

# Fair Trial Rights and Public Health Emergencies



The recommendations in this policy brief are a part of ODIHR's ongoing efforts to respond to human rights challenges caused by the COVID-19 pandemic throughout the OSCE.

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# INTRODUCTION

The participating States of the Organization for Security and Co-operation in Europe (OSCE) have committed to creating and maintaining an effective court system and ensuring compliance with the right to a fair trial, as well as other relevant human rights. The court system is crucial to the proper functioning of any state. Independent courts can ensure that other branches of power guarantee human rights and fundamental freedoms. The COVID-19 pandemic created significant challenges to the functioning of the court system, and the right to a fair trial has been under severe pressure across the OSCE region due to various restrictive measures imposed during the pandemic.

These policy recommendations provide guidance to policymakers, representatives of the judiciary, legal professionals, civil society and other stakeholders on how to develop, implement and follow legislation and rules in line with the right to a fair trial and other relevant rights during public health emergencies, with attention to equality and diversity.

Various aspects of fair trial rights are at the core of the work of the OSCE Office for Democratic Institutions and Human Rights (ODIHR). ODIHR supports the participating States in upholding their commitments pertaining to the rule of law. By developing this set of policy recommendations, ODIHR is continuing its efforts to assist authorities in overcoming the unprecedented challenges posed by the COVID-19 pandemic.

A pandemic, such as COVID-19, is a public health emergency and these recommendations reflect its special nature. They may be less relevant in other types of emergencies, such as military emergencies or natural disasters. Public health emergencies pose significant and specific challenges to the normal functioning of the judiciary, but it is essential that courts' operations are maintained during such emergencies as much as is safe and possible. In order to prevent a disease from spreading, states may be forced to adopt emergency rules and regulations related to the functioning of the

judiciary. These emergency rules and regulations, however, should not fundamentally undermine the delivery of justice in human rights-compliant manner.

These policy recommendations draw inspiration from international standards related to the operation of the judiciary during public health emergencies, relevant human rights standards developed by the European Court of Human Rights and international human rights institutions, as well as good practices in OSCE participating States. These recommendations should not be used to justify the limitation of rights. In fact, national standards that go beyond those outlined here to ensure the effective functioning of the judiciary during public health emergencies can be introduced if states deem them appropriate and possible.

This brief expands upon the key findings and recommendations outlined in two ODIHR reports published in 2020: [OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#) and [The Functioning of Courts in the COVID-19 Pandemic: A Primer](#).

Throughout the COVID-19 pandemic, ODIHR has convened discussions with various stakeholders, including judges, civil society, international and regional partner organizations and the OSCE field operations, to identify the key challenges that the judiciaries across the OSCE region are facing during the pandemic, in particular due to trials being conducted online, and to identify solutions to ensure the observance of the right to a fair trial. Overall, ODIHR consulted around 50 experts from all geographical sub-regions of the OSCE region in the process of developing this policy brief. In the final stage of development, four experienced fair trial rights experts, including senior judges, undertook a detailed peer-review of the policy brief to assess how its recommendations respond to the needs of legal professionals and to verify its alignment with recognised international and regional human rights standards and good practices.

# GLOSSARY

**Hybrid hearings** – a court hearing that takes place partially online, namely some participants are in one physical location (for instance, judges, some witnesses and others) and some are connected via the Internet.

**Judicial self-governing bodies** – governing bodies established within the national judiciary in order to ensure the effectiveness of the judicial system and facilitate the application of general rules and regulations. This definition includes various judicial councils, heads of courts at various levels and judicial administration.

**National judiciary** – all courts and tribunals existing in a given country.

**Online hearings** – a court hearing that takes place fully online, namely, all participants are in different locations and connected via the Internet.

**Professional court participants** – judges, court staff, defence lawyers and prosecutors.

**Public health emergency** – an unusual life-threatening situation that poses a substantial risk of a significant number of human fatalities or permanent or long-term disability, in line with the definition of public health emergencies of [the World Health Organization](#).

