

Strasbourg, 19 November 2020

## **CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)**

### **CCPE Opinion No. 15 (2020):**

### **The role of prosecutors in emergency situations, in particular when facing a pandemic**

#### **I. Introduction: purpose and scope of the Opinion**

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared the present Opinion on the role of prosecutors in emergency situations, in particular when facing a pandemic.
2. An effective and autonomous prosecution service committed to upholding the rule of law and human rights in the administration of justice is one of the pillars of a democratic state. The responsibility of prosecutors to promote and to strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors. These challenges are particularly demanding in the context of emergency situations.
3. The Venice Commission defines the state of emergency as a temporary situation in which exceptional powers are granted to the executive and exceptional rules apply in response to, and with a view to overcoming, an extraordinary situation posing a

fundamental threat to a country. Examples include natural disasters, civil unrest, epidemics, massive terrorist attacks, economic crisis, war and military threats<sup>1</sup>.

4. Keeping this in mind and while considering that the challenges to the work of prosecutors and their responsibilities are particularly demanding in the context of all the above-mentioned examples of emergency situations, the CCPE wishes to focus in the present Opinion, for reasons explained below, on the role of prosecutors in the context of the COVID-19 pandemic declared in 2020. Nevertheless, in light of relevant international and constitutional provisions, the Opinion also encompasses the role of prosecutors in cases of emergencies in a general way<sup>2</sup> and its content may be extended to similar situations in future.
5. The COVID-19 pandemic has caused a global health crisis – a public health emergency - unlike any experienced for more than a century. The unprecedented situation in the world due to the fight against the pandemic has presented equally unprecedented challenges for prosecution services. The pandemic has strongly affected societies, governments, communities, families and individuals' lives, livelihoods and standards of living. Furthermore, the impact of the restriction measures has been felt most severely by the most vulnerable groups. The need for keeping social distancing and applying lockdown measures have resulted, in many instances, in the disruption of courts' and prosecution services' work, delays in proceedings and have impacted on procedural time limits (such as those related to pre-trial detention), and the suspension or reduction of legal aid, as well as public and community services. The measures have significantly affected international cooperation. The pandemic often also had, as a consequence, the need to replace prosecutors or prosecutorial staff infected or who may have died as a result of infection.
6. The main lesson which prosecutors have learned during the pandemic, and which will be applicable in other future emergency situations as well, is that their ability to effectively perform their functions and observe their duties including by applying, as appropriate, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") in member States has been put to the test – quite profoundly - during the pandemic, and will also continue to be during its aftermath (or period of recovery).
7. The restrictions introduced as a result of emergency situations, as the pandemic, may affect not only civil and political rights protected by the ECHR, but also economic, social and cultural rights entailing possible discrimination against certain groups, such as health workers, and racial and ethnic minorities, resulting in hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence, domestic violence, including violence against women and children<sup>3</sup>.
8. Prosecutors may be confronted with dilemmas as regards putting into practice the most fundamental principles and requirements guiding their mission – such as legality,

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<sup>1</sup> See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 5.

<sup>2</sup> See Chapter II of the present Opinion.

<sup>3</sup> The CCPE relies in this regard on the responses of member States to the questionnaire for the preparation of the present Opinion, see the responses, as well as their compilation (document CCPE(2020)1 of 7 October 2020), see at <https://www.coe.int/en/web/ccpe/the-role-of-prosecutors-in-emergency-situations-in-particular-when-facing-a-pandemic> .

proportionality, equality and non-discrimination, and evaluating the adequacy, necessity and duration of certain measures – notions that are not only necessary in regular times but key in case of suspension or restriction of human rights, for instance on public health grounds.

9. In this way, prosecutors have faced the challenge of making sure that, in the course of their work, the measures taken under public health emergency are used so as to protect people and not as a pretext for human rights infringements, and that new legal measures are applied with strict respect for human rights obligations.
10. The objective of this Opinion is therefore to determine how prosecution services can, without hampering their functional autonomy, fulfil their mission with the highest quality and efficiency, respecting the rule of law and human rights, in the context of emergency situations, particularly the COVID-19 pandemic and their aftermath.
11. As the CCPE underlined in its past Opinions, member States of the Council of Europe have different legal systems including prosecution services. The CCPE respects each of them in their diversity. Therefore, not all the elements discussed in the present Opinion may concern all member States. However, this Opinion mostly does address the concerns of prosecutors to work as efficiently as possible, even under the most challenging circumstances, avoiding any unlawful or undue interference in their work and maintaining the highest quality in all their activities and strict respect for the law and human rights.
12. This Opinion has been prepared on the basis of the ECHR<sup>4</sup> and the relevant case law of the European Court of Human Rights (hereafter referred to as ECtHR), as well as other Council of Europe instruments including Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice.
13. This Opinion is also based on the previous CCPE Opinions, in particular No. 2 (2008) on alternatives to prosecution, No. 3 (2008) on the role of prosecution services outside the criminal law field, No. 5 (2010) on the role of public prosecution and juvenile justice, No. 6 (2011) on the relationship between prosecutors and the prison administration, No. 7 (2012) on the management of the means of prosecution services, No. 8 (2013) on relations between prosecutors and the media, No. 9 (2014) on European norms and principles concerning prosecutors, including the “Rome Charter”, No. 10 (2015) on the role of prosecutors in criminal investigations, No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime, No. 13 (2018) on independence, accountability and ethics of prosecutors, as well as on the Statement of the President of the CCJE of 24 June 2020 on the role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges, the Venice Commission’s Opinion on Protection of Human Rights in Emergency Situations (2006), the Venice Commission’s Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency (2020) and on Resolution 1659 (2009)

