediation meetings, provided all parties consent. This will be available after the end of the emergency period.<sup>172</sup> In Slovenia, the pandemic led to a proposal to enable mediation throughout any remote hearing, pending its realization.<sup>173</sup>

#### **Single judge exception considered disproportionate (France)**

Determination, such as rendering rulings, by a single judge was considered as an option to manage the backlog, for example, in some non-criminal matters in France.<sup>174</sup> However, the French Conseil d’État suspended the provision on single judges before the National Court of Asylum (administrative jurisdiction hearing appeals of decisions to reject asylum claims). The Conseil d’État ruled that this was a disproportionate measure, there needed to be consideration of the principle of the collegiality of hearings, and rights of the defence were infringed by implying all appeals would be determined by a single judge.<sup>175</sup>

Other adjustments to increase the court time, and thereby manage the backlog, included reduction of the summer break (e.g., for Greece<sup>176</sup> and the High Court in Ireland<sup>177</sup>) and enabling courts to sit without the usual bench or other individuals who would normally have been involved (e.g., juvenile courts can sit without lay assessors; presidents of courts were able to exercise the function of investigating judge). In Ontario, Canada, a rule was introduced for

<sup>167</sup> Office of the Lord Chief Justice. Business Continuity COVID-19 Update, 12 June 2020, <https://judiciaryni.uk/sites/judiciary/files/media-files/Business%20Recovery%20Plans%20-%20Summary%20-%20Update%2012%20Jun%2020.pptx>.

<sup>168</sup> See “[Separating the People from the Problem: Colin Rule and the rise of online dispute resolution](#)”, *The Practice*, Vol. 6, Issue 5, 2020.

<sup>169</sup> M. Pollard, M. Laronche and V. Grande, “[COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#)”, *OpinioJuris.org*, 3 April 2020.

<sup>170</sup> Emma van Gelder, Xandra Kramer and Erelis Themeli, “[Access to Justice in times of Corona: When COVID-19 makes the case for greater digitisation of justice](#)”, *ConflictofLaws.net*, updated 8 April 2020.

<sup>171</sup> B. Krans et al., “[Civil Justice and COVID-19](#)”, *Septentrio Reports* 5, 2020, p. 42.

<sup>172</sup> Information obtained from consultations.

<sup>173</sup> ODIHR consultations.

<sup>174</sup> “[Justice and Challenges in Times of Pandemic in Europe](#)”, *Magistrats Européens pour la Démocratie et les Libertés (MEDEL)* website, 1 June 2020.p.19.

<sup>175</sup> “[Conseil d’État, 8 juin 2020, Juge statuant seul et recours à la visioconférence à la CNDA](#)”, *Le Conseil d’Etat* website, 8 June 2020.

<sup>176</sup> Safety Measures and Court Operation Procedures in Greek Administrative Courts throughout the COVID-19 pandemic, (March 2020-June 2020). L.4684/2020 G.G No 86/25.4.2020.

<sup>177</sup> See “[High Court – COVID-19 Arrangements](#)”, *The Courts Service of Ireland* website, accessed 18 October 2020.

courts in civil proceedings to “relieve compliance with procedural rules (...) when it is just or equitable to do so, reasonable and (...) required to render justice between litigants (...) or necessary to secure convenience, expeditiousness and efficiency in the administration of justice”.<sup>178</sup>

However, the functional operation of judicial systems cannot be achieved at the expense of the rights of individuals, and some practices applied to alleviate the burden on courts raise significant concerns in complying with the right to liberty, the right to be brought before a judge and the right to a fair trial. For example, in France, an automatic extension of pre-trial detention was introduced by ordinance for two to six months depending on the gravity of the criminal offence alleged, without requiring judicial review.<sup>179</sup>

The increasing use of written procedures, and submitting documents through electronic means, particularly in civil matters, has also been encouraged in a number of States, such as in Belgium, Estonia, Germany, Latvia, Luxembourg and Spain.<sup>180</sup> Yet this can imply a “cultural shift” for countries that have previously relied on oral hearings.<sup>181</sup> In addition, such electronic processes require the up-to-date software and IT support, and these are not always available in some States. For example, in North Macedonia, the Ministry of Justice’s Strategy for Information and Communication Technology 2019-2024 notes the lack of data storage in court servers. In addition, there are a limited number of persons who work on the judicial information database system, ACCMIS; and although equipment has been provided for some courts, such as the basic courts in Skopje, it has not been operationalized.<sup>182</sup>

More broadly, it may be useful to revisit debates around how criminal justice systems can be decongested to ease the workload of the courts. These include reduction of the prison population and releasing prisoners, as occurred, for example, in Croatia, France and Italy,<sup>183</sup> and revisiting laws imposing custody, conversations which are long overdue in many jurisdictions.

## 2. Recommendations

- Prioritization of cases following the end of emergency measures should not undermine the protection of rights of individuals; it should follow fair and objective criteria and be promptly communicated to all stakeholders.
- The prioritization of cases should ensure gender equality and the protection of the most vulnerable, including children, older persons and persons with disabilities.
- Criteria for prioritization should be sufficiently flexible to enable judicial discretion.
- Consideration could be given to the use, or expanding the use of, online mediation processes or mediation through remote hearings, and written procedures.
- Diverting cases away from the courts through should be encouraged.
- Courts and policymakers could consider the extension of deadlines and limitation periods, as well as revising incentives for those who plead guilty at the earliest opportunity, provided that the rights of the defence and international standards are upheld.

<sup>178</sup> B. Krans et al., “[Civil Justice and COVID-19](#)”, *Septentrio Reports* 5, 2020, p. 56.

