The Right to Health Care in Prison during the COVID-19 Pandemic

A legal brief prepared by the Open Society Justice Initiative to assist legal practitioners in advocating and litigating prisoners' right to access health care during the COVID-19 pandemic

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Introduction and purpose of this legal brief

1. This legal brief provides an overview of the international and regional legal standards that guarantee access to health care in prisons. Applying a public health perspective to these standards and in light of policy and guidance provided by health authorities, including the World Health Organization, the brief details specific measures that the Open Society Justice Initiative considers States should implement in order to protect the rights to life and health of prisoners in the context of the COVID-19 pandemic.

2. COVID-19 is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The virus can spread through droplets from nose or mouth when people cough, sneeze, or speak and can reach people within close proximity. The World Health Organization (WHO) has therefore recommended keeping at least 1 meter (3 feet) distance between people and avoiding crowded places. The outbreak of the COVID-19 pandemic, in early 2020, has lead States to adopt drastic measures to protect people from being infected. Vulnerable groups—those more at risk of being infected—have been identified, and public health authorities have urged States to take special measures regarding these vulnerable groups. People deprived of liberty, and in particular prisoners, are among the vulnerable groups, given the overcrowding that characterizes a large number of prisons, the difficulty of securing physical distance, the often poor conditions of detention and poor ventilation in prisons, and the significant number of prisoners in vulnerable health situations. Moreover, the spread of transmissible diseases constitutes a public health concern especially in the prison environment, where diseases can spread rapidly due to the high concentration of persons in confined spaces. As underscored by the WHO, efforts to control COVID-19 in the broader community are likely to fail if strong measures are not taken in prisons and other places of detention. While other transmissible diseases such as tuberculosis and HIV are not uncommon in prisons, COVID-19 is exceptionally dangerous due to its highly contagious character, its presence in and spread to all segments of society, and its novelty. Despite the dangers posed by COVID-19, lessons can be learned from the prevention and control of other contagious

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1 World Health Organization, Coronavirus disease (COVID-19) pandemic, Questions and answers, 17 April 2020, last accessed 6 July 2020.
2 WHO, Coronavirus disease (COVID-19) advice for the public, last updated April 29, 2020. A significant number of national authorities advise bigger distance, up to 1.5 to 2 meters (6 feet). See for example Centers for Disease Control and Prevention, Coronavirus Disease 2019, Social Distancing, last updated May 6, 2020.
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diseases, and specific measures can and must be tailored to the problems posed by this new virus.

3. International law dictates that prisoners have the right to life, the right to be protected from torture and inhumane or degrading treatment, and the right to access health care. Therefore, States must adopt relevant measures to protect prisoners from COVID-19. The first priority is to establish physical distance among prisoners. Numerous international human rights institutions have urged a drastic reduction of the number of people detained, by slowing the number of new admissions, resorting to alternatives to deprivation of liberty, and accelerating the early, provisional, or temporary release of prisoners. In order to create sufficient space for prisoners in the context of COVID-19, States may be guided by the minimum standards and “desirable” higher standards developed by the European Committee for the prevention of torture (CPT) to define living space per prisoner. The CPT has repeatedly criticized the use of large-capacity dormitories that are often poorly ventilated, with poor access to sanitary facilities. These dormitories can become COVID-19 infection clusters given the close proximity they create among prisoners and the large number of prisoners housed in them. When planning to release prisoners, States should pay special attention to prisoners at the most at risk of being infected, including people 65 years and older, pregnant women, and prisoners with lung disease, heart disease, diabetes, blood disorders, chronic liver or kidney disease, inherited metabolic disorders, developmental delays, or who are immunocompromised (cancer, HIV, autoimmune diseases).

4. While efforts to reduce the number of individuals deprived of their liberty are crucial, they are not sufficient per se. States also have the responsibility to protect the health and

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8 Cells of two or more prisoners should give at least 4m² of living space per prisoner – the place taken by sanitary facilities being excluded from the calculation. CPT, Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015) 44, 15 December 2015, para. 9

9 The CPT promotes larger spaces for multi-occupancy cells, i.e. 10m² for two prisoners, 14m² for three prisoners and 18m² for four prisoners, considering that 4m² can still lead to cramped conditions. Living space per prisoner in prison establishments: CPT standards, para. 16.


11 Ibid.

life of prisoners who remain imprisoned during the COVID-19 pandemic. The United Nations, the Council of Europe, the Inter-American Human Rights system, and the African Human and Peoples’ Rights system have developed norms and standards detailing the scope of the right to healthcare in prisons; these norms and standards establish States’ duties in the context of the COVID-19 pandemic. The purpose of this brief is to detail the relevant international and regional norms on access to health care in prisons and, in light of public health guidance, to formulate specific measures to be implemented in order to protect prisoners from being infected by the new virus.