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<sup>4</sup> In this regard, refer to the factsheet “Derogation in time of emergency” ([https://www.echr.coe.int/documents/fs\\_derogation\\_eng.pdf](https://www.echr.coe.int/documents/fs_derogation_eng.pdf)), elaborated by the Press Unit of the European Court of Human Rights in September 2020, which contains a list of ECtHR cases of particular relevance. The Factsheet also indicates, on page 2, under the title “Facts and figures”, the number of Council of Europe member States that have so far resorted to Article 15 of the ECHR as a result of the pandemic, derogating from their obligations under the ECHR.

of the Parliamentary Assembly of the Council of Europe on Protection of Human Rights in Emergency Situations.

14. The Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990), as well as the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (IAP) in 1999, have also been taken into account<sup>5</sup>.

## **II. International and constitutional provisions in case of emergencies and their influence on the work of prosecutors**

15. International provisions of treaties duly ratified by Member States apply in cases of emergency situations in their territories. For instance, Article 15 of the ECHR states that in times of emergency threatening the life of the nation, member States may take measures derogating from their obligations under the ECHR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. The same applies to the United Nations International Covenant on Civil and Political Rights (ICCPR) (Article 4)<sup>6</sup>.
16. Under these international instruments and provisions laid down in the Constitutions or relevant laws of member States, while there is no uniformly defined model for declaring a state of emergency and it is the factual situation which will determine its actual extent and rationale, 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 overcome the emergency and return as soon as possible to the normal situation<sup>7</sup>.
17. The CCPE takes note that, in member States, different frameworks exist for declaring emergencies, either on the basis of the constitution or constitutional laws, or on the basis of regular legislation addressing possible emergency situations, or even by enacting emergency measures without officially proclaiming a state of emergency<sup>8</sup>. In any case, a formal proclamation should be expected to be made before derogating from rights set out in the ECHR.
18. The CCPE further notes that according to the ECHR, any emergency measures should not be inconsistent with other obligations of member States under international law, and, in this regard, the ICCPR which all member States of the Council of Europe are parties

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<sup>5</sup> See also INTERPOL. COVID-19 Pandemic. Guidelines for Law Enforcement, 26 March 2020; Preventing crime and protecting police: INTERPOL's COVID-19 global threat assessment, 6 April 2020; Corruption Risks and Useful Legal References in the context of COVID-19: doc. Greco(2020)4, 15 April 2020).

<sup>6</sup> See document CCPR/C/128/2, "Statement on derogations from the Covenant in connection with the Covid-19 pandemic" adopted by the Human Rights Committee on 24 April 2020 (<https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>).

<sup>7</sup> See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 5.

<sup>8</sup> See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 22.

to, refers to a public emergency the existence of which should be officially proclaimed<sup>9</sup>. In this regard, the meaning of such official proclamation may have different implications in member States.

19. Furthermore, emergency measures should respect human rights obligations and ensure that the public health emergency is not used as a pretext for human rights infringements. A balance has to be struck between national security or public safety (or both), on the one hand, and the enjoyment of fundamental rights and freedoms, on the other<sup>10</sup>.
20. The legislation regulating the adoption of measures during emergency situations must respect first of all non-derogable rights, i.e. those which cannot be affected in any circumstances<sup>1112</sup>.
21. Legislation affecting other rights and freedoms should be based, first of all, 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<sup>13</sup>.
22. This is needed in order to balance the fundamental rights and freedoms with the necessary restrictive measures and thereby address any conflicting rights and conflicting situations, while facing the consequences of the emergency and preparing for future emergencies, including through developing the possibilities for the productive work of prosecutors and prosecutorial staff, and inventing new ways of responding to pressing challenges.

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<sup>9</sup> See Article 4(1)) of the ICCPR.

<sup>10</sup> See Venice Commission's Opinion on Protection of Human Rights in Emergency Situations adopted by the Venice Commission at its 66<sup>th</sup> plenary session (Venice, 17-18 March 2006).

<sup>11</sup> See factsheet "Derogation in time of emergency" ([https://www.echr.coe.int/documents/fs\\_derogation\\_eng.pdf](https://www.echr.coe.int/documents/fs_derogation_eng.pdf)), elaborated by the Press Unit of the European Court of Human Rights in September 2020. Article 15 § 2 of the ECHR prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the rule of "no punishment without law"; similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention. In relation to a pandemic, the freedom "from medical or scientific experimentation without consent" is of relevance.

<sup>12</sup> See document CCPR/C/128/2, "Statement on derogations from the Covenant in connection with the Covid-19 pandemic" adopted by the Human Rights Committee on 24 April 2020: "States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed. Nor can States parties deviate from the non-derogable provisions of the Covenant – article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, the slave trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (principle of legality in the field of criminal law), article 16 (recognition of everyone as a person before the law) and article 18 (freedom of thought, conscience and religion) – or from other rights that are essential for upholding the non-derogable rights found in the aforementioned provisions and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy".

<sup>13</sup> See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), paras 6-16.