**Rule-makers** – for the purposes of these recommendations, the state bodies (including judicial self-governing bodies) with the competence to set up rules and regulations, including those aimed at preventing the spread of disease during public health emergency. These state bodies include relevant legislative, executive and judicial bodies.

**Stakeholders** – for the purposes of these recommendations, stakeholders are judges, supporting court staff, prosecutors, defence lawyers, parties, defendants, victims, witnesses, relevant social workers, experts and other trial participants.

# 1. GENERAL RECOMMENDATIONS

## **1.1. NATIONAL RULES DEVELOPED IN RESPONSE TO A PUBLIC HEALTH EMERGENCY SHOULD BE ADOPTED IN ACCORDANCE WITH THE PRE-EXISTING NATIONAL PROCEDURES. THESE RULES SHOULD BE INTERPRETED RESTRICTIVELY AND BE PROPORTIONATE TO THE AIM PURSUED.**

A formal state of emergency should be declared if the law of a participating State envisages such a declaration and if adopted emergency rules place significant restrictions on public life and affect the normal functioning of a national judiciary. A necessary precondition for declaring a state of emergency should be that the powers provided by regular legislation are not sufficient to overcome the emergency. The ultimate goal of any state of emergency should, therefore, be for the state to resolve the emergency situation and return to the state of normalcy as soon as possible.

Irrespective of whether a state of emergency is officially declared, the rules adopted in response to a public health emergency should be clear and consistent, and they must be adopted in accordance with pre-existing procedures. They should include a time limit or clear indicators of when these emergency rules will cease to exist. They should be revised periodically and should not be kept indefinitely. The emergency rules should be relevant and necessary to reduce the negative consequences of the public health emergency. The rules should aim to mitigate gender inequality exacerbated by public health emergencies, for instance by limited access to child care. It is, likewise, important to ensure that the rights of people with disabilities are not disproportionately affected by the emergency rules.

The impact of the emergency rules on the national judiciary and other stakeholders should be considered prior to their adoption. The present recommendations only consider the emergency rules relevant to the national judiciary; for a more comprehensive analysis of emergency rules and regulations, see the [OSCE Human Dimension Commitments and State Responses to the COVID-19 Pandemic](#).

## **1.2. AUTHORITIES SHOULD ENSURE THAT THE NATIONAL JUDICIARY CONTINUES TO OPERATE TO THE FULLEST POSSIBLE EXTENT DURING A PUBLIC HEALTH EMERGENCY.**

Judges, court staff, defence lawyers and prosecutors should be able to continue their work, albeit with some necessary limitations and restrictions. For example, they should be included in the list of professions exempt from curfews, travel restrictions and other similar restrictions affecting their ability to fulfil their functions, if such restrictions are introduced. A system that allows experts, social workers and other key participants of urgent trials to travel to courts should be introduced. Emergency rules should not undermine the fundamental requirements of fair trial rights, such as access to court and to effective remedies, equality of arms, confidentiality of communication between the parties and their lawyers, presumption of innocence and many others. Rule-makers might consider including professional court participants in the priority categories of those receiving vaccination and personal protective equipment. Emergency rules should be gender sensitive. For instance, professional court participants should be entitled to priority access to child care and relevant social benefits in light of gender and diversity considerations. For a more detailed discussion related to the functioning of the judiciary during the COVID-19 pandemic, see [The Functioning of Courts in the COVID-19 Pandemic: A Primer](#).

## 2. ORGANIZATION OF THE NATIONAL JUDICIARY DURING PUBLIC HEALTH EMERGENCIES

### 2.1. JUDICIAL SELF-GOVERNING BODIES NEED TO ADOPT ADEQUATE, CLEAR AND PREDICTABLE RULES REGARDING THE FUNCTIONING OF THE NATIONAL JUDICIARY.