5. Section A of the brief will recall the international legal framework of the right to health care for prisoners. Section B will provide an overview of the overarching international principles that govern access to health care in prison. Section C will then draw on international and regional sources to set out the minimum standards States must meet to adequately protect the health of prisoners. Section C looks into four areas of preventive medicine, including the educational and supervisory role of health care services in prisons, personal and environmental hygiene, testing, and personal protective equipment. The brief then outlines the duty to ensure prisoners’ access to treatment and medication, as well as the need for physical distance, medical isolation, and contact with the outside world in Sections D and E, respectively. In Section F, the brief recalls the duty of States to conduct proper investigations on deaths in custody. Finally, Section G will explore the need for new forms of transparency at a time when many monitoring bodies cannot carry out their duties on the ground.

6. The rules described in this brief apply to all categories of prisoners, including untried prisoners (those who “have been remanded in custody by a judicial authority”) and convicted prisoners (prisoners “who have been deprived of their liberty following conviction”). Many of the standards are also applicable to persons in police custody, (although it is important to bear in mind that remand prisoners should not be held in police detention facilities for prolonged periods). By contrast, immigration holding facilities,

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15 Council of Europe, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted on 11 January 2006 and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers’ Deputies (hereafter the European Prison Rules), Rule 10.1.

16 Ibid.

17 Report to the Romanian Government on the visit to Romania carried out by the CPT from 7 to 19 February 2018, CPT/Inf (2019) 7, para.32. In addition, persons held in police custody must have immediate access to a lawyer and the possibility to have a medical examination by a doctor of their choice, in addition to any medical examination carried out by a doctor called by the police authorities. UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment; safeguards to prevent torture during police custody and pretrial detention, Resolution 31/31 adopted on 24 March 2016, articles 6-8. 2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, 13 April 1992, para. 36. African Commission on Human and Peoples’ Rights, Resolution on the Guidelines and Measures for the prohibition and prevention of torture, cruel,
psychiatric care establishments, social care institutions, and detention centers for juveniles are not included in the scope of this brief.

7. The Open Society Justice Initiative encourages lawyers to use the research and arguments in this brief to support domestic, regional, and international advocacy and litigation. The Justice Initiative has made every effort to ensure the information presented here is accurate. However, this brief is provided for information purposes only and does not constitute legal advice. It is important to emphasize that COVID-19 is a new disease and medical experts are still in the process of discovering its characteristics and the protective measures that help in curbing infection. The protection of prisoners’ right to health must therefore be secured according to the evolving recommendations issued by health authorities, while always respecting international human rights law.

A. Access to health care is a fundamental right for prisoners

8. The right to health is a fundamental right and every person is entitled to “the highest attainable standard of health conducive to living a life in dignity.” Access to health care is also internationally recognized as a fundamental right for prisoners by the United Nations (Rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners), the Inter-American Commission on Human Rights (Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas), the Council of Europe (Rule 39 of the European Prison Rules), and the African Commission on Human and Peoples’ Rights (Articles 20 and 31 of the Guidelines and Measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment and punishment in Africa). States are responsible for providing health care to prisoners, and have a duty to ensure the health and well-being of persons deprived of their liberty. States also cannot invoke economic hardship to justify prison conditions that do...
not comply with the minimum international standards or respect the inherent dignity of the human being.\(^24\)

9. The right to health care in prison derives also from the right to life\(^25\) and the prohibition on torture and inhuman or degrading treatment.\(^26\) As part of the duty to uphold the right to life, authorities are under an obligation to account for the treatment of people deprived of their liberty and must take appropriate steps to safeguard the lives of those within their jurisdiction.\(^27\) These obligations are especially pertinent with respect to detainees, who are entirely under the control of the authorities and are in a particularly vulnerable position.\(^28\)

10. The prohibition of torture and inhuman or degrading treatment is also widely recognized as imposing on States the duty to secure the health and well-being of persons deprived of their liberty by, among other things, providing them with requisite medical assistance.\(^29\) Indeed, “an inadequate level of health care can lead rapidly to situations falling within the scope of the term ‘inhuman and degrading treatment.’”\(^30\)

**B. Overarching principles**

11. The provision of health care in prison is governed by four overarching principles affirmed by international law: the equivalence of care, the necessity to take into account the specific needs of prison populations, medical confidentiality, and the non-discrimination principle. These principles must guide any action taken by States when implementing measures to protect the health of prisoners.