23. The adoption of emergency measures must clearly stipulate to which part of the territory of the member State they apply, for how long, and – crucially - when and how the emergency situation ceases (for instance, through the inclusion of sunset clauses)<sup>14</sup>.
24. While noting the variety of systems and frameworks in member States, the CCPE is of the opinion that it would be particularly useful to have a uniform approach to emergency situations in European countries based on the principles enunciated above.
25. This is the legal framework, integrated by international instruments and domestic legislation, in which prosecution services will have to operate during emergency situations. Prosecutors should therefore be aware of situations and scenarios where fundamental rights and freedoms are particularly affected by restrictive measures. In order to avoid abuse on the use of such restrictions, as well as to avoid restricting in any way, including de facto, non-derogable rights, simple and effective complaints procedures, including non-formal where it might be applicable, may be established, particularly since courts may not be entirely accessible, due to the reduction of their activity for health reasons.

### **III. Implementation of the usual functions of prosecution services and prosecutors in emergency situations**

#### **A. Implementation of the functions of prosecution services and prosecutors in the field of criminal law**

26. In the same way that the integrity of the court system, including its competences, independence and impartiality, should be safeguarded, especially as concerns access to a court and to an effective remedy for the protection of human rights in emergency situations, the integrity of the prosecution service and its organisation should also be protected, applying the same rationale, as the only way to guarantee the functioning of the justice system during an emergency situation<sup>15</sup>.
27. The CCPE has already emphasised that it is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Prosecutors and judges should ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed. This involves respect for the fundamental rights of defendants and victims<sup>16</sup>.
28. As regards the particular modes of functioning and interventions of prosecution services during an emergency situation<sup>17</sup>, they, as well as courts, should be kept operating<sup>18</sup> to address urgent matters, while ensuring their adequate protection, as in the case of the

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<sup>14</sup> A sunset clause is a provision of a law that it will automatically be terminated after a fixed period unless it is extended by law.

<sup>15</sup> As it has been stated in Resolution 1659 (2009) of the Parliamentary Assembly of the Council of Europe on Protection of Human Rights in Emergency Situations.

<sup>16</sup> See Joint Opinion No. 4 (2009) of the CCPE and No.12 (2009) of the Consultative Council of European Judges (CCJE) on the relations between judges and prosecutors in a democratic society, including the Bordeaux Declaration, Section 1 of the Declaration.

<sup>17</sup> In the case of Portugal, the Prosecutor General's Office is in permanent session during the whole duration of the emergency situation in order to defend the principle of legality and the rights of citizens, as is also the Ombudsman (Articles 18, 2 of Law 44/86).

<sup>18</sup> As is the case, for example, in Portugal (see Article 22 of Law 44/86 in Portugal).

pandemic from the disease, even at a time when some non-urgent cases may be postponed.

29. It is evident that the functioning of prosecution services, like that of courts, should adapt to the circumstances imposed by an emergency situation. The development of new technologies and progressive improvement of videoconferencing systems in the judiciary across the Council of Europe's member States have created new possibilities for ensuring the hearing of witnesses, experts and defendants without the need to compel them to travel to different venues within the member State<sup>19</sup> where the investigation or the trial are being conducted<sup>20</sup>.
30. Obviously, as shown by some examples in Europe<sup>21</sup>, this approach could be of greater interest in cases of emergency, avoiding or reducing limitations on the functioning of the prosecution services and courts. While ensuring safety from infection and facilitating a hearing that allows the parties to fully participate, the objective should be to make the remote proceedings and hearing as close as possible to the usual practices in the prosecution service and the court.
31. The ECtHR in its case law has also established that physical absence does not necessarily constitute a violation of the right to a fair trial. The Court has pointed to several international law instruments that provide for participation in the trial using videoconferencing as a way of respecting Article 6 of the ECHR<sup>22</sup>, and it has adopted several judgments as regards the use of videoconferencing<sup>23</sup>.
32. The CCPE wishes to emphasise that when establishing videoconferencing in courts, due attention should be paid to the interests of all the participants, particularly the preservation of the rights of the defence.
33. Regarding the webcasting of court sessions, in normal conditions, webcasting is being used to reach a wider audience and encourage a broader interest in the aspects of public life touched upon by courts. Accordingly, when it comes to an emergency situation, webcasting is even more justified not only for the civic engagement but in order to expressly demonstrate that justice is being performed openly and in public.

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<sup>19</sup> As an example, the system of e-mail notifications of courts has been introduced in Ireland to ensure the acceptance of agreements in the procedure.

<sup>20</sup> Except, of course, certain cases where physical presence might be necessary, as in the case of habeas corpus.

<sup>21</sup> See Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (adopted on 30 January 2019, CM(2018)169-add1final); see also CEELI/ODIHR joint webinars series on access to justice during and after the pandemic, including videoconferencing in support of remote access to courts at <https://ceeliinstitute.org/webinars/>. Also, for example, in Italy, the security of trials against mafia suspects provided a reason to introduce videoconferencing in criminal proceedings in 1992. This regulation was expanded significantly in 1998. Germany applies a regulation for hearing witnesses, whose well-being could be jeopardised if physically present, using videoconferencing, etc.

<sup>22</sup> See ECtHR *Marcello Viola v. Italy* - 5 October 2006 (<http://hudoc.echr.coe.int/eng?i=001-77246>).