Judicial self-governing bodies need to adopt adequate new working methods and approaches to the process of delivering justice during a public health emergency. These new methods should be clear and predictable, while allowing necessary flexibility. Within their competence, judicial self-governing bodies need to proactively issue rules and protocols to ensure the operation of the national judiciary as effectively and safely as possible. These rules should include norms on rotation of judges and supporting staff, opening hours, case prioritization, setting and postponing hearings, health measures during hearings (for instance distancing), communication with trial participants and the public, and access to court buildings. The rules should also identify those responsible for compliance with these recommendations. These rules should be set with gender and diversity considerations in mind.

### 2.2. THE OPINIONS OF STAKEHOLDERS SHOULD BE CONSIDERED DURING THE DEVELOPMENT OF EMERGENCY RULES.

The reasonable views of judges, lawyers, social services, prosecutors and civil society should be considered in the process of developing emergency rules related to the judiciary. It is recommended that the rule-makers should set up a consultative committee that would be involved in discussing and reviewing the emergency rules. The committee should consist of the relevant stakeholders including judges. Without undermining the independence of the judicial self-governing bodies, this committee should be mandated to provide feedback and recommendations on emergency rules and regulations. The rules should be regularly reviewed, taking the feedback from this committee into account.

### 2.3. EMERGENCY RULES MUST COMPLY WITH INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS.

All emergency rules related to the judiciary should comply with the applicable national laws and international standards of fair trial rights and the rule of law. The rule-makers should verify the compliance of emergency rules with the relevant international human rights law. Official derogations from international human rights mechanisms only allow those measures that are strictly required by the exigencies of the public health emergency. Non-derogable rights, such as the prohibition of torture or slavery, must never be breached even during a state of emergency. The emergency rules affecting other human rights and freedoms should be based on the overarching principle of the rule of law, and on the principles of necessity, adequacy, equality and non-discrimination, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation and loyal co-operation among state institutions.

### 2.4. EMERGENCY RULES SHOULD ENSURE THE INTERESTS OF THE MOST VULNERABLE TRIAL PARTICIPANTS.

The impact of a public health emergency can be particularly severe for the most vulnerable groups, including people with disabilities, elderly people, ethnic minorities, homeless people, minors, migrants and others. Emergency rules should not assume a certain level of computer literacy, education, ability or access, etc. Emergency rules should explain what needs to be done if the parties have no access to computers or are unable to operate them in case of online or hybrid hearings. The rules should ensure the right to effectively participate in online or hybrid hearings without intimidation or pressure on people with disabilities and other vulnerable individuals.

## **2.5. EMERGENCY RULES SHOULD NOT UNDULY RESTRICT ACCESS TO A LAWYER BY SUSPECTS OR THE ACCUSED.**

The authorities should ensure prompt access to a lawyer to all suspects or the accused, including those in police custody or prison. In exceptional circumstances where police authorities are unable to guarantee in-person access to a lawyer, remote access may be arranged subject to specific safeguards.

## **2.6. EMERGENCY RULES SHOULD ENSURE THAT INTERPRETATION IS AVAILABLE TO THOSE WHO DO NOT UNDERSTAND THE LANGUAGE OF THE TRIAL.**

When the right to interpretation is supposed to be provided at in-person hearings, it should also be ensured and facilitated in online or hybrid hearings, free of charge. Courts should use technology that allows them to accommodate interpretation.

## **2.7. EMERGENCY RULES SHOULD ALLOW SOME FLEXIBILITY IN IMPLEMENTATION TO THE LOCAL CIRCUMSTANCES.**

The rule-makers should establish a combination of firm and flexible rules. The rule-makers should set a clear, practical and consistent framework, but the implementation should be overseen by the heads of courts taking local circumstances into account. For example, the rule-makers can establish a fixed rule that there should be two meters social distancing in every court, then the courts should be allowed sufficient flexibility as to how to implement this rule (e.g., limit the number of participants, introduce hybrid hearings or hire bigger venues).