<sup>179</sup> Article 16 of the Ordinance of 25 March 2020 (no 2020-303) and a circular by the Minister of Justice automatically extended the periods of pre-trial detention by 2 to 6 months depending on the gravity of the infraction, without a judge’s decision being required. The provision was challenged by the National Bar Association before the Council of States, which validated the provision on 3 April 2020 <[https://www.cnb.avocat.fr/sites/default/files/refere-liberte\\_ord\\_n\\_2020-303\\_covid-19-procedure-penale.pdf](https://www.cnb.avocat.fr/sites/default/files/refere-liberte_ord_n_2020-303_covid-19-procedure-penale.pdf)>.

<sup>180</sup> “[Coronavirus Pandemic In The EU –Fundamental Rights Implications: With A Focus On Contact-Tracing Apps](#)”, Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

<sup>181</sup> B. Krans et al., “[Civil Justice and COVID-19](#)”, *Septentrio Reports* 5, 2020, p.56.

<sup>182</sup> Information obtained from consultations.

<sup>183</sup> “[Justice and Challenges in Times of Pandemic in Europe](#)”, Magistrats Européens pour la Démocratie et les Libertés (MEDEL) website, 1 June 2020.

- Debates around how the criminal justice system can be decongested should be revisited.

## G. NEW TYPES OF CASES

### 1. Overview of types and numbers of cases

The COVID-19 pandemic has impacted the types and numbers of cases reaching the courts. Firstly, new types of cases emerged: challenges to emergency legislation and sanctions for breach of curfew or quarantine. Courts, in particular Constitutional Courts, have a role to play in scrutinizing emergency legislation. Some emergency laws adopted in the context of COVID-19 were not time limited or were challenged over concerns that they had been adopted without the usual parliamentary scrutiny.

#### Examples of constitutional reviews

- In Moldova, the Constitutional Court held on 13 April 2020 that the “anti-crises package” was unconstitutional and voided it immediately because it had been passed “in breach of the legislative procedure”. The government had adopted the package on 2 April, bypassing parliament after parliament could not muster enough legislators to meet a quorum.<sup>184</sup>
- In Romania, on 6 May 2020, the Constitutional Court declared unconstitutional governmental decrees no.1/1999 and no.34/2020 on the regime of emergency measures, stating that the presidential decree on the establishment of restrictive measures should be subject to parliamentary control and approval. The Court declared explicitly that restrictive measures should be established only by a law adopted by Parliament.<sup>185</sup>

Other laws have been criticized for lack of necessity or proportionality, for being poorly drafted and for lacking legal certainty,<sup>186</sup> resulting in inconsistent application by the police, prosecutors and judges. Discriminatory application of such legislation was reported against certain individuals due to their (perceived) nationality or ethnic origin and a particular country’s relationship with COVID-19.

In almost all participating States, sanctions were handed down for breach of emergency measures, including fines, arrest and detention, some on the basis of newly created administrative or criminal offences, others on the basis of already existing legislation.<sup>187</sup> People turned to the courts to challenge them, in particular fines that were excessive compared to the country’s median wage, as well as arrest and detention, at times for relatively minor offences such as not wearing a mask in public places.<sup>188</sup> In Slovenia, misdemeanours under existing law were applied to sanction breaches of emergency measures such as not wearing a facemask and not keeping distance. By contrast, Poland created new sanctions for breaches of pandemic-related measures, including for “exposure of a large number of people to contagious diseases” and “failure to comply with instructions from personnel”.<sup>189</sup>

<sup>184</sup> [Decision Nr. 10](#), Constitutional Court of Moldova, constcourt.md, 13 April 2020.

<sup>185</sup> Romania, Constitutional Court, Press Release, 6 May 2020,

[http://www.ccr.ro/wp-content/uploads/2020/06/EN\\_Press-Release-6-05-2020.pdf](http://www.ccr.ro/wp-content/uploads/2020/06/EN_Press-Release-6-05-2020.pdf).

<sup>186</sup> N. Sun and L. Zilli, “[COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I](#)”, [OpinioJuris.org](#), 3 April 2020.

<sup>187</sup> N. Sun and L. Zilli, “[COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II](#)”, 3 April 2020.

<sup>188</sup> *Ibid.*; see ODIHR, “[OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#)”, July 2020, p. 37.

<sup>189</sup> See “[Management of the judiciary – compilation of comments and comments by country](#)”, CEPEJ, accessed 15 October 2020.

In some participating States, the problem of false information circulating in media, including social media, led to drastic measures, such as the imposition of sanctions for “spreading false information”.

Secondly, while some types of offences have decreased during the pandemic (e.g., burglary and assault),<sup>190</sup> there has been an increase in others (e.g., cybercrime, domestic violence, hate crimes, fraud and corruption<sup>191</sup>; bankruptcy and labour- and employment-related claims; health and personal injury claims).<sup>192</sup>

Privacy and data protection claims are also predicted to increase as a consequence of remote working, and in the context of contact tracking and tracing schemes in some countries. For example, in Bosnia and Herzegovina, violations of data protection laws were reported when the personal data of COVID-19-positive patients was published.<sup>193</sup> The Agency for Protection of Personal Data, which has exclusive jurisdiction over the protection of personal data, issued a public opinion stating that such publication was contrary to the Law on Protection of Personal Data.<sup>194</sup> In Norway, the Data Protection Authority (Datatilsynet) issued a decision temporarily banning data collection via the contact-tracing application Smittestopp on the basis that it was not a proportionate restriction on rights to data protection.<sup>195</sup>

While in some jurisdictions, the judiciary faces, or anticipates, a significant caseload of new COVID-19-related cases, in others the concern is a potential avalanche of “regular” cases, adding to the existing problems of a growing backlog and financial strain on the justice system. The types and numbers of cases are likely going to continue to change, and the overall effect of the pandemic on the nature of judicial caseload can only be assessed at a later stage.