<sup>23</sup> See ECtHR *Marcello Viola v. Italy* - 5 October 2006 (<http://hudoc.echr.coe.int/eng?i=001-77246>); *Sakhnovskiy v. Russia*, Grand Chamber - 2 November 2010 (<http://hudoc.echr.coe.int/eng?i=001-101568>); *Repashkin v. Russia* (No. 2), 16 December 2010 (<http://hudoc.echr.coe.int/eng?i=001-102282>); *Vladimir Vasilyev v. Russia* - 10 January 2012 (<http://hudoc.echr.coe.int/eng?i=001-108478>); *Yevdokimov and Others v. Russia* - 16 February 2016 (<http://hudoc.echr.coe.int/eng?i=001-160620>); *Gorbunov and Gorbachev v. Russia* - 1 March 2016 (<http://hudoc.echr.coe.int/eng?i=001-160993>); *Sakhnovskiy v. Russia*, 27 November 2018 (<http://hudoc.echr.coe.int/eng?i=001-187831>).

34. Any suspension or extension of procedural time limits due to an emergency situation should be clearly stated in the law, be proportionate to the duration of the emergency and without prejudice to the reasonable time requirements as regards trials (except in urgent cases or cases raising important human rights issues, particularly as regards non-derogable rights<sup>24</sup>). In addition, possible reductions of the time limits to the extent that fair trial rights may be infringed should also be avoided.
35. The creation of crisis response teams within the prosecution service at central, regional and local level may be envisaged, as well as other organisational responses aiming at adaptation among prosecutors vis-à-vis particular situations in a member State. The prosecution services should convey the message about the need for adaptation to all prosecutors and raise awareness about new circumstances and new measures.
36. In accordance with the prosecution system in each member State, guidelines should be issued by the prosecution office at central level, highlighting co-operation mechanisms both within and outside the prosecution service in particular emergency circumstances. If guidelines at central level are not possible due to the organisational set-up of the prosecution services, they should at least strive to be coherent across different prosecutorial offices. Uniformity of application of the law and regulations should be expected from prosecutors and prosecution services throughout the States concerned.
37. Specific cooperation and coordination mechanisms and procedures may be established during emergency situations with other institutions such as law enforcement agencies, investigation and control bodies, courts, health institutions, mass media, professional associations of prosecutors and other civil society organisations. Cooperative and coordinative arrangements may include personnel and other relevant agencies which in a normal situation are not necessarily in contact with the prosecution services.
38. The conduct of investigations, or the supervision of those carried out by police and other investigation authorities, must be implemented with a particular vigilance for monitoring the protection of human rights and freedoms in the context of an emergency situation. An extended power for the prosecution services is not envisaged here, but rather using the existing powers most effectively in such situations.
39. In this context, victims and witnesses and other vulnerable groups should be effectively assisted and/or protected and defendants should have their rights respected throughout the criminal procedure. The prosecution services and prosecutors should particularly monitor whether emergency measures interfere with fundamental human rights and freedoms to a greater extent than is strictly necessary.
40. In these exceptional circumstances, prosecutors and prosecution services should particularly strive to explore the possibility of using alternatives to the prosecution in general and to pre-trial detention in particular. Mediation could also be another possibility to face the effects that may appear as a result of a state of emergency<sup>25</sup>.

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<sup>24</sup> For instance, Decree-Law 10-A/2020, of 13 March, Law 1-A/2020, of 19 March, Law 4-A/2020 of 6 April 2020 in Portugal.

<sup>25</sup> See Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (15 September 1999) and the Guidelines for Prosecutors for Victim – Offender Mediation, adopted by the International Association of Prosecutors on 27 November 2018. See also Recommendation CM/Rec(2002)10 on mediation in civil matters, and European Handbook for

41. An emergency situation may have a considerable impact on criminality. It may help reduce some types of criminality, for instance due to quarantine or confinement measures. It may also increase it, by creating new trends for criminality or conditions for the perpetration of particular offenses (such as domestic violence, economic and financial crime related to the funds used to deal with the emergency situation), by creating new types of offenses or by facilitating their perpetration (such as violation of confinement or curfew measures). This poses challenges and require prosecution services and prosecutors to pay special attention and take corresponding measures, if need be, for initiating prosecution in urgent cases, or cases relating to the emergency situation, for instance, disobedience vis-a-vis law enforcement agencies' or health personnel's lawful orders regarding illegal or wrong disposal of sanitary waste, intervention in cases of domestic violence and other potential infractions specific to such context. They should furthermore pay attention to the need to ensure an adequate understanding of the evolving knowledge related to the emergency situation, for instance, in case of eventual malpractice by health professionals during a pandemic, to take into account, for evaluating their civil, administrative or criminal liability, the scientific knowledge available at the time the medical act was performed<sup>26</sup>.
42. Prosecution services and prosecutors should explore possibilities for approaching and entering into a meaningful dialogue with courts at the time of their reduced capacity and activity, in order to discuss how to proceed with priority cases. Flexibility is also needed from the prosecution services in order to address the backlog of cases leading to their significant reduction in the aftermath of emergency situations, as the pandemic, when courts resume their normal activity, and efforts should be deployed at an early stage to recover as soon as possible from such backlog.
43. The process of appealing court decisions can further be rationalised and streamlined through the application of electronic means of communication and management of proceedings.
44. Where applicable for prosecution services, carrying out, or participating in, the supervision of the execution of court decisions should take into account, whenever possible, in the event of a pandemic, the possibility of using non-custodial measures or reduction of prison sentences in order to avoid overcrowding in penitentiary institutions and to prevent the dissemination or spread of the disease inside them.
45. Ensuring that the law is respected within the framework of national crime policy and adapting its application, where appropriate, to regional and local priorities – for instance, in cases where disobedience of lawful orders from law enforcement and health personnel regarding confinement may add to the spread of the disease – should be high on the agenda of the prosecution services.