## **2.8. EMERGENCY RULES SHOULD ALLOW SOME FLEXIBILITY TO ACCOMMODATE THE SPECIFIC CHALLENGES THAT DIFFERENT TYPES OF COURTS FACE DURING PUBLIC HEALTH EMERGENCIES.**

Different types of courts face different challenges, and the emergency rules need to be flexible enough to accommodate these differences. Courts of various sizes (in terms of the number of staff and available venues) or jurisdictions (civil, criminal or juvenile) need different emergency rules to respond to the challenges of the public health emergency effectively. For example,

commercial courts might introduce online or hybrid hearings more easily than criminal courts because of the nature of evidence usually produced in such hearings, particularities of the proceedings and the applicable fair trial standards.

## **2.9. RULE-MAKERS SHOULD ADOPT PROTOCOLS THAT PROTECT THE HEALTH AND SAFETY OF JUDGES AND OTHER STAKEHOLDERS.**

Emergency rules may include introduction of shifts to minimize the number of staff members in buildings and allow the most vulnerable to work from home, for example. The shifts should not be set automatically but consider gender and diversity considerations. For example, shifts should not place disproportionate burden on primary child-carers. A person or a group of people supervising the compliance with these rules should be appointed within the court.

## **2.10. RULE-MAKERS SHOULD RECEIVE REGULAR FEEDBACK FROM THOSE IMPLEMENTING THE RULES.**

The rule-makers should collect information on the implementation of emergency rules, including on the use of new technologies during public health emergencies. This will establish a feedback loop that can improve the quality of the response of the judicial system to the emergency situation. Local courts should prepare reports that would describe how the emergency rules are implemented and send these reports to the rule-makers.

## **2.11. COURTS AT EVERY LEVEL, AS WELL AS ALL OTHER STAKEHOLDERS, SHOULD BE PROMPTLY INFORMED ABOUT EMERGENCY RULES TO ENSURE THEIR UNIFORM APPLICATION.**

Effective methods of communication between the rule-makers and stakeholders are of key importance during public health emergencies. It is recommended to rapidly disseminate guidance related to emergency rules to all stakeholders. The rule-makers can also use the committee suggested in section 2.2 to share the information among the stakeholders. The rule-makers should also ensure that the general public is informed about the emergency rules affecting the national judiciary through various communication channels normally



accessible by the general public, including specialized websites and social and professional networks.

**2.12. JUDICIAL SELF-GOVERNING BODIES SHOULD NOT CURTAIL RIGHTS AND SAFEGUARDS THAT ARE NOT DIRECTLY LIMITED BY THE EMERGENCY RULES.**

Those regulations that are not affected by emergency legislation should not be *de facto* curtailed. Courts need to follow regular procedures even during a public health emergency.

**2.13. BUDGETARY FUNDING OF THE NATIONAL JUDICIARY SHOULD NOT BE CURTAILED DURING PUBLIC HEALTH EMERGENCIES.**

The right to a fair trial can only be properly guaranteed if courts have appropriate funds and resources at their disposal. In the context of public health emergencies, there is a risk that states may overlook the significant role of courts, in relation to effective remedies against emergency measures and grievances caused. Funding of the national judiciary, including legal aid, should not be disproportionately curtailed during the emergency. Quite to the contrary, funding needs to be increased appropriately where the judiciary is required to implement emergency rules.

## 3. NEW CASE PROCESSING RULES DURING PUBLIC HEALTH EMERGENCIES

### 3.1. EMERGENCY RULES SHOULD PROVIDE A MECHANISM TO EXTEND LEGAL DEADLINES DURING PUBLIC HEALTH EMERGENCIES.

Emergency rules should regulate how legal deadlines are applied. Such rules need to consider the complexities of the situation and enable trial participants to make full use of their procedural rights by allowing them to submit legal documents within the updated legislative deadlines. The relevant amendments should be included in specialized legislation and applied only to the extent that is necessary to accommodate the special circumstances of the public health emergency. It is recommended to set a general rule of deadline extension, with a possibility of exceptions in limited urgent cases.