In the context of administrative and criminal sanctions, courts will also be faced with considerations of the infection risk as an aggravating or mitigating factor in sentencing. For example, activity relating to transmission of the virus, such as coughing or spitting at law enforcement officials, might be treated as an aggravating factor in offences such as assault. Conversely, the imposition of a custodial sentence at a time when the risk of transmission in detention is higher and isolation in prison is greater than usual can be considered a mitigating factor.<sup>196</sup>

#### **Example: Consideration of the pandemic in sentencing (England)**

In a Court of Appeal case in England (*Manning*), the Lord Chief Justice noted that it was appropriate to consider the additional impact that a custodial sentence would have during the pandemic. Considering whether to suspend the custodial sentence, he noted, that “the current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. (...) Judges and magistrates can, therefore and in

<sup>190</sup> Julinda Beqiraj, New types of cases prompted by COVID-19, British Institute of International and Comparative Law, presentation to OSCE-ODIHR online consultation, 18 June 2020.

<sup>191</sup> For example, fraudulent scams selling non-existent or ineffective hand sanitizer or protective equipment was frequent during the height of the pandemic, as well as corruption cases in the context of public purchase of medical equipment.

<sup>192</sup> Julinda Beqiraj, New types of cases prompted by COVID-19, British Institute of International and Comparative Law, presentation to OSCE-ODIHR online consultation, 18 June 2020; “[Coronavirus pandemic in the EU – Fundamental Rights Implications](#)”, Fundamental Rights Agency website, Bulletin 1, 1 February – 20 March 2020, p. 11.

<sup>193</sup> See “[Bosnia and Herzegovina and Montenegro to Respect Right to Privacy of Citizens in Self-Isolation](#)”, Civil Rights Defenders website, 25 March 2020.

<sup>194</sup> Consultations from webinars held in June 2020.

<sup>195</sup> “[Vedtak om midlertidig forbud mot å behandle personopplysninger – appen Smittestopp](#)”, Datatilsynet website, 6 July 2020; see also “[Temporary suspension of the Norwegian Covid-19 contact tracing app](#)”, Datatilsynet website, 22 June 2020.

<sup>196</sup> *Manning R v (Rev 1)* [2020] EWCA Crim 592, 30 April 2022, at 41; see Samuel March, “[Courts should consider coronavirus emergency when sentencing, rules Court of Appeal](#)”, UK Human Rights Blog website, 12 May 2020.

our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be".<sup>197</sup> It further considered that, "[t]hose in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of COVID-19".<sup>198</sup>

In the Netherlands, for example, courts were reported to hand down prison sentences to individuals who had been coughing or spitting on people, including public servants such as a bus driver and a police officer. A court in Limburg, for instance, convicted and sentenced a 19-year-old to an eight-week prison sentence, and granted compensation to the victim, for saying he had coronavirus and spitting on a bus driver. The court argued that, "The court takes into account that we live in a bizarre and violent time where the impact of behaviour is greater, than in normal circumstances."<sup>199</sup>

## 2. Recommendations

- Courts should ensure that the applicability of existing offences to pandemic-related matters is consistent with international standards and current practices.
- Courts should apply international standards, including principles of legal certainty, proportionality, necessity and non-discrimination when ruling on new offences or legislation adopted to deal with the pandemic.
- Courts should ensure consistency in the application of pandemic-related factors when determining sentencing.

## H. COURT MANAGEMENT AND JUDICIAL ADMINISTRATION

Court management is based on a regular or expected inflow of cases and capacity of staff and infrastructure. The COVID-19 crisis has interfered with these assumptions, and resources may have to be reallocated accordingly. Fewer judges are physically working in the courthouse, only "urgent" trials are being held and IT solutions are used in an attempt to manage the incoming cases. Using the COVID-19 terminology, the judiciary also needs to "flatten the curve" of caseload to manage the decreased capacity (judges, courtrooms, physical access and support staff), and the change in demand (urgent cases, increase in certain types of cases and new types of cases).

Conscientious court management becomes even more crucial during this time. General guidance should be provided to judges in order to guide their responses to the pandemic, while leaving them with enough discretion. The pandemic has also been described as an opportunity for courts to "upgrade" their electronic case management systems.<sup>200</sup>

### 1. Financial implications and adaptations

In many jurisdictions, courts have already been operating under financial constraints for many years. The pandemic has added costs, which regular court budgets are unlikely to cater for, given the need to invest in IT solutions, make adjustments to the infrastructure of courts,

<sup>197</sup> [Manning R v \(Rev 1\)](#) [2020] EWCA Crim 592, 30 April 2020, at 41; see Samuel March, "[Courts should consider coronavirus emergency when sentencing, rules Court of Appeal](#)", UK Human Rights Blog website, 12 May 2020.

<sup>198</sup> Ibid.

<sup>199</sup> "[Coronavirus Assault: Ten different arrests for abuse of police, workers](#)", Netherlands Times website, 28 March 2020.

<sup>200</sup> Carl Brewin, "[COVID-19 – What is the immediate future for property lawyers and are there potential opportunities for us in the short to medium term?](#)" Hardwicke.co.uk, 26 March 2020.

intensify the frequency of cleaning and disinfection, provide face masks and ensure compliance with health and safety protocols, and employ additional security personnel, etc.

In addition, the economic crises expected as a result of the pandemic bears the risk of judicial budgets being further reduced while investment in the judiciary is forced to compete with other causes.