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\(^{26}\) Article 7 ICCPR. Article 5 ACHR. Article 3 ECHR. Article 5 of the African Charter on Human and Peoples’ Rights.


\(^{30}\) *Third General Report on the CPT’s activities covering the period 1 January to 31 December 1992*, CPT/Inf (93) 12, 4 June 1993, para. 30.
12. When organizing health care services in prisons, States must guarantee the equivalence of care, which requires care to be provided to detainees in conditions comparable to those enjoyed by patients in the outside community.\textsuperscript{31} The Inter-American Commission on Human Rights calls for the enjoyment of the “highest possible level” of care for prisoners.\textsuperscript{32} After initially adopting a cautious approach for convicted prisoners,\textsuperscript{33} the European Court of Human Rights (Grand Chamber) has now endorsed the principle of equivalence of care, stating: “medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole.”\textsuperscript{34}

13. The provision of health care in prison must also align with the specific needs of the prison population and conditions of detention.\textsuperscript{35} Many prisoners are in poor health even before incarceration, and the deprivation of liberty often leads to additional health problems, due to the shock of the incarceration and the unhealthy conditions of detention and overcrowding.\textsuperscript{36} Health care workers must therefore be familiar with specific forms of prison pathology and adapt their treatment methods to the conditions imposed by detention, including in the context of COVID-19.

14. Rules of medical confidentiality must be strictly respected when providing health care to persons detained in prison.\textsuperscript{37} Accordingly, all medical examinations of prisoners should be conducted out of the hearing and—unless the doctor concerned requests otherwise—out of the sight of prison officers, and prisoners should be examined on an individual basis and not in groups.\textsuperscript{38} The results of medical examinations and tests must be treated with the same respect for confidentiality as is normal according to medical ethics in general medical practice.\textsuperscript{39} Medical files should be kept under doctors’ exclusive responsibility; non-


\textsuperscript{32} IACHR, Resolution 1/08. Principles and best practices on the protection of persons deprived of liberty in the Americas, Principle X.

\textsuperscript{33} \textit{Aleksanyan v. Russia}, ECtHR, Judgment of 22 December 2008, para. 139.

\textsuperscript{34} \textit{Blokhin v. Russia}, ECtHR (Grand Chamber), Judgment of 23 March 2016, para. 137.


\textsuperscript{38} \textit{Third General Report on the CPT’s activities covering the period 1 January to 31 December 1992}, para. 51. See also SPT, \textit{Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives}, 6 February 2009, CAT/OP/MDV/1, para. 184 and 231.

\textsuperscript{39} WHO, Regional Office for Europe, \textit{Prisons and health}, 2014, p. 11.
medical staff should not be allowed to access them. In the context of the COVID-19 pandemic, adequate measures should be taken to prevent stigmatization or marginalization of infected people or those considered to be potential carriers of viruses.

15. Conditions of detention in prisons and access to health care should be guaranteed without any kind of discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status. The non-discrimination principle creates a special obligation: States must take account of the individual needs of prisoners, in particular the most vulnerable ones. Considering that the pandemic is deepening pre-existing inequalities and exposing vulnerabilities, prisoners most at risk of suffering from COVID-19 must be identified and have their needs addressed urgently.

C. Preventive medicine

16. According to international law, the provision of health care in prison is not limited to the treatment of sick prisoners: it includes also social and preventive medicine. To meet their legal responsibility in providing social and preventive medicine in prisons during the COVID-19 pandemic, States must demonstrate adequate intervention in four areas: the educational and supervisory role of health care staff, personal and environmental hygiene, the organization of testing, and access to personal protective equipment.
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Educational information and the supervisory role of health care staff

17. United Nations standards stress the duty of prison health care services to evaluate, promote, protect, and improve the physical and mental health of prisoners.\(^\text{48}\) These preventive tasks have very concrete implications when it comes to combating the spread of COVID-19. The prison health care service should circulate adequate educational information to prisoners, staff, and visitors, covering topics including: the nature of the disease and its transmission route, attitudes to be adopted and protective measures to be taken (including physical distance, use of personal protective equipment, hand washing, cleaning, and disinfection), possible symptoms, and the treatment that will be available.\(^\text{49}\) Staff should receive specific training on COVID-19 infection, transmission, and prevention.\(^\text{50}\) For prisoners and visitors who are not in command of the national language, there may be a need to develop translations or visual materials to address language barriers. Brief, informational factsheets, flyers, posters, and videos should be placed in prison common areas and in areas designated for visits.\(^\text{51}\) The International Committee of the Red Cross developed videos and supporting documents in 11 languages to provide staff, prisoners, and visitors with information on how the COVID-19 pandemic has affected conditions of detention.\(^\text{52}\)

18. Per international law, the prison health care service must also supervise, regularly inspect, and advise the prison’s management on the hygiene and cleanliness of the institution and the prisoners (including sanitary installations and access to running water), the suitability and cleanliness of the prisoners’ clothing and bedding, and the ventilation of the institution.\(^\text{53}\) In the context of the COVID-19 pandemic, the health care service should therefore actively advise on hygiene and cleanliness measures needed to protect the health of prisoners, in light of recommendations issued by international bodies and health authorities in the country.

