

Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings

COVID-19 HUMAN RIGHTS DISPATCH – NUMBER 2

COVID-19 and Protection of right to life in places of detention

#NoCurfewOnHumanRights

With more than 11 million prisoners and other detainees held worldwideⁱ in often overcrowded and unsanitary conditions, without access to adequate health care and unable to practice self-and-mutual protection measures, the real and present risk is that for many, detention during the Covid-19 pandemic may become effectively a death sentence. This dismaying reality is a **humanitarian crisis** and a longer-term challenge for the future of detention systems.

Experts have warned that, “widespread community transmission of Covid-19 within a correctional institution is likely to result in a disproportionately high Covid-19 mortality rate.”ⁱⁱ Incarcerated persons are not the only ones at risk: staff are critically exposed too as are any who come into contact with the institutions. Covid-19 may be carried out inside prisons, but from prisons too -- rapidly transmitted into the broader community.

Places of detention are or will be a possible disaster zone and ought to be treated as such. Governments and societies at large may wait for casualties’ numbers to rise. Or they may act now. Covid-19 could be allowed to act as collective death sentences. But it could also be seen as an opportunity to rethink detention and sentencing policies, including their inherently discriminatory dimensions.

Detention conditions are ideal for mass contamination and the consequences for detainees are even graver than for the broader community:

- **Persons in custody unable to act to protect themselves from Covid-19 transmission**

Persons deprived of their liberty are not at liberty to practice physical distancing. To the contrary, in close confinement with large groups of people, detainees have no choice but to pass their entire days in close quarters one with the other -- sharing cramped cells, large overcrowded collective rooms, toilets, sinks and showers – eating and sleeping in close proximity with often limited access to soaps, let alone hand sanitizer, hot water or other necessary hygiene items. And yet, infectious diseases, particularly airborne ones such as Covid-19, spread more rapidly in correctional and immigration detention facilities. With scarce or absent personal protective equipment (PPE) -- masks and gloves -- prisoner, detainee and staff, are left confined to settings in which fighting the spread of an infection is nearly impossible.

- **The underlying health status of persons in detention means greater risk of death from Covid-19**

In many parts of the world, persons in detention have far poorer health status than the rest of the population, suffering more frequently from health conditions such as diabetes, heart conditions, asthma, hypertension as well as pulmonary infections such as pneumonias and tuberculosis. These are known to increase the risk of Covid-19 mortality. Rates of disease overall, substance dependency

and mental illness are much higher among those imprisoned who also are far more likely to come from impoverished and marginalised backgrounds for whom adequate nutrition is less common, exposure to transmissible diseases much higher and access to good quality health services more limited when it exists at all. Incarceration itself drastically impacts on people's health for the worse. Transmission of disease is rife where facilities are overcrowded, placing the lives of both prisoners and staff at riskⁱⁱⁱ and leading to higher rates of otherwise preventable illness.^{iv}

- **Ethnic minority and socioeconomically disadvantaged individuals are differentially affected by both the criminal justice system and Covid-19**

In many countries, persons of ethnic minority status including persons of color, and socioeconomically disadvantaged individuals are falling ill and dying too from Covid-19 disease at far higher rates. They are also too often disproportionately represented among prison populations. This makes for a devastating combination. Disproportionately caught up in criminal justice and other detention systems, overrepresented among those with preexisting medical conditions, being vulnerable to worse mortality rates from the disease, the consequences for prisoners and detainees of ethnic minority and low socioeconomic status are grave. The potential devastation that Covid-19 disease can wreck on the population of detainees is thus also a racial justice issue of paramount importance.

- **Lack of necessary hygiene, sanitation and medical equipment and services**

Many correctional, immigration detention and other facilities where individuals may be confined often don't have the necessary infrastructure to manage infectious diseases such as Covid-19 – having neither the resources to achieve or maintain the needed levels of daily hygiene and sanitation, nor the infrastructure to provide appropriate medical care for high-risk people in custody.^v Prisons and immigration detention or retention centres are not equipped with sufficient emergency medical equipment, such as oxygen tanks, nasal cannula, and oxygen face masks, to respond to an outbreak of patients with respiratory distress.

This is a grave, urgent, humanitarian crisis, a life-threatening situation which obliges States to take immediate action to avert otherwise probable but preventable loss of life. Those obligations are set out by relevant existing international human rights norms:

- **The Right to Life of all detainees must be upheld**
The right to life entitles everyone everywhere -- inclusive of prisoners and all others persons deprived of their liberty by the State. In detention, all must "be free from acts or omissions that are intended or may be expected to cause their unnatural or premature death". Deprivation of liberty – of freedom of movement – does not trigger any derogation from this right, which extends to a prohibition against arbitrary death.
- **Adequate measures must be taken to protect detainees from arbitrary death**
Death is arbitrary by definition if caused by a violation of international or domestic law, including international human rights law. Whenever the State takes in its custody an individual, it has the responsibility to care for the life and bodily integrity of that person. Death resulting, in whole or in part, from the denial of such essentials to life as potable water, safe and sufficient food, sanitation, adequate space, proper ventilation, or adequate medical care is thus an **arbitrary death** for which the State is responsible.
- **The State bears heightened duty of care to those whom it detains**
Incarceration causes a heightened degree of vulnerability of the detained individuals. It cause a related heightened duty of care on the part of the State which has the obligation to take the necessary measures to protect their lives. Failure to comply with those duties or to “ensure that the manner and method of any deprivation of liberty does not exceed the unavoidable level of suffering inherent in

incarceration [...]” may also constitute “a violation of the absolute prohibition against torture and cruel, inhumane, or degrading punishment or treatment”^{vi} (see also A/56/44, para. 95f).