## 2. Case allocation

To protect judicial independence and prevent corruption, it is important to ensure that case assignment cannot be influenced. Allocation of cases should, therefore, be either random or organized on the basis of predetermined, clear, transparent and objective criteria.<sup>201</sup> As the European Network of Councils for the Judiciary (ENCJ) set out in their *Minimum Judicial Standards for the Allocation of Cases*, the method of allocation should be publicly available, based on objective principles, and set out in legislation, rules or practice.<sup>202</sup>

These principles need to be upheld at all times, including during and in the aftermath of an emergency like the COVID-19 pandemic, even if changes in the types and numbers of cases require adaptations such as modifying the number of judges (and other court personnel) allocated to certain types of procedure. In Portugal, for example, the usual statutory opportunities in July for judges to apply to change court (“Movimento Judicial Ordinário”) or be promoted to courts of second instance (“Tribunal de Relação”) were not offered to prevent disruption of the regular functioning of the courts. However, newly appointed judges were placed, and temporary positions were created, in courts where a workload increase was expected.<sup>203</sup>

Caution should be exercised regarding the assignment of cases to specialized judges as it bears a high risk of politicization.

## 3. Selection, evaluation and promotion of judges

The ramifications of the COVID-19 pandemic need to be taken into account in all mechanisms of judicial administration, including with regard to the evaluation and promotion of judges. In a range of countries, the performance of judges is assessed on a regular basis and may use quantitative data, such as the completion of a certain number or percentage of cases allocated to them. Where such mechanisms exist, judges should not be evaluated under any circumstances for the content of their decisions or verdicts (either directly or through the calculation of rates of reversal).<sup>204</sup> The UN Human Rights Committee has required that States adopt laws setting out “clear procedures and objective criteria” for promotion of judges.<sup>205</sup> Yet the suspension of procedures, (partial) closure of courts and changes in handling cases during and after the pandemic are likely to affect mechanisms of evaluation and promotion of judges, in particular

<sup>201</sup> 2020 ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia, para. 179; 2010 ODIHR Kyiv Recommendations, para. 12; see also *DMD GROUP, a.s. v. Slovakia* (Application no. 19334/03), European Court of Human Rights.

<sup>202</sup> “[Minimum Judicial Standards IV. Allocation of Cases](#)”, European Network of Councils for the Judiciary, 2018, accessed 18 October 2020.

<sup>203</sup> See <https://www.csm.org.pt/2020/04/30/divulgacao-movimento-judicial-ordinario-de-2020/>.

<sup>204</sup> 2010 ODIHR Kyiv Recommendations, para 28; and 2014 ODIHR Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova, para 18.

<sup>205</sup> UN Human Rights Committee, [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32, 23 August 2017, para 19; OSCE ODIHR, *Legal Digest of International Fair Trial Rights*; see also United Nations Basic Principles on the Independence of the Judiciary, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para. 13 (“wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience”).

where the assessment of performance focuses on quantitative data.<sup>206</sup>

Problems may, therefore, arise if the reduced number of cases due to COVID-19-related delays is not sufficiently taken into account. The evaluation mechanism should neither sanction judges who were unable to meet regular case completion rates as a result of the pandemic nor create an incentive for judges to proceed with cases even though fair trial safeguards are not sufficiently met. Judges should not be put in a situation where they need to choose between their duty to comply with national law and international standards, and the desire to satisfy evaluators in order to avoid disadvantages with future promotion. This is even more concerning where judges do not have security of tenure and their re-appointment or re-election depends on an assessment of their performance, especially if dominated by statistical criteria.

In addition, where judges are selected and appointed during or in the aftermath of the pandemic, there may be a temptation to use quick appointments to deal with case backlogs, risking procedures falling short of international standards. Any such accelerated procedures should be avoided, as should the appointment of “interim” judges or the establishment of “special courts” since this would undermine judicial independence.

Furthermore, there is a risk that decisions relating to judicial administration, including selection, promotion and disciplinary procedures of judges, will continue to be subject to remote decision-making, e.g., circular decisions via email. While such measures may provide a temporary solution to prevent paralysis during the height of the pandemic, they do not compensate for conscientious deliberations of judicial bodies, such as judicial councils and general assemblies of courts, and they bear a risk of undue influence of court presidents.

Finally, the pandemic should not be used as an opportunity by the executive to undermine security of tenure of the judiciary, particularly as countries face economic challenges.<sup>207</sup> In North Macedonia, the Constitutional Court annulled the decision of the government to cut the salaries of judges, prosecutors, MPs and other employees in state institutions.<sup>208</sup> The Court found the measures imposed by the decree were neither proportionate nor necessary and resulted in discrimination against certain categories of state officials.<sup>209</sup>

#### 4. Statistics and data collection

Systems to collect and evaluate statistical and other data should be established as soon as possible, both to improve the response to the pandemic-related challenges and to learn lessons from it for the future. As the European Commission noted, “well-functioning case management systems and mechanisms of statistical data collection concerning the functioning of the courts is

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<sup>206</sup> While the use of quantitative data is common, good practice in judicial administration provides that the evaluation of judges’ performance should primarily be qualitative and focus upon skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal competence (ability to cope with the work load, ability to decide, openness to new technologies), social competence (ability to mediate, respect for the parties) and, for possible promotion to an administrative position, competence to lead. (See, for example, ODIHR Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia, 2010, para. 27).

<sup>207</sup> For example, in Slovenia, while the government is increasing its ministers’ own salaries, it also attempted to reduce those of public sector functionaries, of which the judiciary is part. B. Krans et al., “[Civil Justice and COVID-19](#)”, *Septentrio Reports* 5, 2020, p. 49.

<sup>208</sup> North Macedonia [Constitutional Court Decisions U.br.44/2020 and U.br.50/2020](#) relating to [Decree No.44-2867/1](#), 7 April 2020; see also “[Republic of North Macedonia and letters of the EAJ President](#)”, International Association of Judges website, 7 May 2020. See also:

<<http://www.mja.org.mk/Upload/Content/Documents/%D0%98%D0%BD%D0%B8%D1%86%D1%98%D0%B0%D1%82%D0%B8%D0%B2%D0%B0%20%D0%B4%D0%BE%20%D0%A3%D1%81%D1%82%D0%B0%D0%B2%D0%B5%D0%BD%20%D1%81%D1%83%D0%B4%20%D0%BD%D0%B0%20%D0%A0%D0%A1%D0%9C.pdf>>.