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52 International Committee of the Red Cross, COVID-19: Preparedness and response in detention, Safeguarding the health of detainees, staff and communities, 7 April 2020 (last accessed 11th June 2020).
**Personal hygiene**

19. Prisoners should be provided with running water, adequate quantities of essential personal hygiene products necessary for health and cleanliness that are free of charge, and access to adequate bathing and shower installations.54

20. In response to the COVID-19 pandemic, international organizations have issued detailed guidance to criminal justice institutions, affirming that adequate hygiene is essential to protect the rights to health and life of prisoners and to contain the spread of highly contagious diseases, such as coronavirus, in the prison environment.55 In this regard, they reiterate the importance of frequent handwashing and recommend constant and free-of-charge access to soap, water, and personal towels, as well as hand sanitizer when handwashing is not possible.57

**Environmental hygiene**

21. States are also under the duty to ensure that all parts of a prison regularly used by prisoners are properly maintained and kept clean at all times.58 The CPT underlines that “the standard of accommodation is central to the quality of life within a prison,”59 and the ECtHR adds that “access to properly equipped and hygienic sanitary facilities is of paramount importance for maintaining prisoners’ sense of personal dignity.”60 The overall

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56 See below, Section D. Access to treatment and medication.

57 WHO, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance, p. 13. The WHO recommends the use of chlorine-based gels in prisons. Alcohol-based sanitizers could be used if accompanied with adequate security measures to avoid misuse.


59 Report to the Bulgarian Government on the visit to Bulgaria carried out by CPT from 13 to 20 February 2015, para. 38.

60 Ananyev and Others v. Russia, ECtHR, Judgment of 10 January 2012, para. 156. See also Montero-Aranguren et al (Detention Center of Catia) v. Venezuela, IACtHR, Judgment of July 5, 2006, para. 97. Pollo Rivera et al. v. Peru, IACtHR, Judgment of 21 October 21 2016, para. 159
hygiene conditions should be of satisfactory standard (in particular with appropriate occupancy levels, access to direct sunlight, good ventilation, and satisfactory hygiene standards), should meet all health requirements, and should respect privacy. Poor conditions of detention are likely to facilitate the spread of transmissible diseases.

22. Prisons must adopt specific rules to prevent the spread of COVID-19. Every prisoner should be provided with hygiene products, such as general cleaning materials, free of charge, to keep their clothing and living area clean. This is crucial, because environmental disinfecting is essential to containing the spread of the virus given that “people may become infected by touching contaminated surfaces or objects and then touching their eyes, nose or mouth.” Additionally, phones, showers, sinks, toilets, and other high-touch surfaces should be disinfected between uses. Prison authorities should ensure that places and objects like yard equipment, furniture, and transport vans, are cleaned and disinfected several times per day, and that areas where a person confirmed with or suspected to have COVID-19 spent time are thoroughly cleaned and disinfected. The WHO also recommends, in the context of the pandemic, that cleaning and disinfecting is “followed consistently and correctly” by trained personnel. The WHO also holds that “[c]leaning with water and household detergents and with disinfectant products that are safe for use in prison settings should be used for general precautionary cleaning.”

23. Every prisoner should be provided with a separate bed and with separate and sufficient bedding, which shall be clean when issued, kept in good order, and changed often enough to ensure its cleanliness. The mattress, blankets, and bed linens should be clean and washed at regular intervals. To address the risk posed by the COVID-19, the WHO recommends cleaning them with regular laundry soap and water or machine-washing at

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63 Eleventh General Report on the CPT’s activities covering the period 1 January to 31 December 2000, para. 31.

64 See below, Section D. Access to treatment and medication.


66 WHO, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance, p. 11.


69 Ibid.


71 Report to the Bulgarian Government on the visit to Bulgaria carried out by the CPT from 13 to 20 February 2015, para. 38.
60–90°C with common laundry detergent.\textsuperscript{72}

### Testing

24. Testing is an important tool to correctly detect COVID-19 cases and avoid further infections. According to the WHO, “efforts to control COVID-19 in the community are likely to fail if strong infection prevention and control measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well.”\textsuperscript{73} States must ensure “widespread access to testing…for detainees…[and] prison personnel,”\textsuperscript{74} and should perceive both prisoners and staff as priority categories for testing.