➤ **The obligation to ensure adequate provision of health care without discrimination**

The State must ensure that prisoners and other detainees have access to the health services available in the country without discrimination on the grounds of their legal situation. It is further important to understand that States may not invoke the lack of financial resources or other logistical problems to reduce or dodge this responsibility^{vii}. The "duty to protect the life of all detained individuals includes providing them with the necessary medical care and the appropriate regular monitoring of their health, to protect them from inter-prisoner violence, to prevent self-harm practices including suicide and provide reasonable accommodation for persons with disabilities or other particular vulnerabilities."^{viii} The provision of health care which is the responsibility of state authorities must be provided at the same level and standard as available in the general population. (Principle 9, Basic Principles for the Treatment of Prisoners; Mandela Rules, Rule 24.1).

➤ **The obligation to ensure continuity of access to health care**

The State is also obliged to ensure continuity of treatment and care, including for drug dependence disease (Rule 24). Prisoners who require specialist treatment “shall be transferred to specialized institutions or to civil hospitals” (Rule 22(2)); a medical officer at the prison “should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed” (Rule 25(1)); and clinical decisions may only be taken by the responsible healthcare professionals and may not be overruled or ignored by non-medical prison staff. (Rule 27).

The implications of these standards for the provision of appropriate conditions and care to detainee in the midst of the Covid-19 crisis are clear. The burden is on the State to ensure that, without discrimination as to their status, prisoners and other persons deprived of their liberty, are held in conditions that do not aggravate their vulnerability: even in prison they are entitled to an equal and continuing access to the health care they need. The specificities of the Covid-19 disease underscores why close adherence to these obligations is required if those detained by the state are not to be exposed to conditions and treatment that may lead to arbitrary death.

Under these circumstances, emphasizing that prisoners and other detainees are likely exposed to an even higher risk of infection and given the conditions of many detention facilities and prisons, urgent action must be taken to avoid arbitrary death in custody now and in the future. The Special Rapporteur recommends to:

1. **Undertake the immediate, unconditional release of all prisoners whose incarceration is illegal or arbitrary under international law, including all children, prisoners of conscience, religious prisoners as well as political prisoners;**
2. **Abandon or exclude detention as a sanction for persons found to be in breach of Covid-19 related measures such as curfews, lockdowns and other such constraints on freedom of movement.**
3. **Reduce the overall size of the prison populations and help tackle associated overcrowding, through a review of the prison population and consideration of alternative sentencing to imprisonment for misdemeanour.**
4. **Consider alternatives to pre-trial detention such as bail, release under judicial control, or others.**
5. **Consider for immediate release persons detained for misdemeanour and low-level crime, with conditions attached as required.**

6. **Consider for immediate release all persons held in immigration detention centres and closed refugee camps with a view to reducing their populations to the lowest possible level^{ix}.**
7. **Consider for immediate temporarily release on bail or otherwise all persons detained without charge or trial and held on various non-criminal grounds, such as persons held pending deportation or extradition;**
8. **Ensure that the conditions of detention of all those who remain in prison meet international human rights standards.^x**
 - Take urgent measures to ensure that occupancy does not exceed official capacity, and that official capacity is based on a calculation of square area per person which permits social distancing in accordance with the standard guidance given to the general population as a whole.
 - Ensure that adequate health and hygiene facilities, equipment, supplies and personnel are provided for all who remain in detention, in order to allow detainees the same level of access as is available to the population as a whole.
 - Ensure that all detainees receive reliable, accurate and up-to-date information concerning all measures being taken, their duration and the reasons for them.
 - Make all appropriate arrangements for detainees with pre-existing conditions/ comorbidities.
9. **Distribute personal protective equipment for prison staff and prisoners, and provide screening and testing.**

Possible Sources: In 1957, the United Nations Economic and Social Council adopted comprehensive guidelines governing the treatment of those deprived of their liberty, the United Nations Standard Minimum Rules for the Treatment of Prisoners. In 1988, the United Nations General Assembly adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Two years later, the General Assembly adopted the Basic Principles for the Treatment of Prisoners. In December 2015, the United Nations General Assembly adopted Revised Standard Minimum Rules for the Treatment of Prisoners, named the Mandela Rules in honor of Nelson Mandela ("Standard Minimum Rules" or "Mandela Rules"). All of these guidelines affirm the core principle that detainees and prisoners retain their fundamental rights and freedoms.

ⁱ World Prison Population List, 2018, Institute for Criminal Policy Research

https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf

ⁱⁱ "COVID-19 in Correctional Settings: Unique Challenges and Proposed Responses", AMEND (March 23, 2020), <https://amend.us/wp-content/uploads/2020/03/COVID-in-Corrections-Challenges-and-Solutions-1.pdf>;

see also "Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions," Health Affairs Blog, March 26, 2020, available at: <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/>.

ⁱⁱⁱ 6 Global Prison Trends 2019, available at <https://www.penalreform.org/resource/global-prison-trends-2019/>

^{iv} https://www.aclu.org/sites/default/files/field_document/20.04.17_ushrn_wg_covid-19_detention_recs_summary_final.pdf

^v https://www.aclu.org/sites/default/files/field_document/20.04.17_ushrn_wg_covid-19_detention_recs_summary_final.pdf

^{vi} IACtHR, Case of Vélez Loor V. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 198.

^{vii} General Comment 36, ¶ 25

^{viii} GC 36, ¶25.

^{ix} <https://undocs.org/en/CAT/OP/10>

^x <https://undocs.org/en/CAT/OP/10>