<sup>209</sup> [Constitutional Court Decisions U.br.44/2020 and U.br.50/2020](#); [Decree No.44-2867/1](#), 7 April 2020.

especially relevant during a health crisis".<sup>210</sup>

The responsibility for data collection and analysis should be taken on collectively by relevant State institutions, and data collection by the courts should occur even where the executive and other authorities may be carrying out their own data collection exercises. For both policymakers and courts, the collection and analysis of relevant data is key in order to learn lessons from the handling of the pandemic so far. Unfortunately, as the recent CEPEJ Declaration correctly states, "Such a health crisis may be repeated. The judicial systems have to be prepared, notably when it comes to effective solutions to ensure the continuity of court work and access to justice while respecting individual rights."<sup>211</sup>

Therefore, statistical and other information should be collected, comprehensively disaggregated and analysed. The data collected should include, among other aspects: which hearings were held in courts and which were conducted remotely; the numbers of new offences and corresponding sanctions applied, to determine whether certain groups are disproportionately affected; to what extent individuals were legally represented in different types of procedure, and what impact this had on the outcome; whether legal aid was requested and under which conditions it was granted, etc.

#### **COVID-19 related data collection in the judiciary (Kosovo)**

On 15 June 2020, the Kosovo Prosecution Office released a report on the work of prosecution offices during the application of COVID-19 related restrictive measures in the period between 13 March 2020 and 31 May 2020. It contained information on the number of indictments rendered during this period, the number of defendants involved and the number of those detained on remand. The Kosovo Judicial Council also released its report on the work of the judiciary for 15 March 2020 to 1 June 2020, containing statistical information on the nature of cases handled during this period and the current backlog of cases.

It is important that analysis includes not only statistical information relating to efficiency and productivity but also relating to the impact of emergency measures on fair trial rights and the actual outcome of procedures. For example, the Crown Prosecution Service (CPS) in England and Wales provide a "COVID-19 monitoring flag" internally which identified COVID-19-related elements of existing crimes. The CPS have a number of "case monitoring flags" (including, for example, on domestic abuse and modern slavery) on their case management system in order to monitor performance. The flag was applied at the outset<sup>212</sup> and related to aggravating features of the case (e.g., an alleged assault took place in a shop where someone was accused of stockpiling).<sup>213</sup>

In Denmark, a task force has been established to capture lessons learned for the courts.<sup>214</sup> In addition, from July 2020, the Kosovo Judicial Council approved its Emergency Plan for Crisis Management, and this was disseminated to all courts throughout Kosovo. The presidents of the courts were responsible for implementing measures for the prevention of the spread of COVID-19, as per their needs and in accordance with instructions from the competent health bodies.

#### **Study on video and non-video courts (England and Wales)**

A study funded via the Video Enabled Justice (VEJ) Programme identified a number of

<sup>210</sup> ["CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic"](#), CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

<sup>211</sup> Ibid.

<sup>212</sup> ["CPS data summary Quarter 4 2019-2020"](#), Crown Prosecution Service website, United Kingdom, 30 July 2020.

<sup>213</sup> ["313 prosecutions for assaults on emergency workers completed in first month of lockdown"](#), Crown Prosecution Service website, United Kingdom, 21 May 2020.

<sup>214</sup> Information obtained from consultations.

findings when comparing video and non-video courts.<sup>215</sup> The study examined the use of a technology solution that controlled the video links between courtrooms and remote locations. The VEJ Programme was able to analyse its use and then identify differences between in-person and remote hearings, noting the frequency of bail, rate of adjournments, the availability of legal representation and its subsequent outcome on the hearings, among other matters.

## 5. Training needs

As in many other professions, the COVID-19 pandemic has prompted a number of once-in-a-lifetime challenges for the judiciary. Judicial stakeholders are facing a steep learning curve in a short period of time, including the use of new technology, but also in terms of the applicable legal framework and relevant international standards. In addition, the environment keeps changing as States go through different phases of the pandemic. Consequentially, the CEPEJ has recognized the critical need for training judges, staff employed at court, and prosecutors, lawyers and other judicial stakeholders.<sup>216</sup>

At a time when standards of international law and principles of fair trial should be paramount, it becomes even more crucial that judges are familiar with how to apply relevant international law, in particular the concepts of necessity and proportionality, to cases before them, including for instance sanctions for breach of emergency measures. Moreover, judges need avenues to acquire knowledge swiftly and reliably with regard to emergency legislation, as well as how to respond to crises in the future. Legislation that existed prior to the pandemic must be applied in an entirely new context. New laws adopted during the course of the pandemic may raise additional issues for which judges might need training. As the CEPEJ Declaration points out, "Specific training on the new types of cases arising from the COVID-19 pandemic should also be provided for justice professionals", and "[n]ew curricula should be developed to support justice professionals during and after a health crisis".<sup>217</sup>

The same is true with regard to applicable international standards, in particular human rights and fundamental freedoms, which may not be familiar to all judges who now need to apply them. Different areas of international law may have become relevant, and even "familiar" areas of international law have prompted new and challenging legal questions in the context of COVID-19.