To define when to carry out testing in the context of COVID-19 pandemic, lessons can be learned from approaches promoted by international bodies for the prevention of tuberculosis in prison,\textsuperscript{75} taking into account the specific needs of newly arrived prisoners, other prisoners during the period of detention, and staff.

25. International human rights law unanimously stresses the need for detainees to have a medical examination at the time of admission,\textsuperscript{76} “in particular in the interests of preventing the spread of transmissible diseases.”\textsuperscript{77} Contagious prisoners should be isolated for the period of infection.\textsuperscript{78} Although securing the prisoner’s consent prior to any kind of treatment is the rule, mandatory examinations are accepted if based upon law, in clearly and strictly defined exceptional circumstances with respect to the principle of non-discrimination.\textsuperscript{79} Both the WHO and the CPT have underscored the need for systematic


\textsuperscript{73} WHO, Regional Office for Europe, \textit{Preparedness, prevention and control of COVID-19 in prisons and other places of detention}, p. 1.

\textsuperscript{74} Spokesperson for the UN High Commissioner for Human Rights, \textit{Press briefing note on Americas / Prison conditions}, 5 May 2020.

\textsuperscript{75} Tuberculosis is also spread from person to person through the air, when ill people cough, sneeze or spit. WHO, \textit{What is TB? What is TB? How is it treated? Q&A}, 18 January 2019.


\textsuperscript{79} Council of Europe, Committee of Ministers, \textit{Recommendation No. R (98) 71 of the Committee of Ministers to Members States concerning the ethical and organizational aspects of health care in prison}, adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers’ Deputies, para. 16.
testing for tuberculosis of newly arrived prisoners. To prevent the spread of COVID-19 in prison, all newly arrived prisoners should also be, as a rule, systematically tested. However, such systematic testing may be difficult to implement in countries were testing material is not available for the general population. As an alternative, and as recommended by the WHO, upon admission prisoners should be tested for fever and lower respiratory tract symptoms, and isolated if they have symptoms compatible with COVID-19, or if they have a prior COVID-19 diagnosis and are still symptomatic, until there can be further medical evaluation and testing.

26. While in detention, prisoners should have access to a doctor at any time and without undue delay. In the context of the COVID-19 pandemic, they should have access to testing as soon as they present symptoms. If a prisoner or a staff member is tests positive, prisoners and staff members who were in contact with that person in the previous two weeks should also be tested. In addition, proactive and regular testing of all prisoners could help detect outbreaks early and protect prisoners, staff, and the community. Massive testing is recommended by the WHO to protect prisoners against tuberculosis, but the WHO acknowledges such testing may not be sustainable in some settings due to cost and other logistical barriers. The same difficulties may arise with COVID-19 testing, where testing resources are not available in the general community. However, mass testing should be organized when a cluster of infections has been identified in a specific prison, or even a specific section of a prison if there is no circulation of people and goods between the sections.

27. Testing must also apply to prison staff given their close interaction with prisoners and their constant circulation between the community and the prison facility, or among various prison facilities. Infected prison staff may bring coronavirus from the community into the prison, as well as out of the prison to their communities—thereby perpetuating the spread. The WHO recommends systematic temperature screening of all prison employees before

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81 See below, Section E. Physical distance and medical isolation.

82 WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, p. 4. Other countries have applied a systematic quarantine of newly arrived prisoners for 14 days, with proper medical assessment and testing of prisoners presenting symptoms, while systematic isolation is not recommended by WHO given negative impacts unnecessary isolation may have on mental health. See Ireland, *Department of Justice and Equality, Information regarding the Justice Sector COVID-19 plans* (last accessed 1st June 2020). WHO, Regional Office for Europe, *FAQ: Prevention and control of COVID-19 in prisons and other places of detention*, last accessed 4th June 2020.


86 WHO, Regional Office for Europe, *Prisons and Health*, p. 77.
they enter the prison;\textsuperscript{87} staff presenting symptoms or having been in contact with a positively tested person should be given a COVID-19 test.