### 3.2. EMERGENCY RULES SHOULD PRIORITIZE URGENT CASES.

The prioritization and categorization of cases are of fundamental importance in the circumstances of a public health emergency. The criteria for the determination of urgency should be clear and consistent. They might include the need to prevent irreparable harm, cases related to domestic violence, cases involving minors or the elderly and related to non-derogable human rights such as the prohibition of torture. The cases of defendants who are detained on remand should be prioritized. The priority rules should be flexible enough to leave a margin of discretion to judges to accommodate exceptional cases.

### 3.3. EMERGENCY RULES SHOULD ESTABLISH HOW HEARINGS BY PANELS OF JUDGES ARE ORGANIZED.

Rules should clarify whether all or part of a panel of judges should be in the same physical room during hybrid or online hearings, and whether they are allowed to deliberate online. Confidential communication between panel judges in different locations should be ensured.

## 4. NEW COMMUNICATION TECHNOLOGIES

### 4.1. ONLINE AND HYBRID HEARINGS MUST BE COMPATIBLE WITH HUMAN RIGHTS STANDARDS AND THE RULE OF LAW.

Online or hybrid hearings should be used as an alternative to in-person hearings only if the latter are not safe or not possible. Online or hybrid hearings should be conducted in accordance with national legislation and in compliance with the rule of law and human rights, including rules guaranteeing data security, privacy of communications and judicial independence. The increased number of online or hybrid hearings during a public health emergency might require special laws, guidelines and protocols developed by rule-makers in collaboration with IT specialists, data protection experts and judicial self-governing bodies. These rules should be circulated among judges and other stakeholders and made publicly available.

### 4.2. ONLINE OR HYBRID HEARINGS ARE NOT APPROPRIATE IN ALL CASES AND FLEXIBILITY SHOULD BE ALLOWED.

The rule-makers should allow discretion when deciding if online or hybrid hearings are possible and desirable, prioritizing in-person hearings as much as possible. The presiding judge needs to consider the implications of a possible delay on the rights of the parties, the nature of the hearing, access and availability of necessary equipment, the need to physically examine the evidence, as well as vulnerabilities of the parties and witnesses. Thus, online or hybrid hearings might not be possible in all cases and should be used only if appropriate. The presiding judge should consider the opinion of the parties and of the witnesses in this respect and decide in the form of a reasoned judgment.

### 4.3. INTRODUCTION OF NEW TECHNOLOGIES SHOULD BE ACCOMPANIED BY PLANNING, CAPACITY AND HUMAN RIGHTS-COMPATIBILITY ASSESSMENTS.

The rule-makers should conduct a thorough human rights and rule of law compatibility and technical assessment before introducing new courtroom technologies. For example, the mere application of new technologies

should not undermine the equality of arms; it should not become an extra hurdle for effectuating the procedural rights of the parties. The emergency rules should explain how the hearings should be organized, what software and hardware is required, how unsupervised communication of the parties with their lawyers can be arranged, what the presiding judge should do with disruptive witnesses or other trial participants, what to do in case of bad Internet connectivity, if a participant cannot be heard and in other comparable situations.

### 4.4. JUDICIAL SELF-GOVERNING BODIES SHOULD FACILITATE SUFFICIENT TRAINING FOR ALL PARTICIPANTS OF ONLINE AND HYBRID HEARINGS.

Judges, court staff and other professional participants of online and hybrid hearings should be provided with sufficient training in IT solutions, as well as data protection and standards of human rights protection during online or hybrid hearings. The parties, defendants, witnesses and other *ad hoc* participants should be given instructions as to how to operate the software and hardware. It is recommended that an online meeting between the hearing participants and a person responsible for technical support is arranged prior to the hearing. This person should confirm that the participants are able to use the software and hardware and participate in the hearing.