Judges and court staff may not be sufficiently proficient in the use of electronic platforms to access documents, conduct electronic case management, including e-filing and electronic signatures, electronic case management and videoconferencing options. The handling of confidential information in electronic form means that judges and judicial staff need to upgrade their awareness of data security tools and privacy safeguards, including relevant national law and international standards. Training would also be useful on remote hearings, including on the appropriateness of remote adjudication, legal and procedural adaptations for case management, reducing risks associated with new technologies and geographical separation of participants, and safeguarding open justice, privacy and due process. Furthermore, training initiatives that would have ordinarily been delivered may have been cancelled or postponed. This may have implications for promotion or progression. To design training programmes that are tailored to the needs of the judiciary in their response to the pandemic, surveys of judges and court staff

<sup>215</sup> Nigel Fielding et al., "[Video Enabled Justice Evaluation](#)", Sussex Police and Crime Commissioner and University of Surrey, Final Report Version 11, March 2020.

<sup>216</sup> "[CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic](#)", CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020, Principle 6.

<sup>217</sup> Ibid.

could be used.<sup>218</sup>

Some training initiatives could be delivered online or in a hybrid manner. For the European region, the *European Judicial Training Network* (EJTN) could play a role in training initiatives. The Central and Eastern Europe Law Initiative (CEELI) has started offering a course on remote judging for judges from Central and Eastern Europe, intending to mix online and on-site sessions.<sup>219</sup> In Ukraine, the National School of Judges of Ukraine has launched a remote training course for court staff on the European Convention on Human Rights,<sup>220</sup> and also regularly uses two OSCE supported remote training courses for judges on the ECHR. In North Macedonia, the Academy for Judges and Public Prosecutors, in cooperation with some courts and supported by different donors, conducted webinars and training on a range of topics such as the use of electronic evidence and online hearings. Similarly, the Greek National School of Judges (ESDI) has offered remote training to judges using the e-presence platform and has organized eight e-conferences.

## 6. Recommendations

- Judicial administration should be robust and independent.
- There should be additional financial investment for adjustments to the infrastructure of courts.
- Judicial self-governing bodies and judges' associations should engage in timely discussions on preparing for the restoration of court activities at the end of restrictive measures, including ways in which to reduce the backlog of cases.
- Case allocation should be fair, rule based and transparent.
- Training for judges should be initiated to build the capacity of the judiciary on international law relating to the new types of cases arising as a result of the pandemic, in particular relating to the necessity and proportionality of sanctions for breach of emergency measures.
- Where judges are subject to periodic evaluation, such processes should take into account the impact on the number of cases being heard by courts during the pandemic. COVID-19-related delays must never infringe the security of tenure of judges.
- Standards of judicial independence need to be observed at all times, including adherence to national rules and international standards for judicial appointment, promotion and disciplinary procedures.
- Courts, judges and judicial administration should systematically collect, comprehensively disaggregate and analyse information about court operations during and in the aftermath of the pandemic in order to capture lessons learned. This should include an assessment of the impact of emergency measures on case outcomes, including the outcomes of remote hearings.

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<sup>218</sup> [“CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic”](#), CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.

<sup>219</sup> [“Best Practices for Remote Judging: CEELI Online Course”](#), CEELI Institute Prague, accessed 16 October 2020.

<sup>220</sup> [“Management of the judiciary – compilation of comments and comments by country”](#), CEPEJ, accessed 15 October 2020.

## ANNEX 1: CHECKLIST OF ISSUES

### General

- ✓ Courts should consider developing exit strategies, adaptable over time, for emerging from restrictions imposed by the pandemic.
- ✓ States should avoid a “hyper-production” of vague laws, decrees, regulations and instructions on emergency measures for the judiciary from different levels of power (legislative, executive, judicial).
- ✓ Courts should ensure that the requirements of fair trial are respected during states of emergency and never subject to measures that would circumvent non-derogable rights.
- ✓ Judicial oversight should be available to review both the constitutionality and legality of any declaration of state of emergency, and any implementing measures, to evaluate the proportionality of the restrictions, as well as the procedural fairness of application of the public emergency legislation.
- ✓ Higher judicial authorities and court presidents should issue guidance to assist individual judges in determining how to manage their responses to the pandemic. Feedback should be sought and guidance should be amended accordingly.
- ✓ Courts, when determining measures, should consider how to maintain a balance between clarity and predictability and judicial discretion and flexibility.
- ✓ Courts could consider the establishment of committees to propose and oversee measures to manage the pandemic.
- ✓ The judiciary should identify ways to share practices that respond to the pandemic, among and across different courts, different regions of the country and different jurisdictions.
- ✓ Dialogue should be established with a wide range of professions, in particular with lawyers and bar associations, to ensure access to justice and safety measures are adequately taken into account.
- ✓ When designing their protocols and responses to the pandemic, courts should consider the needs of vulnerable persons and the impact on their rights to fair trial and access to justice.
- ✓ Measures and protocols should be communicated to all users, rapidly and regularly, and in ways which are accessible and which take account of vulnerabilities. Those attending court should be provided with detailed guidance.
- ✓ Alternative means of communicating with court users should be considered in order to reduce the numbers of persons attending court in person.
- ✓ The secure and confidential transmission of data needs to be ensured in the provision of any technology used by the courts.

### Determining urgency

- ✓ Clear criteria should be established, preferably in law, with a margin of discretion for judges, for the determination of an “urgent case”.
- ✓ The criteria should be objective, fair and clear and should not undermine judicial independence or be discriminatory.
- ✓ Criteria should be transparent and available to others for consultation, including members of the legal profession and their associations.
- ✓ Courts should retain flexibility to adapt to the pandemic. A case-by-case approach in determining what is urgent may be appropriate as a way of ensuring judicial discretion and independence.
- ✓ Guidance by law, regulation or recommendation can avoid arbitrariness and ensure fairness, transparency and consistency.
- ✓ The “organ” taking decisions on urgency needs to be determined in advance to prevent any tampering and inconsistency.