**Personal protective equipment (PPE)**

28. Currently, States vary in their approaches towards wearing masks in public. However, it is well established that people infected with COVID-19 can transmit the virus before symptoms develop and masks help stop the spread of the virus.\textsuperscript{88} According to recent recommendations, masks should be obligatory in many places—especially where respecting physical distancing is not possible—such as shops, public transportation, or other confined or crowded environments.\textsuperscript{89}

29. In prisons, which are often densely populated and where prisoners often cannot maintain the required minimum physical distance, masks should be distributed to each incarcerated person as a matter of principle. Masks are classified as personal preventive equipment (PPE) and as such are an essential component of preventive medicine. Masks should be distributed to each incarcerated person free of charge. At a minimum, prisoners should be obliged to wear masks when in contact with prisoners from other cells or with prison staff. Masks should be replaced or washed according to the recommendations issued by health authorities. The same rules apply to staff members when in contact with prisoners.

**D. Access to treatment and medication**

30. International law stresses that all prisoners should have prompt access to the medical care necessitated by their state of health, in conditions similar to those in the outside community.\textsuperscript{90} The ECtHR adds they must receive the treatment corresponding to the diseases they were diagnosed with, as prescribed by competent doctors, which must include a comprehensive treatment strategy aimed at adequately treating the health problems or

\textsuperscript{87} WHO, Regional Office for Europe, *FAQ: Prevention and control of COVID-19 in prisons and other places of detention*, last accessed 4th June 2020. This approach has been developed for example in Ireland, *Department of Justice and Equality, Information regarding the Justice Sector COVID-19 plans* (last accessed 1 June 2020).


preventing their aggravation. Treatment must be properly administered and monitored by qualified medical staff. If the health of a prisoner requires their transfer to the hospital, they must be transported with the promptness and in the manner required by their state of health. The decision to transfer should be made exclusively by qualified medical staff.

31. In applying these legal principles, all prisoners suspected or confirmed to have COVID-19 should have access to health services, including urgent, specialized health units outside the prison system, without undue delay, in particular for respiratory isolation and treatment. The WHO and Office of the High Commissioner for Human Rights (OHCHR) have recommended prison services develop close links with community health care and other health care providers and know which hospitals have capacity to provide specialized services (such as respiratory support, intensive care units). The WHO also noted that “consideration should be given to protocols that can manage the patient on site with clear criteria for transfer to hospital, as unnecessary transport creates risk for both transport staff and the receiving hospital.”

32. Prisoners should have access to the necessary health care services (examinations, treatments, and medication) free of charge and without discrimination on the grounds of their legal status. This rule should also apply to the provision of hygiene and cleaning products and masks, as they are part of preventive health care and remain the best ways to prevent the spread of the virus in a public health context.

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91 Wenner v. Germany, ECtHR, Judgment of 1 September 2016, at para. 57. Nogin v. Russia, ECtHR, Judgment of 15 January 2015, para. 84. See also De la Cruz-Flores v. Peru, IACtHR, Judgment of 18 November 2004, para. 132.
92 Bamouhammad v. Belgium, ECtHR, Judgment of 17 November 2015, para. 122. Report to the Greek Government on the visit to Greece carried out by the CPT from 28 March to 9 April 2019, para. 47. Report to the Bulgarian Government on the visit to Bulgaria carried out by the CPT from 13 to 20 February 2015, para. 48. See also Chinchilla Sandoval et al. v. Guatemala, IACtHR, 29 February 2016, para. 189.
94 Report to the Serbian Government on the visit to Serbia carried out by the CPT from 26 May to 5 June 2015, CPT/Inf (2016) 21, para. 80.
E. Physical distance, medical isolation, and contact with the outside world

33. Securing physical distancing is essential to prevent the spread of COVID-19, since the virus can spread when people cough, sneeze, or speak and can reach people who are in close proximity.\(^9^9\) Specific measures to enable physical distancing are also necessary in prisons, but they should not undermine the fundamental rights of people in detention.\(^1^0^0\) Any restrictive measure should have a legal basis and be necessary, proportionate, non-discriminatory, time-limited, respectful of human dignity, and subject to review.\(^1^0^1\) Prisoners should receive comprehensive information, in a language they understand, about any restrictive measures.\(^1^0^2\) Authorities should also guarantee transparency and constant monitoring of any restrictive measures applied.\(^1^0^3\)

34. Highly contagious diseases such as COVID-19 may require isolating prisoners who are infected or suspected of being infected, in order to prevent the exposure and infection of other prisoners or staff members.\(^1^0^4\) According to the UN, a “failure to separate detainees with communicable diseases from other detainees could raise issues primarily under [right to life].”\(^1^0^5\) International standards offer guidance on how to organize such isolation. First, medical isolation should be exclusively imposed when medically necessary\(^1^0^6\) and should not take the form of solitary confinement,\(^1^0^7\) which grounds are of a fundamentally different nature.\(^1^0^8\) The principle of medical isolation and its conditions should be decided by health