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Mediation Lawmaking of 14 June 2019 (CEPEJ (2019)9) of the European Commission for the Efficiency of Justice (CEPEJ).

<sup>26</sup> See UN CTED. The impact of the COVID-19 pandemic on terrorism, counter-terrorism, and countering violent extremism, June 2020 (<https://www.un.org/sc/ctc/wp-content/uploads/2020/06/CTED-Paper%E2%80%933-The-impact-of-the-COVID-19-pandemic-on-counter-terrorism-and-countering-violent-extremism.pdf>); INTERPOL. Global Landscape on COVID-19 Cyberthreat; FATF. COVID-19-related Money Laundering and Terrorist Financing Risks and Policy Responses. Paris, May 2020 (<http://www.fatf-gafi.org/publications/methodsandtrends/documents/covid-19-ml-tf.html>); INTERPOL. COVID-19: The Global Threat of Fake Medicines, May 2020; MONEYVAL report: Money laundering and terrorism financing trends in MONEYVAL jurisdictions during the COVID-19 crisis, 2 September 2020.

46. In emergency situations, as the pandemic, lockdowns and shelter measures may be accompanied by heightened risks for vulnerable groups, including children, victims of gender-based violence and human trafficking and others, facilitating their witnessing of or suffering violence and abuse. Enforcement of restrictions on movement and physical distancing measures can serve as a cover for discrimination and violence against vulnerable groups. In this context, prosecution services and prosecutors should take measures to prevent and remedy such cases as efficiently as possible. For example, in order to ensure permanent access to legal remedies for victims, including of domestic violence and other vulnerable persons, their complaints should continue to be received and acted upon during, as well as, in the aftermath of emergency situations, as the pandemic, where appropriate by creating innovative ways for victims to present their complaints.
47. In member States, where prosecutors perform functions outside the criminal law field, the conclusions and recommendations of the present Section A also apply, *mutatis mutandis*, to prosecutorial activities mentioned below in Section B.

#### **B. Implementation of functions of prosecution services and prosecutors outside the criminal law field**

48. The CCPE notes substantial differences in member States due to the fact that in some of them, prosecutors have extensive powers outside the criminal law field, and in others they do not have such powers. Therefore, it should be kept in mind that the following paragraphs may be only relevant for the former group of States.
49. In this context, and depending on the national legal framework, the prosecution services, as in the field of criminal law, may also monitor the necessity, proportionality and adequacy of emergency measures adopted outside the criminal law field (for instance, in the field of civil and administrative law). This is an important activity of the prosecution services in the non-criminal area, which should also be focused mainly on the protection of human rights and freedoms, including the health of the general population.
50. Where applicable, and depending on the national legal framework, it is thus essential to ensure that all restrictive measures are taken in accordance with international human rights standards and obligations, that any interference with these rights is proportionate and limited, both in time and in scope, to situations when it is genuinely necessary in a democratic society. Enforcement of these measures should not be discriminatory<sup>27</sup>. To ensure these objectives, the prosecution services may consult representatives of civil society (non-governmental organisations, foundations, charitable organisations, professional associations, etc.) where appropriate, and preferably prior to the introduction of new restrictive measures.
51. Prosecution services, particularly in emergency situations, should adopt adequate measures to prevent any undue influence in their prosecutorial activity. They should also refrain from any type of discrimination, especially discrimination against human rights defenders and journalists, ensuring that they do not face disproportionate treatment or punishment as a result of their work.

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<sup>27</sup> OHCHR, COVID-19: States should not abuse emergency measures to suppress human rights – UN experts, online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>.

52. Modern technology is currently used to monitor the contacts of persons infected with COVID-19, symptoms or compliance with the imposed quarantine measures. To achieve these objectives, mobile phone applications and traffic and location data from telecommunication services providers are used. The prosecution services and prosecutors, where competent and appropriate, should monitor this process in line with ECHR principles, and relevant domestic legislation in order to see that any interference with the right to privacy be limited to what is required to achieve the intended purpose and its applicability be restricted in time
53. Personal data must be processed in accordance with applicable laws and with control by competent data protection authorities. Any use of such data should be, as a general rule, subject to the consent of the person concerned or at least the person should be later informed of such use. Personal data collected must be secured so that they cannot be misused by hackers or other persons who should not have access to it. Individuals shall be informed of the reasons behind measures taken and their duration and should be able to defend themselves against their possible misuse. The use of personal data collected in this way should primarily serve to prevent the spread of COVID-19, not for assessing administrative or criminal liability of people involved. Competent units or experts of the prosecution services may, where appropriate, control this process in line with ECHR principles, as well as other relevant international and domestic provisions.
54. Compliance with quarantine measures imposed should take priority over the enforcement of other more stringent restrictive measures. Sanctions for possible infractions should be proportionate to the acts committed. In order to avoid over-criminalisation of such acts, and to avoid undermining public trust in the rule of law, cases should be, wherever possible, resolved by agreement, especially if perpetrators cooperate with the authorities. The enforcement of restrictive measures should not be discriminatory against minorities, marginalised groups or human rights defenders and journalists. The prosecution services, where applicable and if they are competent, should monitor this process in line with ECHR principles and other relevant international and domestic provisions.
55. The impact of emergency situations is usually felt long after the restrictive measures are lifted. Even after lifting these measures, people may remain restrained, as is the case, in the event of a pandemic, having to stay in quarantine or some other form of social isolation. This applies even more to vulnerable groups that have been disproportionately affected by the pandemic, notably members of minority groups, people at risk of poverty, the elderly, persons with disabilities, persons in nursing homes or other persons suffering most from the pandemic, migrants, refugees, women and children at risk of domestic abuse and sexual violence, victims of hate speech, human trafficking. These vulnerable groups must be protected, not isolated, and their protection has to be fully ensured, where applicable, by prosecution services and prosecutors which must treat them in accordance with the principle of equality before the law and non-discrimination, to ensure respect of their human dignity and rights.