### 4.5. AN ONLINE CASE AND DOCUMENT MANAGEMENT SYSTEM MIGHT BE REQUIRED FOR EFFECTIVE ONLINE OR HYBRID HEARINGS.

The rule-makers need to introduce electronic case management systems linking all the stakeholders to facilitate social distancing before, during and after hearings. In order to facilitate online or hybrid hearings, the rule-makers might need to ensure that new simplified rules related to the circulation of documents are introduced. These rules should not compromise the authenticity of these documents. Acceptance of scanned copies of documents and e-signatures might be appropriate in some cases. Online case and document management systems must not interfere with the independence of the judiciary and the privacy rights of the participants; for instance, access to court materials should be properly protected.

**4.6. CONFIDENTIAL COMMUNICATION BETWEEN PARTIES AND THEIR LAWYERS SHOULD ALWAYS BE ENSURED.**

It is recommended that the rule-makers and judicial self-governing bodies ensure that confidential communication is facilitated between the parties (defendants in criminal cases or parties in civil cases) and their legal representatives before and during online and hybrid hearings. If possible, such communication should be done in person or through a secure and confidential channel. This recommendation is especially relevant if the defendant is in pre-trial detention.

**4.7. RULE-MAKERS AND PRESIDING JUDGES SHOULD ENSURE THAT THE PARTICIPANTS OF ONLINE OR HYBRID HEARINGS ARE ABLE TO TAKE PART WITHOUT PRESSURE, INTIMIDATION OR FEAR.**

It is more challenging to ensure that the participants are not under pressure during online or hybrid hearings than during in-person hearings. For instance, victims of domestic violence should not give evidence from home in the presence of the defendant. Those complaining about ill-treatment should not give their statements in a police station. To the extent possible and necessary, the participants of online or hybrid hearings should be able to observe all other participants.

**4.8. EMERGENCY RULES SHOULD CLARIFY THE LEGAL EFFECTS ON HYBRID AND ONLINE HEARINGS OF A FAILURE OF THE IT SYSTEM.**

Emergency rules should include solutions in the case of an IT system failure. This is especially pertinent when such failures can result in interference with the human right safeguards or procedural entitlements of the parties.

**4.9. TECHNICAL SUPPORT AND HIGH-QUALITY EQUIPMENT SHOULD BE MADE AVAILABLE TO ALL TRIAL PARTICIPANTS IN ORDER TO ENSURE THEIR EFFECTIVE ENGAGEMENT WITH THE PROCESS.**

Judges, parties, court staff and all other trial participants should be able to access IT support in order to avoid delays and technical difficulties during online or hybrid hearings. The quality of Internet connections and video cameras (including vision and sound) used in hybrid or online hearings should be appropriate in order not to interfere with the trial.

**4.10. IF THE EMERGENCY CONTINUES FOR AN EXTENDED PERIOD OF TIME IT IS RECOMMENDED TO DEVELOP A SPECIFIC SOFTWARE TO FACILITATE ONLINE OR HYBRID HEARINGS.**

Generic video conferencing tools are appropriate as a temporary solution during a public health emergency, but more tailor-made tools are required in the longer run. The rule-makers also need to ensure that courts, pre-trial detention centres and other relevant criminal justice institutions have appropriate equipment and software to facilitate the online or hybrid hearings. This equipment would ensure preparedness of the national judiciary for future public health emergencies.

## 5. EMERGENCY-RELATED OFFENCES AND SENTENCING DURING PUBLIC HEALTH EMERGENCIES

### 5.1. DURING PUBLIC HEALTH EMERGENCIES, THE AUTHORITIES SHOULD KEEP NEWLY INTRODUCED EMERGENCY-RELATED OFFENCES UNDER CONSTANT REVIEW AND CANCEL THEM AS SOON AS THE PUBLIC HEALTH EMERGENCY ENDS.

Offences introduced to enforce measures aimed at limiting the consequences of public health emergencies should only be enacted when strictly necessary. As soon as the emergency is over, these measures and related offences should be lifted. New types of cases are likely to reach courts, including those in which penalties for breaches of emergency rules are imposed, and these cases should not place an excessive burden on the national judiciary.