- ✓ Determining what is urgent should take into consideration those cases where defendants are in (pre-trial) detention; cases where immediate protection is required by women or other vulnerable groups from (domestic) violence (in particular during confinement in quarantine); other urgent family disputes; and cases relating to violation of measures concerning COVID-19 that imply irreparable harm. The availability of certain remedies is required by international human rights obligations and cannot be suspended.
- ✓ Those who have been held on remand longer than they would have been without the pandemic should have their cases be considered as urgent.
- ✓ Other procedures dealing with potentially unjustified detention should also be considered a priority, particularly considering the risk of infection in usually cramped conditions in prison.
- ✓ Determining what is urgent should be a judicial decision, taken without prejudice to the merits of the case, and made simply and quickly. Any decisions should be communicated promptly to all stakeholders.
- ✓ Courts need to consider the impact of the pandemic on other actors outside of the judiciary, including the legal profession, probation officers, notaries, interpreters, etc.
- ✓ The accessibility and effectiveness of legal aid during and in the aftermath of the pandemic by States and courts should be provided. There should be the possibility of submitting and reviewing applications for legal aid online.

#### **Videoconferencing and IT solutions**

- ✓ The right to a fair trial must not be jeopardized by any technological solutions to the pandemic.
- ✓ The needs of vulnerable persons in accessing and managing the technology must be considered.
- ✓ Courts should adopt criteria to identify those cases which are suitable for remote hearings and those which are not.
- ✓ The decision on whether to hold a remote hearing should be a matter for the court, in line with the need to respect the right to fair trial.
- ✓ The use of this new technology or expansion into other areas will need some basis in law.
- ✓ The respective technical solutions and support must be in place for all parties involved, i.e., judges, lawyers, prosecutors, parties, witnesses, interpreters (where applicable).
- ✓ Decisions may ultimately need to be taken on a case-by-case basis, but they should be based on predictable, general rules and take into account the overarching principle of the right to a fair trial. The seriousness of the impending sanction and the preference of the defendant should be considered.
- ✓ Judiciaries should consider the amendment of rules of procedure for judicial councils and general assemblies of courts in order to enable remote deliberation or decision-making in case of emergency, taking account of necessity and proportionality.
- ✓ The physical presence of parties in court hearings should remain the rule, and recourse to remote proceedings should constitute an exception. Judiciaries should ensure that all hearings are held in person when fair trial rights cannot otherwise be guaranteed.
- ✓ The consent of the parties, with limited exceptions, should be required for remote hearings.
- ✓ States should provide the necessary financial resources to courts to conduct remote proceedings and should cover: the necessary technical equipment, connection to the Internet, training for the staff in charge of the use of this equipment, guaranteeing access for vulnerable defendants, parties and witnesses, etc.

- ✓ Judges should respect the right to a public trial and the right to a fair hearing of defendants during the pandemic, recognizing that some aspects of the right cannot be derogated. Any restrictions need to be necessary, proportionate and based on law.
- ✓ Managing participants in virtual hearings requires a reconsideration of court etiquette, managing and engaging individuals.
- ✓ The observation of trials and trial monitoring in videoconference hearings should continue.

### **Health and safety**

- ✓ Courts need to remain functional to discharge key functions while preserving the right to life and health of judges and judicial staff, as well as for all users of court services.
- ✓ Health and safety considerations in courts are required for a range of stakeholders who use the courts, both remotely and in person.
- ✓ There should be clarity on whose responsibility it is to determine health and safety protocols, identify risk and put measures in place.
- ✓ Consideration needs to be given to the suitability of courtrooms for various hearings, bearing in mind their size, accessibility, IT equipment and ventilation; the availability of waiting rooms and spaces; the availability of other suitable venues.
- ✓ Health and safety protocols for courts will need to include entry, egress and movement within buildings; sanitation, management of usual security requirements; and the consequent staffing implications.
- ✓ Higher judicial authorities should provide clear guidance on sanctions in the event of non-compliance and on compelling individuals to attend court.

### **Prioritization of cases and dealing with the backlog**

- ✓ While the prioritization of cases following the end of emergency measures should not undermine the protection of the rights of individuals, it should follow fair and objective criteria and should be promptly communicated to all stakeholders.
- ✓ The prioritization of cases should ensure gender equality and the protection of the most vulnerable, including children, older persons and persons with disabilities.
- ✓ Criteria for prioritization should be sufficiently flexible to enable judicial discretion.
- ✓ Consideration should be given to the use, or expanding the use of, online mediation processes or mediation through remote hearings, and written procedures.
- ✓ Alternative ways of diverting cases away from the courts should be encouraged.
- ✓ Courts and policymakers should consider the extension of deadlines and limitation periods, as well as revising incentives for those who plead guilty at the earliest opportunity, provided that the rights of the defence and international standards are upheld.
- ✓ Debates around how the criminal justice system can be decongested should be revisited.

### **New types of cases**

- ✓ Existing offences need to be applied in a manner which is consistent not only with international standards but also with current practices.
- ✓ New offences and laws need to satisfy principles of legal certainty, proportionality, necessity and non-discrimination
- ✓ There should be consistent application of pandemic-related factors when determining sentencing.

### **Court management and judicial administration**

- ✓ A strong and independent judicial administration is essential.
- ✓ There should be additional financial investment for adjustments to the infrastructure of courts.

- ✓ Case allocation should be fair, rule based and transparent.
- ✓ International standards on appointment, promotion and progression of judiciary must be complied with.
- ✓ Courts should gather their own statistics and data on responses to the pandemic.
- ✓ Training of the judiciary and court staff should continue, and additional training should be provided to deal with the new realities, including training on international standards.