#### **IV. Existing, new or extended functions of prosecution services and prosecutors in response to emergency situations**

56. At the time of a pandemic, existing functions of prosecution services and prosecutors may be extended, where applicable and appropriate. New functions may also be entrusted to them in this context. Diverse legal systems in member States regulate differently the possibility of such new or extended functions. Accordingly, interventions

by the prosecution service in certain member States may go beyond previously established limits. There have been different examples of how the extended role of the prosecution services and prosecutors may apply in order to protect people better in these circumstances.

57. The following paragraphs refer to examples provided by member States in their responses to the questionnaire for the preparation of the present Opinion. Such examples include:

- investigations on profiteering on foodstuffs, hygiene products and essential medicines and supplies, as well as criminal liability related to the transmission of the infection or to its medical treatment<sup>28</sup>;
- prosecutor's offices organise inspections in residential care homes for the elderly with identified COVID-19 cases to check the measures taken to prevent its further spread<sup>29</sup>;
- disrespect of the curfews as a health measure is considered as a crime in several countries, and the prosecution service has an extended authorisation to prosecute such cases. The implementation in general of emergency measures is subject to supervision by prosecution offices<sup>30</sup>;
- given the powers of the prosecution service, preventive measures and the prompt and effective handling of reported facts are important tools in the fight against domestic violence, and this is given close attention in the context of the pandemic<sup>31</sup>;
- the prosecution service has taken appropriate measures in order to avoid overcrowding in places of custody, as well as in court halls, in the offices of prosecutors and judges, without encroaching upon the rights of defendants and vulnerable groups. It applies necessary measures for the protection of individuals in general and vulnerable groups in particular, predominantly for possible violent discrimination. It gives instructions for the prosecution of some cases in order of priority, such as when a danger of exceeding the statute of limitations exists or when there are defendants temporarily in custody. There is no possibility that important cases would "close" in any way because of the accumulation of a large number of files. Problems that arise due to coronavirus must be overcome with a great deal of effort by all participants related to justice (prosecutors, judges, secretaries, lawyers)<sup>32</sup>.

58. In many member States, the prosecution services and prosecutors have to interact in general more closely with the media and explain their work in the context of the pandemic. In some cases, they have to inform the public of more severe sanctions in times of emergency and of the penalties imposed<sup>33</sup>. In this regard, it is important to ensure that possible restrictions on media freedom and freedom of expression are not

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<sup>28</sup> Italy.

<sup>29</sup> Bulgaria and Spain. At the beginning of June 2020, the Spanish Public Prosecutor's Office investigated almost 200 residential care homes for elderly people, regarding COVID-19 problems.

<sup>30</sup> North Macedonia.

<sup>31</sup> Slovakia.

<sup>32</sup> Greece.

<sup>33</sup> Belgium.

vaguely formulated, since actions to combat alleged "misinformation" could be unduly applied to any sort of criticism. At the same time, and despite the pandemic, prosecutors should seek to ensure that information provided to the media does not undermine the integrity of investigations and prosecution or the purpose of the investigations. Neither should it breach the rights of third parties, nor influence those involved in the investigation or prosecution. It should not influence the outcome of legal proceedings<sup>34</sup>.

59. The prosecution services and prosecutors should strive to ensure respect for human rights and freedoms in the course of application of emergency measures, such as confinement/lockdown, closure of public areas and other relevant restrictive measures.
60. Thus, the enforcement of emergency measures should be carried out fairly and humanely and any penalties imposed should be proportional to the offence committed and laid down by law.
61. The prosecution services may be asked to monitor the process of setting up of areas for quarantine or confinement. Where applicable, the prosecution services should ensure that persons held in quarantine or confinement are treated as free persons, except for the limitations necessarily placed upon them in accordance with the law and on the basis of scientific evidence for quarantine purposes. These persons should not be viewed or treated as if they were detainees.
62. Persons held in quarantine or confinement should further be able to continue benefitting from the fundamental safeguards against ill-treatment, including information on the reasons for their quarantine or confinement, have the right of access to independent medical service, the right to legal assistance and the right to ensure that third parties are notified of their being in quarantine or confinement, in a manner consonant with their status and situation. They should be able to communicate with families and friends through appropriate means and should not suffer from any form of marginalisation or discrimination, including once they have returned to the community.

#### **V. Overcoming challenges faced by prosecution services and prosecutors in emergency situations**

63. In emergency situations, and in particular during a pandemic, prosecution services and prosecutors must apply the law without falling below the expected standards, with strict respect for human rights and fundamental freedoms. In such situations, prosecutors assume the greatest responsibility and duty, since these are times where they are most needed
64. A pandemic brings about unemployment and loss of income caused by the decrease in economic activity and it may have enduring negative psychological effects. Cases of domestic violence, racism and intolerance, and in particular violence against medical and health staff may increase. Consequently, as a result of a possible increase in crimes against vulnerable persons, as well as crimes against property, prosecution services may experience some momentary difficulties.
65. Other possible challenges derive from a possible decrease in the budget allocated to the prosecution services, due to the dire economic consequences of the pandemic and the need to adequately protect prosecutors, prosecutorial staff, as well as their families and the parties to the proceedings from the risks caused by a pandemic.