### 5.2. EMERGENCY-RELATED OFFENCES SHOULD ONLY BE INTRODUCED IF THEY ARE STRICTLY NECESSARY AND PROPORTIONATE TO THE MAGNITUDE OF PUBLIC HEALTH EMERGENCIES.

Emergency-related offences should not disproportionately affect human rights and fundamental freedoms. Human rights and rule of law scrutiny of emergency rules should be arranged where possible. Measures to regulate misinformation about the public health emergency should be crafted with care as they may lead to censorship of unpopular or minority opinions. Criminal penalties for misinformation offences should be avoided.

### 5.3. EMERGENCY RULES ESTABLISHING PENALTIES FOR NON-COMPLIANCE SHOULD BE CLEAR AND PRECISE, AND ANNOUNCED TO THE PUBLIC IN ADVANCE.

Emergency rules, especially those establishing penalties, should be clear, precise and widely announced in advance of their entry into force. The laws establishing these sanctions should be freely accessible, for example on public websites, and widely advertised in regular media. If the emergency rules are changed often to reflect the unpredictable nature of public health emergencies,

a system of warnings should precede the application of more serious sanctions.

### 5.4. FINES SHOULD BE COMMENSURATE TO THE SERIOUSNESS OF THE OFFENCE COMMITTED.

In assessing the appropriate sum of a fine, consideration should be given to individual circumstances, including gender-specific impacts. This is particularly relevant for people who are not generating income due to emergency measures.

### 5.5. CONSISTENT APPLICATION OF PENALTIES MUST BE ENSURED.

The rule-makers, within their competence, must ensure consistent application of emergency laws across the state through effective communication between different law-enforcement agencies.

### 5.6. JUDICIAL REVIEW SHOULD BE AVAILABLE IN RELATION TO FINES AND OTHER SANCTIONS THAT ARE IMPOSED BY POLICE OR LOCAL AUTHORITIES DURING PUBLIC HEALTH EMERGENCIES.

Although some simplified proceedings can be imposed during emergencies, administrative action should be reviewed by judicial authorities. Public health emergencies cannot justify the lack of effective and prompt judicial review.

### 5.7. CUSTODIAL SENTENCES SHOULD BE THE MEANS OF LAST RESORT.

Deprivation of liberty must be reasonable, necessary and proportionate, even in a state of emergency. Judges must consider the impact that custodial sentences (especially short ones) might have on the defendant in the circumstances of a public health emergency. Custodial sentences should be limited and alternative methods, such as fines or house arrests, should be prioritised. When assessing the appropriateness of detaining

someone, rule-makers should pay specific attention to the public health implications of overcrowding in places of detention and the particular risks to the detainees created by the public health emergency.

## 6. THE PROCESS OF PRE-TRIAL DETENTION AND DETENTION ON REMAND

### 6.1. ANYONE DETAINED SHOULD APPEAR BEFORE A JUDGE.

A detainee has the right to be brought physically in front of a judge. The rule-makers must ensure that this right is given a priority. If the public health emergency does not allow physical presence, an online or hybrid hearing needs to be organized using a high-definition video camera. A defence lawyer should preferably be present at the same location as the detainee during the hearing. If the physical presence of a lawyer in proximity to the detained person is not possible, there should be a confidential and unobserved line of communication between them, for example access to secured rooms with a secure communication channel or via a separate video-link, to enable detainees to have effective, frequent and confidential access to their lawyers.

### 6.2. THE RIGHT TO HAVE CONFIDENTIAL ACCESS TO A LAWYER SHOULD BE GUARANTEED, TO THE EXTENT POSSIBLE DURING PUBLIC HEALTH EMERGENCIES.