## ANNEX 2: LIST OF RESOURCES AND RELATED PUBLICATIONS

### General resources on courts and COVID-19

- Consultative Council of European Judges (CCJE), "[Statement of the President of The CCJE. The role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges](#)", CCJE(2020)2, 24 June 2020.
- Council of Bars and Law Societies of Europe (CCBE), "[CCBE Survey: exchange of experiences and best practices between bars](#)", 2020.
- Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states, 7 April 2020, SG/Inf(2020)11.
- European Commission for the Efficiency of Justice (CEPEJ), "[CEPEJ Declaration. Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic](#)", CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.
- European Commission for the Efficiency of Justice (CEPEJ), "[Concluding Remarks by Hanne Juncker, Justice and Legal Co-operation Department, Directorate General of Human Rights and Rule of Law](#)", CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020.
- Fair Trials, "[Commentary: COVID-19- A Threat to Fair Criminal Justice?](#)", FairTrials.org, 7 April 2020.
- Fair Trials, "[Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings](#)", FairTrials.org, 30 March 2020.
- Fundamental Rights Agency, "[Coronavirus Pandemic In The EU –Fundamental Rights Implications: With A Focus On Contact-Tracing Apps](#)", Bulletin No. 2, 21 March – 30 April 2020, p. 28.
- Illustrious Bar Association of Madrid, "[COVID-19 Sector Guide](#)", Human Rights Section, April 2020, (Spanish).
- International Commission of Jurists (ICJ), "[Human Rights in the time of COVID-19: Front and Centre – ICJ news, articles, op-eds, legal blogs, videos](#)", 6 April 2020 (Website with relevant documents and videos).
- International Commission of Jurists (ICJ), "[ICJ Guidance on the Courts and COVID-19](#)", 7 April 2020.
- International Commission of Jurists (ICJ), "[The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan](#)", Briefing Paper, 2020, pp.13.
- Krans, B. et al., "[Civil Justice and COVID-19](#)", *Septentrio Reports* 5, 2020.
- Magistrats Européens pour la Démocratie et les Libertés (MEDEL), "[Justice and Challenges in Times of Pandemic in Europe](#)", 1 June 2020.
- Nuffield Family Justice Observatory, "[Remote hearings in the family justice system: a rapid consultation](#)", 2020.
- OSCE Office for Democratic Institutions and Human Rights (ODIHR) "[OSCE Human Dimension](#)

[Commitments and State Responses to the Covid-19 Pandemic](#)”, July 2020.

OSCE Office for Democratic Institutions and Human Rights (ODIHR) and Association for the Prevention of Torture, Guidance. Monitoring Places of Detention through the COVID-19 Pandemic, Warsaw, OSCE/ODIHR and APT 2020.

Penal Reform International, “[Coronavirus. Preventing harm and human rights violations in criminal justice systems](#)”, 14 July 2020.

Pollard, M., Laronche M. and Grande, V., “[COVID-19 Symposium: The Courts and Coronavirus \(Part I\)](#)”, OpinioJuris.org, 3 April 2020.

Pollard, M., Laronche M. and Grande, V., “[COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#)”, OpinioJuris.org, 3 April 2020.

Standing International Forum of Commercial Courts, “[Delivering justice during the COVID-19 pandemic and the future use of technology](#)”, Memorandum, 29 May 2020.

Standing International Forum of Commercial Courts, “[Case Management best practice – working presumptions produced by first SIFoCC International Working Group](#)”, 2 May 2020.

Sun, N. and Zilli, L., “[COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I](#)”, OpinioJuris.org, 3 April 2020.

Trial International, “[Justice in the time of Coronavirus](#)”, May 2020.

UNODC, “[Guidance Note. Ensuring Access to Justice in the Context of COVID-19](#)”, May 2020.

van Gelder, E., Kramer, X. and Themeli, E., “[Access to Justice in times of Corona: When COVID-19 makes the case for greater digitisation of justice](#)”, ConflictofLaws.net, updated 8 April 2020.

Villadiego Burbano, Carolina, “[Judiciaries during COVID-19: South American experience](#)”, 29 April 2020.

### **Materials on videoconferencing**

Council of Europe, “[Regional online round table on 'Videoconference in court proceedings: human rights standards'](#)”, 18 June 2020.

Devoe, D. and Frattaroli, S., “[Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward](#)”.

Equality and Human Rights Commission, “[Inclusive justice: a system designed for all](#)”, June 2020.

Fair Trials, “[Commentary: Impact assessment of remote justice on fair trial rights](#)”, 5 May 2020.

Fielding, N. et al., “[Video Enabled Justice Evaluation](#)”, Sussex Police and Crime Commissioner and University of Surrey, Final Report Version 11, March 2020.

### **Materials relating to particular countries**

CEPEJ, “[Management of the judiciary – compilation of comments and comments by country](#)”, 15 October 2020.

Council of Europe, "[The impact of COVID-19 on judicial cooperation in criminal matters - Executive summary of information compiled by Eurojust and EJN](#)", 7693/4/20, REV 4, 18 September 2020.

Hungarian Helsinki Committee, "[Main changes in the Hungarian criminal procedure due to COVID-19](#)", 1 June 2020 (an English summary about the changes introduced to the criminal procedure due to the pandemic).

Galič, A., "[Slovenian Civil Procedure in the age of COVID-19](#)", Septentrio.uit.no, 21 April 2020.

Graver, H.P., "[Fighting the Virus and the Rule of Law – A Country Report on Norway](#)", 13 April 2020.

Safety Measures and Court Operation Procedures in Greek Administrative Courts throughout the COVID-19 pandemic, (March 2020-June 2020), paper on file with authors.

### **Other websites**

<<https://remotecourts.org/>>

<<https://cmja.biz/forum-introduction>>: The Commonwealth Magistrates and Judges Association has established an online forum. The forum is for members only and password protected.

<<https://www.ibanet.org/Document/Default.aspx?DocumentUid=E9A83AEF-6B17-4A54-815F-1C6E0D600163>>: A booklet published by the IBA summarizes what is happening in some jurisdictions.