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<sup>34</sup> See Opinion No. 8 (2013) of the CCPE on "Relations between prosecutors and the media", para 23.

66. Moreover, there is the risk of a spread of the disease in prisons and detention facilities. This raises the need to protect the prison personnel, prisoners and detainees, as well as their families, from the pandemic. Where applicable, all essential measures must be taken by prosecution services to protect the rights of detainees and prisoners.
67. In order to minimise the effect of a pandemic, prosecutors should urgently and effectively deal with crimes committed against vulnerable persons. While dealing with all other crimes, prosecutors should continue their activities in due course. If necessary, investigations that are not urgent may be postponed provided that the limits and conditions thereof are established by law beforehand.
68. As regards investigations of violations caused by the application of public health measures, the balance between the protection of human rights and of the health of general public and particular persons should be continuously taken into consideration.
69. Since the challenges that prosecutors face in emergency situations are serious and complex, cooperation among prosecution services, justice administration bodies and parties to the proceedings is particularly needed to overcome these challenges.
70. During emergency situations, when compared to normal times, there may be an increased risk of unlawful interferences that might damage the independence of prosecutors. In this regard, in order to preserve the internal and external independence or autonomy of prosecutors and prosecution services, governments and other powers of State, media, parties to the proceedings and civil society should assume the corresponding responsibility of not unduly interfering with prosecutorial activity.
71. As regards the evaluation of prosecutors' work, any deterioration in their working conditions and increase in their workloads as a result of an emergency situation should be duly taken into consideration.
72. In order to protect prosecutors, prosecutorial staff, parties to the proceedings, detainees and prisoners from a pandemic, all physical measures must be taken within the premises of prosecution services to ensure their safety, for instance through the organization of shifts for prosecutors and prosecutorial staff, as well as in prisons and detention facilities, and all necessary cleaning and sanitary supplies must be provided.
73. In addition, instead of face to face contact, effective teleworking, teleconferencing and videoconference systems should be provided through developing the technological infrastructure.
74. In emergency situations, the allocation of an appropriate budget is key in ensuring prosecution services are equipped with all means necessary and up to expected standards, so as not to significantly affect its activity.
75. Prosecutors should not compromise by reducing or limiting the standards of professional ethics even in emergency situations and they should be aware that challenges should be dealt with while preserving these standards.
76. In order for prosecutors and prosecutorial staff not only to adapt to new working modes and conditions but also to adequately protect themselves from an emergency situation, as a pandemic, training activities should be developed in an effective manner and all kinds of expert support should be provided in this regard.

77. Prosecution services should maintain contacts with national health authorities and periodically evaluate measures and precautions that should be taken.
78. If necessary, medical staff should be made available to prosecution services, courts, law enforcement agencies, as well as in prisons and detention facilities. The measures that minimise the risks in these places should be regularly evaluated in line with the recommendations of experts.
79. If risks increase significantly due to an emergency situation, in order to manage them and possibly postpone some activities, legal and administrative regulations can be adopted while strictly respecting human rights and establishing the limits beforehand.

#### **VI. International co-operation and difficulties during the pandemic**

80. An emergency situation such as a pandemic poses particularly serious problems for international co-operation. At the time when confinement and lockdown measures affect even the simplest operations of prosecution services inside their countries, the closed borders and quarantine measures affect even more strongly any kind of international, including transborder co-operation.
81. Certain elements of such co-operation may break down completely or be substantially delayed during emergency situations, as a pandemic, for example, in cases of mutual legal assistance, implementation of European arrest warrants, extradition, joint investigation teams and other measures related to the physical transfer of persons.
82. The impact of the COVID-19 pandemic has particularly magnified the need for all stakeholders to step up efforts to fight crime.
83. Since the special measures connected with the COVID-19 pandemic are different in member States, prosecution offices in different States should intensify consultations among themselves to develop more effective and innovative forms of co-operation and to maximise operational efficiency. In order to strengthen international cooperation and coordination, prosecution services of member States should announce their emergency contacts in advance for such situations.
84. Good practices should be identified and used to inform the development of new protocols and procedures related to the effective functioning of the prosecution offices during the COVID-19 pandemic. These should include a wider use of technology, such as online procedures to communicate cases, videoconferencing, legal recognition of electronic evidence or evidence presented by electronic means, establishment of electronic case files and evidence management systems, as well as the use of emergency regulations. Good practices can also involve facilitating the remote participation of victims and witnesses in pre-trial proceedings. Oversight and accountability of prosecutors in the context of emergency regulations should continue to be ensured throughout the duration of the emergency.
85. Because of the difficulties with paper-based documents' transmission, affected by the pandemic, prosecution offices should consider the possibility of accepting and processing mutual legal assistance and extradition requests if communicated by electronic mail. States that have a mandatory requirement to provide legal assistance only when receiving paper-based requests, should temporarily reconsider such

requirements and try to process the requests based on electronic copies until the receipt of the corresponding paper-based requests.