Those detained on remand should have access to a lawyer. If necessary, the remand facilities need to be equipped with unsupervised video-conferencing. Necessary restrictions can be imposed to ensure the safety of lawyers and detainees but should not undermine the core of the right of access to a lawyer. The duration of the visits might be limited in time, but these restrictions need to be proportionate and justified, for example by a lack of facilities and other relevant factors. Police stations, prisons and courts should be equipped with properly functioning video-conferencing facilities that can enable lawyers to participate effectively in on-line or hybrid hearings.

### 6.3. LAW ENFORCEMENT AUTHORITIES SHOULD USE BAIL AS MUCH AS POSSIBLE DURING PUBLIC HEALTH EMERGENCIES.

Where possible and appropriate, the national judicial institutions should consider the exigencies of the public health emergency and use alternative forms of restrictions such as bail or house arrest instead of pre-trial detention.

## 7. TRIAL MONITORING AND PUBLIC HEARINGS

### 7.1. COURT HEARINGS SHOULD BE HELD PUBLICLY AS MUCH AS POSSIBLE.

It is recommended that online and hybrid hearings are made public to the extent possible. Public access to hearings can be ensured by allowing the public to attend the hearing in real-time or by uploading the audio/video recordings on the courts' website. National courts should consider the privacy of the participants, the presumption of innocence, the need to avoid disruptions to hearings, whether the case is of public interest and other relevant factors when deciding whether to allow the public to access the online hearing or to upload the recordings.

### 7.2. A BLANKET BAN ON PUBLIC HEARINGS DURING PUBLIC HEALTH EMERGENCIES IS LIKELY TO BE DISPROPORTIONATE.

A blanket rule preventing the general public and trial monitors from attending online, hybrid or regular hearings is likely to be disproportionate and the authorities should find ways to allow some access to hearings. Certain temporary prohibition might be acceptable at particular stages of an emergency, but these restrictions should be justified and then gradually lifted as circumstances change. All emergency rules should be practical, accessible and proportionate.

### 7.3. JUDICIAL SELF-GOVERNING BODIES NEED TO DEVELOP A COMMUNICATION STRATEGY DURING PUBLIC HEALTH EMERGENCIES.

In the circumstances of public health emergencies when trial monitoring may be restricted, the national judiciary needs to effectively communicate with its stakeholders and the general public, for example by regularly producing press releases on particular cases and informing about the proceedings. Press officers should be available to provide information about cases of major importance.

### 7.4. JUDICIAL SELF-GOVERNING BODIES NEED TO FIND ALTERNATIVE ROUTES TO ACCOMMODATE THE ACCESS OF TRIAL MONITORS TO CASES OF INTEREST.

If hearings have to be conducted in camera due to a public health emergency, courts can use other means to accommodate some degree of trial monitoring, for example by providing access to some court documents and to video/audio recordings.

### 7.5. JUDICIAL SELF-GOVERNING BODIES SHOULD APPLY UNIFORM RULES TO FACILITATE ACCESS OF MONITORS ACROSS THE STATE.

The applicable rules in relation to trial monitoring should be unified across the state, but there might be fluctuations due to the building capacity, health situation and other relevant factors. These differences need to be taken into account by the emergency rules. For instance, the emergency rules can provide some restrictions on the number of monitors and other attendees allowed in the courtroom of a particular size.

### 7.6. ACCESS TO TRIALS SHOULD BE PRACTICAL AND EFFECTIVE, NOT FORMAL AND DECLARATORY.

When the emergency rules allow fast and easy access of monitors to trials, such access cannot be curtailed by complex rules of admission that effectively prevent monitors from attending hearings. For instance, a lengthy waiting time for permission might prevent a monitor from accessing a particular trial of interest. Health-related limitations should be reasonable and explicitly stated.



# ANNEX: LIST OF SOURCES

## RELEVANT OSCE COMMITMENTS

The [Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe](#) (Vienna Document, 1989)

The [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#) (Copenhagen Document, 1990)

The [Charter of Paris for a New Europe](#) (Paris, 1990)

The [Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Moscow](#) (Moscow Document, 1991)

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