\(^1^0^0\) SPT, *Advice to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic*, section I.3.
\(^1^0^2\) CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, para. 4.
\(^1^0^3\) IACHR, “Pandemic and Human Rights in the Americas,” para. 48.
\(^1^0^4\) CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, para. 4.
\(^1^0^5\) Inter-Agency Standing Committee, OHCHR and WHO, *Interim Guidance on COVID-19: Focus on Persons Deprived of Their Liberty*, p. 5.
\(^1^0^6\) The Nelson Mandela Rules, Rule 30(d).
care professionals\textsuperscript{109} and not ignored or overruled by non-medical prison staff.\textsuperscript{110} Isolation should never last for a period longer than medically required.\textsuperscript{111} Health care staff should pay particular attention to isolated prisoners,\textsuperscript{112} who should be provided with meaningful human contact every day.\textsuperscript{113} The decision to isolate a prisoner should be communicated to that prisoner, who should have the opportunity to notify a third party about his state of health.\textsuperscript{114}

35. In the context of COVID-19, medical isolation should be limited to prisoners who are infected or suspected of being infected.\textsuperscript{115} The WHO recommends isolating them in single accommodation, and if not possible, to accommodate detainees with similar risk factors and exposures together under temporary quarantine. Prisoners suspected of being infected should be under medical observation at least twice a day, including by taking body temperature and checking for symptoms of COVID-19.\textsuperscript{116} Isolation should terminate as soon as ill prisoners have recovered and have ceased to be contagious; and isolation of prisoners suspected of being infected should stop after 14 days from the date of last possible day of suspicious contact.\textsuperscript{117}

36. The damaging effect of prolonged solitary confinement on the mental, physical, and social health of prisoners has been internationally recognized and States have been urged to limit its use to very exceptional circumstances.\textsuperscript{118} States should therefore never use de

facto isolation or solitary confinement of prisoners as a preemptive measure to organize physical distance.

37. International bodies have stressed that maintaining meaningful contacts with others is important for the well-being of prisoners.\textsuperscript{119} During the COVID-19 pandemic, in order to prevent the spread of the virus in prison, visits of families and friends may be temporarily restricted. Such restrictions should be replaced by an increased access to alternative means of communication (such as telephone or videoconferencing) without creating any financial burden on prisoners.\textsuperscript{120} The restrictive measures should be regularly evaluated, in light of the evolution of the pandemic in that country, the needs of the specific prisoner, and the facilities available in the prison. Restrictions on communications and alternative ways to communicate with the outside world should be clearly communicated to all prisoners and their visitors in a language they understand, with an indication of how long the restrictions are likely to last.\textsuperscript{121}

38. Prisoners should have access to a lawyer as part of their right to a fair trial and as a safeguard against ill-treatment.\textsuperscript{122} Access to a lawyer is critical for prisoners awaiting trial, but also for sentenced prisoners, since a lawyer can help them address the concerns they may have in prison, such as ill-treatment or adequate access to health care during the COVID-19 pandemic. Restrictions on this fundamental right should be exceptional, and justified by compelling reasons based on an individual assessment of the particular circumstances of the case.\textsuperscript{123} In the context of COVID-19, the ability of prisoners to meet with their legal counsel must be maintained and authorities should ensure that lawyers can


\textsuperscript{121} UN High Commissioner for Human Rights, Urgent action needed to prevent COVID-19 - rampaging through places of detention, Statement of 25 March 2020. See also the video material developed by the International Committee of the Red Cross: International Committee of the Red Cross, COVID-19: Preparedness and response in detention, Safeguarding the health of detainees, staff and communities, 7 April 2020 (last accessed 11 June 2020).


\textsuperscript{123} Ibrahim and Others v. United Kingdom, ECtHR, Judgment of 13 September 2016, para. 258. See also UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.
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still speak with their clients confidentially. Where necessary in light of compelling circumstances, alternative settings such as video-conferencing could be organized, but they must guarantee lawyer-client privilege, confidential communication, and safeguards against reprisals and intimidation. Such restrictions and alternatives should be clearly communicated to the prisoners in a language they can understand, with an indication of how long the restrictions are likely to last.

F. Duty to investigate deaths in prison

39. Tragically, prisoners have died from COVID-19. Based on States’ responsibility to protect life of prisoners and protect them from torture and ill-treatment, authorities have the duty to investigate deaths in custody to establish the factual circumstances surrounding the death and identify lessons to be learned in order to prevent similar lethal incidents. These rules fully apply to deaths that occur in prisons during the COVID-19 pandemic.