86. Because of the current restrictions on free movement of persons between States, prosecution offices should consider the possibility of accepting and processing the requests for transit permission of the extradited persons by e-mail, which will help to reduce the amount of working time and resources needed during the pandemic and to respond more promptly to the requests.
87. As the persons who are subject to extradition are in custody and there are numerous issues (technical, organisational, financial) related to their transfer, requested and transiting States should consider providing possible assistance in applying more simplified procedures of established quarantine rules for officials from requesting States who are traveling to their territory with a mission to organise the transfer of those persons.

## **VII. Recommendations**

### **Introduction**

1. Under international instruments ratified by member States of the Council of Europe, a formal declaration of a state of emergency must be made, before emergency measures can be applied.
2. While there is no uniformly defined model for declaring a state of emergency and it is the factual situation which will determine its actual extent and rationale, 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 overcome the emergency and return as soon as possible to the normal situation.
3. The legal framework in which prosecution services will have to operate during emergency situations, as a pandemic, is defined by international instruments ratified by member States, as the ECHR and the ICCPR, which define a set of conditions to be observed in such situations (for instance, regarding non-derogable rights or other rights essential for upholding non-derogable rights), as well as by constitutional or other domestic legislation.
4. The responsibility of prosecutors to promote and to strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors. These challenges are particularly demanding in the context of emergency situations.
5. The COVID-19 pandemic has caused a global health crisis – a public health emergency - unlike any experienced for more than a century. The unprecedented situation in the world due to the fight against the pandemic has presented equally unprecedented challenges for prosecution services.

### **Recommendations**

1. If a state of emergency is to be declared, and in the case of derogation from rights set out in the ECHR, in line with its Article 15, or set out in the ICCPR, in line with its Article 4, a formal proclamation should be made before such derogation enters into force.

2. The restrictions introduced as a result of the pandemic may affect not only civil and political rights protected by the ECHR, but also economic, social and cultural rights with the possible risk of entailing discrimination against particular groups. Restrictions to be imposed should therefore respect human rights obligations and ensure that the public health emergency is not used as a pretext for human rights infringements but aims foremost at protecting people.
3. The legislation regulating the adoption of measures during emergency situations must respect first of all non-derogable rights. Legislation affecting other rights must 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.
4. In the same way that the integrity of the court system, including its competences, independence and impartiality, should be safeguarded, especially as concerns full access to a court and to an effective remedy for the protection of human rights in emergency situations, the integrity of the prosecution service and its organisation should also be protected, applying the same rationale.
5. While ensuring safety from infection for prosecutors and prosecutorial staff and their families or providing necessary medical treatment to those infected, the functioning of prosecution services, like that of courts, should adapt to the circumstances imposed by an emergency situation, while still being able to deal with urgent cases or decisions. Prosecution services should adopt at an early stage all necessary measures to recover backlog of cases delayed due to the emergency situation.
6. The development of new technologies and progressive improvement of videoconferencing systems in the judiciary across the Council of Europe's member States have created new possibilities for ensuring the hearing of witnesses, experts and defendants. The objective to achieve with their use should be to facilitate a hearing that should allow the parties to fully participate and make the remote proceedings and hearing as close as possible to the usual practices in the prosecution service and the court, while respecting the same rights and safeguards.
7. The creation of crisis response teams within the prosecution service at central, regional and local level may be envisaged, as well as other organisational responses aiming at addressing particular pressing situations in a member State.
8. In accordance with the prosecution system in each member State, guidelines should be issued by the prosecution office, for instance at central level, highlighting co-operation mechanisms both within and outside the prosecution service in particular emergency circumstances. Uniformity of application of the law and regulations should be expected from prosecutors and prosecution services (or offices) throughout the States concerned.
9. During emergency situations, specific cooperation and coordination mechanisms and procedures may be established by prosecution services with other institutions such as law enforcement agencies, investigation and control bodies, courts, health institutions, mass media, professional associations of prosecutors and other civil society organisations.
10. Where appropriate, prosecution services and prosecutors should particularly monitor whether the use of emergency measures interfere with fundamental human rights to a

greater extent than is strictly necessary. They must apply the law without falling below the expected standards, with strict respect for human rights and fundamental freedoms.

11. Depending on the national legal framework, prosecution services, in addition to their intervention in the field of criminal law, may also be called upon to monitor the necessity, proportionality and adequacy of emergency measures adopted outside the criminal law field.
12. All restrictive measures should be taken in accordance with international human rights standards and obligations and ensuring that any interference with these rights is proportionate and limited, both in time and in scope, and that they apply to situations when it is genuinely necessary in a democratic society. Enforcement of these measures should not be discriminatory.
13. An emergency situation such as a pandemic poses particularly serious problems for international co-operation. Closed borders and quarantine measures affect even more strongly any kind of international, including transborder co-operation.
14. Certain elements of such co-operation may break down completely or be substantially delayed during an emergency situation, as a pandemic. Prosecution offices should intensify consultations to develop more effective and innovative forms of co-operation in order to maximise operational efficiency.
15. Prosecution offices should consider the possibility of applying more simplified procedures during emergency situations, for instance accepting and processing mutual legal assistance and extradition requests if communicated by electronic mail. States should consider providing possible assistance in applying more simplified procedures of established quarantine rules for officials from requesting States.
16. Considering that member States will certainly conduct evaluations of the impact of the pandemic on their judicial systems and on the regular functioning of their courts and prosecution services, and considering also that those evaluations may contain valuable information, the CCPE may request member States to share the results of those evaluations in order to assess whether the present Opinion needs to be updated in the future.