40. According to well established human rights law, deaths in custody (or soon after transfer from prison), must be reported to an authority independent from the prison system and mandated to conduct impartial investigations into the circumstances and causes of the death. The investigation must ascertain, inter alia, the cause of death, the facts leading up to the death (including any contributing factors), and whether the death might have been prevented. An autopsy should be carried out and the prison’s management and medical services should be provided with the conclusions of autopsy reports (or at least information


126 The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killing has underscored that “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.” United Nations Human Rights Special Procedures, Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, COVID-19 and Protection of right to life in places of detention, p. 2.


128 Report to the Romanian Government on the visit to Romania carried out by the CPT from 7 to 19 February 2018, para. 77.
on the cause of death), as well as the results of any judicial investigation.\textsuperscript{129} The ECtHR has underscored that investigations must be effective, meaning “capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible;” authorities should “act of their own motion once the matter has come to their attention;” and the investigations should be “prompt and expedited in a reasonable delay.”\textsuperscript{130} The IACtHR also stressed that authorities have the duty to conduct \textit{ex officio} impartial and effective investigations, without any delay.\textsuperscript{131} The relatives of the deceased person must receive relevant information concerning the circumstances of the death.\textsuperscript{132}

41. Causes of and possible factors that contributed to a death in prison must be carefully examined by the prison management in order to define whether the death could have been prevented and whether new measures or protocols should be adopted. Therefore, an analysis should be undertaken of each death in prison to consider what general lessons may be learned for the prison in which the death occurred.\textsuperscript{133}

\section*{G. Need for increased transparency}

42. Inspection and monitoring visits play a key role in the prevention of torture and ill-treatment in places of deprivation of liberty.\textsuperscript{134} The numerous challenges posed by the pandemic require close monitoring of the situation in prison in order to assess how prisoners’ rights to life, health, and well-being are being protected. According to the CPT, “States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine.”\textsuperscript{135} The Subcommittee on the Prevention of Torture (SPT) also encouraged National Preventive Mechanisms (NPMs) to continue to carry out their inspection missions.\textsuperscript{136} However, both the SPT and the CPT

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\item[\textsuperscript{129}] Report on the visit to “the former Yugoslav Republic of Macedonia” carried out by the CPT from 6 to 9 December 2016, CPT/Inf (2017) 30, at para. 42. Report to the Serbian Government on the visit to Serbia carried out by the CPT from 26 May to 5 June 2015, para. 84.
\item[\textsuperscript{130}] Prizreni v. Albania, ECtHR, Judgment of 11 June March 2019, para. 42-43
\item[\textsuperscript{131}] Vera Vera et al v. Ecuador, IACtHR, Judgment of 19 May 2011, para. 87.
\item[\textsuperscript{132}] Report to the Romanian Government on the visit to Romania carried out by the CPT from 7 to 19 February 2018, para. 75.
\item[\textsuperscript{133}] Report to the Spanish Government on the visit to Spain carried out by the CPT from 6 to 13 September 2018, CPT/Inf (2020) 5, para. 75. Report to the Romanian Government on the visit to Romania carried out by the CPT from 7 to 19 February 2018, para. 77.
\item[\textsuperscript{134}] United Nations, \textit{Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment}, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly, Resolution A/RES/57/199, Preamble. See also Association for the Prevention of Torture, \textit{Yes, torture prevention works. Insights from a global research study on 30 years of torture prevention}, September 2016, p. 35-36.
\item[\textsuperscript{135}] CPT, \textit{Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic}, para. 10.
\item[\textsuperscript{136}] SPT, \textit{Advice to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic}, section I.7.
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asked monitoring bodies to adhere to the “do no harm” principle, in particular when dealing with older persons and persons with pre-existing medical conditions.

43. However, confinement rules imposed by authorities in many countries—as well as the closure of borders—have prevented many monitoring bodies including NPMs, the CPT, and the SPT from carrying out their duties through their traditional working methods that include field visits. Therefore, they are not able to directly assess the treatment of prisoners and how their health is being protected against COVID-19. Therefore, States should assume an increased duty of transparency towards detainees, their families, and the public in general. Prisons cannot remain opaque worlds during such a critical period. Applied to the provision of health care, this extended duty of transparency should lead States to provide detailed information on the measures taken regarding health care for prisoners. States should also communicate data on a regular basis, including the number of cases detected, the number of deaths (including among staff members), and the number of cases referred to the authorities in charge of investigations. Everyone—whether in prison or outside—would benefit from such transparency, as well as from the other steps outlined in this brief. Prison authorities themselves will benefit from measures that keep themselves, their families, and their communities safe from disease—and that allow them to demonstrate they care about vulnerable people under their charge.

137 NPMs have of course developed other ways to exercise their responsibilities.
138 SPT, Advice to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic, section I.4.